JUSTICE ROBERTS' DRONE STRIKE ON GEORGE WASHINGTON'S LEGACY

Chief Justice John Roberts cloaked his radical opinion granting Presidents broad immunity in the Farewell Address of George Washington, normally celebrated as the codification of the peaceful cession of power, the humility of the role of the President.

> Our first President had such a perspective. In his Farewell Address, George Washington reminded the Nation that "a Government of as much vigour as is consistent with the perfect security of Liberty is indispensable." 35 Writings of George Washington 226 (J. Fitzpatrick ed. 1940). A government "too feeble to withstand the enterprises of faction," he warned, could lead to the "frightful despotism" of "alternate domination of one faction over another, sharpened by the spirit of revenge." Id., at 226–227. And the way to avoid that cycle, he explained, was to ensure that government powers remained "properly distributed and adjusted." Id., at 226.
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> It is these enduring principles that guide our decision in this case.

But Roberts instead focuses on Washington's warning against factionalism — and from there, to a claim to honor separation of powers.

Never mind that, as Justice Ketanji Brown Jackson notes, Roberts' opinion instead radically *altered* the balance of powers, which (adopting Washington's logic) will arguably feed factionalism.

> It is important to note that the majority reframes the immunity question presented here as a separation of powers concern that is compelled by Article II—as if what is being asked is whether Congress can criminalize executive prerogatives. See, e.g., ante, at 6–7; see also ante, at 1– 2 (BARRETT, J., concurring in part). But that is not anywhere close to what is happening in this case. No one maintains that Congress has passed a law that specifically criminalizes the President's use of any power that the Constitution vests exclusively in the Executive, much less that the Judiciary is being conscripted to adjudicate the propriety of such a statute. To the contrary, the indictment here invokes criminal statutes of general applicability that everyone is supposed to follow, both on and off the job. So, the real question is: Can the President, too, be held accountable for committing crimes while he is undertaking his official duties? The nature of his authority under Article II (whether conclusive and preclusive, or shared with Congress, or otherwise) is entirely beside the point.

Plus, by my read, the only separation of powers that Roberts really cares about is that between one Executive and his successor. Roberts is, in actuality, usurping the Article II authority of DOJ to prosecute crimes exclusively in the case of a former President, adopting that power to the judiciary.

Roberts' opinion does that even while it permits the sitting President to use the trappings of DOJ against everyone but his predecessor, with personal presidential involvement. All the abuses of the Trump DOJ? The revenge prosecution of Greg Craig, Michael Sussmann, and Igor Danchenko? All cool with John Roberts. The use

of DOJ resources to have an FBI informant frame Joe Biden? Still totally cool. Not revenge. Just the President doing what he's empowered to do.

But it's that more cherished precedent Washington set, of the transfer of power rather than kings, that Roberts has done real violence to.

Consider what happened to Blassingame — the DC Circuit opinion holding that a former President can be sued for actions taken in his role as candidate for office — in this opinion.

Blassingame was mentioned repeatedly in the argument of this case, 16 times, often when a Republican who joined Roberts' opinion today queried John Sauer if he agreed with it.

It came up when Clarence Thomas asked whether Sauer accepted the function of a candidate to be a private act — with which he mostly agreed and then backtracked somewhat.

> JUSTICE THOMAS: Mr. Sauer, in assessing the official acts of a president, do you differentiate between the president acting as president and the president acting as candidate?
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> MR. SAUER: Yes, we do. And we don't dispute essentially the Blassingame discussion of that.
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> JUSTICE THOMAS: Okay. Now —
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> MR. SAUER: But, of course, that has to be done by objective determinations, not by looking at what was the purpose of what you did this, and that's the most important point there.

It came up when Neil Gorsuch queried Sauer about it (in which case Sauer adopted former Trump White House Counsel Greg Katsas' more narrow holding on it).

> JUSTICE GORSUCH: And then the question becomes, as we've been exploring here

> today a little bit, about how to segregate private from official conduct that may or may not enjoy some immunity, and we — I'm sure we're going to spend a lot of time exploring that. But the D.C. Circuit in Blassingame, the chief judge there, joined by the panel, expressed some views about how to segregate private conduct for which no man is above the law from official acts. Do you have any thoughts about the test that they came up with there?
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> MR. SAUER: Yes. We think, in the main, that test, especially if it's understood through the lens of Judge Katsas' separate opinion, is a very persuasive test. It would be a great source for this Court to rely on in drawing this line. And it emphasizes the breadth of that test. It talks about how actions that are, you know, plausibly connected to the president's official duties are official acts. And it also emphasizes that if it's a close case or it appears there's considerations on the other side, that also should be treated as immune. Those are the — the aspects of that that we'd emphasize as potentially guiding the Court's discretion.

Gorsuch would go on to question Dreeben about Blassingame at length.

It came up when John Kavanaugh invited Sauer to rewrite Blassingame, and Sauer largely declined.

> JUSTICE KAVANAUGH: Where — where do you think the D.C. Circuit went wrong in how it determined what was official versus what's personal?
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> MR. SAUER: Well, I read — I read the opinion below in this particular case as adopting a categorical view. It does not matter, is the logic of their — their opinion because there is no immunity for

> official acts and, therefore, you know, that's the end of the story. I don't really think they went wrong in Blassingame in the civil context when they engaged in the same determination with respect to what's official and what isn't official. There, we agree with most of what that opinion said.

And it came up when Sammy Alito asked John Sauer if he'd like an order saying that the President was immune unless there was no possible justification, in which case Sauer raised Blassingame, and Alito shifted from analysis of official and unofficial.

> JUSTICE ALITO: But what if it were not — what if it did not involve any subjective element, it was purely objective? You would look objectively at the various relevant factors? MR. SAUER: That sounds to me a lot like Blassingame and especially viewed through the lens of Judge Katsas' separate opinion, and that may not be different than what we're proposing to the Court today.
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> JUSTICE ALITO: Well, Blassingame had to do with the difference between official conduct and private conduct, right?
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> MR. SAUER: That's correct. I — I understood the Court to be asking that.
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> JUSTICE ALITO: No. This — this would apply — and it's just a possibility. I don't know whether it's a good idea or a bad idea or whether it can be derived from the structure of the Constitution or the Vesting Clause or any other source. But this would be applied in a purely objective — on purely objective grounds when the president invokes an official power in taking the action that is at issue?
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> MR. SAUER: Yes, I believe — the reason I think of Blassingame is because it talks

> about an objective context-specific determination to winnow out what's official and what is purely private conduct, and, again, in a — with a strong degree of deference to what — and, therefore, you know, that's the end of the story. I don't really think they went wrong in Blassingame in the civil context when they engaged in the same determination with respect to what's official and what isn't official. There, we agree with most of what that opinion said.

You might be justified in thinking that Blassingame would be central to today's ruling, not least because the charged crimes are the same ones as the complaints alleged in Blassingame.

The central holding of Blassingame, however, is gone.

Blassingame appears just three times in the opinion rendered today. Roberts uses it as a limiting factor.

> But the breadth of the President's "discretionary responsibilities" under the Constitution and laws of the United States "in a broad variety of areas, many of them highly sensitive," frequently makes it "difficult to determine which of [his] innumerable 'functions' encompassed a particular action." Id., at 756. And some Presidential conduct—for example, speaking to and on behalf of the American people, see Trump v. Hawaii, 585 U. S. 667, 701 (2018)—certainly can qualify as official even when not obviously connected to a particular constitutional or statutory provision. For those reasons, the 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.” Blassingame v. Trump, 87

Sonia Sotomayor notes that Roberts has used it as a limiting factor, then notes he has also eliminated any analysis of motive.

> In fact, the majority’s dividing line between “official” and “unofficial” conduct narrows the conduct considered “unofficial” almost to a nullity. It says that whenever the President acts in a way that is “‘not manifestly or palpably beyond [his] authority,’” he is taking official action. Ante, at 17 (quoting Blassingame v. Trump, 87 F. 4th 1, 13 (CADC 2023)). It then goes a step further: “In dividing official from unofficial conduct, courts may not inquire into the President’s motives.” Ante, at 18.

Jackson makes a similar observation.

> At most, to distinguish official from unofficial conduct, the majority advises asking whether the former President’s conduct was “‘manifestly or palpably beyond [his] authority.’” Ante, at 17 (quoting Blassingame v. Trump, 87 F. 4th 1, 13 (CADC 2023)).

There’s not even much discussion of Trump’s role as a candidate! Roberts raises it, and then says Trump’s electioneering tweets might serve some other purpose.

> There may, however, be contexts in which the President, notwithstanding the prominence of his position, speaks in an unofficial capacity—perhaps as a candidate for office or party leader. To the extent that may be the case, objective analysis of “content, form, and context” will necessarily inform the

> inquiry. Snyder v. Phelps, 562 U. S. 443, 453 (2011) (internal quotation marks omitted). But "there is not always a clear line between [the President's] personal and official affairs." Mazars, 591 U. S., at 868. The analysis therefore must be fact specific and may prove to be challenging.
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> The indictment reflects these challenges. It includes only select Tweets and brief snippets of the speech Trump delivered on the morning of January 6, omitting its full text or context. See App. 228–230, Indictment ¶104. Whether the Tweets, that speech, and Trump's other communications on January 6 involve official conduct may depend on the content and context of each. Knowing, for instance, what else was said contemporaneous to the excerpted communications, or who was involved in transmitting the electronic communications and in organizing the rally, could be relevant to the classification of each communication.

In ruling (unsurprisingly) that the Jeffrey Clark allegations have to be thrown out, Roberts goes further, and reads the Executive Branch interest in policing election crime to extend to making false claims about the election.

> The Government does not dispute that the indictment's allegations regarding the Justice Department involve Trump's "use of official power." Brief for United States 46; see id., at 10–11; Tr. of Oral Arg. 125. The allegations in fact plainly implicate Trump's "conclusive and preclusive" authority. "[I]nvestigation and prosecution of crimes is a quintessentially executive function." Brief for United States 19 (quoting Morrison v. Olson, 487 U. S. 654, 706 (1988) (Scalia, J., dissenting)). And the Executive Branch

> has "exclusive authority and absolute discretion" to decide which crimes to investigate and prosecute, including with respect to allegations of election crime. Nixon, 418 U. S., at 693; see United States v. Texas, 599 U. S. 670, 678–679 (2023) ("Under Article II, the Executive Branch possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'" (quoting TransUnion LLC v. Ramirez, 594 U. S. 413, 429 (2021))). The President may discuss potential investigations and prosecutions with his Attorney General and other Justice Department officials to carry out his constitutional duty to "take Care that the Laws be faithfully executed." Art. II, §3. And the Attorney General, as head of the Justice Department, acts as the President's "chief law enforcement officer" who "provides vital assistance to [him] in the performance of [his] constitutional duty to 'preserve, protect, and defend the Constitution.'" Mitchell v. Forsyth, 472 U. S. 511, 520 (1985) (quoting Art. II, §1, cl. 8)

And when entertaining Trump's claims that his interference in state and congress' role were just an effort to protect the integrity of the election, Roberts thumbs both the scale and the facts again, using the Take Care clause as a shield rather than the sword that Judge Karen Henderson viewed it as.

> On Trump's view, the alleged conduct qualifies as official because it was undertaken to ensure the integrity and proper administration of the federal election. Of course, the President's duty to "take Care that the Laws be faithfully executed" plainly encompasses enforcement of federal election laws passed by Congress. Art. II, §3. And the

> President's broad power to speak on matters of public concern does not exclude his public communications regarding the fairness and integrity of federal elections simply because he is running for re-election. Cf. Hawaii, 585 U. S., at 701. Similarly, the President may speak on and discuss such matters with state officials—even when no specific federal responsibility requires his communication—to encourage them to act in a manner that promotes the President's view of the public good.

Even when conceding that Trump was pressuring Mike Pence as President of the Senate, not as his Vice President, when he was threatening to have him assassinated, Roberts suggests this is a close call, because Trump has to be able to pressure the President of the Senate to get legislation passed.

> The question then becomes whether that presumption of immunity is rebutted under the circumstances. When the Vice President presides over the January 6 certification proceeding, he does so in his capacity as President of the Senate. Ibid. Despite the Vice President's expansive role of advising and assisting the President within the Executive Branch, the Vice President's Article I responsibility of "presiding over the Senate" is "not an 'executive branch' function." Memorandum from L. Silberman, Deputy Atty. Gen., to R. Burress, Office of the President, Re: Conflict of Interest Problems Arising Out of the President's Nomination of Nelson A. Rockefeller To Be Vice President Under the Twenty-Fifth Amendment to the Constitution 2 (Aug. 28, 1974). With respect to the certification proceeding in particular, Congress has legislated extensively to define the Vice President's role in the counting of the

> electoral votes, see, e.g., 3 U. S. C. §15, and the President plays no direct constitutional or statutory role in that process. So the Government may argue that consideration of the President's communications with the Vice President concerning the certification proceeding does not pose "dangers of intrusion on the authority and functions of the Executive Branch." Fitzgerald, 457 U. S., at 754; see supra, at 14.
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> At the same time, however, the President may frequently rely on the Vice President in his capacity as President of the Senate to advance the President's agenda in Congress. When the Senate is closely divided, for instance, the Vice President's tiebreaking vote may be crucial for confirming the President's nominees and passing laws that align with the President's policies. Applying a criminal prohibition to the President's conversations discussing such matters with the Vice President—even though they concern his role as President of the Senate—may well hinder the President's ability to perform his constitutional functions.
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> It is ultimately the Government's burden to rebut the presumption of immunity. We therefore remand to the District Court to assess in the first instance, with appropriate input from the parties, whether a prosecution involving Trump's alleged attempts to influence the Vice President's oversight of the certification proceeding in his capacity as President of the Senate would pose any dangers of intrusion on the authority and functions of the Executive Branch.

Over and over again, then, Roberts has applied his new standard — whether anything might conceivably intrude on the functions of the

Presidency — to immunize usurping Congress' (and states') role in certifying the election.

What John Roberts has done — at least preliminarily — is carve out an Executive authority so broad that in every area where the President is explicitly excluded, even in the role of candidate-for-President, the President can still act with absolute immunity.

That authorizes the President to use all the powers of the Presidency to win re-election — precisely the opposite holding of what Blassingame adopted.

In an opinion that tries to cloak his power grab with an appeal to President Washington, John Roberts has suffocated the greatest thing Washington gave the United States, the presumption that Presidential powers would cede to the power of elections.