U.S. Senate Committee on the Judiciary

Presidential Immunity Doctrines
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Dear Chairman Durbin, Ranking Member Graham, and Members of the Committee:

Thank you for the invitation to appear today to testify regarding the constitutional doctrine of presidential immunity. This doctrine is longstanding, rooted in the sovereign nature of the President's role vested with the executive power under Article II of the U.S. Constitution. Similar to the doctrine of sovereign immunity implicit in the sovereign character of the federal U.S. government, presidential immunity is understood as inherent in the vesting of executive power in the President as the chief official over one of three coequal branches within the federal government.[1]

The executive and judicial branches of the federal government have repeatedly, previously acknowledged doctrines of presidential immunity.[2] The United States Congress has not enacted legislation undermining this doctrine, suggesting a collective, implicit historical understanding within the federal system that the President's unique role as the head of a coequal branch of government contains within it immunity adequate to perform the President's executive duties under Article II of the Constitution. The constitutional system of separated powers has always been understood to require "an energetic,

[1] *See* U.S. CONST. art. II, section 1 ("The executive Power shall be vested in a President of the United States of America . . . ."); *Trump v. United States*, No. 23-939, at 37-38 (S. Ct. July 1, 2024) (grounding presidential immunity in the constitutional structure and the Article II Vesting Clause) [hereinafter "Slip Op."].

[2] *See infra* footnotes 4-7 and accompanying text.

independent Executive" who can exercise his sweeping constitutional duties without fear of prosecution by successors or political rivals.[3]

For example, in 2000, the U.S. Department of Justice during the Clinton Administration explained and clarified the executive branch understanding of the principle of immunity from criminal prosecution for currently serving Presidents.[4] The Office of Legal Counsel ("OLC") for the Clinton Administration issued this analysis shortly after the conclusion of the impeachment trial of the former President. In *United States v. Nixon*[5] and *Nixon v. Fitzgerald*,[6] the U.S. Supreme Court implicitly acknowledged at least partial immunity from civil damages liability and disclosure of official presidential communications. The OLC opinion explaining that a President cannot be criminally prosecuted for any action while serving his Term noted that this position was based on executive branch analysis from as early as 1973, predating either of those two Supreme Court opinions. The OLC opinion was addressed only to criminal prosecutions initiated during a presidential term itself. But the immunity doctrines set out in that opinion are broader than the scope of the immunity that the Supreme Court articulated this past Term in *Trump v. United States*, as detailed below. Both the Clinton Administration's 2000 analysis and *Trump v. United States* are built on the shared understanding that "[g]iven the potentially momentous political consequences for the Nation at stake, there is a fundamental, structural incompatibility between the ordinary application of the criminal process and the Office of the President."[7]

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[3] *See* Slip Op. at 40, 42. *See also* Federalist No. 70 ("Energy in the Executive is a leading character in the definition of good government.").

[4] *See* A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. Off. L. Counsel 222 (2000) (authored by Assistant Attorney General Randolph D. Moss), available at https://www.justice.gov/file/146241-0/dl?inline (confirming the continued validity of the Department's earlier 1973 conclusion that a sitting President is constitutionally immune from criminal prosecution) [hereinafter "The 2000 OLC Opinion"].

[5] United States v. Nixon, 418 U.S. 683, 705 & n.15 (1974) (observing that Presidents have a constitutional confidentiality interest even though in that case the equities required the President to hand over documents); *id.* at 705-06 (noting that "the protection of the confidentiality of Presidential communications has . . . constitutional underpinnings").

[6] Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (finding absolute immunity from damages liability stemming from official actions, "rooted in the constitutional tradition of the separation of powers and supported by our history").

[7] *See* The 2000 OLC Opinion, at 258.

The unprecedented nature of the current Special Counsel prosecution of the former, and now current, rival of a sitting President led to the U.S. Supreme Court's consideration this past summer of the application of presidential immunity to criminal prosecutions of former Presidents.[8] To the point, the Executive Branch, in 2000, had concluded that a prosecutor such as a Special Counsel could not take action against a President while he served as head of the Executive Branch. This past summer, the Supreme Court considered the extent to which this presidential immunity continues past the end of a presidential term to prevent Presidents from the threat of facing politicized future prosecution for official actions during their presidency.[9]

In particular, the Supreme Court evaluated the degree to which the actions of a sitting President are constitutionally protected with a measure of immunity from potentially politically motivated prosecutions once the President no longer has the mantle of federal resources at his disposal. The knowledge of the risk of such prosecutions could significantly impact and restrict the actions of a sitting President, hampering his ability to take care to faithfully execute laws.[10]

In *Trump v. United States* issued on July 1, 2024, the U.S. Supreme Court articulated three categories of presidential actions framing the doctrine of the scope of presidential immunity from criminal prosecution. At the threshold, the Court clarified that once a presidential term ends, unofficial acts by a President during his term in office are subject to potential criminal prosecution.[11] In contrast, two subcategories of official actions at least presumptively are not. Delineating these three categories, the Court noted that the first category of unofficial acts is entirely outside the scope of presidential, Article II immunity.

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[8] *See* Slip Op. at 5 ("This case is the first criminal prosecution in our Nation's history of a former President for actions taken during his presidency.").

[9] *See id.* (noting that the Court granted certiorari to consider "[w]hether 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," 601 U.S. __ (2024)).

[10] *Cf.* U.S. CONST. art. II, section 3 ("[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.").

[11] Both parties in the case, including President Trump's lawyers, agreed that former Presidents "can be subject to criminal prosecution for unofficial acts committed while in office." *See* Slip. Op. at 5. Although President Trump's lawyers agreed that private acts are not immune, the Office of Special Counsel did not take a similar couched position on its side, contending that "a former President does not enjoy immunity from criminal prosecution for any actions, regardless of how they are characterized." *See id.* at 6. The Supreme Court rejected this Office of Special Counsel position.

There is no presidential immunity for actions taken in a private capacity or for unofficial acts. All parties in the case agreed on this point, including counsel for President Trump. At the other end of the spectrum, there is a category of official acts involving a subset of actions constituting such core presidential functions that those actions are subject to absolute immunity and never susceptible to criminal prosecution. In the middle category, there are official acts subject to at least an initial, but potentially rebuttable, presumption of immunity. The Court's opinion provided several general principles for discerning which actions fall into each of these three buckets but left most of the demarcation between official and unofficial acts to the lower courts to sort out among the particular facts of President Trump's case.[12]

Providing the constitutional context for the articulation of these three categories, the Court explained that within the federal constitutional structure, "the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure."[13] In the exercise of "core constitutional powers, this immunity must be absolute."[14] The Court listed a few examples of areas of exclusive presidential authority that suggest the areas of core constitutional functions clearly subject to absolute immunity are relatively narrow. Examples include only those areas of authority so far within the President's entire discretion that Congress is understood to lack any power to regulate the subject area. They include core duties such as the pardon power, the power to choose which, if any, executive officials to remove (a termination decision in which Congress cannot participate), and the power to recognize the sovereignty of foreign countries—a function that the Supreme Court deemed as exclusively executive nine years ago in *Zivotofsky v. Kerry*, 576 U.S. 1, 32 (2015).[15] Consequently, Congress "may not criminalize" presidential actions within these relatively narrow areas.[16] Courts may not "adjudicate a criminal prosecution that examines such Presidential actions."[17]

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[12] *See id.* at 6-8.

[13] *Id.* at 6.

[14] *Id.*

[15] *See* Slip. Op. at 7-8.

[16] *See id.* at 8-9.

[17] *See id.*

Outside of this category of core executive functions, there is a remaining, and much larger, collection of official acts up to and including the "outer perimeter" of a President's executive authority. For this broader and more inchoate category, the Court declined to specify in its July opinion "whether that immunity must be absolute" or just "presumptive" on the ground that no definitive ruling on that point was required "[a]t the current stage of the proceedings."[18]

The President is uniquely situated as "the only person who alone composes a branch of government."[19] Consequently, the Court concluded, its constitutional separation of powers precedents "necessitate at least a *presumptive* immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility."[20] The unique nature of this "one case in more than two centuries" counseled against issuing any further determinative pronouncements on the rebuttable character of the immunity in the July opinion.[21]

After articulating the three-part framework, the Court provided initial rudimentary analysis of how the lower courts should distinguish official and unofficial actions. The Court began by clarifying that all presidential discussions with close advisers such as an Acting Attorney General are clearly official and therefore walled off from forming the basis for criminal allegations. In contrast, presidential comments to private parties and the general public are more difficult to classify and their official versus unofficial status may be more fact-dependent. The Court's remaining guidelines for the lower courts' official versus unofficial acts determination were more generalized. The Court noted that "differentiat[ion] between a President's official and unofficial actions" is a "[c]ritical threshold issue[]" as only official actions receive even presumptive immunity. The category of official acts extends to include any action so long as it is "not manifestly or palpably beyond [presidential] authority."[22] Official acts and statements may not be used as evidence to prove the prosecution of unofficial acts. Further, courts may not inquire into a President's motives when making the initial threshold determination of whether a President's challenged actions were

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[18] *Id.* at 6.

[19] *See id.* at 9-10 (internal quotations omitted).

[20] *See id.* at 14-15.

[21] *Id.* (internal quotations and alteration omitted).

[22] *See id.* at 17-18. *See also* Blassingame v. Trump, 87 F. 4th 1, 13 (D.C. Cir. 2023).

official. And an action cannot be designated as unofficial simply because a prosecutor alleges the action violated a law; a contrary rule would subject a President to trial on the basis of mere allegations and undermine the purpose of immunity.[23]

The Supreme Court returned the case to the lower courts to apply these principles to the Special Counsel's charges here. The Supreme Court typically sits as a body of last resort.[24] Because of the extraordinary nature of the power to issue final judgments that bind lower courts and ultimately decide interpretive questions of law appliable to every branch of the federal government, the U.S. Supreme Court often waits to resolve legal questions until lower courts have had the opportunity to weigh in on those questions over time. The Court similarly issued a modest opinion here, leaving the application of the general broad brush strokes of immunity principles it espoused to the district courts in the first instance.

Importantly, this opinion in no way eliminated the ability to prosecute former Presidents, making it clear that unofficial acts are subject to prosecution similar to actions taken by a private citizen, a position the former President's counsel here agreed was correct. In some ways, given this clarification by the Court regarding prosecution of unofficial acts, the Court's opinion extended less broadly than the Executive Branch's 2000 opinion and 1973 analysis calling for immunity from criminal prosecution on any ground during a presidential term. During both the Clinton and Nixon Administrations, the Department of Justice had indicated that a President could not be criminally prosecuted even for private acts. Under their view, a President would have to be removed from office or his term would have to conclude before a prosecutor could even bring an indictment for actions during the presidential term. The Department of Justice had grounded this analysis on the incompatibility between criminal prosecution and conviction, by private citizens, of a President who was elected by the nation to serve out his presidential term subject to removal only by impeachment and conviction.[25]

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[23] *See* Slip. Op. at 17-19.

[24] *See* Slip. Op. at 16 (citing *Zivotofsky v. Clinton*, 566 U.S. 189, 201) (2012)).

[25] *See generally* The 2000 OLC Opinion at 245-57 (explaining the constitutional consequences of prosecution and conviction of a sitting President).

Reexamination of the doctrines of presidential immunity and criminal prosecutions also necessitates close examination of the role of the Office of Special Counsel within the constitutional system. In a concurring opinion in *Trump v. United States*, Justice Thomas raised questions related to consistency between the Appointments Clause constraints in the Constitution and the establishment and appointment of a special counsel to prosecute a President.[26] Within an Executive Branch supervised by the President, there are challenging questions related to the role a subordinate position like Special Counsel can play and how independently the Special Counsel may operate from the supervision of the Attorney General and ultimately the President himself. Additionally, the Appointments Clause gives Congress a significant role in executive administration, authorizing the exercise of governmental power only through offices "established by Law."[27] The congressional role in office creation, separate and distinct from the executive's role in filling those offices, was an important Founding-era alteration to the British monarchical system of kings both creating offices and filling them.[28]

The Appointments Clause constraints applicable to the creation of offices such as the Office of Special Counsel are a very significant, and often-overlooked, source of accountability for the Executive Branch. These requirements help to ensure that Congress has a role in overseeing the construction and fashioning of Executive Branch departments and positions and ensure accountability back to the electorate.[29] If Congress were to take up close consideration of the constitutional questions that Justice Thomas raises in his concurring opinion in *Trump v. United States*, Congress could carefully examine whether the current statutory scheme adequately specifies and contours the Office of Special Counsel under the constitutional "established by Law" requirement. In considering questions related to executive branch prosecutions, Congress also could consider

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[26] *See* Slip. Op. (Concurring Opinion of Thomas, J.).

[27] U.S. CONST. art. II, section 2, clause 2 (The President "shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.").

[28] *Cf.* Jennifer L. Mascott, Private Delegation Outside of Executive Supervision, 45 HARV. J. OF L. & PUB. POL'Y, 837, 847-50 (2022). *See also* Decl. of Independence (referring to the colonists' grievances against the King "erect[ing] a multitude of New Offices" and then "sen[ding] hither swarms of Officers to harass our people, and eat out their substance").

[29] *See generally* Jennifer L. Mascott, Who are "Officers of the United States?", 73 STAN. L. REV. 443 (2018).

as both a policy and constitutional matter, whether the current model of Attorney General deference to prosecutorial authority of the Office of Special Counsel is consistent with a constitutional scheme that vests executive power entirely in a single President of the United States.

Finally, at a time when Supreme Court justices and presidential candidates and even Members of Congress and their families have faced threats of violence and assault, the need to instill and preserve respect for institutions and public servants is particularly acute.[30] Commitment to the constitutional oath that each official in each branch of government takes upon entering office involves respect for the role of coequal branches.[31] The governmental structure is best served by officials at every level of government, within each branch, accurately portraying the decisions and actions of coequal branches, and respecting each branch's legitimacy.[32]

Institutional integrity, and public safety, demand a circumspect approach to public statements and characterizations of public officials and their governmental decisions. The judicial and federal government systems, generally, are best served when members of the public receive an accurate and contextually complete understanding of the actions taken by the judges, legislators, and executive officials who serve their constitutional interests.[33]

The complex nature of the doctrine of presidential immunity, and current political circumstances, underscore the importance of this approach. Additionally, the recent spike in the breaking of norms such as confidentiality within the judicial branch are serious issues and demonstrate the potential consequences of a degradation in respect for institutional norms across government. This committee's study of recently issued Supreme Court decisions

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[30] Kannon K. Shanmugam, "The Legitimacy of the Supreme Court," Transcript of Prepared Remarks, Duke Law School (Sept. 16, 2024), available at https://drive.google.com/file/d/1Kx04pQUjLvNq5IoPvuIOgOfeP6-qznrR/view.

[31] *See* U.S. CONST. art. VI, section 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

[32] *Cf.* Shanmugam, *supra* note 31, at 3 ("[A]ttacks on the Court's legitimacy are dangerous—undermining public confidence in the Court and imperiling the rule of law.")

[33] *Cf. id.* ("[C]ritics of the current Court would be better served engaging with the Court's work on the merits.").

and Supreme Court norms appropriately would take account of any efforts needed to restore the important norms of attorney confidentiality at the Court.

Thank you. I look forward to questions from the Committee.