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Writing a Rule for the Aegis: Subordinate Criminal Liability After *Trump v. United States*

ABSTRACT. In *Trump v. United States*, the Supreme Court immunized Presidents from criminal prosecution for their official acts. Another question now looms: could thousands of executive-branch officials claim that same protection when implementing criminal presidential directives? History suggests presidential immunities rarely remain cabined within the Oval Office. When courts have created special protections for Presidents, those protections have tended to metastasize, reaching officials throughout the executive branch. Criminal prosecution thus stands today as one of the last serious constraints on executive-branch malfeasance. *Trump* threatens this guardrail.

This Note takes seriously the Court's functionalist approach to immunity and its increasingly expansive view of the unitary executive. Under this framework, a bad-man President's criminal conduct becomes presumptively immune simply by flowing through official channels, potentially bringing whomever it touches under its golden shield from prosecution.

Indicted officials have already started raising these defenses. In this Note, I highlight the risk of creeping criminal immunity and advocate for its rejection on a straightforward basis: unconstrained governance existentially undermines the rule-of-law interests that necessitate vigorous executive authority in the first place. In its constructions of immunity, the Court has committed to consequentialist analyses of the exercise of power. Let it also consider the consequences of lawlessness.

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> "[L]ife looks really shitty from behind bars . . . . And, if you guys do anything that's illegal, I don't mind having you in prison."
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> — General Mark Milley[1] warns Kash Patel[2] and Ezra Cohen[3] about subverting the results of the 2020 election.[4]

INTRODUCTION

"Immune. Immune, immune, immune." This drumbeat echoes through Justice Sotomayor's dissent as she prophesizes the "nightmare scenarios" that could follow from the Supreme Court's grant of criminal immunity to the President in *Trump v. United States*.[5] Political assassinations, military coups, bribery, and all other variety of high crimes and misdemeanors committed under the guise of official responsibility to earn a shield from prosecution. The refrain of the dissenting Justices was grim. But the majority paid little heed to their concerns. Chief Justice Roberts instead asserted in his majority opinion that any fears related to the abuse of power were outweighed by the unacceptability of the counterfactual world: an enfeebling of the presidency that would occur if future Presidents were "unable to boldly and fearlessly carry out [their] duties" for fear of criminal prosecution.[6]

This Note argues that the Court's decision, however, reaches beyond the future occupants of the Oval Office and threatens far more than presidential accountability alone. While the majority claimed to immunize only the President,

1. Chairman of the Joint Chiefs of Staff from October 1, 2019 to September 29, 2023. *Retired General Mark A. Milley*, U.S. DEP'T DEF., https://www.war.gov/About/Biographies/Biography/Article/614392/retired-general-mark-a-milley [https://perma.cc/BR6X-PGN4].

2. Chief of Staff to the Acting Secretary of Defense from November 10, 2020 to January 20, 2021. Director of the Federal Bureau of Investigation from February 20, 2025 to present at the time of writing. *Director Kash Patel*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/about/leadership-and-structure/director-patel [https://perma.cc/L3VE-LTCE].

3. Acting Under Secretary of Defense for Intelligence from November 10, 2020 to January 20, 2021. *Ezra Cohen*, U.S. DEP'T DEF., https://www.war.gov/About/Biographies/Biography/Article/2297081/ezra-cohen [https://perma.cc/K6ZV-92FV].

4. Susan B. Glasser & Peter Baker, *Inside the War Between Trump and His Generals*, NEW YORKER (Aug. 8, 2022), https://www.newyorker.com/magazine/2022/08/15/inside-the-war-between-trump-and-his-generals [https://perma.cc/3YDX-WBYT].

5. 603 U.S. 593, 685 (2024) (Sotomayor, J., dissenting) ("The President of the United States is the most powerful person in the country, and possibly the world. When he uses his official powers in any way, under the majority's reasoning, he now will be insulated from criminal prosecution. Orders the Navy's Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune.").

6. *Id.* at 640 (majority opinion).

the logic that drove its decision—warding off the chilling effects of prosecution on executive vigor—applies with similar force to subordinates whose cooperation is essential to presidential action. The Court's methodology and motivation, I contend, open the door to a follow-on criminal immunity for subordinate executive officials, transforming what was intended as protection for one office into a shield that could place thousands beyond the reach of criminal law.

To understand why this doctrine is at such great risk of slippage, one must first unpack the flawed functionalism forming *Trump*'s analytical backbone. "[I]mmunity," the Court claimed, "is required to safeguard the independence and effective functioning of the Executive Branch, and to enable the president to carry out his constitutional duties without undue caution."[7] At first glance, perhaps a compelling proposition. But context matters, and so it is worth recalling the profane genesis of this landmark case.

Donald Trump was not criminally indicted due to some misstep made in overzealousness while taking care that the laws be faithfully executed. He was charged with orchestrating a sprawling conspiracy to overturn the 2020 presidential election, enlisting or attempting to enlist a cadre of subordinate officials—from senior Justice Department personnel to the Vice President—to subvert the peaceful transfer of power.[8] Special Counsel Jack Smith's original indictment catalogued a litany of criminal acts: pressuring state officials to "find" nonexistent votes, attempting to assemble fraudulent slates of electors, and urging Justice Department leadership to open sham investigations and falsely declare the election corrupt.[9] These acts culminated in the events of January 6, 2021, when, after a presidential exhortation to "fight like hell," a mob stormed the Capitol as Congress attempted to certify electoral votes.[10] And as the chaos continued, the President, taking advantage of the moment, attempted to convince a set of Senators—who had, hours before, been evacuated to avoid the violent mob—to delay the certification of the election.[11]

Following his indictment, Trump sought dismissal of the charges against him, arguing that his acts fell within the scope of his official presidential duties

7. *Id.* at 614.

8. *See* Indictment at 3-6, United States v. Trump, 757 F. Supp. 3d 82 (D.D.C. 2024) (No. 23-cr-00257).

9. *Id.* at 5-6, 16.

10. *Id.* at 39-42; *see also* Peter Baker, *A Mob and the Breach of Democracy: The Violent End of the Trump Era*, N.Y. Times (Jan. 6, 2021), https://www.nytimes.com/2021/01/06/us/politics/trump-congress.html [https://perma.cc/UE9Q-VWGY] (describing the events of the January 6 storming of the Capitol).

11. Indictment, *supra* note 8, at 41-42.

and thus enjoyed absolute immunity from prosecution.[12] The district court rejected this claim, concluding that "[f]ormer Presidents enjoy no special conditions on their federal criminal liability."[13] The D.C. Circuit affirmed.[14] Only when the Supreme Court intervened, four months before a presidential election featuring the defendant as a candidate, did the logic, text, and history of presidential accountability yield to the then-former President's theory.[15] And thus, the doctrine of presidential criminal immunity was born.

The Court's approach exemplifies, on its face, legal functionalism—a methodology that prioritizes institutional purpose and practical concerns about governance above text or history.[16] Rather than anchoring immunity in constitutional text or Founding Era practice, the *Trump* majority divines it primarily from an apprehension about "distort[ing] Presidential decisionmaking" and "risk[ing] . . . the effective functioning of government" under "a pall of potential prosecution."[17] This approach reflects functionalist generality shifting, where the Court overvalues what it understands to be the general purposes of the Constitution (here, an energetic executive) while undervaluing the specific requirements of constitutional text that might otherwise constrain presidential power.[18] This same functionalist reasoning risks expanding presidential immunity into a

12. Motion to Dismiss Indictment Based on Presidential Immunity at 8, 21, *Trump*, 757 F. Supp. 3d 82 (No. 23-cr-00257).

13. United States v. Trump, 704 F. Supp. 3d 196, 206 (D.D.C. 2023).

14. United States v. Trump, 91 F.4th 1173, 1192 (D.C. Cir. 2024) ("[T]he separation of powers doctrine does not immunize former Presidents from federal criminal liability . . . .").

15. A theory which, prior to *Trump*, could charitably have been described as fringe. *See* Alexandra Hutzler, *Experts Break Down What the Constitution, Framers Said About "Presidential Immunity,"* ABC News (Apr. 24, 2024), https://abcnews.go.com/Politics/experts-break-constitution-framers-presidential-immunity/story?id=106140371 [https://perma.cc/UJD6-N79G] (quoting legal experts describing the pro-immunity arguments of Trump's legal team as "abhorrent to American law" and "exceptionally weak").

16. *See* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 Harv. J.L. & Pub. Pol'y 21, 21-22 (1998) (contrasting formalist approaches that emphasize constitutional text and structure with functionalist approaches that prioritize flexibility for public officials); *cf.* Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1124-25, 1374-80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (outlining the foundations of legal purposivism as interpreting legal rules in light of their purposes and the functions they serve).

17. Trump v. United States, 603 U.S. 593, 613 (2024) (internal quotation marks omitted); *see also* Aziz Z. Huq, *Structural Logics of Presidential Immunity*, 75 Duke L.J. (forthcoming 2026) (manuscript at 17-25), https://ssrn.com/abstract=5139465 [https://perma.cc/GF25-NJWW] (characterizing the *Trump* opinion as "explicitly consequentialist").

18. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1950-52 (2011) (explaining that functionalist approaches tend "to validate schemes as long as they preserve an appropriate balance [among the branches], even if doing so entails rejecting the detailed procedural requirements of a discrete structural provision").

far broader form of derivative criminal immunity for executive-branch officials writ large.

A doctrine with the potential to upend traditional checks and balances demands a clear perimeter to prevent unlimited expansion. The majority dismissed the concerns of the dissenting Justices, who highlighted the decision's potential boundlessness,[19] as "fear mongering," contending that the impact of their decision would be blunted by separation-of-powers principles and the Court's precedent.[20] However, the murky tests the Court established—distinguishing between "core," "official," and "unofficial" acts while outright forbidding any inquiry into presidential motive that could elucidate the nature of the act in question—seem destined to expand, rather than constrain, immunity.[21]

The Court's approach also has such potential to spiral because it is asymmetrical: it deploys functionalist concerns to justify expansive immunity while falling back on a formalist analysis of constitutional provisions, like the separation of powers and the concomitant finite scope of the President's authority, as supposed limiting principles.[22] But this is not enough. In its teleological prioritization of unbridled executive action over specific, formal constitutional

19. *See, e.g.*, *Trump*, 603 U.S. at 668 (Sotomayor, J., dissenting) ("Under [the majority's] rule, any use of official power for any purpose, even the most corrupt purpose indicated by objective evidence of the most corrupt motives and intent, remains official and immune."); *id.* at 698 (Jackson, J., dissenting) ("[T]he majority does not—and likely cannot—supply any useful or administrable definition of the scope of that 'core.' For what it's worth, the Constitution's text is no help either; Article II does not contain a Core Powers Clause.").

20. *Id.* at 640 (majority opinion) ("The dissents' positions in the end boil down to ignoring the Constitution's separation of powers and the Court's precedent and instead fear mongering on the basis of extreme hypotheticals about a future where the President 'feels empowered to violate federal criminal law.'" (quoting *id.* at 673 (Sotomayor, J., dissenting))); *cf.* Nathan Eckert & Bob Sheffer, *This War Will Destabilize the Entire Mideast Region and Set Off a Global Shockwave of Anti-Americanism vs. No It Won't*, ONION (Mar. 26, 2003), https://theonion.com/this-war-will-destabilize-the-entire-mideast-region-and-1819594296 [https://perma.cc/678W-K6WL] ("Why do you keep saying these things? I can tell when there's trouble looming, and I really don't sense that right now. We're in control of this situation, and we know what we're doing. So stop being so pessimistic.").

21. *See, e.g.*, Akhil Reed Amar, *Something Has Gone Deeply Wrong at the Supreme Court*, ATLANTIC (July 2, 2024), https://www.theatlantic.com/politics/archive/2024/07/trump-v-united-states-opinion-chief-roberts/678877 [https://perma.cc/GE2Y-ZZXK] (emphasizing the need to inquire into a President's motives to analyze the official nature of an act); Andrew Weissmann, *Three Flaws in the Supreme Court's Decision on Presidential Criminal Immunity*, JUST SEC. (July 17, 2024), https://www.justsecurity.org/97781/three-flaws-supreme-court-immunity [https://perma.cc/TKM7-3LGV] ("[M]otive evidence would help establish the necessary showing of illegality noted above for functions that are not core constitutional presidential functions . . . .").

22. *See* Gillian E. Metzger, *Disqualification, Immunity, and the Presidency*, 138 HARV. L. REV. F. 112, 138 (2025) (arguing that *Trump* blends formalist analysis of presidential authority with functionalist assessments of immunity).

constraints, the Court has established a methodology inherently resistant to the formal boundaries that could be imagined as its strictures. Any remaining constraints predicated on constitutional text or Founding Era understandings of accountability are demarcations on paper alone; those, too, are at constant risk of being gerrymandered to reside within the ambit of presidential prerogative.[23]

Yet some scholars have argued that existing safeguards — formal checks — will prevent rampant lawlessness in practice.[24] They note that, in prior episodes of executive malfeasance, the threat of prosecution deterred subordinate officials from carrying out criminal presidential impulses.[25] So too here, they claim, will subordinate liability deter presidential misconduct — by making its actualization too personally costly for executive officials to stomach.[26] This solution is admittedly appealing in its elegance: if the President cannot be prosecuted, hold the subordinates accountable instead and pray that the threat of a prison sentence outweighs their fealty. After all, the President is only one person,[27] relying on scores of executive-branch officials to implement his or her directives.[28] There

23. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 496 (1987) ("[T]he functional approach . . . allows for a large degree of discretion (and therefore uncertainty) both in characterizing the appropriate constitutional commitment and in deciding whether it has been violated."); *see also* Metzger, *supra* note 22, at 137-39 (describing the "strikingly glib" functional reasoning of the Roberts Court and its tendency to override formal and longstanding separation-of-powers principles to expand presidential power).

24. Jack Goldsmith, *The Relative Insignificance of the Immunity Holding in* Trump v. United States *(and What Is Really Important in the Decision)* 3-4 (Harv. Pub. L. Working Paper No. 24-28, 2024), https://ssrn.com/abstract=4975788 [https://perma.cc/8VR8-M289] (discussing the principle of subordinate criminal liability and its role as a check on lawless presidential acts in the wake of *Trump*); Zachary S. Price, *Even If the President Is Immune, His Subordinates Are Not*, YALE J. ON REGUL.: NOTICE & COMMENT (July 11, 2024), https://www.yalejreg.com/nc/even-if-the-president-is-immune-his-subordinates-are-not-by-zachary-s-price [https://perma.cc/AS7P-3XCA] (arguing that subordinate criminal liability is "essential to offsetting any accountability gap created by the President's personal immunity").

25. For instance, following a declaration by the Department of Justice in 2004 that certain ongoing warrantless wiretapping programs were illegal, President Bush disagreed and declared the programs lawful. A handful of senior executive-branch officials threatened to resign, many for fear of criminal investigation and conviction, and the White House folded. More recently, several high-ranking Trump Administration subordinates refused to obstruct the Mueller investigation for fear of being criminally charged with obstruction themselves. Goldsmith, *supra* note 24, at 3-4.

26. *Id.* at 3; Price, *supra* note 24.

27. U.S. CONST. art. II, § 1, cl. 1.

28. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010) ("In light of '[t]he impossibility that one man should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'" (quoting 30 THE WRITINGS OF GEORGE WASHINGTON 334 (John C. Fitzpatrick ed., 1939))).

will always be some legally exposed officer where the buck of criminal liability will stop and the deterrent effect of prosecution and incarceration can kick in.[29] But such a compromise, while tidy on paper, sidesteps the reality of how this Court understands presidential power.

The Roberts Court has advanced a muscular vision of presidential control over the executive branch.[30] Executive officials are increasingly considered to be instruments of the President who can be removed by the President at any point, for any reason.[31] This, the Court argues, is necessary for an executive branch that functions on behalf of a President duly elected by the people.[32] The modern Court has thus emphasized that subordinate frustrating of presidential will is inapposite to the constitutional design and competing intrabranch mandates are affronts to the President's authority. But in contrast to the functionalism of presidential immunity, theories of the unitary executive tend to be formalist—and specifically originalist—in nature.[33] The Court's string of unitary-executive precedents over the past two decades has accordingly staked its credibility primarily on constitutional text and Founding Era practice.[34] But now, atop this

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29. Setting aside, for a moment, a history of presidential norms diametrically opposed to this kind of blame shifting. *See, e.g.*, *"The Buck Stops Here" Desk Sign*, Harry S. Truman Presidential Libr. & Museum, https://www.trumanlibrary.gov/education/trivia/buck-stops-here-sign [https://perma.cc/AQ95-HPZV].

30. *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 224 (2020) (noting executive officials are "subject to the ongoing supervision and control of the elected President" and that "'the lowest officers, the middle grade, and the highest' all 'depend, as they ought, on the President, and the President on the community'" (quoting 1 Annals of Cong. 499 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison))).

31. Collins v. Yellen, 594 U.S. 220, 256 (2021) (holding that the President must be able to remove officers who "disobey his commands," as well as "those who exercise their discretion in a way that is not intelligent or wise," "those who have different views of policy," "those who come from a competing political party," "and those in whom he has simply lost confidence" (internal citations omitted)).

32. *Seila L.*, 591 U.S. at 231-32 (citing *Free Enter. Fund*, 561 U.S. at 499).

33. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1241-46 (1994) (arguing that Article II vests executive power exclusively in the President and that congressional attempts to insulate executive functions from presidential control violate the Constitution). *See generally* Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive: Presidential Power from Washington to Bush (2008) (reviewing historical practice to argue that every President has embraced the unitary-executive theory and arguing this grants the theory additional legitimacy); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994) (marshaling Founding Era evidence to argue that the Constitution grants the President authority to administer all federal laws).

34. *See* Jed Handelsman Shugerman, *Vesting*, 74 Stan. L. Rev. 1479, 1491-93 (2022) (describing the Roberts Court's formalistic reliance on Article II, and in particular, on the Vesting Clause

formalistic, text-and-history-driven structure, the Court has superimposed an intensely consequentialist and ahistorical immunity which necessarily lacks the limiting principles—the checks and balances—that might have been built into an immunity doctrine at the Founding.[35]

Why, then, would this Court, with its deepening commitment to a vigorous and unitary executive, accept—much less embrace—the premise that subordinate disobedience for fear of criminal prosecution could serve as a meaningful check on presidential power?[36] Having fashioned from whole cloth a doctrine of presidential criminal immunity to prevent excessive executive trepidation, one struggles to imagine this Court tolerating that same chilling effect simply shifting one level down the chain of command.[37]

In this Note, I argue that the interweaving of these threads in Supreme Court jurisprudence threatens to further unravel traditional mechanisms of executive-branch accountability in ways that extend far beyond the President himself. The Court's robust vision of the unitary executive—wherein the President exercises executive duties through a set of faithful officers whose conduct he or she controls—combined with a functional approach to immunity may compel a form of derivative criminal immunity for subordinates implementing presidential directives. If presidential immunity exists to prevent the distortion of executive decision-making, and if subordinate officers are merely implementing the President's constitutional authority, then dangling the threat of prosecution over the heads of those subordinates would create precisely the paralysis of presidential power that immunity was designed to prevent. The Roberts Court, in "writing a rule for the ages,"[38] has opened the door to a dangerous follow-on doctrine: when subordinates act to implement directives that would be criminal but for

and the Take Care Clause, in *Seila Law* and *Free Enterprise Fund*, among other cases); *see also* Metzger, *supra* note 22, at 137-39 (distinguishing the Roberts Court's formalist approaches to placing large swaths of the administrative state under presidential control from their functional analyses of presidential accountability).

35. That is, had the Framers wished to make the President criminally immune. They did not. *See* U.S. CONST. art. I, § 3, cl. 7 (outlining availability of criminal prosecution for former Presidents, including those already subject to impeachment proceedings for the same offenses).

36. *Seila L.*, 591 U.S. at 214 (holding that the President controls the appointment and removal of officers to ensure that they effectuate the faithful execution of the law as aligned with the President's vision).

37. Certain members of today's Court, after all, disparage such clever workarounds that undercut the practical thrust of their decisions. *Cf.* Trump v. CASA, Inc., 606 U.S. 831, 868 (2025) (Alito, J., concurring) (arguing that if universal injunctions could be replaced with nationwide class relief in practice, "today's decision [sharply limiting the availability of nationwide injunctions] will be of little more than minor academic interest").

38. Transcript of Oral Argument at 141, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939).

the President's immunity, they too become shielded from criminal liability. Not just one man above the law, but thousands.

Criminal immunity for the President's subordinates is not merely theoretical. In the wake of *Trump*, executive officials are already invoking the decision's logic to claim protection from criminal prosecution. Former White House Chief of Staff Mark Meadows, indicted for his role in attempting to overturn the results of the 2020 election, has argued in both Georgia and Arizona that presidential immunity must extend to subordinates, contending that holding subordinates accountable would deter "enthusiastic service," chill officers from carrying out their duties, and distort presidential decision-making.[39] Similarly, Jeffrey Clark, the acting Assistant Attorney General who sought to have the Justice Department falsely declare the 2020 election corrupt, has sought dismissal of professional disciplinary charges by arguing that *Trump*'s recognition of absolute presidential immunity for discussions with DOJ officials requires immunity for those on the other side of the conversation.[40] Even the "fake electors" have invoked derivative immunity arguments in their criminal proceedings.[41]

Members of the federal judicial bench have already signaled some receptivity to these arguments, writing that *Trump*'s concern about executive decision-making being "distorted by the threat of future litigation" provides "additional support" for protecting officers implementing presidential directives.[42] These early claims reveal derivative immunity not as a distant possibility but as an active development, making it essential to understand the historical patterns and functional variables that will determine whether such arguments succeed and how far they might extend.

This Note proceeds in four Parts. Part I explores why the criminal prosecution of executive officials remains a critical backstop against abuse of power as other mechanisms of personal accountability have eroded. Part II examines the phenomenon of immunity creep, where doctrines designed to shield the President have trickled down to subordinates, and revisits *Trump v. United States* in light of this history. Part III turns to the ongoing invocations of derivative immunity in the lower courts before engaging with counterarguments that derivative immunity is, in various formulations, impossible, irrelevant, or essential. Finally, in Part IV, I sketch three judicial interventions that could reject or constrain subordinate immunity. Throughout, I argue that while *Trump*'s reasoning

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39. Petition for Writ of Certiorari at 3, 22, Meadows v. Georgia, 145 S. Ct. 545 (2024) (No. 24-97); *see also* Arizona v. Meadows, No. CV-24-02063, 2024 WL 4198384, at *4 (D. Ariz. Sep. 16, 2024) (describing Meadows's argument for immunity based on *Trump*).

40. Jeffrey B. Clark's Supplemental Brief at 3-4, *In re* Clark, Disciplinary Docket No. 2021-D193 (D.C. Bd. Prof. Resp. July 15, 2024).

41. Georgia v. Shafer, 119 F.4th 1317, 1335 (11th Cir. 2024) (Grant, J., concurring).

42. *Id.* (quoting *Trump*, 603 U.S. at 615).

threatens to dismantle executive-branch accountability, neither law nor prudence counsel completing the transformation.

I. CRIMINAL LIABILITY AS MANDATE

For executive-branch officials, criminal liability serves essential functions that other mechanisms of accountability cannot replicate. While civil suits might compensate victims, administrative and judicial sanctions might shame misbehaving officials into compliance, and electoral processes might remove bad actors, only criminal law carries the moral weight and practical force needed to check the most grievous forms of official misconduct. The prospect of prosecution — and with it, the loss of liberty — cuts through the layers of institutional protection and partisan loyalty that increasingly insulate officials from other consequences.

The Court's extension of established presidential civil immunity to criminal conduct threatens to hamper this check on subordinate officials. As this Part demonstrates, criminal prosecution of executive-branch officials has served since the Founding as a vital deterrent against abuse of power. The steady erosion of civil remedies makes this criminal backstop even more crucial. Yet rather than treat the collapse of personal civil accountability for government officials as a cautionary tale, the modern Court has opted to use it as a roadmap, threatening to walk back this bulwark of accountability. Before examining that risk, it is necessary to first understand what about our system of government makes criminal law uniquely essential to checking official abuses of power.

A. Accountability for Officials in Constitutional Design

The notion that executive-branch subordinates must be criminally liable for their unlawful acts — even those undertaken at presidential direction — is embedded in the framework of our government. In crafting a new republic that explicitly rejected monarchical immunity, the Framers envisioned the personal accountability of government officials as an essential check against the abuse of power. This understanding was evinced in heated debates at the Constitutional Convention, shaped the First Congress's legislative program, and anchored early Supreme Court decisions rejecting claims that presidential orders could absolve subordinates of responsibility. Criminal liability for executive officials is baked into our system of government and has been since the beginning.

At the Constitutional Convention, the debate over presidential accountability turned on the understanding that subordinate officers would face criminal sanction for their roles in illegal schemes spearheaded by the President. One question, however, was whether presidential accountability through

impeachment was even necessary given the background understanding that the President's accomplices could be criminally prosecuted, thus providing a form of accountability and deterring presidential criminality in practice. The Framers' fears, in this context, were rooted in fear of redundancy, not fear of accountability. When Gouverneur Morris, for example, argued against providing for impeachment, he grounded his position in the availability of prosecution of subordinates: "[The President] can do no criminal act without Coadjutors who may be punished" in his stead.[43] The "punishment" of subordinate accomplices for criminal acts discussed by the Framers was *not* impeachment; the question of impeachability for executive-branch officials other than the President was not raised until the closing days of the Convention, over a month after the debate recounted above.[44] If not impeachment, then the punishment of presidential "coadjutors" for criminal acts as described here reflected the availability of criminal prosecution. The potential for criminal prosecution was clarified in a later debate. Discussing the President's pardon power, the delegates considered prohibiting the President from pardoning treason, as "[t]he President may himself be guilty. The Traytors may be his own instruments."[45] The delegates thus recognized that presidential powers could be used to shield subordinates who implement the President's unlawful schemes yet crucially assumed those subordinates would remain subject to criminal prosecution in the first instance.

The issues raised in these debates were not mere rhetorical flourish. The First Congress, packed with former Convention delegates, immediately got to work codifying liability for federal officers.[46] Early statutes criminalized officers' engagement in certain commercial transactions,[47] taking bribes,[48] filing false reports or misappropriating funds,[49] and executing unlawful legal processes

43. 2 Max Farrand, Records of the Federal Convention of 1787, at 64 (1911).

44. *Id.* at 552 ("'The vice-President and other Civil officers of the U.S. shall be removed from office on impeachment and conviction as aforesaid' was added to the clause on the subject of impeachments.").

45. *Id.* at 626.

46. *See* Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity at 8, *In re* Proceedings of the Grand Jury Impaneled Dec. 5, 1972, No. 73-965 (D. Md. 1973) [hereinafter 1973 SG Memorandum]. This episode is also well documented in Saikrishna Bangalore Prakash, *Prosecuting and Punishing Our Presidents,* 100 Tex. L. Rev. 55, 86 (2021).

47. An Act to Establish the Treasury Department, ch. 12, § 8, 1 Stat. 65, 67 (1789) (amended 1791).

48. Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46 (repealed 1790); *see also* United States v. Worrall, 2 U.S. (2 Dall.) 384, 390 (1798) (discussing the scope of a federal bribery statute covering "Judge[s], . . . Officer[s] of the Customs, [and] . . . Officer[s] of the Excise").

49. Act of Sep. 1, 1789, ch. 11, § 34, 1 Stat. 55, 64-65 (repealed 1793).

against foreign ambassadors in violation of diplomatic immunity.[50] These statutes reflected a foundational ethos of accountability: executive-branch officers were meant to face criminal liability for unlawful acts, even—and perhaps especially—when those acts were enabled by their office and taken at the direction of superiors.

Contemporaneous evidence confirms that federal executive accountability was established under the assumed availability of criminal prosecution of lower officials.[51] Promoting the Constitution for adoption by the states, Framer (and future Associate Justice) James Wilson responded to fears that impeachment by the Senate may not be a sufficiently powerful tool to rein in criminal officials. In instances of abrogation by the Senate, he explained, "responsibility is not entirely lost . . . . [W]e have a greater degree of security."[52] Absent impeachment, officials who behave criminally still "may be tried by their country; and if their criminality is established, the law will punish."[53] Not long thereafter, Justice Story elaborated on this principle in his commentaries on the Constitution. He declared it "indispensable" that "common tribunals of justice should be at liberty to entertain jurisdiction" when federal officials commit crimes in office.[54] Otherwise, "the grossest official offenders might escape without any substantial punishment."[55]

In addition to confirming a priori the availability and importance of criminal prosecution of subordinates, early efforts and statements toward the accountability of executive officers underscore the implicit fungibility of such officers. Unlike the President, whose potential criminal prosecution (even for egregious and obviously unofficial conduct) while in office raised functional concerns for

50. Act of Apr. 30, 1790, ch. 9, § 25, 1 Stat. 112, 117-18 (1790). This provision included not merely abuses of office as did its sister statutes, but also liability for officers carrying out their purportedly official duties. A similar principle, which would require that officials be discerning in their exercise of potentially unlawful orders from superiors—including the President—was central to the case of *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). *See infra* notes 63-69 and accompanying text.

51. Justice Sotomayor surveys some of this history with respect to the President in her *Trump* dissent. *See* Trump v. United States, 603 U.S. 593, 663 (2024) (Sotomayor, J., dissenting).

52. James Wilson, *The Debates in the Convention of the State of Pennsylvania*, *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 415, 477 (D.C., Jonathan Elliot ed., 1836).

53. *Id.*

54. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 393, at 279 (Bos., Hilliard, Gray & Co. 1833).

55. *Id.*

the Framers about incapacitating the sole head of the executive branch,[56] sitting subordinate officials were unambiguously subject to criminal process. This reflects a basic understanding that lower-ranking executive officers were, in certain ways, replaceable—their removal through arrest and prosecution would not cripple the functioning of government as presidential prosecution might.[57]

In other words, the Framers conceived executive officers as broadly interchangeable—a view that sits uneasily with the modern Court's functionalist defenses of derivative immunity.[58] Today's doctrine treats the risk that civil liability might chill subordinates from carrying out lawful presidential directives as reason to expand immunity,[59] even though any truly recalcitrant officer can be removed and replaced.[60] The Founding design cut the other way, contemplating immediate criminal prosecution of offending officers, reflecting a preference for accountability over administrative continuity.[61] In short, the ability to replace disobedient officers operated as the counterweight to officers' exposure to

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56. *See* 1973 SG Memorandum, *supra* note 46, at 17 ("[The Framers] assumed that the nation's Chief Executive, responsible as no other single officer is for the affairs of the United States, would not be taken from duties that only he can perform . . . ." (first citing 2 FARRAND, *supra* note 43, at 500; and then citing THE FEDERALIST NOS. 65, 69 (Alexander Hamilton))).

57. Some authorities suggest that the prosecution of certain subordinates *could* sufficiently impair government function, so as to require nuance when evaluating whether a criminal prosecution interferes with one's ability to discharge the duties of one's office. *See, e.g.*, A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 233-34 (2000) [hereinafter 2000 OLC Memorandum] ("[I]ndictment would not effect the de facto removal of that officer . . . . '[T]he real question . . . is whether a governmental function would be seriously impaired if a particular civil officer were liable to indictment before being tried on impeachment.'" (quoting 1973 SG Memorandum, *supra* note 46, at 15-16)). This distinction may confer immunity to certain "indispensable" executive officials. But it rings hollow against the historical evidence: the Framers' codification of criminal liability for executive officers—and their explicit discussions of subordinate prosecution as a check on the unlawful exercise of presidential power—demonstrate they anticipated and accepted that criminal process might temporarily sideline important officials, or even permanently remove and bar them from office. Indeed, modern authorities, looking to the trial of Aaron Burr, accept that even the Vice President—the highest officer behind the Commander in Chief himself—could be prosecuted without fear of impairing crucial government functions. *See* 2000 OLC Memorandum, *supra*, at 234. It therefore remains unclear how these distinctions, if valid, cash out in practice.

58. *See infra* Section II.B.1.b (contrasting modern unitary-executive jurisprudence and its role in accelerating the logic of subordinate immunity with this understanding from the Founding).

59. *See, e.g.*, Ziglar v. Abbasi, 582 U.S. 120, 150-56 (2017) (immunizing high-ranking executive officials from damages claims for implementing unlawful detentions at the behest of the President in the wake of 9/11).

60. *See, e.g.*, Collins v. Yellen, 594 U.S. 220, 255-56 (2021) (cataloging the many potential differences between Presidents and their subordinates that may justify those subordinates' dismissal).

61. *See supra* notes 47-50 and accompanying text.

liability—an equilibrium modern immunity doctrine disrupts when it treats turnover driven by liability concerns as incompatible with effective governance.

And the Framers' conception of personal accountability was not limited to criminal law. At the Founding, executive officials faced personal exposure to both criminal prosecution and civil liability: two halves of a system designed to deter misconduct through individual consequence. Understanding this parallel accountability is essential to grasping how the Court's reasoning in *Trump* threatens to unravel both forms of deterrence. The Court analogized from civil to criminal immunity for the President, and civil liability for subordinate officials has diminished alongside that of the Commander in Chief. Now, the same functional logic that has steadily eroded civil accountability for subordinates risks doing the same for criminal liability.

B. The Steady Retreat from Personal Liability

Modern readers may find the Framers' commitment to personal accountability, both civil and criminal, alien. While today we are used to a complex federal bureaucracy that demands a degree of legal insulation for its employees, they built a framework premised on personal consequence. Having established the criminal foundation of this accountability, it is worth examining how civil liability operated as its complement—especially as civil liability has weakened. This Section thus documents the retreat from personal accountability, tracing how the courts have steadily expanded civil immunity and consequently increased the weight borne by criminal law.

At the Founding and for decades thereafter, federal officers who exceeded their authority or violated the law faced direct liability through common-law suits, even when acting at the direction of superiors.[62] The premise was a relatively simple one: under our system of government, neither the dignity of office nor the orders of a superior could launder illegal conduct into legal behavior.

Even those acting on the orders of the President himself were acting at their own peril "[i]f those instructions [were] not strictly warranted by law."[63] Take the paradigmatic case of *Little v. Barreme*.[64] President John Adams had instructed naval commanders to seize vessels sailing both to and from French ports, despite

62. *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1871-76 (2010) (discussing the common law's emphasis on officer suits, which was inherited by the Founding generations).

63. Little v. Barreme, 6 U.S. (2 Cranch) 170, 170 (1804).

64. *Id.*

Congress authorizing only the seizure of vessels sailing to French territories.[65] George Little, a Navy captain acting upon those orders, was then sued for wrongfully seizing a Danish vessel sailing from a French port.[66] The Court squarely rejected Little's defense that Adams's order absolved him of liability, instead holding that subordinate officers remain personally accountable even when following executive directives.[67] As Chief Justice Marshall's opinion notes, "[T]he instructions [of the President] cannot . . . legalize an act which without those instructions would have been a plain trespass."[68] Marshall did not come to this conclusion lightly and noted that he was initially inclined to rule in Little's favor. He worried that personal liability would undercut the type of unflinching obedience to superiors that is "indispensably necessary" to the function of the military system[69]—presaging the functional arguments the Court would later use to undercut personal liability for subordinates in the civil context.[70] Nevertheless, Marshall's musings about obedience to the executive did not carry the day, and the rule that emerged was unambiguous: subordinate officers remained personally accountable for unlawful acts.

This rule, rigidly applied, was quickly found to be unworkable in the early days of the Republic,[71] and workarounds soon emerged. Personal exposure to liability was tempered by Congress's power to indemnify officials, provided that the officials acted in good faith, creating a calibrated system that deterred misconduct ex ante while protecting conscientious service.[72] Officials who acted beyond the scope of their legal authority first had to face judgment, with individualized reimbursement available only after the fact through private bills of indemnification.[73] Over time, seeking a more predictable doctrine, the Court established indemnity as a matter of right, rather than congressional discretion

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65. *Id.* at 178; *see also* Act of June 13, 1798, ch. 53, 1 Stat. 565 (suspending commercial intercourse between the United States and France).

66. *Little*, 6 U.S. (2 Cranch) at 178.

67. *Id.* at 179.

68. *Id.*

69. *Id.*

70. *See infra* Section II.A.1.

71. *Cf.* Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 40 (1997) ("Without indemnification, who would agree to work for the government?").

72. *See* Pfander & Hunt, *supra* note 62, at 1876 ("[P]rivate bills of indemnification . . . protected the officer from ruinous liability [and] assured the victim of compensation.").

73. *Id.*

premised on good faith, for officers whose illegal actions were carried out pursuant to the instructions of a superior.[74]

The modern system that began to take form in the twentieth century sought, in theory, to achieve similar ends through different means. Beginning with *Pierson v. Ray*, the Supreme Court adapted the common-law defenses available at the Founding to shield certain government officials from personal liability, creating what would later be termed qualified immunity as a blanket protection for officials acting in good faith.[75] But the practice of litigating the good faith of federal government officials was costly. The Court, seemingly annoyed at "insubstantial claims" being brought against those officials, announced a simpler, objective test in *Harlow v. Fitzgerald*. The new qualified immunity no longer turns on good faith, instead shielding government officials from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[76] Over a relatively short period, the Court's qualified-immunity doctrine expanded far beyond its original scope, making civil liability exceedingly rare even for clearly unlawful conduct.

The all-but-vanished hope of constitutional tort remedies under *Bivens*, for instance, is illustrative of this trend.[77] Increasingly allergic to personal liability for federal officials, the Court has systematically closed doors it had briefly opened. Most recently, in cases like *Ziglar v. Abbasi* and *Egbert v. Boule*, the Court has expressed deep skepticism toward any judge-made remedies against federal officials, especially when doing so would inhibit officials in the discharge of their duties or would interfere with the prerogatives of the other branches of government.[78] Even when plaintiffs overcome these doctrinal barriers, agencies now

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74. This right was not self-executing; Congress would still have to pass a private bill. "[S]ome personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship." *Id.* at 1912-13 (quoting Tracy v. Swartwout, 35 U.S. (10 Pet.) 80, 98-99 (1836)) .

75. 386 U.S. 547, 557 (1967) ("[T]he defense of good faith and probable cause . . . available to the officers in the common-law action . . . is also available to them in the action under § 1983.").

76. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

77. From the beginning of *Bivens* claims, we have seen the Court's skepticism of tying the hands of the government through the invocation of personal liability: "I agree with the Court that the appropriateness of according Bivens compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 407-08 (1971) (Harlan, J., concurring).

78. Ziglar v. Abbasi, 582 U.S. 120, 141 (2017) ("Allowing a damages suit . . . would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch."); Egbert v. Boule, 596 U.S. 482, 498 (2022) (refusing to extend a *Bivens* cause of action to First

indemnify their employees virtually automatically—not just for reasonable mistakes, but even for egregious misconduct.[79] And, perhaps disappointing the more optimistic of the law-and-economics crowd, agencies have not internalized the costs of their disobedient officials and adjusted their policies accordingly. They don't have to, because they instead pay off most of their indemnified *Bivens* claims from a centralized pool of federal dollars, not from their own appropriations.[80]

As a result of these developments, the careful calibration of equities where personal exposure to legal consequence deterred malfeasance while good-faith service provided legal cover has been replaced by a system of sweeping, if not yet entirely absolute, official immunity from civil consequence.[81] Misconduct is essentially costless to the individual official: the government pays, the official walks free, and the deterrent effect of personal consequences vanishes.

C. The Last Guardrail

With civil liability curtailed and other forms of accountability eroding, this Section establishes the critical, unique role of criminal accountability. Criminal law serves as the final, indispensable guardrail against executive misconduct because it addresses fundamental public wrongs, cannot be easily delegated away,

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Amendment claims because of "social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties" (quoting Anderson v. Creighton, 483 U.S. 635, 638 (1987))).

79. *See* James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 595 & n.139, 596 (2020) (finding that "virtually all" successful *Bivens* claims against Bureau of Prisons employees are paid out not by the officials themselves or the agency but through a centralized fund at the federal treasury and concluding that "[t]he threat of personal liability appears . . . to be far more theoretical than real"); *see also* Cornelia T.L. Pillard, *Taking Fiction Seriously*, 88 GEO. L.J. 65, 65, 76 n.51, 77 (1999) (documenting DOJ representation in approximately 98% of *Bivens* cases where requested and describing agency indemnification as "a virtual certainty," such that the United States—not the agency official—is the real party in interest).

80. Pfander et al., *supra* note 79, at 595-96; Pillard, *supra* note 79, at 77 n.54.

81. Coming full circle, these and related cases have entirely flipped the script from the Founding Era. Initially, government officials were personally liable by default and Congress indemnified them on a case-by-case basis; now, officials are all but *immune* by default, with the Court requiring Congress to authorize specific causes of action to create personal liability. *See, e.g.*, *Egbert*, 596 U.S. at 499 ("Congress, not the courts, is better suited to authorize such a damages remedy."). And where Congress previously conditioned its indemnification on an official's good-faith conduct, now, ironically, the federal government foots the bill *precisely when* the official's conduct fails to pass legal muster. The incentives seem, to put it lightly, misaligned. *See* Pfander et al., *supra* note 79, at 613-14 (claiming that the availability of funds for payouts may lead agencies to "take too few steps to lessen the magnitude of *Bivens* liability").

and offers the only remaining mechanism to deter the most egregious abuses of power.

Recent history repeatedly confirms the unique deterrent power of criminal law at the highest levels of government. During the Bush administration, senior Justice Department officials threatened mass resignation when asked to approve certain legally suspect surveillance programs, explicitly citing fears of criminal prosecution.[82] The specter of criminal liability also haunted President Trump's first term. When Trump sought to obstruct the investigation into Russia's interference in the 2016 presidential election, many of his top subordinates refused to comply with his orders for fear of criminal exposure.[83] As Trump then tried to overturn the results of the 2020 election, Mark Milley, then the Chairman of the Joint Chiefs of Staff, explicitly invoked the threat of prison in his efforts to rein in Trump loyalists within the Department of Defense and the intelligence community, whom he suspected could be trying to subvert the transfer of power.[84] And as the dust settled after January 6, the cloud of prospective prosecution hung over even the most dogged foot soldiers within the Administration, convincing them to finally lay down their arms against reality.[85] With civil liability too defanged to be a credible deterrent, contempt more of a theoretical check than a real one, and reputational hazards all but extinct in an era of hyperpolarization,[86] there is no substitute for the threat and availability of criminal prosecution.

It is possible to reasonably defend the evolution of official civil liability described in the previous Section. The modern system, despite its flaws, still achieves certain core aims. Victims receive compensation, albeit from the public

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82. *See* Goldsmith, *supra* note 24, at 3.

83. *Id.* at 3-4.

84. *See* Glasser & Baker, *supra* note 4.

85. *See* H.R. Rep. No. 117-663, at 469 (2022) ("[John] Eastman called [Eric] Herschmann on January 7th to discuss litigation on behalf of the Trump Campaign in Georgia. This gave Herschmann another opportunity to lay into Eastman. '[Are] you out of your F'ing mind? . . . Get a great F'ing criminal defense lawyer, you're going to need it.' Days afterward, Eastman sent an email to [Rudy] Giuliani, making a request that tacitly acknowledged just how much trouble he was in: 'I've decided that I should be on the pardon list, if that is still in the works.'" (citations omitted)).

86. Consider, for example, the all-but-party-line confirmation of Emil Bove III to a lifetime judicial appointment. The Senate approved Bove's nomination despite widely reported accusations that, while serving as Principal Associate Deputy Attorney General, he instructed government attorneys they might defy court orders in pursuit of President Trump's agenda. *See* Devlin Barrett, *Senate, Rejecting Whistle-Blower Alarms, Confirms Bove to Appeals Court*, N.Y. Times (July 29, 2025), https://www.nytimes.com/2025/07/29/us/politics/emil-bove-confirmed-appeals-judge.html [https://perma.cc/7NWD-JEXA]. For a discussion of contempt, see *infra* notes 92-98 and accompanying text.

treasury rather than individual officers.[87] Government officials can execute their duties without constant fear of personal financial ruin. And a constellation of professional checks—from bar licensure to internal oversight to reputational sanctions—theoretically adds additional safeguards against official misconduct. Indeed, qualified immunity's objective test might seem to be a more predictable way to separate good-faith errors from true abuses than the Founders' emphasis on personal liability.

This sanguine view, however, obscures structural gaps. The present state of our civil-accountability mechanisms is such that they can only weakly deter unlawful conduct by determined bad actors.[88] The federal judiciary *claims* to consider the deterrence of illegal government action as the primary function of civil liability. Lines of cases hold that deprivations of certain rights for any period of time are irreparable, to such an extent that any risk of deprivation will near-automatically earn a litigant an injunction against the government;[89] accordingly, the availability of these injunctions is premised on deterring government actors from violating such rights in the first place.[90] But in marked contrast to this conception, the Supreme Court has erected barriers to personal liability that might deter the actual on-the-ground violators from carrying out the policy, and has emphasized that such personal liability, when it exists, ought not serve as a "vehicle for altering an entity's policy."[91]

In lieu of personal civil liability in the form of damages, contempt of court appears to offer another avenue for holding officials accountable—by imposing fines or jail time or threatening to do so—but it too proves ineffective against an executive hell-bent on breaking the law and getting away with it. If a court has

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87. *See supra* note 79 and accompanying text.

88. In an era of "constitutional hardball," this sort of realpolitik is a useful frame for understanding whether limitations on misconduct actually exist, or whether the institutional arrangements traditionally *thought of* as limitations have simply not been sufficiently challenged to some inevitable, as-yet-undetermined breaking point. *Cf.* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."). *See generally* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004) (describing constitutional hardball as a practice in which motivated political actors continually push the boundaries of existing institutions and legal constraints, unconcerned with traditional norms).

89. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 373 (1976) (holding that First Amendment violations are irreparable); *see also* Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J.L. & PUB. POL'Y 743, 759-60 (2013) (documenting this presumption in the circuit courts).

90. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001).

91. Ziglar v. Abbasi, 582 U.S. 120, 140 (2017) (quoting *Malesko*, 534 U.S. at 74).

ruled a federal policy or action unlawful and issued an injunction, we assume the agency or official carrying out that policy will stop, or else be held in contempt. Nicholas R. Parrillo has documented, however, that contempt against agency heads and other officials is a relatively toothless doctrine, with the judiciary reticent to impose sanctions against executive-branch officials.[92] When courts *do* issue contempt fines, the officials almost never pay: the funds come from the same centralized pool of appropriated funds at the U.S. Treasury used for individual officials found liable in *Bivens* actions.[93]

In principle, courts could circumvent the limited effects of fines by imprisoning federal government officials for contempt if they fail to abide by court orders.[94] Given the complexity and institutional inertia of government agencies and organizations, a contempt inquiry against a government official often necessitates a showing of subjective intent.[95] This is a high bar, raised further by the fact that ambiguity in court orders resolves in favor of the alleged contemnor.[96] Perhaps this is why imprisonment of government officials for contempt of court is extraordinarily rare.[97] Or perhaps it is more straightforward, and courts are

92. *See* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 697 (2018) ("[T]he judiciary as an institution—particularly the higher courts—has exhibited a virtually complete unwillingness to allow sanctions, at times intervening dramatically to block imprisonment [of agency officials] or budget-straining fines at the eleventh hour."); *see also* Alan Feuer, *Contempt Plan for Trump Aides Has Been Paused by Appeals Court for Months*, N.Y. TIMES (July 15, 2025), https://www.nytimes.com/2025/07/15/us/politics/appeals-court-trump-contempt-el-salvador-deportation.html [https://perma.cc/P9CJ-LW5Z] (documenting the D.C. Circuit's unusual months-long administrative stay of Judge Boasberg's finding of probable cause to hold Trump Administration officials in criminal contempt).

93. Parrillo, *supra* note 92, at 738 ("[A]gencies' judicially determined debts are paid overwhelmingly from the Judgment Fund." (footnote omitted)); *see also* Pfander et al., *supra* note 79, at 594-96 (finding that liability from *Bivens* claims against Bureau of Prisons officials was overwhelmingly satisfied using the Judgment Fund, housed in the U.S. Treasury).

94. Parrillo, *supra* note 92, at 742-43 (citing a line of cases from the D.C. Circuit confirming the availability of imprisonment for contempt).

95. *Id.* at 744-45.

96. *See* J.G.G. v. Trump, 147 F.4th 1044, 1046 (D.C. Cir. 2025) (Katsas, J., concurring). Ambiguity is a powerful shield from contempt. In *J.G.G.*, for instance, Judge Katsas argued that Judge Boasberg's injunction prohibiting the "remov[al]" of class-member migrants was not sufficiently clear to support a criminal contempt inquiry into the subordinate officials who, hours after the injunction was handed down, facilitated the transfer of said migrants into foreign custody. *Id.* at 1058.

97. Parrillo identifies only four cases where imprisonment of a high-ranking government official occurred or was credibly threatened by a court. Parrillo, *supra* note 92, at 745.

simply uncomfortable with taking it upon themselves to throw members of a coequal branch of government behind bars.[98]

Whatever the reason for the rarity of actual punishment, the threat of punishment is more common.[99] A threat is one way for a court to have its cake and eat it too: a court can impose a prospective personalized cost on an agency official, thus scaring or shaming them into compliance without risking being overturned later for abuse of discretion. But why do these threats work if they are so rarely enforced? Professional norms and reputational concerns do much of the heavy lifting here. Federal officials tend to move between similar communities—career civil servants, political appointees, the bar, Congress—where compliance with law is traditionally a strong norm.[100] Being labeled a law violator is damaging reputationally, professionally, and even socially. But these informal sanctions prove effective only when misconduct is rare and universally condemned—when misconduct becomes partisan or politicized, these norms break down.[101] A finding of contempt that might once have ended a career becomes dismissible as mere judicial activism, and the deterrent effect of shame dissipates.[102]

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98. Judge Boasberg took a substantial step in this direction with his order finding probable cause to hold Trump Administration officials in criminal contempt for violating his order. The D.C. Circuit later blocked the contempt inquiry, stating that its unusual interlocutory review and grant of mandamus were necessary to "stave off a looming 'constitutional confrontation' between the Executive and Judicial Branches." *See* J.G.G. v. Trump, 147 F.4th 1044, 1058 (D.C. Cir. 2025) (Katsas, J., concurring) (quoting United States v. Nixon, 418 U.S. 683, 692 (1974)); Mattathias Schwartz, *Appeals Court Blocks Judge Boasberg's Contempt Inquiry Into Trump Officials*, N.Y. Times (Aug. 8, 2025), https://www.nytimes.com/2025/08/08/us/politics/boasberg-trump-deportation-flights.html [https://perma.cc/X585-6ZYS].

99. Parrillo, *supra* note 92, at 770.

100. *Id.* at 777.

101. *Id.* at 794 ("If partisanship regarding judicial contempt approached that regarding congressional contempt, it could diminish contempt's shame and ultimately the efficacy of judicial review of the federal government."). Partisanship regarding judicial legitimacy in general is certainly reaching such heights. *See* JD Vance (@JDVance), X (Feb. 9, 2025, 10:13 AM), https://x.com/JDVance/status/1888607143030391287 [https://perma.cc/G9M6-98Z9] ("Judges aren't allowed to control the executive's legitimate power."). Vance was responding to recent setbacks of Trump's agenda, in particular, to nationwide injunctions by federal judges against a brazenly unconstitutional effort to suspend birthright citizenship. *See* Washington v. Trump, 765 F. Supp. 3d 1142, 1154 (W.D. Wash.), *stay denied*, 2025 WL 654902 (9th Cir.), *stay granted sub nom.*, Trump v. CASA, Inc., 606 U.S. 831 (2025); CASA, Inc. v. Trump, 763 F. Supp. 3d 723, 746 (D. Md.), *stay denied*, 2025 WL 654902 (4th Cir.), *stay granted*, 606 U.S. 831 (2025).

102. At the time of writing, no official from the second Trump Administration has been held in contempt, though some judges have initiated inquiries into disobedience or ruled that the Administration has violated their orders. *See* Mattathias Schwartz, *White House Failed to Comply with Court Order, Judge Rules*, N.Y. Times (Feb. 10, 2025), https://www.nytimes.com/2025

This is all to say: criminal liability serves an irreplaceable function among our instruments of accountability. Criminal liability cuts through the fog of institutional defenses and partisanship to strike directly at individual wrongdoing. No matter the extent to which loyalism and patronage can insulate one's social standing and career prospects, a jury of twelve strangers can still convict. An agency can readily shift or absorb all manner of financial or injunctive consequences, but it cannot serve prison time on behalf of its employees.

Criminal law is different for another reason as well: it vindicates not just private harms but also public wrongs. When officials abuse power to the point of criminality, they breach not only individual rights, not only the public trust in their position, but our bedrock social order. As Blackstone observed, while civil injuries are primarily "infringement[s] . . . of the private or civil rights belonging to individuals," crimes are "a breach and violation of public rights and duties, which affect the whole community."[103]

The Framers could have adopted the English model, where the attribution of criminal responsibility with respect to the Crown was an empty question, because "the law [did] not suppose the king capable of doing wrong."[104] They chose instead to reject emphatically the "sacred and inviolable" nature of the King, making the President "liable to prosecution and punishment in the ordinary course of law."[105] Because of this foundational choice and the constitutional design that entrusts those same officials with the faithful execution of the law,[106] the violation of criminal law is at its most offensive when committed by figures at the highest echelons of power.

Yet the Court has steadily dismantled remedies against these officials, extending immunity after immunity—all while citing the availability of criminal

/02/10/us/trump-unfreezing-federal-grants-judge-ruling.html [https://perma.cc/Z5WY-TW87] ("[T]he White House had defied his order to release billions of dollars in federal grants . . . ."); Alan Feuer, *'Nothing Has Been Done': Judge Rebukes U.S. Effort to Return Wrongly Deported Man*, N.Y. Times (Apr. 15, 2025), https://www.nytimes.com/2025/04/15/us/trump-abrego-garcia-deported-hearing.html [https://perma.cc/VS2F-92XP]; Alan Feuer, Tyler Pager, Hamed Aleaziz & Mattathias Schwartz, *Judge Finds U.S. Violated Court Order with Sudden Deportation Flight to Africa*, N.Y. Times (May 21, 2025), https://www.nytimes.com/2025/05/21/us/politics/south-sudan-deportation.html [https://perma.cc/8BK7-AW4R].

103. 3 William Blackstone, Commentaries *2.

104. St. George Tucker, *Note D: View of the Constitution of the United States*, *in* 1 Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia 140, 348 (Rothman Reprints, Inc. 1969) (1803).

105. The Federalist No. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

106. *See* U.S. Const. art. II, § 3.

prosecution to justify their retreat from civil accountability.[107] The collapse of personal civil accountability thus elevates the importance of criminal law—until very recently, one of the few remaining legal playing fields where governing and governed could stand as equal subjects.

The slow and steady retreat from personal civil accountability for government officials, marked at each retrenchment by purported limiting principles and carveouts that were later overruled as judicially unmanageable,[108] institutionally disruptive,[109] or doctrinally unsound,[110] ought to read as a cautionary tale. The Court in *Trump* instead saw a blueprint. By bootstrapping doctrines of civil immunity into a constitutional shield from criminal prosecution, the Court has recast concerns about the annoying intrusion of civil litigation into a sweeping bar on criminal accountability.

The majority may claim that this extraordinary protection extends to the President alone.[111] But as Part II will demonstrate, when the Court fashions an immunity and nominally limits it to the President, it often metastasizes beyond the Oval Office. The collapse of other forms of accountability may thus preview an even more troubling erosion of criminal liability throughout the upper reaches of the executive branch.

II. IMMUNITY CREEP

Modern experience shows that when the Supreme Court fashions some allegedly unique protection for the President, subsequent decisions gradually extend that shield to subordinate officials, all in service of preserving presidential effectiveness. Call it immunity creep—an evidently strong judicial impulse to spread presidential protections throughout the executive branch, lest a President's immunized decisions be frustrated by the vulnerability of those who must

107. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 428-29 (1976) ("[Civil] immunity . . . does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law."); Burns v. Reed, 500 U.S. 478, 484-87 (1991) (affirming *Imbler*).

108. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982) ("[I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials.").

109. *See, e.g.*, Ziglar v. Abbasi, 582 U.S. 120, 139-40 (2017) (counseling against extending causes of action amid a "risk of disruptive intrusion by the Judiciary into the functioning of other branches").

110. *See, e.g.*, Egbert v. Boule, 596 U.S. 482, 483 (2022) ("Since [*Bivens*], however, the Court has come 'to appreciate more fully . . . the Constitution's separation of legislative and judicial power.'" (quoting Hernandez v. Mesa, 589 U.S. 93, 100 (2020))).

111. Trump v. United States, 603 U.S. 593, 610 (2024) ("The President 'occupies a unique position in the constitutional scheme' . . . ." (quoting Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982))).

carry them out. This Part first examines the functional logic underlying expansions in civil immunity, executive privilege, and administrative law, demonstrating how these doctrines provide theoretical and practical foundations for the Court to extend a form of derivative criminal immunity. It then returns to *Trump v. United States*, showing how the decision opens the door to that same functionalist logic, and sketches what potential "qualified criminal immunity" could look like.

A. Functionalist Blueprints

The Court has developed novel protections designed to keep the President out of legal fights and/or able to serve as the nation's chief executive in three key areas: civil immunity, executive privilege, and unreviewability under the Administrative Procedure Act (APA). While these shields are occasionally couched in formalistic terms — references to the President's unique constitutional role, for instance — they are driven by function and designed to preserve vigorous and energetic executive action. Courts have struggled to resist extending these doctrines and their logics to the subordinate officials whose actions are necessary to actualize presidential aims.

1. Civil Immunity

Presidential criminal immunity is atextual, ahistorical, and anticonstitutional, but it did not emerge entirely from a vacuum. Rather, en route to its conclusion that the President is immune from criminal prosecution for official acts, the *Trump* Court analogizes from the justification underlying the similarly scoped absolute *civil* immunity for official presidential acts. *Nixon v. Fitzgerald* is the landmark case establishing that the President "is entitled to absolute immunity from damages liability predicated on his official acts."[112] This immunity is "functionally mandated," because a "diversion of [the President's] energies by concern with private lawsuits would raise unique risks to the effective functioning of government."[113] In crafting a doctrine of civil immunity, the Court's "central concern was to avoid rendering the President 'unduly cautious in the discharge of his official duties.'"[114]

Trump pushed the point further, reasoning that the "threat of trial, judgment, and imprisonment . . . and the peculiar public opprobrium that attaches to criminal proceedings" is "more likely to distort presidential decisionmaking

112. *Nixon*, 457 U.S. at 749.

113. *Id.* at 749, 751.

114. Clinton v. Jones, 520 U.S. 681, 693-94 (1997) (quoting *Nixon*, 457 U.S. at 752 n.32).

than the potential payment of civil damages."[115] By porting *Nixon v. Fitzgerald*'s functional approach from civil to criminal immunity, *Trump* both signals its functional concerns and presages what might come next: a derivative immunity for subordinates. In an attempt to learn from history, I thus begin this Section by tracing how that move first played out over four decades ago.

Two forms of civil immunity are available to subordinate executive officials. First is qualified immunity, which originated as a good-faith defense and was designed to protect officials who acted reasonably and without malice. Second is absolute immunity, which is available to officials performing certain roles and operates as a complete bar to civil liability regardless of the official's motives.[116] The Court honed its doctrine of qualified immunity in a string of cases from the mid-1970s and early 1980s, amid swirling fears of executive-branch misconduct.[117] In so doing, it limited the availability of absolute immunity, providing that it would only be extended to executive-branch officials who could make a strong showing for its necessity as a matter of public policy.[118] These developments left qualified immunity the primary form of subordinate civil immunity.

With qualified immunity the new norm, the Court needed to develop an objective test rather than relying on subjective (and thus costlier to litigate) good-faith analysis. The objective qualified-immunity standard emerged in *Harlow v. Fitzgerald*, significantly expanding the situations in which immunity could be invoked.[119] It is no coincidence that this expansion came down the same day as *Nixon v. Fitzgerald*. Indeed, the Court in *Harlow* begins its analysis by invoking its sister case: "As we reiterated today in *Nixon v. Fitzgerald* . . . public officers require [immunity] to shield them from undue interference with their duties."[120] The new objective test, then, was useful to the extent it would "avoid excessive disruption of government."[121] A functional argument for absolute presidential

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115. *Trump*, 603 U.S. at 613.

116. *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1270 (2010) (describing the origins of official immunity and the Court's attempts to distinguish it into two varieties, with qualified immunity being a transmutation of good-faith defenses similarly available at the common law); *see also supra* Section I.B (describing the general retreat from personal liability for executive officials).

117. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 239 (1974) (finding that qualified immunity may protect certain state executive officers depending on the circumstances); Butz v. Economou, 438 U.S. 478, 484-85 (1978) (finding that federal executive officials engaging in discretionary conduct generally only get qualified immunity); Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (expanding the availability of qualified immunity for presidential aides to encourage the effective exercise of discretion).

118. *Butz*, 438 U.S. at 506.

119. 457 U.S. at 818.

120. *Id.* at 806 (citing Nixon v. Fitzgerald, 457 U.S. 731, 751-53 (1982)).

121. *Id.* at 818.

immunity—purportedly grounded in the President's unique office—devolved, the very same day, into a functional argument for qualified subordinate immunity. As described in Part I.A, the doctrine of qualified immunity has since ballooned, driven not by concerns over fairness and good faith but rather by fears that liability will chill subordinates from carrying out their duties.[122]

Other parallels between presidential and subordinate immunity are similarly instructive. Just as presidential immunity turns on whether conduct falls within the outer perimeter of official responsibility, subordinate immunity depends on whether actions fall within the authorized scope of an official's constitutional or statutory duties.[123] This symmetry suggests that when subordinates implement presidential directives, their immunity may track the President's protection.

This framework has important implications for subordinate criminal immunity. If civil immunity for subordinate officials attaches to conduct within the scope of authorized duties and subordinate officials derive their authority from the President's constitutional powers, then criminal immunity might logically extend to subordinates implementing presidential directives that fall within the President's protected sphere. The Court's persistent focus on function over form in both civil and criminal contexts reinforces this conclusion. Just as civil immunity protects the fearless administration of the law, criminal immunity might similarly shield subordinates executing presumptively immune presidential actions.

It is worth noting that, in *Harlow*, the Court rejected the strong form of the argument: that presidential aides should automatically derive an *absolute* immunity from that of the President.[124] The Court reasoned that absolute derivative immunity would "sweep[] too far," immunizing a wide range of conduct without sufficient need or justification.[125] Instead, the Court held that "an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high

122. *See supra* notes 75-80 and accompanying text.

123. As a necessary precondition for extending immunity, courts require that an official's acts fall within the scope of his authority. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) ("[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office . . . .").

124. *Harlow*, 457 U.S. at 810 ("[Petitioners] argue that recognition of derivative absolute immunity is made essential by all the considerations that support absolute immunity for the President himself. Petitioners' argument is not without force. Ultimately, however, it sweeps too far.").

125. *Id.* at 810, 813. Note that the Court does not foreclose that *some* aides could make the showing necessary to derive an absolute immunity insofar as "public policy requires" it. *Id.* at 813 (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

station."[126] Perhaps a subordinate's immunity does not follow the President's after all.

Not so. Justice Powell here attempted a sleight of hand. By ruling earlier that morning that the President's immunity was "functionally mandated," the Court quietly shifted the jurisprudential Overton window.[127] Prior doctrine on subordinate civil immunity came in two flavors. The first, absolute immunity, was functionally mandated to enable fearless discharge of duties and was narrowly available to officials exercising legislative, judicial, or prosecutorial functions.[128] The second, qualified immunity, was not functionally mandated, but rather emerged from common-law good-faith defenses that protected officials who acted honestly but made reasonable mistakes—a doctrine rooted in fairness rather than governmental necessity.[129] In announcing qualified immunity premised on functional necessity, then, the *Harlow* Court tangled these justifications. Its embrace of functional analysis for presidential immunity had left no coherent way to maintain the traditional approach for subordinate officers.[130]

Chief Justice Burger dissented in *Harlow*, arguing that presidential aides and other high-ranking executive officials needed absolute immunity to be able to fearlessly discharge their duties.[131] His analysis would not be out of place in a Roberts Court decision on executive power: subordinate officials are "the President's 'arms' and 'fingers' to aid in performing his constitutional duty to see 'that the laws [are] faithfully executed.'"[132] To the extent that these officials exist to carry out presidential will, their subjection to civil suits would "diminish[]" and "frustrate[]" the functioning of the presidency.[133] Then-Justice Rehnquist, meanwhile, in his concurrence, applied the same logic and suggested that

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126. *Id.* at 812.

127. Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982). For a discussion of the novel, extraconstitutional foundations of absolute presidential civil immunity in *Nixon*, see Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The* Nixon *and* Clinton *Cases*, 108 HARV. L. REV. 701, 708-15 (1995).

128. *Butz*, 438 U.S. at 511-12.

129. *See supra* notes 72-75 and accompanying text.

130. I note here that a function-grounded, judicially expedient version of qualified immunity has the effect of barring many potentially meritorious claims from proceeding past summary judgment. Justices Brennan, Marshall, and Blackmun noted the importance of discovery and warned that the majority risked "erect[ing] an impenetrable barrier to the plaintiff's use of . . . evidence [of the defendant's knowledge]." *Harlow*, 457 U.S. at 821 (Brennan, J., concurring) (quoting Herbert v. Lando, 441 U.S. 153, 170 (1979)).

131. *Id.* at 822-23 (Burger, C.J., dissenting).

132. *Id.* at 825.

133. *Id.* at 826 (quoting Gravel v. United States, 408 U.S. 606, 617 (1972)).

absolute immunity ought to adhere to cabinet secretaries and agency heads as well.[134] These positions, though they failed to command a majority, illustrate the expansionary pressure inherent in functional reasoning: once the Court embraces the logic that immunity is necessary to preserve executive effectiveness, that same logic provides a ready justification for extending protection to ever-wider circles of officials whose cooperation the President requires.

The rejection of absolute derivative immunity in *Harlow*, moreover, occurred in a different doctrinal era, and the Court's modern embrace of the unitary executive and rejection of other forms of executive liability alter the calculus. Even Chief Justice Burger, a staunch defender of both absolute presidential and absolute subordinate immunity, noted that, in the absence of civil liability, there remained important checks on abuses by Presidents and executive officers, critically including criminal prosecution.[135] Criminal prosecution, Chief Justice Burger reasoned, was subject to administrative and prosecutorial requirements not found in commonplace civil litigation,[136] so criminal liability would not chill executive action to the same extent that exposure to civil litigation might.[137] The Court in *Trump*, of course, wholesale rejected the sufficiency of those procedural safeguards in the criminal context — a stark reminder of the Court's evolving hostility to checks on presidential power.[138]

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134. *Id.* at 822 (Rehnquist, J., concurring).

135. *Id.* at 826 n.6 (Burger, C.J., dissenting) ("The same remedies for checks on Presidential abuse also will check abuses by the comparatively small group of senior aides who act as 'alter egos' of the President . . . . Congressional and public scrutiny maintain a constant and pervasive check on abuses, and such aides may be prosecuted criminally . . . . [A] criminal prosecution cannot be commenced absent careful consideration by a grand jury at the request of a prosecutor; the same check is not present with respect to the commencement of civil suits in which advocates are subject to no realistic accountability.").

136. *Id.*

137. *Id.* Chief Justice Burger concluded that "civil liability for official acts will result in constant judicial questioning." *Id.* at 826.

138. Trump v. United States, 603 U.S. 593, 637 (2024) ("As for the Government's assurances that prosecutors and grand juries will not permit political or baseless prosecutions from advancing in the first place, those assurances are available to every criminal defendant and fail to account for the President's 'unique position in the constitutional scheme.'" (quoting Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982))). Justice Alito appeared particularly skeptical. *See* Transcript of Oral Argument, *supra* note 38, at 104 ("So moving on to the . . . protection that the D.C. Circuit cited, [that] federal grand juries will shield former presidents from unwarranted indictments. How much protection is that? . . . I mean, there — there's the old saw about indicting a ham sandwich.").

2. *Executive Privilege*

The Supreme Court's treatment of the presidential-communications privilege provides another roadmap for how unitary-executive advocates on the Court may extend criminal immunity to subordinates implementing presidential directives. Indeed, communications-privilege jurisprudence offers both theoretical and practical bases for such an expansion: it demonstrates a doctrinal framework for extending presidential protections to subordinates based on functional necessity, and it also creates evidentiary barriers that make prosecution of subordinates practically impossible without undermining presidential immunity itself.

The functional blueprint emerges clearly from the Court's analysis of why presidential communications warrant special protection. In *United States v. Nixon*, the Court grounded the communications privilege not in any explicit constitutional text but in the functional necessity of protecting "the effective discharge of a President's powers."[139] The Court emphasized that presidential communications are uniquely deserving of protection because of the need to ensure "candid, objective, and even blunt or harsh opinions in Presidential decisionmaking."[140] The *Trump* Court took this protection as a given, adopting its reasoning in recognizing "the need to protect 'communications between high Government officials and those who advise and assist them in the performance of their manifold duties.'"[141]

Since *Nixon*, courts have decided that executive privilege must extend beyond just communications involving the President to encompass advisers and staff who implement his or her decisions. The D.C. Circuit in *In re Sealed Case* explained that the privilege would be meaningless if it did not protect the predecisional feedback and input of the President's immediate advisers, whose candor and information-gathering are essential to presidential decision-making: "Presidential advisers do not explore alternatives only in conversations with the President . . . . If these materials are not protected by the presidential privilege, the President's access to candid and informed advice could well be significantly circumscribed."[142] The court thus concluded that the privilege must therefore presumptively cover communications made by presidential advisers in the course of their duties informing and advising the President, "even when these communications are not made directly *to* the President."[143]

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139. United States v. Nixon, 418 U.S. 683, 711 (1974).

140. *Id.* at 708.

141. *Trump*, 603 U.S. at 612 (quoting *Nixon*, 418 U.S. at 705).

142. *In re* Sealed Case, 121 F.3d 729, 750 (D.C. Cir. 1997).

143. *Id.* at 752 (emphasis added).

The communications privilege has continued to creep further into the executive branch. The D.C. Circuit attempted to establish boundaries, including by cabining the presumption of privileged communications to White House officials, and noted that "operational proximity" to the President is what sets the parameters of privilege in practice.[144] As such, the communications of non-White House officials, such as cabinet secretaries and agency heads, have been found to be privileged when the relevant documents were "'solicited and received' by the President or his or her 'immediate White House advisers,'" even if the President never actually saw or relied upon the materials.[145] This solicitation need not be formal: the President, it would seem, solicits advice whenever he or she engages these officials for their advice, whether in meetings or merely in conversation, putting those communications under presumptive privilege as well.[146] If the President (or an aide at the President's behest) approached a subordinate about some idea and requested their assistance or input on it, that interaction—and any subsequent related work product and communications—could well fall under the umbrella of executive privilege.

As with civil immunity, the courts often yield and expand the outer boundaries of presidential privilege when pressed. What began as a relatively limited doctrine of immunity from investigative process has expanded ever outward to cover a wide scope of executive officials, even when their communications do not involve the President directly.

3. Administrative Law

Immunity creep has also shaped doctrines of reviewability in administrative law, as the application of the APA to presidential action reveals a systematic—if somewhat more restrained—pattern of expansion beyond the presidency. In *Franklin v. Massachusetts*, the Supreme Court held that the President is not an "agency" within the meaning of the APA, thereby shielding presidential actions from judicial review under that statute.[147] Though initially characterized as a

144. *Id.* ("[I]t is 'operational proximity' to the President that matters in determining whether '[t]he President's confidentiality interest' is implicated . . . ." (quoting Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 910 (D.C. Cir. 1993))).

145. Buzzfeed, Inc. v. FBI, 613 F. Supp. 3d 453, 466 (D.D.C. 2020) (quoting Loving v. Dep't. of Def., 550 F.3d 32, 37 (D.C. Cir. 2008)); *see also* Prop. of the People, Inc. v. OMB, 394 F. Supp. 3d 39, 46 (D.D.C. 2019) (holding that the President "solicits" advice when he calls a meeting and thus confers his privilege upon the attendees).

146. Trump v. Thompson, 573 F. Supp. 3d 1, 14 (D.D.C.) ("Presidential conversations are presumptively privileged, but the privilege is not absolute." (citing Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 447 (1977))), *aff'd*, 20 F.4th 10 (D.C. Cir. 2021).

147. 505 U.S. 788, 800-01 (1992).

narrow exemption rooted in "respect for the separation of powers and the unique constitutional position of the President,"[148] this immunity has since grown to cover a widening circle of executive officials implementing presidential orders.

The expansion began almost immediately. In *Dalton v. Specter*, decided just two years after *Franklin*, the Court extended *Franklin*'s reasoning to foreclose APA review of agency recommendations that led to a presidential decision to close military bases.[149] The Court characterized these directions not as final agency action subject to review, but as "more like a tentative recommendation" or "the ruling of a subordinate official," despite their substantive significance and procedural formality.[150] In so doing, the Court established a principle that when an agency's action derives its operative legal effect from a subsequent presidential decision, APA review is foreclosed.

Before long, the Court applied this line of reasoning to cover agency actions taken pursuant to a presidential order that leaves the agency without discretion.[151] Lower courts have also taken up this logic to cover a broader range of actions. In *Tulare County v. Bush*, the D.C. District Court, later affirmed by the D.C. Circuit, held unreviewable agency actions "merely carrying out directives of the President," because "the APA does not apply to presidential action."[152] The court rejected the possibility of distinguishing between presidential direction and implementing agency action as "the absurd notion that all presidential actions must be carried out by the President him or herself in order to receive the deference Congress has chosen to give to presidential action."[153] We see here again the strength of consequentialism, as the court's approach sacrifices formal distinctions between "presidential" and "agency" action to the practical concern that reviewing the actions of the latter would indirectly constrain the former, thereby impairing the effective function of presidential decision-making.

Agency action need not be the rote implementation of a presidential order to be shielded by *Franklin*; later decisions have included certain discretionary decisions made by agencies without individual presidential instruction. The key inquiry has become whether the agency is acting under color of authority delegated by the President. In one case, the court declared unreviewable the State

148. *Id.* at 800.

149. 511 U.S. 462, 468 (1994).

150. *Id.* at 469-70 (quoting *Franklin*, 505 U.S. at 798).

151. *See* Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 113 (2020) ("[T]he agency has no discretion to decline to follow the President's order, so the decision to do so is unreviewable."); *see also* Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 766 (2004) (noting that a "critical feature" of the case was the agency's "[in]ability to countermand the President's" decision).

152. 185 F. Supp. 2d 18, 28 (D.D.C. 2001), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002).

153. *Id.* at 28-29.

Department's issuance of a permit for a transnational bridge, despite the agency exercising significant independent judgment in the decision, because the ability to issue permits had been delegated by the President.[154] The court reasoned that, even though agencies "occupy a different 'constitutional position'" than the President and their actions are contemplated as reviewable under the APA, these formalistic distinctions were not sufficient to permit review when the delegated power came from the President himself.[155] And, once again, this was the result of a functionalist reading of presidential power: "[J]udicial review of . . . decisions that the President has delegated . . . would impose an unconstitutional burden on his power to delegate," and "would surely frustrate the President's discretion to enact his preferred decision-making process."[156]

Another case held that when an agency "is exercising purely presidential prerogatives" pursuant to an executive order, it "cannot be subject to judicial review under the APA."[157] Even more striking, the court reasoned that the agency action in question was impossible without presidential acquiescence, and that "the President's acquiescence is itself an exercise of discretion that constitutes unreviewable presidential action."[158] Did the court mean to suggest that any agency action which *could* theoretically be overridden by the President is unreviewable? Maybe, or maybe not, but the question in any event stands as a reminder of the slipperiness of these doctrines.

The trajectory is expressly functional. When an agency's act is legally or practically inseparable from a presidential decision, courts have reasoned that reviewing the actions of "the agency" would burden the presidential decisional space the Supreme Court sought to protect.[159] In that posture, form (the "agency" label) yields to function (preserving presidential decision-making). This progression once again demonstrates how a presidential shield, once established, often expands to shield subordinate officials and their actions. The

154. Detroit Int'l Bridge Co. v. Canada, 189 F. Supp. 3d 85, 100-02 (D.D.C. 2016), *aff'd*, 875 F.3d 1132 (D.C. Cir. 2017).

155. *Id.* at 103-04 (quoting Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., 801 F. Supp. 2d 393, 403 (D. Md. 2011)). The court's reasoning extended to cover not merely delegations of inherent Article II power but also congressionally delegated power to the President that is subsequently delegated to an agency. *Id.* at 101 ("[T]he source of the President's authority (*i.e.*, the Constitution or a federal statute) is not relevant so long as the authority being exercised is: (1) discretionary . . . and (2) specifically vested in the President.").

156. *Id.* at 104 (quoting Nat. Res. Def. Council, Inc. v. U.S. Dep't of State, 658 F. Supp. 2d 105, 112 (D.D.C. 2009)).

157. *Nat. Res. Def. Council, Inc.*, 658 F. Supp. 2d at 109.

158. *Id.* at 111.

159. *See, e.g.*, *Detroit Int'l Bridge Co.*, 189 F. Supp. 3d at 102; Tulare County v. Bush, 185 F. Supp. 2d 18, 28-29 (D.D.C. 2001), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002).

formalist reasoning that initially justified withholding presidential actions from review—concerns about separation of powers, the text of the APA, and the "unique constitutional position of the President"—quickly transformed into a much broader principle that shields from review many of the officials implementing presidential directives or exercising power delegated by the President.

4. Patterns and Variables

What do these different doctrines have in common? Each reflects a persistent judicial tendency to export a protection crafted for the President to the subordinates who execute his will. The historical record reveals three conditions that make a derivative immunity especially probable: (1) a direct presidential directive that leaves subordinates with no meaningful discretion;[160] (2) an official's "operational proximity" to the Oval Office—that is, the closer the functional or advisory relationship to the President, the likelier and broader the borrowed protection;[161] and (3) the conviction that formal alternative avenues of accountability (damages suits, injunctions against lesser officials, criminal prosecution, or impeachment) remain open.[162]

Perhaps unsurprisingly, the most consistent constraint on derivative immunity is functional detachment from the President's agenda. As a general matter, immunity only extends as far as official conduct.[163] And when an official's actions

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160. *See* Dalton v. Specter, 511 U.S. 462, 469-70 (1994) (quoting Franklin v. Massachusetts, 505 U.S. 788, 797-98 (1992)).

161. *See, e.g.*, *In re* Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997) (holding that executive privilege extends to communications of close presidential advisers where disclosure would impair presidential decision-making); Harlow v. Fitzgerald, 457 U.S. 800, 812-13 (1982) (explaining that aides receive qualified immunity based on their function, not rank).

162. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731, 757-58 (1982) (stating that other remedies—political, judicial, or criminal—remain available to check presidential wrongdoing); Swan v. Clinton, 100 F.3d 973, 978-79 (D.C. Cir. 1996) (holding that injunctive relief could be available against subordinates even where it could not issue against the President); Chamber of Com. v. Reich, 74 F.3d 1322, 1326-32 (D.C. Cir. 1996) (indicating that review of agency action taken pursuant to a presidential directive would be available under the APA); Imbler v. Pachtman, 424 U.S. 409, 427-29 (1976) (holding that prosecutors are immune from civil suits for actions intimately associated with the judicial phase of the criminal process, in part because other checks exist); Mitchell v. Forsyth, 472 U.S. 511, 522-23 (1985) (denying absolute immunity to the Attorney General's performance of national-security functions in part because his performance is not subject to "other checks").

163. *See* Clinton v. Jones, 520 U.S. 681, 694-95 (1997) (holding that immunity designed to protect presidential functions does not extend to conduct by the President unrelated to official duties); *cf.* Forrester v. White, 484 U.S. 219, 229-30 (1988) (holding absolute immunity inapplicable when judges engage in administrative or personnel actions rather than core judicial functions).

do not concretely assist the President in carrying out a specific directive or core constitutional or statutory role—whether because the action exceeds statutory bounds,[164] reflects independent discretion,[165] or is simply too remote in the chain of execution[166]—courts tend to deny the borrowed protection. This boundary is neither fixed nor consistently enforced: courts often portray subordinate review as a limiting principle on presidential insulation, only to narrow or retract it once its implications threaten core executive interests.

B. The Innovation of Criminal Immunity

Having examined the analogues from which the Court fashioned criminal immunity for the President, as well as how those same function-driven doctrines trickled down to subordinate officials over time, we can now map how *Trump* threatens to follow the same pattern. First, its expansive definition of protected presidential conduct, combined with its embrace of the unitary executive, provides a straightforward doctrinal foundation for derivative-immunity claims. Second, the Court's novel evidentiary restrictions create practical obstacles that may render the prosecution of subordinates implementing presidential directives extremely difficult, if not impossible. I conclude this Part by describing one possible result: the doctrine of qualified criminal immunity.

1. The President's Mandate

The scaffolding for derivative immunity rests on two doctrinal pillars, each flowing from *Trump*'s elevation of presidential vigor over accountability. First, by defining "official acts" apparently so broadly as to encompass virtually any

164. Scheuer v. Rhodes, 416 U.S. 232, 244-48 (1974) (holding that officials lose qualified immunity where their actions clearly exceed lawful authority and are thus outside the protection afforded by alignment with executive directives); Butz v. Economou, 438 U.S. 478, 495 (1978) (emphasizing that federal officials who act beyond their authority cannot claim derivative immunity merely because they occupy positions closely tied to the President's policies).

165. *See* E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 667 (9th Cir. 2021) (holding that the Department of Homeland Security's independent implementation of a presidential proclamation through APA rulemaking was reviewable because it involved discretionary, nonministerial action); *Reich*, 74 F.3d at 1330 (holding that agency enforcement of a presidential executive order was reviewable under the APA where it reflected discretionary legal interpretation not mandated by the President).

166. *See, e.g.*, Jud. Watch, Inc. v. Dep't of Just., 365 F.3d 1108, 1119-23 (D.C. Cir. 2004) (holding that executive privilege does not apply to all documents and communications from officials who sometimes advise the President; only those materials which have actually been "solicited and received" by the President or his immediate advisers qualify); *In re Sealed Case*, 121 F.3d at 752-53 (limiting the presidential-communications privilege to advisers in "operational proximity" to the President and denying it to communications from officials further removed).

presidential directive issued through the proper formal channels, the Court troublingly incentivizes a bad-man President to launder criminal schemes through government institutions. Second, the Court's muscular vision of the unitary executive—where subordinates exist primarily to execute presidential will—makes it logically difficult to prosecute officials for implementing presumptively immune presidential orders. Together, these principles create a system where subordinates could claim derivative immunity for implementing directives that fall within *Trump*'s expansive zone of protection. I examine these two pillars in turn.

a. Sweeping Officialdom

The Roberts Court's broad view of official conduct raises the likelihood that criminal immunity could spread to the President's advisors and agents. The specter of a trepidatious executive drives the Court's creation of immunity, as the majority's analysis flows less from constitutional text or historical practice—both of which, as the dissents note, largely cut against immunity[167]—but from the Court's own assessment of what the presidency requires to function effectively. Even the Court's novel evidentiary holding, which bars consideration of immune conduct even in prosecutions for private acts, stems from its determination that allowing such evidence would create precisely the kind of distortion of presidential decision-making that immunity seeks to prevent.[168] The necessity of a "'vigorous' and 'energetic' Executive" to ensure good government is the single greatest determinant of criminal immunity for the President.[169]

Following from this focus on government function, the Court in *Trump* purported to only shield presidential actions from criminal liability to the extent that those actions are official—that is, taken pursuant to constitutional or statutory authority.[170] Under this reading, any derivative immunity would extend only as far as an official's legitimate authority. Crimes committed while exceeding or abusing that authority would remain prosecutable.

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167. *See* Trump v. United States, 603 U.S. 593, 660 (2024) (Sotomayor, J., dissenting) ("This official-acts immunity has 'no firm grounding in constitutional text, history, or precedent.'" (quoting Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 280 (2022))); *see also id.* at 660-61 (arguing that the Framers intentionally excluded criminal immunity for Presidents when drafting the constitution).

168. *Id.* at 630 (majority opinion) (concluding that admitting evidence from official conduct to prove private criminality "threatens to eviscerate the immunity we have recognized").

169. *Id.* at 610 (quoting THE FEDERALIST NO. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

170. *Id.* at 618 ("[T]he immunity we have recognized extends to the 'outer perimeter' of the President's official responsibilities, covering actions so long as they are 'not manifestly or palpably beyond [his] authority.'" (quoting Blassingame v. Trump, 87 F.4th 1, 13 (D.C. Cir. 2023))).

However, *Trump* renders it challenging to even define, let alone curtail, the sweep of an official's legitimate authority. Such a definition starts simply enough: some presidential conduct is expressly authorized by the Constitution.[171] These comprise the "core" powers—the pardon, the veto, the power to remove subordinates, among others. These are the easiest type of conduct to categorize as official, and are thus where the President's conduct is absolutely immune from criminal prosecution.[172]

But we immediately run into problems in attempting to parse the official nature of *other* presidential conduct. The Court's analysis in *Trump* repeatedly emphasizes institutional relationships and chains of command in determining whether conduct qualifies as "official," and thus out of bounds for criminal prosecution.[173] The President's conversations with Justice Department officials, for instance, are deemed official because they implicate the President's "special province" over investigative and prosecutorial decision-making;[174] interactions with the Vice President are official if and when they concern either's constitutional duties.[175]

This institutional framing transforms what might appear to be clearly unofficial criminal conduct—pressuring prosecutors to drop investigations of allies in return for favors, for instance[176]—into presumptively immune "official acts" by virtue of occurring within recognized channels of presidential authority. It matters not that an "official" act may have been taken in exchange for a bribe, because the Court forbids the type of investigation into presidential motive that could elucidate the nature of the act in question.[177] The indictments filed by Special Counsel Jack Smith before and after *Trump* are illustrative.[178] The

171. *Id.* at 607 (noting that when the authority to act comes from the Constitution, "the President's authority is sometimes 'conclusive and preclusive'" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (Jackson, J., concurring))).

172. *Id.* at 606.

173. *See, e.g.*, *id.* at 621, 623 (holding that the President is absolutely immune from prosecution for his conduct involving discussions with the Vice President and Justice Department officials); *cf. id.* at 625 (preserving the possibility of prosecution for "interactions with persons outside the Executive Branch").

174. *Id.* at 620 (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985)).

175. *Id.* at 623.

176. *See, e.g.*, William K. Rashbaum, Dana Rubinstein, Glenn Thrush, Michael Rothfeld & Jonah E. Bromwich, *Push to Drop Adams Charges Reveals a Justice Dept. Under Trump's Sway*, N.Y. TIMES (Feb. 14, 2025), https://www.nytimes.com/2025/02/10/nyregion/eric-adams-charges-doj-trump.html [https://perma.cc/TXG4-WR38].

177. *See, e.g.*, sources cited *supra* note 21.

178. *See* Indictment, United States v. Trump, 704 F. Supp. 3d 196 (D.D.C. Aug. 1, 2023) (No. 23-cr-00257), 2023 WL 4883396; Superseding Indictment, *Trump*, 704 F. Supp. 3d 196 (No. 23-cr-00257), 2024 WL 3950645.

indictments filed prior to *Trump* are rife with examples of the President enlisting Justice Department officials to enable and further his schemes; in the latter, those accusations are absent.[179] The content of those interactions is, very likely, shielded.

And if subordinates refuse to carry out a criminal scheme, it appears that the President could simply "Saturday night massacre" successive scores of executive officials,[180] churning through replacements until reaching one sufficiently pliant to carry out some brazenly criminal order. The Court in *Trump* certainly leaves this door open, going to great pains to remind us that the removal power is unfettered and thus beyond the reach of investigation for criminal motive.[181] Indeed, it took less than one month into the second Trump Administration for such an episode to play out. When the President and his allies commanded that federal prosecutors drop charges against indicted New York City Mayor Eric Adams, a half-dozen officials, including the acting U.S. Attorney for the Southern District of New York, resigned rather than facilitating "'what amounted to a quid pro quo' of assistance with the president's immigration crackdown if the mayor's case [was] dismissed."[182]

In short, *Trump*'s definition of official conduct creates a perverse tautology: criminal conduct may become presumptively immune to the extent that it is executed through official channels rather than private ones. A President seeking to shield criminal activity from prosecution now has every reason to conscript and corrupt public officials rather than hire private actors—the very opposite of what one might want from government officials acting under the public trust.[183]

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179. See sources cited *supra* note 178. Note, for instance, that the section of the original indictment titled "The Defendant's Attempt to Leverage the Justice Department to Use Deceit to Get State Officials to Replace Legitimate Electors and Electoral Votes with the Defendant's," Indictment, *supra* note 178, ¶¶ 70-86, and all allegations therein are completely missing from the superseding indictment.

180. *See Saturday Night Massacre: President Nixon Fires Cox; Richardson Resigns*, UNITED PRESS INT'L (Oct. 21, 1973), https://www.upi.com/Archives/1973/10/21/Saturday-Night-Massacre-President-Nixon-fires-Cox-Richardson-resigns/6142295711870 [https://perma.cc/V9V4-SGBB].

181. Trump v. United States, 603 U.S. 593, 621 (2024) ("[T]he President's power to remove 'executive officers of the United States whom he has appointed' may not be regulated by Congress or reviewed by the courts." (quoting Myers v. United States, 272 U.S. 52, 106 (1926))).

182. *See* Lola Fadulu, *Recent Resignations Recall Nixon-Era Saturday Night Massacre*, N.Y. TIMES (Feb. 15, 2025), https://www.nytimes.com/2025/02/14/nyregion/nixon-saturday-night-massacre-adams-sassoon.html [https://perma.cc/P7WE-TSVR].

183. *See, e.g.*, Robert H. Jackson, Att'y Gen., Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor 3 (Apr. 1, 1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf [https://perma.cc/3LEZ-UJ62] ("[Federal law enforcement] positions are of such independence and importance that while you are being

b. The Loyal Functionaries

The Court's recent adoption of unitary-executive jurisprudence has also greased the wheels for derivative criminal immunity to spread to officials of various rank and seniority throughout the executive branch. For the Roberts Court, the development of the unitary executive is a matter of democracy. In *Seila Law v. CFPB*, the majority honed the view that the President is uniquely representative of the national interest:

> [T]he Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides "a single object for the jealousy and watchfulness of the people."[184]

As a consequence of this singularity, the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it."[185] This forms the doctrinal backbone of the Court's recent unitary-executive jurisprudence, holding that the President—as the sole individual comprising a full branch of government—must retain significant abilities to supervise and control the function of the executive branch.

This vision of presidential supremacy forms the second half of the theoretical foundation for derivative immunity. If the President alone bears ultimate responsibility for executive action, and if executive officials exist to implement his or her will, then the possibility that those officials would be held criminally liable for carrying out presidential directives and their ensuing trepidation could frustrate the very purpose of their offices. Subordinate criminal immunity could thus sweep to officials throughout the executive branch, transcending the formal boundaries that the Court typically looks to in assessing the executive branch.

Derivative immunity would not apply automatically or with uniform strength across the executive branch, however, and parsing who would be immune—and when—requires analyses of both formal status and functional role. The lines of precedent discussed so far have traditionally differed in their treatment of executive officials. Theories of the unitary executive have historically dedicated much effort to formal roles, while doctrines of immunity take a

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diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done.").

184. Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 224 (2020) (quoting THE FEDERALIST NO. 70, at 479 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

185. *Id.* (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496-97 (2010)).

functional approach. But more recently, the Court's distinctions between officers and nonofficers have collapsed into a similarly functional analysis that could mirror the Court's treatment of immunity.

This convergence toward functional analysis is significant because, as demonstrated in Section II.A, functional reasoning tends to resist formal boundaries. When immunity serves to protect governmental effectiveness, that same logic readily extends to *anyone* whose cooperation is necessary to achieve the protected end.[186] As in *Harlow*, where fear of "disruption" retooled the standard for aides,[187] the concern is functional. If subordinates hesitate, the President's protected decision cannot be effectuated. Or take the case of executive privilege, where privilege expanded beyond the President because candid presidential decision-making depends on aides' frank input;[188] the same dependency logic pushes immunity outward when decision-making is framed as needing insulation from fear of prosecution.

The strongest case for derivative immunity may then lie with principal officers—cabinet secretaries, heads of agencies, and other Senate-confirmed senior officials who report directly to the President.[189] This is where direct presidential control is at its highest point: "Each head of a department is and must be the President's *alter ego* in the matters of that department where the President is required by law to exercise authority."[190] Because "principal officers . . . wield significant executive power[, t]he Constitution requires that such officials remain dependent on the President."[191] To the extent that these officials exercise great control directly on behalf of the President and are most likely to receive his or her orders directly, a functional approach to derivative criminal immunity would shield much of that conduct from investigation and prosecution.

Inferior officers present a more complex case for derivative immunity, but recent doctrinal developments at the Court suggest that they, too, may be

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186. *See supra* Section II.A.1 (explaining that civil immunity has expanded to subordinates based on the same functional logic about avoiding disruption to government function); Section II.A.2 (describing executive privilege's extension to presidential advisers based on the functional necessity of protecting presidential communications); Section II.A.3 (referencing administrative-law protections spread to agency officials implementing presidential directives based on concerns about frustrating presidential decision-making).

187. Harlow v. Fitzgerald, 457 U.S. 800, 813-19 (1982) (emphasizing the need to avoid disruptive litigation burdens on officials).

188. *See In re* Sealed Case, 121 F.3d 729, 745-47 (D.C. Cir. 1997) (explaining that the presidential-communications privilege extends to senior advisers based on functional necessity and "operational proximity").

189. U.S. CONST. art. II, § 2, cl. 2.

190. Myers v. United States, 272 U.S. 52, 133 (1926).

191. Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 238 (2020).

protected by subordinate criminal immunity. While still constitutionally subordinate to the President, these officials often operate with some removal from direct presidential control. An exact test for separating inferior and principal officers has proven elusive, with the Court tending to look to the function and supervision of officers to make the determination.[192] The Court's recent jurisprudence has emphasized presidential control over inferior officers, striking down multilayer removal protections in *Free Enterprise Fund* and expanding presidential removal power in *Seila Law*. Indeed, *Seila Law* recognized that Congress could provide tenure protections only to "certain inferior officers with narrowly defined duties."[193] This suggests that inferior officers might qualify for derivative immunity, particularly when acting to carry out a directive within the President's protected sphere of authority.

The civil service is perhaps the most difficult case. The 1978 Civil Service Reform Act enshrines for-cause removal protections for the vast majority of the federal civil service,[194] conflicting with unitary-executive principles.[195] The Court has historically allowed this balance, distinguishing career civil servants from constitutional "Officers of the United States," with Chief Justice Roberts explicitly noting in *Free Enterprise Fund* that nothing in the Court's expansion of presidential control should "cast doubt on the use of what is colloquially known as the civil service system within independent agencies."[196]

This distinction rests on the notion that many civil servants do not "exercise 'significant authority pursuant to the laws [of the United States].'"[197] Some

192. *Id.* at 217 n.3 ("While 'our cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers,' we have . . . examined factors such as the nature, scope, and duration of an officer's duties. More recently, we have focused on whether the officer's work is 'directed and supervised' by a principal officer." (quoting Edmond v. United States, 520 U.S. 651, 661, 663 (1997))).

193. *Id.* at 204 (emphasis omitted) (citing Morrison v. Olson, 487 U.S. 654 (1988)). The Court has also upheld removal protections for multimember boards made up of principal officers. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 631-32 (1935). *But see* Trump v. Slaughter, No. 25-332, 2025 WL 2692050 (U.S. Sep. 22, 2025) (granting certiorari to consider "[w]hether the statutory removal protections for members of the Federal Trade Commission violate the separation of powers and, if so, whether *Humphrey's Executor* should be overruled" (citation omitted)).

194. 5 U.S.C. § 7513(a) (2024) ("Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee *only for such cause as will promote the efficiency of the service*." (emphasis added)).

195. *See* David Driesen, The Specter of Dictatorship: Judicial Enabling of Presidential Power 5 (2021) ("While scholarly unitary executive proponents usually do not mention the civil service, the theory envisions a system of complete presidential hierarchical control, which seems at odds with the whole concept of the civil service.").

196. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 507 (2010).

197. *Id.* at 506 (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976)).

Justices have noted that this supposedly limited scope of *Free Enterprise Fund* rests on often superficial distinctions in the roles of inferior officers versus those of civil servants, arguing that a minor expansion of doctrines of presidential control could transform the vast majority of the currently insulated civil service into a politically subservient and contingent workforce.[198] These concerns also reflect the reality that, as with the principal/inferior officer distinction, the lines between inferior officers and civil servants may be blurry.

Ultimately, the varying treatment of aides and advisors, principal officers, inferior officers, and ordinary employees within the executive branch increasingly reflects a flexible, rather than categorical, approach. The key question for derivative immunity may not be the formal status of the official but rather the extent to which they are implementing protected presidential directives. If a civil servant is enlisted to execute a presidential order that falls within *Trump*'s zone of immunity, they may have a stronger claim to derivative protection than a cabinet secretary acting pursuant to independent statutory authority. This suggests that the reach of derivative immunity could extend quite far down the organizational chart of the executive branch, limited not by title or status but by proximity to presidential will.[199]

That turn—privileging indispensability to presidential aims—tracks the Court's tendency toward functionalist generality shifting and, in the process, sidelines formal Founding Era checks like personal liability.[200] Today's Court considers it generally unacceptable for the penumbra of civil liability to frighten subordinates such that they fail to carry out lawful presidential directives.[201] To militate against that risk, the Court has spread various immunities throughout the executive branch.[202] The fact that specific fearful officials could be removed by the President and replaced with more pliant ones is, to the modern Court, seemingly immaterial—a paradox, given its repeated declarations that recalcitrant officials simply ought to be replaced by the President.[203] Indeed, these

198. *See, e.g.*, Lucia v. SEC, 585 U.S. 237, 260-61 (2018) (Breyer, J., concurring in part and dissenting in part); *Free Enter. Fund*, 561 U.S. at 538 (Breyer, J., dissenting) (highlighting the difficulties in distinguishing the civil service from inferior officers without for-cause protections).

199. *See, e.g.*, *supra* note 144 and accompanying text (discussing "operational proximity" as the critical line for determining whether presidential confidentiality interests are implicated).

200. *See* Manning, *supra* note 18 and accompanying text.

201. *See, e.g.*, Ziglar v. Abbasi, 582 U.S. 120, 150-56 (2017).

202. *See supra* note 78 and accompanying text; *see also supra* Section II.A.1 (tracing the development of qualified immunity in relation to the ability of subordinate officials to carry out their duties).

203. *See, e.g.*, Collins v. Yellen, 594 U.S. 220, 255-56 (2021) (cataloging the many potential differences between Presidents and their subordinates that may justify those subordinates' dismissal).

arguments stand in stark contrast to the exchangeability of these officials as conceived by the Framers, who evidently had no qualms about criminal prosecution taking specific offending officers out of service and leaving the President to refill their empty offices.[204]

Instead, the Framers embraced a system where the President's ability to replace disobedient officers with more compliant ones was understood as a natural counterbalance to individual officers' exposure to liability. This stands in marked contrast to modern subordinate-immunity doctrines, which treat the prospects of turnover or recalcitrance as incompatible with effective executive functioning, rather than as an intended feature of executive-branch accountability.

2. *Impossible Prosecutions*

The core functionalist tension discussed in the preceding Section—the need to insulate subordinate action to protect presidential effectiveness—is compounded by the practical difficulty of prosecuting subordinates under *Trump*'s novel evidentiary rules. "In dividing official from unofficial conduct," the *Trump* Court held, "courts may not inquire into the President's motives."[205] How, then, could prosecutors prove requisite criminal intent for subordinates without introducing evidence of the order that set the crime in motion? The practical effect may be to render subordinate prosecutions effectively impossible whenever the criminal conduct stems from an ostensibly "official" presidential directive.[206]

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204. Compared to the federal government at the time of the Founding, the modern executive branch is admittedly far more complex, and individual officials possess far more power. This may indeed make them less interchangeable, since their jobs grant them discretion over matters of greater consequence. Had the Framers confronted the executive branch of 2025, they may not have reached the same conclusions they did in 1787. Nevertheless, we can predict how they may have approached the issue: in explicitly providing for the immediate criminal prosecution of sitting executive officers, they demonstrated a clear preference for accountability even when it interrupts the functioning of government. Otherwise, they might have deferred criminal prosecution until after an official left office—just as they determined would be done for the President himself. *See* 2 FARRAND, *supra* note 43, at 64-69, 500, 626. Or they may have necessitated impeachment as a prerequisite for criminal indictment—something that we know they considered and rejected for officials up to and including the president. For a survey of the historical evidence on that point, and its endorsement by the *Trump* court, see Trump v. United States, 603 U.S. 593, 633 (2024).

205. *Trump*, 603 U.S. at 618.

206. For a discussion on the unworkability of subordinate prosecutions following *Trump*, see LAWFARE, *Lawfare Live: Discussing the SCOTUS Immunity Decision*, at 00:23:31 (YouTube, July 1, 2024), https://www.youtube.com/watch?v=f_GrK6bOIpY [https://perma.cc/NNL5-DU36].

This new rule, like so much of *Trump*, was premised on its risk of distorting decision-making.[207] It is therefore unsurprising that, to craft this novel exclusionary rule, the Court turns to *Harlow*, which focuses on shielding *subordinates* from distracting litigation. To avoid such "peculiar[] disrupti[ons]," "bare allegations of malice should not suffice to subject government officials . . . to the burdens of broad-reaching discovery."[208] This should all sound doubly familiar. Not only does it track *Harlow*'s concerns about government function, but it also mirrors the expansion of executive privilege from the President to subordinates to preserve candid conversation and its downstream effect on presidential decision-making.[209]

The Court's novel holdings here, when combined with existing doctrine on executive privilege, may thus make the prosecutions of accomplice subordinates impossible. The Court held that prosecutors may not present evidence that "threatens to eviscerate" presidential immunity by revealing the President's official decision-making process, even if the conduct for which the President is being prosecuted is *squarely unofficial*.[210] This is because the potential introduction of such evidence would defeat the "intended effect" of immunity: preventing the distortion of presidential decision-making.[211] The Court thus establishes the principle that even a constitutionally permissible prosecution must still abide by these strict evidentiary rules. So even if we assume that the prosecution of a subordinate could proceed, the prosecutor would presumably be barred from entering any evidence which would be forbidden in the prosecution of a President for unofficial conduct.

This evidentiary framework interacts with the communications-privilege doctrine to create multiple, overlapping barriers to prosecution. A prosecutor seeking to charge a subordinate would face both the bar on evidence concerning official presidential conduct and the presumptive privilege for presidential communications.[212] Each of these protections serves slightly different interests—preventing distortion of decision-making, preserving the practical effect of

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207. *See, e.g.*, *Trump*, 603 U.S. at 631 ("Use of evidence about [official] conduct . . . heighten[s] the prospect that the President's official decisionmaking will be distorted."); *see also id.* at 618 ("[A]n inquiry [into the President's motives] would risk exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose, thereby intruding on the Article II interests that immunity seeks to protect.").

208. *Id.* at 619 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817-818 (1982)).

209. *See supra* Section II.A.2.

210. *Trump*, 603 U.S. at 630-31.

211. *Id.* at 631 (quoting Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982)).

212. *In re* Sealed Case, 121 F.3d 729, 744-45 (D.C. Cir. 1997); United States v. Nixon, 418 U.S. 683, 708 (1974).

immunity, and ensuring candid advice—but they converge to shield the entire process of presidential directives and their implementation from criminal liability.

Trump's practical implications become clearer when considering how these doctrines would affect specific types of evidence. Direct testimony about presidential orders or directives would implicate both immunity and the communications privilege.[213] Documentary evidence showing how subordinates implemented presidential decisions would face similar barriers—prosecutors could not introduce such evidence without running afoul of *Trump*'s prohibition on using evidence of official conduct.[214] Even evidence of the subordinate's own actions might be excluded if intertwined with evidence of presidential decision-making that the Court has deemed inadmissible. The cumulative effect is to make it extraordinarily difficult to prove criminal charges against subordinates without relying on evidence that would reveal protected presidential deliberations and decisions.

Notably, some of these barriers exist independently of any explicit derivative criminal immunity. The mere combination of existing doctrines, coupled with the President's newfound criminal immunity and the ensuing rejection of motive inquiries, effectively shields subordinates by making prosecution impracticable. This practical reality may influence how courts ultimately resolve the question of derivative immunity. If subordinates are already functionally protected through evidentiary rules and criminal prosecutions become tedious, fruitless battles over essential motive evidence that the judiciary would be loath to expose following *Trump*, the Court may elect to formalize the criminal immunity that its doctrines accomplish in practice.[215]

3. Qualified Criminal Immunity

The combination of the Court's unitary-executive reasoning and the practical bar on introducing essential evidence creates fertile ground for a new doctrine. When courts are inevitably confronted with claims of derivative immunity premised on *Trump*'s functionally mandated logic, I contend that the judiciary will be inclined to slink back to familiar territory. Rather than reject claims of

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213. *Trump*, 603 U.S. at 621-23 (holding that the President's conversations with the Vice President are official acts protected by immunity); *In re Sealed Case*, 121 F.3d at 747 (explaining that the presidential-communications privilege protects communications made in performance of the President's official duties).

214. *Trump*, 603 U.S. at 630.

215. *Cf.* Harlow v. Fitzgerald, 457 U.S. 800, 814-15 (1982) (replacing good-faith immunity defenses with a sweeping, one-size-fits-all qualified immunity because of the costs that attended litigation of the more tailored standard).

derivative immunity outright, they may operationalize *Trump* with a doctrine resembling what I refer to here as qualified criminal immunity. Operating much like its civil counterpart, qualified criminal immunity for subordinate officials would shield them from criminal liability unless their conduct violated a clearly established criminal prohibition that a reasonable official in their position would have known applied. Evidence of reliance on presidential authority or on an Office of Legal Counsel (OLC) opinion could strengthen claims for protection, grafting a subjective element absent from modern civil-immunity doctrine.[216]

Mechanically, qualified criminal immunity would unfold through a series of structured determinations. It would begin with threshold inquiries: whether the alleged crime occurred within the scope of an officer's official duties and whether the official operated within their prescribed authority.[217] Only conduct falling within both spheres would merit protection. Prior to indictment, prosecutors would need to evaluate whether clearly established law prohibited the conduct in question—a standard borrowed from civil qualified-immunity jurisprudence.[218]

Abstractions only get us so far. Consider the implications through the lens of historical executive-branch scandals. Had President Nixon directed Attorney General John Mitchell to orchestrate the Watergate break-in through official Justice Department channels rather than through private operatives, the entire episode could have been immunized as part of the President's "special province" over law-enforcement operations. Had President Reagan formally directed National Security Advisor John Poindexter and Lieutenant Colonel Oliver North to arrange arms sales to Iran through official military and intelligence channels—rather than through the shadow network they used—their actions might have been protected as routine exercises of commander-in-chief authority.

In short, the more a President integrates criminal schemes into the formal machinery of government, cloaking misconduct in the costume of official action, the more likely those actions are to receive immunity from prosecution. A bare pretext of official process prevents a judicial inquiry into motive and transforms

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216. The shielding power of OLC opinions is discussed in detail in Sections III.B.2 and III.B.3.b, *infra*, and good-faith reliance on orders from a superior is discussed at note 75, *supra*, and accompanying text. *See also infra* note 245 and accompanying text.

217. This threshold inquiry parallels the Court's approach in *Trump v. United States*, which tied the "official" status of presidential conduct to whether it involved matters within the President's or a subordinate official's constitutionally or statutorily defined authority. *See supra* Section II.B.1.a.

218. Law is "clearly established" as applied to an official's conduct when "existing precedent [has] placed the statutory or constitutional question beyond debate." Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011). The catch-22 for prosecutions of novel conduct raised by this requirement is beyond the scope of this Note.

what would otherwise be clearly criminal conduct into presumptively protected executive action.[219]

III. FROM THEORY TO PRACTICE

The emergence of derivative criminal immunity is neither innocuous nor theoretical. This Part examines the first wave of derivative-immunity claims in courts and disciplinary proceedings, demonstrating that the risk is immediate and growing. I then address counterarguments that minimize this threat, showing that the accountability gap derivative immunity could create would go beyond that generated by existing practices like pardons and the shield of OLC opinions. As this analysis shows, criminal prosecution is fundamentally different from civil liability and other forms of accountability, challenging the Court's casual analogizing between them and emphasizing the centrality of subordinate criminal liability to upholding the rule of law.

A. The First Wave of Derivative Claims

Derivative criminal immunity is a live and urgent question. Courts are beginning to grapple with questions of subordinate criminal liability—though as of this Note's publication, no federal court has ruled on the substance of these immunity claims. This is in part because the charges leveled against President Trump's coconspirators have played out primarily in state courts and disciplinary hearings. But the inopportune venues have not stopped a handful of criminally indicted executive-branch subordinates from expediently raising claims of derivative immunity in the wake of *Trump*.

1. Disciplinary Hearings

The disciplinary proceedings against Jeffrey Clark, acting Assistant Attorney General for the Civil Division amid Trump's efforts to stay in power, have afforded a forum for novel arguments about subordinate immunity. In July 2022, Clark was charged by the Board on Professional Responsibility of the D.C. Bar for violating his professional code of conduct in his efforts to subvert the 2020 election.[220]

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219. In other words, "[Y]ou don't have to consider everything true, you just have to consider it necessary." FRANZ KAFKA, THE TRIAL 192 (Breon Mitchell trans., Schocken Books 2012) (1925).

220. *See generally* Specification of Charges, *In re* Clark, Disciplinary Docket No. 2021-D193 (D.C. Bd. Prof. Resp. July 19, 2022) (charging Clark for a violation of professional ethics).

Prior to the release of the official recommendation of the Board, *Trump* was decided. Clark filed a supplemental brief arguing that the Court's recognition of absolute presidential immunity for discussions with Justice Department officials required dismissal of all charges against him.[221] Clark contended that presidential immunity must extend to subordinates as "a functionally mandated incident" of executive authority, particularly when implementing the President's core constitutional powers through the Justice Department.[222] Because *Trump* emphasized protecting against "intrusion on the authority and function of the Executive Branch," Clark argued, the D.C. Bar had "no authority to intrude upon the internal deliberations of the President with DOJ."[223]

The Board rejected this interpretation, noting that "*Trump* repeatedly and carefully limits its analysis to the President's conduct" and does not address immunity for executive-branch employees from either criminal liability or professional discipline.[224] Yet the Board's response, while technically correct about *Trump*'s limited holding, does not fully engage with the functional logic of Clark's argument. If presidential immunity exists to prevent the distortion of executive decision-making, and subordinates like Clark are carrying out presidential will, then holding them criminally accountable for that implementation may lead to disobedience or abrogation of presidential orders—which is completely at odds with the Court's understanding of the role of executive officers.

2. *Courts*

Federal and state courts are another battleground where these defenses are being actively litigated—and where some judges are beginning to signal receptivity to the underlying logic.

Mark Meadows, White House Chief of Staff for the final year of Trump's first term, was indicted in August 2023 as part of the Georgia election racketeering prosecution.[225] Meadows immediately sought to remove the case to federal court, in part to raise officially a plethora of pre-*Trump* immunity defenses in a

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221. Jeffrey B. Clark's Supplemental Brief, *supra* note 40, at 2-4.

222. *Id.* at 3 (quoting Trump v. United States, 603 U.S. 593, 611 (2024)).

223. *Id.* at 3-4.

224. Report and Recommendation of Hearing Committee Number Twelve at 149, *In re* Clark, Board Docket No. 22-BD-039, Disciplinary Docket No. 2021-D193 (D.C. Bd. Prof. Resp. Aug. 1, 2024). Perhaps more to the point, the Board noted that this question is mostly irrelevant to the present case, because "even if Mr. Clark were entitled to presidential immunity from criminal prosecution, he has not shown that this immunity also affords him a special privilege to practice law in the District of Columbia without complying with its Rules of Professional Conduct." *Id.* at 150.

225. Indictment at 15, State v. Trump, No. 23SC188947 (Fulton Cnty. Super. Ct. Aug. 14, 2023).

federal forum.[226] The Eleventh Circuit rejected the request for removal in December 2023, dismissing Meadows's concerns over immunity not on substance but on the grounds that state courts are sufficiently well equipped to evaluate such arguments.[227]

Meadows filed for certiorari in July 2024, three weeks after the Court's decision in *Trump*.[228] In his petition, en route to his request that he be allowed to raise immunity defenses in federal court, Meadows argued for the functional necessity of derivative immunity, so that "current and future officers are not deterred from enthusiastic service."[229] The Court in *Trump*, Meadows contended, in analogizing long-recognized doctrines of civil immunity to the criminal context, recognized that "immunity exists . . . 'to protect against the chilling effect [later legal] exposure might have on the carrying out of' an officer's duties."[230] The Supreme Court rejected the petition in November 2024.[231]

Even though Meadows's threshold removal arguments were dismissed by the circuit court, his arguments about the functional necessity for subordinate immunity found some purchase. Among the other indicted coconspirators in the Georgia case were three of the "fake electors" who fraudulently promulgated an alternative certificate of ascertainment giving Georgia's Electoral College votes to Trump.[232] The Eleventh Circuit rejected their request for removal in October 2024 on the grounds that the federal officer removal statute would not apply to former electors, even if they were found to be federal officers.[233]

But in a concurring opinion, Judge Grant indicated openness to arguments about the broader implications of *Trump* vis-à-vis derivative immunity. She observed that the Supreme Court's concern about executive decision-making being

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226. Georgia v. Meadows, 88 F.4th 1331, 1335, 1343 (11th Cir. 2023). Meadows attempted to raise the same defense in the prosecution against him in Arizona, but he was blocked in federal court for having missed filing deadlines. *See* Arizona v. Meadows, No. CV-24-02063, 2024 WL 4198384, at *4 (D. Ariz. Sep. 16, 2024).

227. *Meadows*, 88 F.4th at 1343.

228. Petition for Writ of Certiorari, *supra* note 39, at 3, 22.

229. *Id.* at 3.

230. *Id.* at 22 (alteration in original) (quoting Trump v. United States, 603 U.S. 593, 604 (2024)).

231. Ann E. Marimow, *Supreme Court Rejects Mark Meadows Effort to Move Georgia 2020 Election Case*, WASH. POST (Nov. 12, 2024), https://www.washingtonpost.com/national-security/2024/11/12/supreme-court-mark-meadows-georgia-election-interference [https://perma.cc/E49D-JEKZ].

232. The three indicted fake electors were David James Shafer, Shawn Mical Tresher Still, and Cathleen Alston Latham. *See* Indictment, *supra* note 225, at 15.

233. 28 U.S.C. § 1442(a)(1) (2024); Georgia v. Shafer, 119 F.4th 1317, 1320 (11th Cir. 2024) ("We need not decide whether nominated presidential electors are federal officers. Even if Shafer, Still, and Latham were federal officers in 2020 when they were nominated to the Republican slate of electors, they would not be *current* federal officers.").

"distorted by the threat of future litigation" stands in "serious tension" with a narrow reading of protections for federal officers.[234] So while *Trump* did not directly address subordinate immunity, Grant's concurrence took up its functional analysis—focused on preserving effective governance—writing that it provides "additional support" for protecting officers implementing presidential directives, even after they leave office.[235] It is unlikely that Grant will be the lone voice on the federal bench embracing (or, at the very least, entertaining) this expansive view of derivative immunity.

B. Why Worry? Or, Varieties of Apologism

Responses to the prospect of subordinate criminal immunity raised here range from those rejecting its plausibility to those championing its necessity. I group these arguments into three categories. The first is denial: insisting the Court's immunity doctrine could never extend beyond the President's unique constitutional position. Next is bargaining: suggestions that existing mechanisms like pardons and reliance defenses already provide a shield from prosecution for subordinates, rendering derivative immunity, if it comes to exist, redundant and/or inconsequential. Finally, I address acceptance: the embrace of subordinate immunity not as an unwarranted byproduct but as an essential shield for effective governance.

1. Immunity Stops at the President

Perhaps cabining *Trump*'s immunity doctrine is a simple matter of constitutional structure. The President is the sole individual who composes an entire branch of government, making his or her protection from prosecution uniquely necessary to prevent paralysis of an entire branch of government.[236] Indeed, several commentators have pointed out exactly that: *Trump* turns on the unique role of the President, and so the President alone is immune; case closed.[237]

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234. *Shafer*, 119 F.4th at 1335 (Grant, J., concurring) (quoting *Trump*, 603 U.S. at 615).

235. *Id.* ("Though *Trump* addresses neither immunity for federal officers nor the removal statute, its observation about the distortive effect of future litigation offers additional support for adhering to that commonsense justification here.").

236. *Trump*, 603 U.S. at 610 ("[The President is a] single, constitutionally indispensable, individual [with] ultimate authority that, in respect to the other branches, the Constitution divides among many." (quoting Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in judgment))).

237. *See* Goldsmith, *supra* note 24, at 4; Price, *supra* note 24; *see also* THE EZRA KLEIN SHOW: *"A Sword and a Shield": How the Supreme Court Supercharged Trump's Power*, at 07:58 (Dec. 17,

It is correct to say that the language of the *Trump* decision defines an immunity only for the President. But interpreting this structural argument such that it could never encompass subordinate immunity is an optimistic underreading that collides head-on with the consistent logic of the Court's precedent. The limiting language in *Trump*—its emphasis that the President "occupies a unique position in the constitutional scheme"—directly parrots *Nixon v. Fitzgerald*.[238] Yet that supposedly constraining language in that case did not prevent civil immunity from expanding to subordinates *the very same day* in *Harlow v. Fitzgerald*, where the Court extended qualified immunity to executive officials based on the same functional reasoning.[239] There is no fundamental reason to believe today's Court will adhere to its self-imposed strictures with any more fidelity than did the Court of four decades ago.

It is more likely that the Court will either come to forget or choose to ignore these formalistic, structural arguments when faced with an executive branch that demands impunity for the sake of expedience. Indeed, multiple doctrines protecting executive-branch officials, surveyed in Part II, have developed in recent years based not on the official's constitutional status but on functional concerns about paralysis and timidity in executing presidential will.[240] The Court's fear that criminal prosecution would distort presidential decision-making applies with similar force to subordinates: any official faced with implementing potentially criminal directives must choose between risking prosecution and defying presidential authority. The fear of prosecution has, in the past, deterred actual criminal activity from within the executive branch.[241] It has likely also deterred lawful but legally ambiguous action. The Court will need to choose which consequence it will tolerate: chilling some amount of legally gray executive action, or shielding criminal conduct by those charged with enforcing the law.[242]

2024), https://www.nytimes.com/2024/12/17/opinion/ezra-klein-podcast-kate-shaw-gillian-metzger.html [https://perma.cc/MX58-2BMY] (statement of Gillian Metzger) (contending that the *Trump* Court did not consider officials other than the President in its opinion).

238. *Trump*, 603 U.S. at 610 (quoting Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982)).

239. Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982) ("As we reiterated today in *Nixon v. Fitzgerald* . . . public officers require [immunity] to shield them from undue interference with their duties . . . .").

240. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 711 (1974); *see also supra* notes 127-130 and accompanying text (discussing the functional logic of presidential immunity justifying derivative civil immunity).

241. *See supra* note 25.

242. And history suggests it will be tempted to choose the latter. *See supra* Section II.A.

2. Immunity Is the Status Quo

Skeptics may also downplay the novelty and significance of derivative immunity, contending that existing mechanisms already shield executive officials from prosecution. The President's pardon power surely already provides protection: officials implementing questionable directives may be able to rely on pardons to eliminate criminal exposure.[243] Indeed, the mere prospect of a pardon might embolden officials to execute controversial orders, knowing their loyalty will be rewarded with immunity.[244] Alternatively, one could highlight that actions taken under the guidance of an OLC opinion historically have been protected from prosecution, as longstanding executive-branch policy cuts against prosecuting officials who relied on OLC guidance.[245]

These arguments ignore the practical and theoretical limitations of existing safeguards and the enormous additive protection afforded by qualified criminal immunity. Pardons carry significant political costs, requiring Presidents to publicly shield subordinates from criminal liability—a particularly fraught proposition in cases of potential executive-branch misconduct.[246] President Trump, for instance, allegedly refused to pardon Mark Meadows following the events of January 6, despite Meadows's request.[247]

Moreover, for the types of federal criminal prosecution at issue here, it can be assumed that nearly all prosecutions of executive officials will occur after "their" President leaves office, meaning that the relevant pardon must have been issued prospectively. Although possible, it is unlikely that a subordinate would choose to bet their freedom on a *future* President's willingness to bear the political costs of a pardon. Pardoning a criminal subordinate often works, in practice,

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243. U.S. CONST. art. II, § 2, cl. 1.

244. *See, e.g.*, Jake Tapper, *Trump Told CBP Head He'd Pardon Him If He Were Sent to Jail for Violating Immigration Law*, CNN (Apr. 13, 2019), https://www.cnn.com/2019/04/12/politics/trump-cbp-commissioner-pardon/index.html [https://perma.cc/YV2K-H34U].

245. *See* Zachary S. Price, *Reliance on Executive Constitutional Interpretation*, 100 B.U. L. REV. 197, 204-08 (2020) (surveying OLC memos that authorized potentially illegal actions and the practice of declining to prosecute officials who relied on the advice or guidance therein).

246. An obvious point, but there is a reason why the most controversial pardons of political allies tend to come in the lame-duck period. *See, e.g.*, David Johnston, *Bush Pardons 6 in Iran Affair, Averting a Weinberger Trial; Prosecutor Assails 'Cover-Up,'* N.Y. TIMES, Dec. 25, 1992, at A1; Maggie Haberman, Kenneth P. Vogel, Eric Lipton & Michael S. Schmidt, *With Hours Left in Office, Trump Grants Clemency to Bannon and Other Allies*, N.Y. TIMES (May 5, 2021), https://www.nytimes.com/2021/01/20/us/politics/trump-pardons.html [https://perma.cc/SK2W-KQAB].

247. Andrew Solender, *Meadows Sought Pardon After Jan. 6, His Former Top Aide Testifies*, AXIOS (June 28, 2022), https://www.axios.com/2022/06/28/meadows-sought-pardon-after-jan-6-former-top-aide-testifies [https://perma.cc/KM4H-TRGB].

somewhat as issuing a private bill of indemnification did at the Founding of the republic. An official may hope that they will be relieved of liability after the fact, but such recourse typically is not certain, and that uncertainty is what encourages good behavior in the face of legally unmoored orders.[248]

The OLC-opinion argument suffers from similar flaws. For one, OLC opinions must be drafted ex ante for reliance defenses to attach,[249] whereas criminal immunity operates as a defense ex ante or ex post. This matters because not every criminal act will have an OLC opinion to hide behind. Some schemes will be beyond any ability or willingness of OLC to defend. One can also imagine a President not wanting to involve OLC in advance of a legally questionable (or knowingly criminal) scheme, believing that the historically independent office might not give the green light. Alternatively, a plot might move too quickly for even a pliant OLC to draft a fulsome legal defense. Indeed, in the various prosecutions of the efforts to overturn the 2020 election, it does not appear that the coconspirators have cited any OLC opinions or memoranda drafted in preparation. These are precisely the types of cases for which the marginal impact of criminal immunity — and its guaranteed shield — are particularly potent.

And even if an opinion is drafted, its existence does not necessarily preclude prosecution under a later administration. Prosecutors have historically declined to charge officials relying on OLC guidance, but this practice remains a norm rather than a binding constraint.[250] Future administrations could choose to play hardball, prosecuting officials who relied on dubious legal opinions to justify questionable conduct. As Zachary Price has argued, criminal immunity should attach to reliance on OLC opinions only where that reliance was objectively reasonable[251] — a standard that provides cold comfort to officials implementing facially suspect directives. The advent of qualified criminal immunity obviates the need to jump through these hoops at all. No prosecution means no need to demonstrate reliance, good-faith or otherwise.

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248. *See supra* Section I.B.

249. *See, e.g.*, Press Release, U.S. Dep't of Just., Department of Justice Releases Four Office of Legal Counsel Opinions (Apr. 16, 2009), https://www.justice.gov/archives/opa/pr/department-justice-releases-four-office-legal-counsel-opinions [https://perma.cc/44C4-CMSC] ("It would be unfair to prosecute dedicated men and women working to protect America for conduct that was sanctioned in advance by the Justice Department.").

250. *See* Note, *The Immunity-Conferring Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086, 2102 (2008) (arguing that the immunizing effect of OLC opinions arises from pragmatic institutional considerations in addition to legal doctrine).

251. *See* Price, *supra* note 245, at 202, 244 (arguing that "the best balance available may be to protect reliance only insofar as the advice is objectively reasonable, thus preserving a backstop against gravely flawed advice").

3. Immunity Must Go Further

A final camp of counterarguments does not just embrace the possibility of qualified criminal immunity; it advocates for its necessity.[252] Proponents argue that criminal exposure for subordinates implementing presidential directives would cripple legitimate executive functions, while also unfairly exposing officials to personal jeopardy for good-faith execution of duties.

a. Overbreadth and Chilling Effects

Proponents of derivative immunity argue that without protection, certain legitimate executive-branch operations may grind to a halt. Even well-intentioned officials, they contend, will hesitate before implementing presidential directives that could brush up against vaguely worded and overly broad criminal statutes, chilling lawful action and creating exactly the kind of decisional paralysis that *Trump* sought to prevent.

This argument contains its own refutation. If potential criminal liability so thoroughly permeates executive action that officials require a qualified criminal immunity to function, that reality suggests a presidency operating at or beyond the outer bounds of legality. A doctrine that immunizes subordinates to reduce their fear in enabling a borderline or truly lawless executive turns the very notion of good governance on its head.

Put another way, the functional arguments for executive immunities across the board are premised on the energetic discharge of executive duties—chiefly that "the Laws be faithfully executed"—both by the President and by his or her many subordinates.[253] The problem identified by defenders of derivative immunity is that, in its absence, subordinates will be paralyzed. They will not do enough to faithfully execute the law. On that same premise, the solution emphatically cannot be one that enables those subordinates, at presidential direction, to violate and undermine those same laws. That would be a cure far worse than the disease.

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252. *See, e.g.*, Adrian Vermeule, *The Head and Body of Leviathan: A Thought Experiment on Executive Power*, NEW DIG. (July 18, 2024), https://thenewdigest.substack.com/p/the-head-and-body-of-leviathan [https://perma.cc/432B-EUSR].

253. *See* Trump v. United States, 603 U.S. 593, 607 (2024) (quoting U.S. CONST. art. II, § 3); *see also* Mitchell v. Forsyth, 472 U.S. 511, 536-37 (1985) (Burger, C.J., concurring in part) ("A Cabinet officer . . . is an 'aide' and arm of the President in the execution of the President's constitutional duty to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)); *In re* Sealed Case, 121 F.3d 729, 753 (D.C. Cir. 1997) ("[T]he duty to take care that the laws are faithfully executed[] can be exercised or performed without the President's direct involvement . . . .").

Aziz Z. Huq has suggested that the structural logic of presidential immunity itself weakens the rule of law.[254] He argues that immunity does not merely shield an individual—it distorts the entire legal order by severing the link between lawbreaking and accountability, fostering incentives for illegality throughout the executive branch. Once the President is perceived as beyond legal reproach, subordinates rationally infer that law is no longer a constraining force but a political weapon wielded only against the weak.[255] If this effect is already present with immunity confined to the President, extending it to subordinates would further corrode the normative foundations of legal obedience, normalizing impunity and personal loyalty as the governing principles of the administrative state.

Finally, I emphasize again that the orientation of criminal law is unique. It was inapt for the *Trump* Court to analogize from *Fitzgerald* because the countervailing interest there—private redress through civil liability—while important, encompasses private wrongs to individuals.[256] Criminal law, by contrast, is the system by which we remedy public wrongs. The wrongdoings addressed by these systems are different in kind, not just degree. Foundational to the American legal system is the rejection of monarchical impunity; as such, there is an especially potent public interest in the redress, through the criminal justice system, of public wrongs committed by those of high public station.[257] The functional law-enforcement-oriented arguments used to justify immunity in noncriminal settings, therefore, do not apply with the same force here. As Justice Brandeis put it a century ago, "To declare that . . . the end justifies the means—to declare that the government may commit crimes . . . would bring terrible retribution."[258]

b. Fairness and the Reliance Defense

Perhaps a more sympathetic argument for subordinate immunity is grounded in principles of fairness: subordinates should not face prosecution for following what they reasonably believed to be lawful orders. This intuition stems from a long tradition of good-faith defenses, which historically protected officials acting under color of authority.[259] As discussed above, this doctrine has long

254. Huq, *supra* note 17 (manuscript at 1).

255. *Id.* (manuscript at 46, 53) (arguing that presidential immunity itself imperils institutional cultures of legality throughout the executive branch).

256. The *Trump* Court noted and quickly moved on from this point. *Trump*, 603 U.S. at 614.

257. *See, e.g.*, United States v. Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692D).

258. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

259. *See supra* Sections I.A, I.B. These defenses were generally not honored at the Founding, though they began to appear in the decades thereafter.

been used to justify the nonprosecution of executive-branch officials who relied upon memoranda promulgated by OLC.[260]

OLC has historically operated independently, attempting to provide objective legal guidance even when inconvenient to the incumbent administration.[261] But this is a norm, and norms are no obstacle to bad-man Presidents. Recent developments portend this danger. Attorney General Pam Bondi, shortly after taking her post, threatened to fire DOJ lawyers who refuse to advance legal arguments in defense of the Trump Administration—a move that undercuts independence throughout DOJ, including in OLC.[262] More plainly, a recent executive order asserts that the President and the Attorney General (subject to presidential supervision) will provide the sole "authoritative interpretations of law for the executive branch."[263] These moves have yet to fully play out, but at first glance, they may have the effect of binding OLC—both doctrinally and practically—into rubber-stamping the President's interpretation of law. This top-down control generates a qualitatively different type of OLC opinion, eviscerating the logic behind the OLC-reliance norm.[264]

When operating independently, OLC opinions carried weight because they reflected objective legal analysis rather than political preference. Officials could reasonably rely on such guidance as professional interpretations of law, not post hoc justifications for predetermined outcomes.[265] Political control of OLC strips away this presumption of independence. Those same officials should thus be on notice that the contents of an OLC opinion may be contrary to law, and if the

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260. *See supra* Section III.B.2.

261. *See, e.g.*, Memorandum Re: Best Practices for OLC Legal Advice and Written Opinions from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Couns., to Att'ys of the Off. 1 (July 16, 2010), https://justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf [https://perma.cc/RBP3-KU8G] ("OLC must always give candid, independent, and principled advice—even when that advice is inconsistent with the aims of policymakers."); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1463-68 (2010) (discussing OLC's practices that lend it independence and credibility); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 726 (2005) (noting a view of OLC attorneys as "neutral, dispassionate advisor[s], interpreting the law more as a judge would than as a lawyer for a private client").

262. Andrew Goudsward & Sarah N. Lynch, *Trump's Attorney General Says Lawyers Who Refuse Orders Could Be Fired*, REUTERS (Feb. 5, 2025, 5:42 PM EST), https://www.reuters.com/world/us/trumps-attorney-general-says-lawyers-who-refuse-orders-could-be-fired-fox-2025-02-05 [https://perma.cc/TE7Y-ZNNY].

263. Exec. Order No. 14,215, 90 Fed. Reg. 10447, 10448-49 (Feb. 24, 2025).

264. *Cf.* Morrison, *supra* note 261, at 1512 ("[T]he President's constitutional views or preferences should not, ipso facto, be conclusive for OLC's purposes.").

265. Price, *supra* note 245, at 230 (arguing that good-faith reliance on OLC opinions should shield officials from criminal liability where OLC maintains authority over executive interpretation and reputational incentives for objective legal analysis).

contents are suspect, their reliance defense should be strongly tempered.[266] In other words, in scenarios of political capture, a faulty OLC opinion should be worth no more as a defense than the paper it was printed on—a firm response, but no different than the inability of President Adams's facially invalid interpretation of the Nonintercourse Act to shield Captain Little.[267] Criminal law cannot bend to accommodate a President's attempt to redefine lawfulness by fiat.[268]

IV. THREE JUDICIAL INTERVENTIONS

The stakes are high. As demonstrated in Part I, criminal accountability serves as one of the last meaningful constraints on executive-branch misconduct in an era where other forms of oversight have steadily eroded.[269] Unlike civil liability, which agencies routinely absorb,[270] or reputational damage, which partisan polarization has mutated into a rite of passage,[271] criminal prosecution cuts through institutional defenses to impose real personal consequences on individual wrongdoers. The threat of imprisonment has repeatedly proven its unique deterrent power, convincing executive officials to resist unlawful presidential directives even when other incentives favored compliance.[272] If derivative immunity extends this shield to the thousands of officials needed to implement presidential will, it risks transforming the executive branch into a domain where loyalty to power trumps fidelity to law—precisely the outcome the Framers sought to prevent by rejecting the immunity of the crown and embracing personal accountability for government officials.

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266. This is a principle readily available in criminal law generally. *See id.* at 233-34 (surveying anti-entrapment case law and noting courts' convergence on a "reasonableness" standard for reliance on government legal assurances).

267. *See supra* notes 63-70 and accompanying text.

268. *Cf.* Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) ("[T]he instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.").

269. *See supra* Section I.B.

270. *See supra* notes 79-81 and accompanying text.

271. *See* Wioletta Dziuda & William G. Howell, *Political Scandal: A Theory*, 65 AM. J. POL. SCI. 197, 207 (2021) (finding that political scandals in highly polarized environments can rebound to the benefit of the accused politician when the allegations of wrongdoing come primarily or exclusively from the opposing party, and thus that polarization "stimulates misconduct"); *see also* Shane Goldmacher, *Trump Announces Nearly $53 Million Fund-Raising Haul After Guilty Verdict*, N.Y. TIMES (May 31, 2024), https://www.nytimes.com/2024/05/31/us/politics/trump-fundraising-verdict.html [https://perma.cc/3AJL-AY7T] (noting that President Trump's 2024 campaign raised nearly as much money in the twenty-four hours after his felony conviction alone as it did in the last six months of 2023).

272. *See supra* Section I.C.

Where does this leave us? Ideally, the Court would take, at its earliest opportunity, the chance to completely disavow this theory and reimpose a standard of subordinate criminal liability in crystal-clear terms. While this Note has assessed the doctrinal corner into which the Court has seemingly painted itself, I have little doubt that, if it so chooses, the Court could find itself an escape hatch. To do so would require a departure from recent trends away from personal liability for government officials, but the stakes—preserving a strong form of executive accountability—warrant such a pivot.

Alas, the Court has now passed up at least two chances to settle this issue. First, the Justices were certainly aware of principles of subordinate liability when writing their opinion—at oral argument, Justice Gorsuch directly questioned whether subordinate liability remained in place, seemingly indicating that he believed it could serve as a check on an unlawful executive in a world without presidential criminal liability.[273] Had the Court agreed on this point, it could easily have tacked Gorsuch's reassurance onto its opinion amid other guarantees against fears of rampant criminality. Its absence in the final opinion could be innocuous—a question that was unnecessary to address in the first instance—though it may indicate that, among the Justices, there is no clear consensus. More recently, the Court denied certiorari to Mark Meadows's appeal, where he raised a novel defense premised on the type of subordinate criminal immunity described here.[274] The Court could and should have accepted that case to reject Meadows's arguments.[275] Instead, the question remains open.

In this Part, I begin to sketch three possible answers. First, the Court could halt derivative immunity in its tracks by leveraging the malleability of its functionalist analysis, recognizing that expanding immunity to the subordinate level risks undermining the very vigorous execution of the law it seeks to protect. Second, the Court could embrace a formal, structural analysis grounded in the separation of powers and Congress's unique role in establishing and defining subordinate executive offices. Finally, if the Court deems some form of immunity necessary, it should implement a rigorous, objective standard to curtail the most sweeping forms of derivative criminal immunity.

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273. Transcript of Oral Argument, *supra* note 38, at 48-49 ("You don't contest that everybody following an unlawful order beneath the president of the United States can be immediately prosecuted, do you? . . . If the president gives an unlawful order, call in the troops, all the examples we've heard, every subordinate beneath him faces criminal prosecution, don't they?").

274. Petition for Writ of Certiorari, *supra* note 39, at 3, 22.

275. Meadows's case will remain in state court, where he may still be able to test this federal immunity defense. With luck, the case could eventually find its way to the Supreme Court.

A. Functionally Rejecting Immunity

The best solution is simple. The Court should reject wholesale a doctrine of criminal immunity for subordinates and can do so while retaining doctrinal consistency. *Trump*'s functionalist reasoning threatens to swallow established principles of executive-branch accountability with a simple argument: if presidential immunity protects the faithful execution of the law, then qualified criminal immunity for subordinates must similarly shield the mechanisms of that function.[276] Fortunately, functionalist analysis cuts both ways. I contend that the Court's framework compels the rejection of derivative criminal immunity, as it would so thoroughly undermine the rule of law as to vitiate the purpose of an energetic executive in the first place.

In its ever-growing string of cases granting various immunities, the Court has created a balancing-test framework that weighs competing interests: unconstrained governance and personal accountability.[277] Over time, prioritizing

276. Trevor W. Morrison offers a different account, responding to an earlier draft of this Note and disputing the notion that subordinate immunity is a fundamentally functional problem. *See* Trevor W. Morrison, *All the President's Men*, N.Y.U. L. Rev. Case Comment 7 n.29 (2025) https://nyulawreview.org/wp-content/uploads/2025/08/Morrison-All-The-Presidents-Men-1.pdf [https://perma.cc/94PV-LD89]. On that view, while *Trump*'s official-acts immunity rests on functional concerns about governance, immunity flowing from conclusive and preclusive authority is grounded in formal constitutional structure. *Id.* I collapse these categories for two related reasons. First, determining whether a power is "conclusive and preclusive" in the first instance entails functional analysis, even when the power is the President's alone. In *Zivotofsky ex rel. Zivotofsky v. Kerry*, for example, only after engaging in functional analysis about the President's role in foreign policy did the Court conclude that the recognition power—which the Constitution confers exclusively upon the President—precluded regulation. 576 U.S. 1, 13-17 (2015); *see also* Morrison, *supra*, at 38 (acknowledging that preclusion requires showing the President "would be undermined or frustrated in some critical way" by the regulation). Second, within the conclusive and preclusive domain, the *Trump* Court protected "the President's actions." *See* Trump v. United States, 603 U.S. 593, 609 (2024). Subordinates implementing presidential directives are exercising presidential authority, but their actions are not literally "the President's actions." *See* Franklin v. Massachusetts, 505 U.S. 788, 828 (1992) (Scalia, J., concurring) (distinguishing "[p]residential action" from an officer's "attempt to enforce the President's directive" for purposes of judicial review). The question remains in each instance whether applying generally applicable criminal laws *to subordinates* impermissibly burdens the President. That is an inescapably functional inquiry, laden with all the risks of the modern Court's casual and expansive functional analyses of executive powers and immunities. *See supra* Part II.

277. For discussions on balancing the vindication of rights against executive-branch functions, see, for example, *United States v. Nixon*, 418 U.S. 683, 707-09 (1974); *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982); *Ziglar v. Abbasi*, 582 U.S. 120, 151 (2017); *Egbert v. Boule*, 596 U.S. 482, 482 (2022); and *Trump*, 603 U.S. at 613-15.

logical consistency with its precedent, the Court has upheld the former interest.[278] Immunities have grown and grown and grown.[279] As demonstrated in Parts II and III, rote path dependency and rigid logical consistency alone would yield derivative criminal immunity. But nothing strictly doctrinal in the Court's jurisprudence forces this mechanical result. In fact, the Court's decisions elsewhere may counsel against it.

Bargains struck in creating other immunities have relied explicitly on the availability of other sanctions against subordinate executive officials as a backstop against government misconduct—treating the various forms of accountability as functionally interchangeable.[280] In *Imbler v. Pachtman*, for instance, the Court acknowledged that civil immunity leaves wronged defendants without civil redress but justified this outcome in part because "there are other checks on prosecutorial misconduct, including the criminal law."[281] The Court has consistently treated criminal accountability not as an optional supplement to civil liability, but as an essential bulwark, especially when other forms of accountability are curtailed.

And when the Court held that presidential actions were unreviewable under the APA, they maintained, and lower courts initially insisted, that the implementation of those actions by subordinates could be reviewed.[282] This framework explicitly contemplated that subordinate accountability could frustrate presidential aims—and the Court was *comfortable* with that tension, perhaps because the aim was to avoid chilling lawful presidential actions while still preventing widespread unlawfulness in practice. The courts have, however, since chipped away at subordinate review up to the point where even discretionary agency decisions have become unreviewable simply because the underlying authority was delegated by the President.[283] The result is a shield where both the President and agencies implementing presidential directives—lawful or not—may escape APA review.

The Court certainly should not replicate these moves in the criminal context. Unlike civil law, which redresses private wrongs, or APA review, which ensures consistency and adherence to policy and procedure, criminal accountability

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278. For some of the changing circumstances that have led the Court of the last five decades to expand official immunities, see *supra* notes 108-110 and accompanying text and Section II.A.

279. *See supra* Part II.

280. *Cf. supra* note 107 and accompanying text (noting that the Court has often invoked criminal liability as a backstop when expanding other forms of immunity or privilege).

281. Imbler v. Pachtman, 424 U.S. 409, 429 (1976); *see also* Burns v. Reed, 500 U.S. 478, 486 (1991) (reaffirming *Imbler*).

282. *See supra* note 148 and accompanying text.

283. *See supra* Section II.A.3.

addresses fundamental public wrongs that cannot be compartmentalized.[284] In *Trump v. Vance*, the Court reaffirmed that "no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding," rejecting claims of absolute immunity from criminal investigations.[285] Holding the President to criminal account, the Court reasoned, was essential to preserving "the integrity of the criminal justice system."[286]

The same logic reappeared in *Trump*. Because federal criminal laws seek redress to wrongs to the public and not just wrongs to individuals, the Court notes that there is, in the criminal context, a "compelling 'public interest in fair and effective law enforcement.'"[287] This public interest is why the *Trump* Court establishes presumptive, and not absolute, immunity for acts within the outer perimeter of the President's official responsibility. The President cannot be entirely above the laws he or she has been charged with enforcing.[288]

In its immunity doctrines, the Court has constructed a scale. Having now dramatically tipped it toward unconstrained governance in crafting presidential criminal immunity, the Court retains full discretion — and bears a heightened obligation — to preserve what remaining balance it can. On its own terms, the Court's functional analysis must reckon with this reality. At some point, expanding immunity to prevent the improper chilling of executive action so thoroughly undermines the rule of law that it negates the very purpose of vigorous authority to execute that law.[289]

That tipping point would arrive precisely when qualified criminal immunity would enable thousands of officials to commit crimes without consequence, so long as they do so at presidential direction.[290] Once subordinates understand that criminal immunity flows from presidential direction, the incentive structure inverts entirely: rather than fearing prosecution for implementing illegal orders, officials would rationally compete to demonstrate loyalty through increasingly brazen criminality, knowing that proximity to presidential authority provides impunity rather than accountability. The potential for an upside-down execution of the laws duly enacted by Congress could — and should — nudge the Court

284. *Cf.* E. Garrett West, *Torts Stories After* Bivens, 138 HARV. L. REV. F. 89, 106-07 (2025) (arguing against an assumption that all remedies, criminal sanctions, professional norms, and damages against the government are interchangeable tools of bureaucratic incentive structuring).

285. 591 U.S. 786, 810 (2020).

286. *Id.*

287. Trump v. United States, 603 U.S. 593, 596 (2024) (quoting *Vance*, 591 U.S. at 808).

288. *Id.* at 613-14.

289. *See id.* at 610 ("The purpose of a 'vigorous' and 'energetic' Executive, [the Framers] thought, was to ensure 'good government.'" (quoting THE FEDERALIST No. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961))).

290. *See* Huq, *supra* note 17 (manuscript at 44-46).

to turn away from its historic commitment to the one-way ratchet of functionalism.

B. Formally Rejecting Immunity

A framework which takes seriously the separation of powers—namely, Congress's authority to define the scope of executive offices—provides an independent structural reason to bar subordinate immunity. The argument is straightforward. The authority of all subordinate executive offices comes from and is delimited by statute; criminal conduct necessarily falls outside those bounds; therefore, criminal conduct by a subordinate official can never be part of an "official act." Because *Trump* tethers immunity to official acts, the defense of derivative criminal immunity is foreclosed.

Officials within the executive branch are empowered by acts of Congress.[291] Their offices and agencies are created when Congress deems it "necessary and proper" for the execution of the law.[292] And it is definitionally impossible for Congress to create an office with the intent that it be adulterated into a vehicle to break Congress's own laws. Such a construction, absurd on its face, would also run headlong into other constitutional complications: namely, the Supremacy Clause, which enlivens federal statutes as the "Law of the Land" to the extent that they operate in pursuance of constitutional aims.[293]

And so, this framework operates by parrying *Trump*'s formulation of the "official acts" which qualify for immunity. For the President, these include exercises either of inherent constitutional authority or of authorities delegated by Congress.[294] For subordinate officials, however, who have no inherent constitutional authority, an official act deserving of immunity must therefore be one that falls strictly within the duties circumscribed by Congress.[295] But conduct that runs afoul of generally applicable criminal law exceeds that statutory remit and is definitionally *ultra vires*—whether committed at the behest of the President or on

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291. U.S. CONST. art. II, § 2, cl. 2 (providing that "all other Officers of the United States . . . shall be established by Law"). The Presidency is also an "office," to be sure, though crucially not one established by Congress.

292. *Id.* art. I, § 8, cl. 18.

293. *Id.* art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made *in Pursuance thereof* . . . shall be the supreme Law of the Land . . . ." (emphasis added)).

294. *Trump*, 603 U.S. at 618 ("When the President acts pursuant to 'constitutional and statutory authority,' he takes official action to perform the functions of his office." (quoting Nixon v. Fitzgerald, 457 U.S. 731, 757 (1982))).

295. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 117 (2022) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.").

the officer's own accord. As a result, officials should receive no immunity whatsoever for criminal conduct, as such acts necessarily fall outside the boundaries of their offices and cannot constitute official acts.

While the President is constitutionally instructed to execute the law, including by making use of the offices which Congress creates, the officers themselves are bound to stay within the lanes set by Congress.[296] Were that not the case — were those officers immunized and thus empowered by the President to use their "official" privileges to transcend the boundaries of their stations and break the law — then the President's prerogatives would be substituted for the legislature's, and the unique congressional power over office creation would be a dead letter.[297]

C. Barring Wholesale Rejection, a Strict Test

If the Court determines that some form of protection for subordinates is functionally necessary, perhaps given fears that vindictive Presidents could pursue spurious, bad-faith prosecutions of individuals from predecessor administrations, it need not embrace a blanket form of qualified criminal immunity. Instead, the Court could craft a narrow framework that balances executive function and accountability, preserving criminal prosecution for knowing participation in criminal conduct.[298] The approach here is intended to be skeptically applied, preserving prosecution for all but the most genuinely ambiguous legal questions encountered by officials acting without corrupt motive. I suggest a two-part test. First, any subordinate claiming immunity would need to prove that whatever act they committed could plausibly constitute part of their official

296. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 573 (1838) ("The true and sound constitutional doctrine upon this subject is, that whenever the legislature may constitutionally create an office, and prescribe its duties and its powers; they may make the incumbent responsible to the judiciary for the faithful performance of those duties.").

297. *Cf.* E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 180 (2018) (arguing that Congress uniquely sets the bounds of executive offices, while the President's narrow authority in office creation "is confined to his or her participation in the lawmaking process"); *see also* Buckley v. Valeo, 424 U.S. 1, 137-38 (1976) (noting Congress's role in defining the scope of official duties through legislation).

298. Prosecutions here, as well as under Sections IV.A and IV.B, would still need to clear the bars on inquiries into presidential motive established in *Trump*. I mostly leave that maze to the future prosecutors. One solution could be to establish a pattern of presumptively nonofficial misconduct through permissible or publicly available evidence, then use that foundation to obtain communications that, while involving official conduct, were made in furtherance of that presumptively nonprotected criminal scheme. This two-step process would mirror aspects of the crime-fraud exception to attorney-client privilege and appears permissible under the balancing test for overcoming executive privilege generally. *See* United States v. Nixon, 418 U.S. 683, 712 (1974).

duties. Second, the court must then interrogate whether the subordinate's belief in the legality of the act was objectively reasonable in light of the law and facts known to the official at the time.

Begin with the first prong. Drawing on judicial-immunity doctrine, this approach would confine any immunity protection strictly to the scope of statutory or regulatory authority, ensuring that derivative immunity could not shield criminal conduct that exceeds an official's defined role. The Supreme Court has, in the past, tied immunity to jurisdictional scope, especially in the judicial context. In *Bradley v. Fisher*, the Court held that "[j]udges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction," but distinguished this from situations involving "the clear absence of all jurisdiction over the subject-matter."[299] *Stump v. Sparkman* later applied this principle to immunize a circuit-court judge with "general jurisdiction" even for procedural errors and actions lacking specific statutory authorization.[300]

By contrast, officials with limited jurisdiction receive correspondingly constrained protection. In an early case, *Wise v. Withers*, the Court held that when officials exercise "peculiar limited jurisdiction" and "exceed it," then "not only their officers, but they themselves are liable to an action."[301] This approach prevents immunity from expanding beyond legitimate authority by grounding protection in the scope of official power.

Under this framework, derivative immunity would extend only to acts within an official's statutory or regulatory authority. Cabinet secretaries would receive, at most, protection for actions within their departmental responsibilities—an Attorney General directing Justice Department investigations, for instance—but not for conduct outside their roles. This inquiry must ask more than whether the specific act was conducted through official channels. Officials would receive protection only for actions both within their departmental subject-matter jurisdiction and consistent with statutory or regulatory purpose: shielding an Attorney General exercising prosecutorial discretion lawfully, but not one accepting bribes to close investigations or one corruptly targeting political enemies.

Second, after the act has plausibly been found to fall within the four corners of the subordinate's office, a court must evaluate whether the subordinate's belief in the legality of their actions was objectively reasonable. I suggest a standard deliberately more demanding than its civil analogues. Unlike civil qualified immunity, which has grown substantially over time, this criminal standard must

299. 80 U.S. (13 Wall.) 335, 351 (1871).

300. 435 U.S. 349, 356-57 (1978).

301. 7 U.S. (3 Cranch) 331, 334-35 (1806).

protect only those subordinates who, amid sincere and documented legal uncertainty, made good-faith efforts to comply with law. The inquiry ought not be whether prior case law establishes illegality in functionally identical circumstances, but whether a reasonable official, consulting appropriate legal authorities, would genuinely conclude the conduct was lawful.

While it is true that criminal liability traditionally involves subjective inquiry into intent, this distinction breaks down when considering the need to deter chilling effects — the central concern of the *Trump* majority — as well as the practical difficulties of admitting evidence of intent in the post-*Trump* world.[302] Indeed, the Court consciously abandoned the subjective "good-faith" component of civil immunity in *Harlow* because it was too complex and intrusive.[303] That same logic applies with greater force here. Forcing prosecutors to prove that a subordinate subjectively knew a presidential order was criminal would require intrusive discovery — all the while, the most dispositive, smoking-gun evidence is likely off-limits under *Trump*'s new evidentiary rule.[304] A good-faith standard would be the worst of both worlds, requiring burdensome but fatally constrained discovery into motive that may well resolve in practice into failures to indict all but the most flagrant, self-documented crimes.

An objective test offers a functional compromise. It asks a single question: *would a reasonably well-trained official have viewed the order as legal*? By denying immunity for conduct that is facially and clearly criminal, this framework ensures that the executive branch as a whole is constrained only from pursuing patently unlawful objectives, thereby satisfying both the need for executive function and the supremacy of the rule of law.

Critical to this framework is the careful treatment of purported legal authorization. OLC opinions have historically provided a reasonable basis for officials defending their belief that conduct was lawful, which has deterred later administrations from prosecuting otherwise criminal conduct.[305] But a presumption of good-faith reliance cannot hold if OLC becomes a mere conduit for presidential

302. For a discussion of novel difficulties in admitting evidence related to purportedly criminal acts involving the President, see *supra* Section II.B.2.

303. Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982) (explaining that "[t]he subjective element . . . frequently ha[s] proved incompatible with our admonition that insubstantial claims should not proceed to trial," and noting that this required discovery "of officials' motive and intent" that was too burdensome).

304. *See* Amar, *supra* note 21; Weissman, *supra* note 21.

305. *See supra* Section III.B.2 (outlining general practice of not prosecuting officers for good-faith reliance on OLC opinions).

preferences.[306] At that point, officials are on notice to inquire independently about orders or legal guidance — from OLC or otherwise — they suspect to be pretextual, and they cannot claim reliance on their validity.[307]

Skeptics of this approach may contend that it would lead subordinates to second-guess even legitimate presidential directives, creating the type of executive paralysis to which the Court seems allergic. The Court could accommodate granting this responsibility to subordinates, as it mirrors the status quo of qualified immunity, which does not sweep so far as to immunize against penalties for actions that a reasonable actor would understand to be "clearly" unlawful.[308]

Proponents of a stronger immunity might also suggest that executive-branch officials are ill-equipped to evaluate the legality of their own actions, especially when it conflicts with a presidential order, so placing the onus on those officials would be unduly burdensome.[309] As a first response, we can draw a parallel from law enforcement, where the Court has established that law-enforcement officers are not granted immunity if they rely upon statutory commands that they "should have known" were unconstitutional.[310] This is an objective standard, and "does not turn on the subjective good faith of individual officers."[311] Surely executive-branch officials can be held to a similar standard on criminality. Second, subordinate officials are not automata. If apprehension over criminal prosecution has ever served as a deterrent, which the Court takes for granted in

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306. *See* Price, *supra* note 245, at 202, 244; *see also supra* Section III.B.3.b (describing moves to suborn the Justice Department, including OLC, to presidential will during the second Trump Administration).

307. *Cf.* Little v. Barreme, 6 U.S. (2 Cranch) 170, 170 (1804) ("[I]n obeying his instructions from the President of the United States, [an officer] acts at his peril.").

308. *See Harlow*, 457 U.S. at 818.

309. Echoes of this reluctance appear in some of the Court's qualified-immunity precedents, especially when officials rely on neutral guidance or when the law is ambiguous. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions."); United States v. Leon, 468 U.S. 897, 922-23 (1984) (noting that an officer's reliance on a warrant issued by a neutral magistrate normally suffices to establish good faith). *But see* Messerschmidt v. Millender, 565 U.S. 535, 546-47 (2012) (recognizing an exception to qualified immunity conferred by a magistrate's issuance of a warrant "when 'it is obvious that no reasonably competent officer would have concluded that a warrant should issue.'" (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986))).

310. Illinois v. Krull, 480 U.S. 340, 355 (1987) ("[A] law enforcement officer [cannot] be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional."). *Krull* also drew from *Harlow*'s standard that conduct must "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* (quoting *Harlow*, 457 U.S. at 818).

311. *Id.* (citing *Leon*, 468 U.S. at 919 n.20).

Trump and has remarked explicitly elsewhere,[312] it is only because those officials were able and willing to independently scrutinize the legality of the offending directives.[313]

If the Court were to adopt this approach, then principled defiance by the officers and employees of the executive branch would become an even more essential backstop in resisting illegal or criminal orders. While the Court has worked to erode the exercise of counterpresidential discretion within the executive branch, explicitly eliminating protections for — or, worse, justifying retaliation against — officials who defy clearly unlawful orders would be a serious mistake.

I take my cue from the Uniform Code of Military Justice (UCMJ), which famously permits the disobedience of unlawful orders.[314] My analogy within the executive branch differs insofar as this test for immunity creates an affirmative *duty* to disobey,[315] which is stronger than the UCMJ's *permission*. But the Court should, in any event, consider exceptions to its increasingly ironclad doctrines of at-will removal within the executive branch, shielding from termination any employee suffering retaliation from their resistance against orders they know to be criminal.[316] Without such protections, those standing in the way of a bad-man President would be fired and replaced by servile functionaries ready and willing to carry out criminal schemes without question and further emboldened by a novel doctrine of derivative criminal immunity.[317]

The complexity of this suggested framework should be taken as evidence of the extreme difficulty in crafting a subordinate criminal immunity resistant to the expansionary pathologies documented throughout this Note. These elaborate safeguards would be necessary because any simpler immunity would rapidly

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312. *See* Trump v. United States, 603 U.S. 593, 595 (2024) ("[T]he threat of trial, judgment, and imprisonment is a far greater deterrent and . . . likely to distort Presidential decisionmaking."); Imbler v. Pachtman, 424 U.S. 409, 428-29 (suggesting that criminal liability deters misconduct by government officials).

313. It is also evident from historical practice that potential criminal exposure has, in previous episodes of prospective malfeasance, led the executive branch to change course. *See, e.g.*, Goldsmith, *supra* note 24, at 3.

314. *See* 10 U.S.C. §§ 890-892 (2024) (establishing that failing to obey only a "lawful" command, order, general order, or regulation is punishable).

315. Or else risk criminal prosecution.

316. The second Trump Administration has demonstrated that these protections are essential, for instance, through the firing of one Justice Department official who refused to follow blatantly unlawful orders from superiors. *See* Devlin Barrett, *Justice Dept. Leader Suggested Violating Court Orders, Whistle-Blower Says*, N.Y. TIMES (June 24, 2025), https://www.nytimes.com/2025/06/24/us/politics/justice-department-emil-bove-trump-deportations-reuveni.html [https://perma.cc/GJZ4-8KZM].

317. *See supra* note 181 and accompanying text.

grow, yet even they may prove insufficient given historical patterns and functional pressures. This framework is offered only as a last-ditch backstop; subordinate criminal immunity should not exist and, as explained in Sections IV.A and IV.B, ought to be rejected entirely.

CONCLUSION

History is replete with warnings. The blueprints for executive immunity—drawn from doctrines in civil immunity, executive privilege, and administrative law—have taught the consistent lesson that protections created for the President rarely stay put. Despite judicial assurances that these doctrines would remain tethered to the Oval Office, those supposed limitations have steadily yielded to the logical force of functionalism, and the President's immunities have crept throughout the executive branch. Criminal prosecution has thus been relied upon, decade after decade, as an increasingly strained load-bearing backstop for subordinate accountability. Granting yet another immunity destabilizes this already-fraught structure, risking the total collapse of legal constraints on official power.

The *Trump* Court repeatedly emphasized that their decision did not place the President above the law.[318] The Justices in dissent, as well as numerous commentators, have cast substantial doubt on this assertion.[319] But even if the Court has not placed one man *wholly* above the law, history warns that it is on track to place untold thousands mostly beyond its reach. A doctrine of subordinate criminal immunity, in multiplying yet another presidential immunity across the executive branch, would conclude nothing less than a revolution against government accountability. A shield created to prevent one man from facing prosecution could readily be warped into a barricade behind which an army of officials might commit crimes with impunity, so long as they do so while executing presidential will.

This extension demands rejection on grounds of practice and principle. It subverts the very rule of law that both necessitates and legitimizes the executive

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318. *See* Trump v. United States, 603 U.S. 593, 639-40 (2024); *id.* at 642 ("The President is not above the law.").

319. *See id.* at 685 (Sotomayor, J., dissenting) ("The relationship between the President and the people he serves has shifted irrevocably. In every use of official power, the President is now a king above the law."); *id.* at 694 (Jackson, J., dissenting) ("The majority's new Presidential accountability model is also distinct insofar as it accepts as a basic starting premise that generally applicable criminal laws do *not* apply to everyone in our society."); Ed. Bd., *The Supreme Court Gives a Free Pass to Trump and Future Presidents*, N.Y. TIMES (July 1, 2024), https://www.nytimes.com/2024/07/01/opinion/supreme-court-presidential-immunity-trump.html [https://perma.cc/U5TW-CEMQ] ("As of Monday, the bedrock principle that no one is above the law has been set aside.").

authority it purports to protect. Our nation, at its inception, rightly rejected the divine right of kings.[320] The Court must not proclaim, a quarter-millennium later, the divine right of the king's men.

320. *Trump*, 603 U.S. at 686 (Jackson, J., dissenting) ("[T]he concept of immunity boils down to a maxim—'[t]he King can do no wrong'—a notion that was firmly 'rejected at the birth of [our] Republic.'" (second and third alterations in original) (quoting Clinton v. Jones, 520 U.S. 681, 697 n.24 (1997))).