

**THE “LOADED WEAPON” OF PRESIDENTIAL IMMUNITY:  
AN INTERNATIONAL LAW PERSPECTIVE ON *TRUMP V. UNITED STATES***

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ABSTRACT

*In July 2024, the Supreme Court of the United States held that President Donald Trump enjoys absolute immunity for acts he committed within his constitutional powers as President, even if they were unlawful under U.S. law. Under international law, upon vacating office, a head of state continues to enjoy functional immunity for prior acts in their official capacity, which may include acts that exceeded the person’s authority. In this Article, we analyze the Supreme Court’s ruling from the viewpoint of international law. We explore the divergences between the Supreme Court’s approach to official and unofficial conduct and that of international law. In particular, we address the Court’s tripartite distinction between immunity and presumptive immunity for official conduct, and non-immunity for unofficial conduct—an approach that does not exist in international law. We consider how the Supreme Court’s categorization of activities will have implications both domestically and internationally.*

*We are delighted to write this contribution in honor of Professor David Stewart whose work on immunity law in the United States and internationally is consistently insightful and thoughtful. His enthusiasm for the intricacies and implications of this area of law is infectious, and his support for colleagues, junior and senior alike, is a model for us all.*

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I. INTRODUCTION

Under international law, former heads of states continue to enjoy immunity from criminal jurisdiction for certain conduct. This immunity *ratione materiae* (or functional immunity) “belong[s] not to the individual but to the state in question.”<sup>1</sup> It exists in order to “preserve the integrity of the activities of the foreign state” during the period when the head of state was in control. Without this protection, “the sovereign immunity of the state could be

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<sup>1</sup> *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No. 3)* [2000] 1 AC 147 (HL) 265 [hereinafter *Pinochet (No. 3)*] (per Lord Saville). See also *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, Judgment, 2002 I.C.J. 3, ¶ 31 [hereinafter *Arrest Warrant*] (Feb. 14).

evaded by calling in question acts done during the previous [head of state's] time.”<sup>2</sup> But this international law immunity is limited—it only pertains to acts performed in an official capacity while the head of state was in post.<sup>3</sup>

In July 2024, the Supreme Court of the United States held, in a six-to-three ruling, that President Trump enjoys absolute immunity for acts he committed within his constitutional powers as President, even if they were unlawful under U.S. law.<sup>4</sup> This marks the first time that the Supreme Court has recognized any form of presidential immunity from prosecution.<sup>5</sup>

In this Article, we analyze the Supreme Court's ruling from the viewpoint of international law. Unlike the approach of the Supreme Court, the international law starting point is that a country's official is *not* immune from the criminal jurisdiction of their own country's courts.<sup>6</sup> Moreover, the Supreme Court develops a tripartite distinction between (i) absolute immunity; (ii) presumptive immunity; and (iii) non-immunity depending on whether the conduct fell within the President's “core” constitutional powers.<sup>7</sup> Such a distinction also does not align with the international law approach.

After summarizing the Supreme Court's ruling, we compare the Court's assessment of official and unofficial conduct with the current approach under international law. The next section addresses the majority's decision on the relationship between presidential immunity and illegal conduct. We conclude with some observations on the ramifications of this decision.

## II. THE SUPREME COURT'S RULING

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<sup>2</sup> *Id.* at 202 (per Lord Browne-Wilkinson).

<sup>3</sup> See Int'l L. Comm'n, Rep. on the Work of its Seventy-third Session, art. 6, U.N. Doc. A/77/10 (2022) [hereinafter Draft Articles on Immunity of State Officials]. Article VI is the Commission's Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction. It was adopted on first reading.

<sup>4</sup> See *Trump v. United States*, 603 U.S. 593, 610-11 (2024).

<sup>5</sup> See *id.* at 605.

<sup>6</sup> Arrest Warrant, *supra* note 1, ¶ 61.

<sup>7</sup> *Trump*, 603 U.S. at 606.

In August 2023, a federal grand jury issued an indictment accusing President Trump of five streams of activity occurring during and after the November 2020 election.<sup>8</sup> First, it alleged that President Trump and his co-conspirators knowingly used false claims of election fraud to compel election officials to change electoral votes for President-elect Biden to President Trump.<sup>9</sup> Second, President Trump and his co-conspirators were alleged to have organized fraudulent slates of electors in seven targeted states, which were sent to be counted at the certification proceeding on January 6, 2021.<sup>10</sup> Third, President Trump and his co-conspirators were said to have attempted to use the U.S. Department of Justice to conduct sham election investigations and send a letter to some states, which falsely claimed that the Justice Department had identified significant concerns that may have impacted the election outcome.<sup>11</sup> Fourth, President Trump and his co-conspirators were alleged to have attempted to persuade Vice President Pence to fraudulently alter election results, and when that failed, repeated knowingly false claims of election fraud to gather supporters.<sup>12</sup> Fifth, President Trump and his co-conspirators were said to have exploited the disruption created by the enraged crowd storming the Capitol by redoubling efforts to levy claims of election fraud and convince Members of Congress to further delay the certification.<sup>13</sup> The grand jury concluded that these allegations were properly supported by evidence.<sup>14</sup>

President Trump moved to dismiss the indictment based on presidential immunity.<sup>15</sup> The District Court<sup>16</sup> and DC Circuit<sup>17</sup> denied the motion to dismiss, holding that “former Presidents do not possess absolute federal criminal immunity for any acts committed while in

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<sup>8</sup> Indictment, *United States v. Trump*, No. 1:23-cr-257 (D.D.C. Aug. 1, 2023), [https://www.justice.gov/storage/US\\_v\\_Trump\\_23\\_cr\\_257.pdf](https://www.justice.gov/storage/US_v_Trump_23_cr_257.pdf).

<sup>9</sup> *Trump*, 603 U.S. at 602.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 603.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *See United States v. Trump*, 704 F. Supp .3d 196, 219-220 (D.D.C. 2023).

<sup>17</sup> *See United States v. Trump*, 94 F.4th 1173, 1208 (D.C. Cir. 2024).

office.”<sup>18</sup> In *Trump v. United States*, the Supreme Court, on appeal, held that President Trump cannot be prosecuted for actions within his constitutional powers as President.<sup>19</sup> Chief Justice Roberts, writing for the majority, confirmed that the President is absolutely immune from criminal prosecution for acts within his exclusive authority:

[W]e conclude that the separation of powers principles explicated in our precedent necessitate at least a *presumptive* immunity from criminal prosecution for a President’s acts within the outer perimeter of his official responsibility. Such an immunity 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. Indeed, if presumptive protection for the President is necessary to enable the “effective discharge” of his powers when a prosecutor merely seeks evidence of his official papers and communications, . . . it is certainly necessary when the prosecutor seeks to charge, try, and imprison the President himself for his official actions. At a minimum, the President must therefore be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose no “dangers of intrusion on the authority and functions of the Executive Branch.” *Fitzgerald*, 457 U.S., at 754.<sup>20</sup>

This immunity does not extend to unofficial conduct:

As for a President’s unofficial acts, there is no immunity. The principles we set out in *Clinton v. Jones* confirm as much. When Paula Jones brought a civil lawsuit against then-President Bill Clinton for acts he allegedly committed prior to his Presidency, we rejected his argument that he enjoyed temporary immunity from the lawsuit while serving as President. Although Presidential immunity is required for *official* actions to ensure that the President’s decisionmaking is not distorted by the threat of future litigation stemming from those actions, that concern does not support immunity for *unofficial* conduct . . . The “justifying purposes” of the immunity we recognized in *Fitzgerald*, and the one we recognize to- day, are not that the President must be immune because he is the President; rather, they are to ensure that the President can undertake his constitutionally designated functions effectively, free from undue pressures or distortions. . . . “[I]t [is] the nature of the function performed, not the identity of the actor who perform[s]

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<sup>18</sup> *Trump*, 704 F. Supp. 3d at 220.

<sup>19</sup> *Trump v. United States*, 603 U.S. 593, 606 (2024).

<sup>20</sup> *Id.* at 614.

it, that inform[s] our immunity analysis.” *Forrester v. White*, 484 U.S. 219, 229 (1988). The separation of powers does not bar a prosecution predicated on the President’s unofficial acts.<sup>21</sup>

The case was remanded back to the presiding U.S. District Court judge to determine whether President Trump’s conduct fell within the President’s official acts, which required determining whether charging President Trump would “pose any dangers of intrusion on the authority and functions of the Executive Branch.”<sup>22</sup> Notably, the Supreme Court pre-emptively determined that some of President Trump’s conduct—such as his interactions with Justice Department officials—were official acts.<sup>23</sup> However, since President Trump’s 2024 re-election, almost all of the charges have been dropped.<sup>24</sup>

The United States is not the only nation that provides immunity to its head of state under constitutional rules.<sup>25</sup> A survey of practice from African,<sup>26</sup> Asian,<sup>27</sup> European,<sup>28</sup> and Latin American countries<sup>29</sup> shows that the immunity of heads of state under domestic law is of growing importance.<sup>30</sup> The general rule across these jurisdictions is that constitutional

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<sup>21</sup> *Id.* at 615.

<sup>22</sup> *Id.* at 598; *see also* *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982).

<sup>23</sup> *Trump*, 603 U.S. at 621.

<sup>24</sup> Madeline Halpert, *Special counsel’s last criminal case against Trump dismissed*, BBC (Nov. 26, 2024), <https://www.bbc.co.uk/news/articles/c4gvd7kxxj5o>.

<sup>25</sup> Some States also give functional immunity to judges and parliamentarians, but this is limited to official functions and can be waived by an independent body. *See* Kirsten Roberts Lyer, *Protecting the Protectors: Redefining Immunity for National Human Rights Institutions*, 29 INT’L J. HUMAN RIGHTS 593, 598-99 (2024).

<sup>26</sup> *Sam-Sumana v. Attorney General and Another*, (SC 4 of 2015) [2015] SLSC 1214 (5 May 2015) (Sierra Leone); CONSTITUTION art. 145 (2010) (Kenya). *See generally* Aila Škrbić, *Immunity of Heads of State under Constitutional Law*, in MAX PLANCK ENCYCLOPAEDIA OF COMPARATIVE CONSTITUTIONAL LAW (Martina Mantovani et al. eds., 2019), <https://oxcon.oup.com/display/10.1093/law-mpeccol/law-mpeccol-e305>.

<sup>27</sup> CONSTITUTION OF THE PEOPLE’S REPUBLIC OF BANGLADESH Dec. 16, 1972, arts. 51-52 (Bangl.); CONSTITUTION OF THE REPUBLIC OF KAZAKHSTAN Aug. 30, 1995, art. 46 (Kaz.); *See generally* *Rubico v. Glora Macapagal-Arroyo*, G.R. No 183871 (Feb. 18, 2010) (Phil.); PAKISTAN CONST. arts. 173, 248. *See generally* Škrbić, *supra* note 26.

<sup>28</sup> Grl, Lov art. 13 af 5.6.1953 [Constitution] (Denmark); Grl art. 5 [Constitution] (Norway); *see generally* *Crown Proceedings Act 1947*, c.44 (UK); 1958 CONST. art. 67-68 (Fr.); Corte Cost. [Constitutional Court], 4 December 2012, n. 1/203, ECLI:IT:COST:2013:1 (It.) (finding that allowing recordings of the President’s telephone conversations to be used in criminal proceedings would thwart the President’s functions premised on informal contacts and networking); BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBL, art. 9 (Austria); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Basic Law], art. 25 (Ger.), translation at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html); *see generally* Škrbić, *supra* note 26.

<sup>29</sup> Constitución Política de los Estados Unidos Mexicanos, CP, art. 108, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.); Arts. 53, 60, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO Mar. 29, 1976, arts. 38, 80(2); *see generally* Škrbić, *supra* note 26.

<sup>30</sup> Škrbić, *supra* note 26, at §58.

immunity is granted to sitting heads of state, even if they have violated the law, as long as the violation was committed in the context of their official duties. However, former heads of state are no longer protected by personal immunity, and there is a growing emphasis on the functional dimension of immunity as the appropriate basis for granting immunity, instead of personal status.<sup>31</sup> Notably, there is an emerging practice<sup>32</sup> of limiting the immunity of sitting heads of state, according to the principle that no person is above the law.<sup>33</sup> The Supreme Court's judgment has been criticized for its incompatibility with this principle.<sup>34</sup>

Concerns have also been raised about the potential for this decision to strengthen a U.S. culture of impunity for actions taken abroad by presidents.<sup>35</sup> The U.S. Congress gives presidents "wide latitude" to take actions overseas,<sup>36</sup> and the Supreme Court's judgment has been said to create a "remedial vacuum", undermining checks on corruption and leaving a gap in accountability.<sup>37</sup> In her dissent, Justice Sotomayor observed that this "new official-acts immunity now 'lies about like a loaded weapon' for any President that wishes to place his own interests, his own political survival, or his own financial gain, above the interests of the Nation."<sup>38</sup>

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<sup>31</sup> *See id.*

<sup>32</sup> *Czech Senate approves constitutional lawsuit against president*, CONSTITUTIONNET (Jul. 25, 2019), <https://constitutionnet.org/news/czech-senate-approves-constitutional-lawsuit-against-president>; *Law on impeachment of president comes into force in Ukraine*, CONSTITUTIONNET (Sept. 25, 2019), <https://constitutionnet.org/news/law-impeachment-president-comes-force-ukraine>; *Mexican lawmakers vote overwhelmingly to end presidential immunity*, REUTERS (Oct. 29, 2019), <https://www.reuters.com/article/world/mexican-lawmakers-vote-overwhelmingly-to-end-presidential-immunity-idUSKBN1X82TE/>; Ione Wells & Vanessa Buschschlüter, *Bolsonaro sentenced to 27 years in prison for plotting Brazil coup*, BBC NEWS (Sept. 11, 2025), <https://www.bbc.co.uk/news/articles/c8xrqk9p4xo>; *Paraguay President Fernando Lugo impeached by congress*, BBC NEWS (Jun. 23, 2012), <https://www.bbc.co.uk/news/world-latin-america-18553813>; *South Korean president faces impeachment vote as defence minister offers to resign*, BBC NEWS (Dec. 3, 2024), <https://www.bbc.co.uk/news/live/cn38321180et>.

<sup>33</sup> Škrbić, *supra* note 26, at 60.

<sup>34</sup> *Trump v. United States*, 603 U.S. 593, 667, 684 (2024) (Sotomayor, J., dissenting).

<sup>35</sup> *See, e.g.*, Brian Osgood, *What could the Supreme Court's immunity ruling mean for U.S. foreign policy?*, AL JAZEERA (Jul. 4, 2024), <https://www.aljazeera.com/news/2024/7/4/what-could-the-supreme-courts-immunity-ruling-mean-for-U.S.-foreign-policy>.

<sup>36</sup> *See id.*

<sup>37</sup> *See Aziz Huq, Presidential Criminal Immunity: A Rule-of-Law Threat Beyond the Oval Office*, LAWFARE (Jun. 12, 2025), <https://www.lawfaremedia.org/article/presidential-criminal-immunity--a-rule-of-law-threat-beyond-the-oval-office>.

<sup>38</sup> *Trump*, 603 U.S. at 684 (Sotomayor, J., dissenting) (citing *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting)).

The Court’s decision in *Trump v. United States* is in conflict with the premise in international law that state officials can—and should—be held accountable by their own courts. When the International Court of Justice (ICJ) considered the issue of the immunity of the most senior government officials in 2002, it stated that such immunity did not equate to impunity because of the action that their own State could take.<sup>39</sup> As explained by the ICJ, “the immunities enjoyed under international law by an incumbent or former Minister of Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances” because “such persons enjoy no criminal immunity under international law *in their own countries*, and may thus be tried by those countries’ courts in accordance with the relevant rules of domestic law.”<sup>40</sup>

### III. THE DISTINCTION BETWEEN OFFICIAL AND UNOFFICIAL CONDUCT

Under international law, upon vacating office, a head of state loses his or her immunity *ratione personae* (also known as personal immunity), but continues to enjoy a functional immunity.<sup>41</sup> This immunity protects the former head of state from being prosecuted for acts in an official capacity such as military activities, the exercise of police power, or legislative acts.<sup>42</sup> There is not yet an exhaustive list of acts performed in an “official capacity.” The critical question is “whether the conduct was engaged in under colour of or in ostensible exercise of the head of state’s public authority.”<sup>43</sup> Illegal conduct is not automatically excluded from the scope of official immunity. As Lord Millett held in *Pinochet (No. 3)*:

The immunity is available whether the acts in question are illegal or unconstitutional or otherwise unauthorised under the internal law of the state, since the whole purpose of state immunity is to

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<sup>39</sup> Arrest Warrant, *supra* note 1, ¶ 61 (emphasis added).

<sup>40</sup> *Id.*

<sup>41</sup> Draft Articles on Immunity of State Officials, *supra* note 3, art. 6(2). Immunity *ratione personae* continues to apply with respect to acts performed in an official capacity during term of office. *See id.* art. 6(3).

<sup>42</sup> Arrest Warrant, *supra* note 1, ¶ 61; *Pinochet (No. 3)*, *supra* note 1, at 202E-F (per Lord Browne-Wilkinson); *see* JOANNE FOAKES, THE POSITION OF HEADS OF STATE AND SENIOR OFFICIALS IN INTERNATIONAL LAW 142-43 (2014); *Jones v. Saudi Arabia* [2006] UKHL 26 [11-12], [2007] 1 AC 270; Draft Articles on Immunity of State Officials, *supra* note 3, art. 2 comment 31; HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 556 (3rd ed., 2015).

<sup>43</sup> *Pinochet (No. 3)*, *supra* note 1, at 210 (per Lord Goff) (quoting Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 COLLECTED COURSES HAGUE ACAD. INT’L L. 10, 56 (1994)).

prevent the legality of such acts from being adjudicated upon in the municipal courts of a foreign state. A sovereign state has the exclusive right to determine what is and is not illegal or unconstitutional under its own domestic law.<sup>44</sup>

Functional immunity does not bar proceedings in respect of “acts committed during [the] period of office in a private capacity.”<sup>45</sup> When acting in his or her public capacity, the head of state enjoys the same immunities as the State itself.<sup>46</sup> Functional immunity has a protective function because it “prevent[s] the official and governmental acts of one state from being called into question in proceedings before the courts of another.”<sup>47</sup> The European Court of Human Rights has explained that “[t]he weight of authority at international and national level . . . appears to support the proposition that State immunity in principle offers individual employees or officers of a foreign State protection in respect of acts undertaken on behalf of the State under the same cloak [of immunity] as protects the State itself.”<sup>48</sup> Functional immunity also reflects the “non-personal responsibility of State officials for acts performed on behalf of the State”<sup>49</sup>—“State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act.”<sup>50</sup> On this approach, the official cannot be impleaded because their conduct is attributable to the country, so that only the state can be the right defendant.<sup>51</sup>

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<sup>44</sup> Pinochet (No. 3), *supra* note 1, at 270 (per Lord Millett).

<sup>45</sup> Arrest Warrant, *supra* note 1, ¶ 61.

<sup>46</sup> The United Nations Convention on Jurisdictional Immunities of Foreign States and their Property includes Heads of State within the definition of the “State.” G.A. Res. 59/38, U.N. Doc. A/RES/59/38, art. 2(1)(b)(i), (iv) (Dec. 2, 2004) (not yet in force). Some domestic immunity legislation also take this approach. *E.g.*, Canadian State Immunity Act, R.S.C. 1985, c. S-18, s. 2 (Can.); *e.g.*, State Immunity Act 1979, 2020 rev. edn, s. 16(1)(a) (Sing.). The UK includes Heads of State in the definition of a “State” when he is “in his official capacity. State Immunity Act 1978, c. 42 §§ 14(1)(a), 20(a) (UK).

<sup>47</sup> Pinochet (No. 3), *supra* note 1, at 269 (per Lord Millett).

<sup>48</sup> Jones v. United Kingdom, App. Nos. 34356/06 and 40528/06, ¶ 204 (Jan. 14, 2014), <https://hudoc.echr.coe.int/eng?i=001-140005>.

<sup>49</sup> See Rosanne van Alebeek, *Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts*, in THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 496, 499-500 (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019).

<sup>50</sup> Prosecutor v. Blaškić, IT-95-14, Judgment, ¶ 38 (Int’l Crim. Trib. for the former Yugoslavia, Oct. 29, 1997).

<sup>51</sup> van Alebeek, *supra* note 49, at 501.

In 2007, the International Law Commission (ILC) began its study of the immunity of a country's officials from foreign criminal jurisdiction. In the current version of the draft articles (adopted on first reading), the ILC defines "act[s] performed in an official capacity" as "any act performed by a State official in the exercise of State authority."<sup>52</sup> According to the ILC, such acts will share a "direct connection between the act and the exercise of State functions and powers," found where an official is acting "in the exercise of their functions and in the interests of the State."<sup>53</sup> To be official (and therefore immune), the ILC draft articles provide that the act must be attributable to the state<sup>54</sup> under the relevant customary international law rules.<sup>55</sup> The analysis of who may be afforded immunity is made on a case-by-case basis.<sup>56</sup> The ILC has placed no special weight on the importance of the official's motive in determining whether his or her actions were official.<sup>57</sup> However, "as a rule, acts performed by officials *purely* for their own benefit and in their own interest cannot be considered as acts performed in an official capacity, even though they may appear to have been performed officially."<sup>58</sup> Moreover, in relation to national responsibility, the ILC noted that:

A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State.<sup>59</sup>

In finding that former presidents have absolute immunity for official conduct, the Supreme Court's decision superficially adopts an official/unofficial dichotomy. However, the analysis

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<sup>52</sup> Draft Articles on Immunity of State Officials, *supra* note 3, art. 2.

<sup>53</sup> *Id.*, art. 2 cmt. 26.

<sup>54</sup> *Id.*, art. 2 cmt. 24.

<sup>55</sup> Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, at 31, U.N. Doc. A/56/10 (2001), *reprinted in* 2001 Y.B. Int'l L. Comm'n 31, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter Articles on State Responsibility]; *Draft Articles on Immunity of State Officials*, *supra* note 3, art. 2 cmt. 25.

<sup>56</sup> Draft Articles on Immunity of State Officials, *supra* note 3, art. 2 cmt. 8, 12.

<sup>57</sup> *Id.*, art. 2 cmt. 30.

<sup>58</sup> *Id.*, cmt. 25 (emphasis added).

<sup>59</sup> Articles on State Responsibility, *supra* note 55, art. 4 cmt. 13. This conclusion was later cited by Lord Bingham in *Jones v. Saudi Arabia*. *Jones v. Saudi Arabia* [2006] UKHL 26 [12], [2007] 1 AC 270.

does not mirror the international law approach to immunity. The Supreme Court decided that the category of “official conduct” contains two subdivisions: (i) acts falling within a president’s “core” functions, for which former presidents enjoys absolute immunity,<sup>60</sup> and (ii) other acts falling within the “outer perimeter” of presidential authority, for which former presidents are “at least” presumptively immune.<sup>61</sup> “Core” functions are those unfettered by legal restrictions, such as hiring and firing employees or issuing pardons, which the president may do on his or her own discretion.<sup>62</sup> For these acts, the president is absolutely immune.<sup>63</sup> Conduct falling within the “outer perimeter” of the president’s functions can be harder to categorize as official or unofficial, and in these cases, the president is presumptively immune unless the prosecution can demonstrate that the relevant act was unofficial,<sup>64</sup> or, as argued by Lord Sumption, that there would be no danger of a “distracting ‘intrusion’” on his or her attention.<sup>65</sup> A president’s unofficial conduct will not be immune.<sup>66</sup>

This tripartite division of immune, presumptively immune, and non-immune conduct does not exist in international law—as international law does not include a gray zone between official and unofficial conduct. For example, in *Jones v. Saudi Arabia*, Lord Hoffmann cited to a case in which a U.S. deputy constable who, holding a private grudge against the Mexican consul, had assaulted him on two separate occasions.<sup>67</sup> First, the deputy assaulted him in the street on a Sunday night, while on a private outing.<sup>68</sup> This was held to be an act in his private

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<sup>60</sup> *Trump v. United States*, 603 U.S. 593, 606 (2024).

<sup>61</sup> *Id.* at 614.

<sup>62</sup> *Id.* at 606.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 614-15.

<sup>65</sup> Jonathan Sumption, *The President’s Crimes*, PROSPECT MAGAZINE (Aug. 27, 2024), <https://www.prospectmagazine.co.uk/world/united-states/67655/the-presidents-crimes-trump-v-united-states-supreme-court>. See *Trump*, 603 U.S. at 611 (referring to the concern to avoid “diversion of the President’s attention during the decisionmaking process...” as the “dominant concern” when finding that former President Nixon was immune from suit) (citing *Clinton v. Jones*, 520 U.S. 681, 694 n. 19 (1997)).

<sup>66</sup> *Trump*, 603 U.S. at 614-16.

<sup>67</sup> *Jones v. Saudi Arabia* [2006] UKHL 26 [75], [2007] 1 AC 270 (citing *Mallén v. United States*, 4 R.I.A.A. 173, 174-77 (Gen. Claims Comm’n, 1927)).

<sup>68</sup> *Mallén v. United States*, 4 R.I.A.A. 173, 174-75 (Gen. Claims Comm’n, 1927).

capacity.<sup>69</sup> On the second occasion, the on-duty deputy boarded a car in which the consul was traveling, showed his badge, beat him up, and took him to jail.<sup>70</sup> Although this seemed to be a “private act of revenge,” “the act as a whole [could] only be considered as the act of an official” and was therefore immune.<sup>71</sup>

The Supreme Court’s approach is based on the scope of the president’s power under the Constitution. Although the Supreme Court ultimately left the scope to be determined by the lower courts, the majority held that the primary step in determining whether an action is covered by immunity is to assess whether the conduct is “not manifestly or palpably beyond [the president’s] authority”.<sup>72</sup> If the conduct falls within the president’s constitutional authority, the act will be official.<sup>73</sup> Similar to under international law,<sup>74</sup> motives are irrelevant.<sup>75</sup> The approach in international law—which takes into account the attribution of the conduct to the country and the existence of a “special connection” between the act and the country<sup>76</sup>—is more contextual than the Supreme Court’s analysis.

In terms of the Supreme Court’s categorization of President Trump’s conduct into immune, presumptively immune, and non-immune, the majority concluded that his alleged attempts to compel the Department of Justice to launch criminal investigations into non-existent election frauds fell within the “core” constitutional duty to “take Care that the laws be faithfully executed” and were therefore absolutely immune from prosecution.<sup>77</sup> The allegations that President Trump tried to swing states to falsify their election returns to the Senate and convince the Vice President to reject the election results of certain states did not concern acts

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<sup>69</sup> *Id.* at 174-75 ¶ 4.

<sup>70</sup> *Id.* at 176-77 ¶ 7.

<sup>71</sup> *Id.* at 177.

<sup>72</sup> *Trump v. United States*, 603 U.S. 593, 618 (quoting *Blassingame v. Trump* 87 F.4<sup>th</sup> 1, 13 (D.C. Cir. 2023)).

<sup>73</sup> *See id.* at 617.

<sup>74</sup> Articles on State Responsibility, *supra* note 53, art. 4, cmt. 2; *Jones v. Saudi Arabia* [2006] UKHL 26 [12], [2007] 1 AC 270.

<sup>75</sup> *Trump*, 603 U.S. at 616.

<sup>76</sup> Draft Articles on Immunity of State Officials, *supra* note 3, art. 2 cmt. 24, 26.

<sup>77</sup> *Trump*, 603 U.S. at 620 (citing U.S. CONST. art. 2 § 3).

within his “exclusive constitutional authority”<sup>78</sup> (but did “involve official conduct”)<sup>79</sup> so were only presumptively immune.<sup>80</sup> However, discussing such matters with state authorities and the Vice President in particular may be a presidential function.<sup>81</sup> President Trump’s threatened removal of the acting Attorney General formed part of the executive branch’s function of “[i]nvestigative and prosecutorial decisionmaking,” such that it fell within his conclusive and preclusive presidential authority and could not be reviewed by the Court.<sup>82</sup> As for President Trump’s conduct on January 6, 2021, when he allegedly urged his supporters to go to the Capitol and place pressure on the Vice President, the Court found that the President “possesses ‘extraordinary power to speak to his fellow citizens...’” and President Trump’s tweeting and speaking as President were also immune.<sup>83</sup> Whether this will be the case depends on an objective analysis of “content, form, and context.”<sup>84</sup>

By contrast, under international law, actions taken purely within a head of state’s own interests generally do not enjoy immunity and would not be attributable to the country.<sup>85</sup> It would be difficult to contend that President Trump’s efforts to overturn the election results were taken within the interests of the nation, rather than in the interest of retaining presidential power for his own gain.<sup>86</sup>

In finding that former U.S. Presidents enjoy absolute immunity for acts taken within their “core” constitutional powers, the Court was guided by its concern that presidents such as President Trump would be deterred from taking “bold and unhesitating action,” which raises

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 622.

<sup>80</sup> *Id.* at 620-23.

<sup>81</sup> *Id.* at 623-24.

<sup>82</sup> *Id.* at 620-21 (quoting *Heckler v. Chaney*, 470 U.S. 821, 823 (1985)).

<sup>83</sup> *Id.* at 629 (quoting *Trump v. Hawaii* 585 U.S. 667, 701 (2018)).

<sup>84</sup> *Id.* (quoting *Snyder v. Phelps*, 562 U.S. 443 (2011)).

<sup>85</sup> Draft Articles on Immunity of State Officials, *supra* note 3, art. 2 cmt. ¶ 25: “[A]s a rule, acts performed by officials purely for their own benefit and in their own interest cannot be considered as acts performed in an official capacity, even though they may appear to have been performed officially.”

<sup>86</sup> *See Trump*, 603 U.S. 593, 684 (Sotomayor J., dissenting).

“unique risks to the effective functioning of government.”<sup>87</sup> The majority also observed that if a former President’s official acts are routinely subjected to scrutiny in prosecutions, “the independence of the executive branch may be significantly undermined.”<sup>88</sup> These justifications have been criticized as potentially ignoring the existing substantive, ex ante limits on prosecutorial action, and the ex post checks on partisan motives under U.S. law.<sup>89</sup>

Under international law, “the court must consider the whole context in which the claim against [the state official] is made.”<sup>90</sup> It is not correct to view the relevant claims “narrowly.”<sup>91</sup> If the Supreme Court had taken a holistic view of President Trump’s conduct, it may well have reached the conclusion that these were self-interested activities in his personal capacity. However, the Court instead chose to assess each of President Trump’s actions in isolation. As Lord Sumption has noted:

[t]he majority did not say and cannot possibly have thought that it was part of the official functions of the president to try to overturn a regular election result and occupy the White House through what would have amounted to a coup. But instead of looking at the nature and object of the conspiracy, their approach was to look separately at each of the things Trump is alleged to have done to further it.<sup>92</sup>

#### IV. OFFICIALLY UNLAWFUL CONDUCT?

The decision to treat President Trump’s alleged unlawful conduct as immune appears to be in tension with the Supreme Court’s findings on the official nature of presidential conduct. For example, the Court found that President Trump’s discussions with the Department of Justice that sought to encourage the Department to launch criminal investigations into alleged

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<sup>87</sup> *Id.* at 613 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 745 (1982)).

<sup>88</sup> *Id.* at 614 (internal quotations omitted) (quoting *Trump v. Vance*, 591 U.S. 786, 808 (2020)).

<sup>89</sup> Aziz Huq, *Presidential Criminal Immunity: A Rule-of-Law Threat Beyond the Oval Office*, *LAWFARE* (Jun. 12, 2025), <https://www.lawfaremedia.org/article/presidential-criminal-immunity--a-rule-of-law-threat-beyond-the-oval-office>.

<sup>90</sup> *Surkis v. Poroshenko* [2021] EWHC (Comm) 2512 [49, 79] (citing *Playa Larga v. I Congreso del Partido* [1983] 1 AC (HL) 244, 267); *see also* *Holland v. Lampen-Wolfe* [2000] 1 WLR 1573, 1577 (HL).

<sup>91</sup> *Surkis v. Poroshenko* [2021] EWHC (Comm) 2512 [79].

<sup>92</sup> Jonathan Sumption, *The President’s Crimes*, *PROSPECT MAGAZINE* (Aug. 27, 2024), <https://www.prospectmagazine.co.uk/world/united-states/67655/the-presidents-crimes-trump-v-united-states-supreme-court> (writing extrajudicially).

election frauds were absolutely immune.<sup>93</sup> But this ignores the fact that “the discussions were actually about defeating the laws by mounting sham investigations.”<sup>94</sup> The relevant communications did not concern legitimate policy discussions, but instead efforts aimed at subverting the law. By a “perverse irony,” the fact that the president has a duty to see the observance of the law becomes “a reason why he cannot be prosecuted for breaking it himself.”<sup>95</sup> Moreover, the Supreme Court appears to ignore some of the key facts that weigh in favour of President Trump’s conduct being unofficial. A different conclusion might have been reached, for example, if the Court had acknowledged that the “fellow citizens” that President Trump was addressing on January 6th were an angry mob “whom he was inviting to invade the Capitol and threaten legislators with violence.”<sup>96</sup>

Justice Coney Barrett, in her concurrence, might have left the door open for the loss of immunity when the criminal statute makes clear that the President is subject to its authority:

The first question is whether the relevant criminal statute reaches the President’s official conduct. Not every broadly worded statute does. For example, §956 covers conspiracy to murder in a foreign country and does not expressly exclude the President’s decision to, say, order a hostage rescue mission abroad . . . . The underlying murder statute, however, covers only “unlawful” killings. §1111. The Office of Legal Counsel has interpreted that phrase to reflect a public-authority exception for official acts involving the military and law enforcement . . . . I express no view about the merits of that interpretation, but it shows that the threshold question of statutory interpretation is a nontrivial step.<sup>97</sup>

This in some ways echoes the approach of the House of Lords in *Pinochet (No. 3)* when some judges contended that heads of state should not enjoy immunity from criminal

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<sup>93</sup> *Trump*, 603 U.S. 593, 619-621 (2024).

<sup>94</sup> Sumption, *supra* note 90.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *See Trump*, 603 U.S. at 652 (Barrett, J., concurring in part).

proceedings after leaving office because they are included in the list of persons liable for the commissions of torture<sup>98</sup> in the Convention against Torture.<sup>99</sup>

The idea that the U.S. President might declare a political opponent an enemy of the country and have a military sniper kill that person was raised as a hypothetical during oral arguments. Justice Sotomayor asked President Trump’s counsel “[i]f the president decides that his rival is a corrupt person and he orders the military or orders someone to assassinate him, is that within his official acts [] for which he can get immunity?” Counselor Sauer replied “[i]t would depend on the hypothetical. But we can see that could well be an official act[,]” even if it was for personal gain.<sup>100</sup> The resulting decision does not categorically rule that act to be a prosecutable abuse of power.<sup>101</sup> This is all the more ominous given President Trump’s recent statements about targeting the “enemy from within.”<sup>102</sup>

Finally, one issue that the judgment has not considered and that has only received limited discussion since, is where the Supreme Court’s decision now places U.S. law when considered from the international perspective. As noted above, the growing practice in other regions is to scrutinize the functions for which head-of-state immunity is invoked.<sup>103</sup> Moreover, the Supreme Court appears to have ruled that, even if a U.S. President orders an act of torture to take place on U.S. territory or where the United States has control of a territory, the president will enjoy immunity under constitutional law before U.S. courts. In contrast, under the *Pinochet*

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<sup>98</sup> See *Pinochet* (No. 3), *supra* note 1, ¶¶ 200-01 (per Lord Browne-Wilkinson).

<sup>99</sup> See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, 10 Dec. 10, 1984, 1465 U.N.T.S. 85 (referring to “a public official or other person acting in an official capacity”).

<sup>100</sup> Transcript of Oral Argument at 9-10, *Trump v. United States*, 603 U.S. 593 (2024) (No. 23-939), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2023/23-939\\_3fb4.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-939_3fb4.pdf).

<sup>101</sup> See George Chidi, *How Might a Rogue President Use the U.S. Supreme Court Immunity Ruling?*, *GUARDIAN* (July 8, 2024), <https://www.theguardian.com/us-news/article/2024/jul/08/how-president-could-use-supreme-court-immunity-ruling>.

<sup>102</sup> See Tom Dreisbach, *Trump Has Made More Than 100 Threats to Prosecute or Punish Perceived Enemies*, *NPR* (Oct. 22, 2024), <https://www.npr.org/2024/10/21/nx-s1-5134924/trump-election-2024-kamala-harris-elizabeth-cheney-threat-civil-liberties>.

<sup>103</sup> See *supra* Section II; see also Škrbić, *supra* note 26, at §§25-57 59.

(No. 3) decision and subsequent developments in relation to the exercise of universal jurisdiction, the president will not enjoy immunity in foreign courts.<sup>104</sup>

In summary, the Supreme Court’s decision to afford President Trump presidential immunity is troublesome in treating the president’s duty to uphold the law as barring prosecution for breaking it. The decision also potentially ignores the unofficial aspects of President Trump’s actions. The breadth of the immunity it affords to the conduct of former presidents, regardless of whether those acts are for personal or governmental interests, is also problematic, and potentially places U.S. law at odds with broader international practices.

#### IV. CONCLUSION

The decision of the Supreme Court establishes that a president cannot be prosecuted for the crime committed in her official capacity—for example, pocketing funds from a foreign government.<sup>105</sup> This “opens up potential for a foreign government to bribe their way out of state sanctions, an embargo or diplomatic trouble from, say, murdering a journalist working for a US newspaper.”<sup>106</sup> Nor can the president be prosecuted for launching a military action that is illegal, after firing refusing officers and offering those who obeyed a presidential pardon, immunizing them from the consequences of a court martial.<sup>107</sup> But perhaps the most troubling outcome of this decision is that it makes the president’s actions within the United States just as unchecked as they are outside of the borders.<sup>108</sup> As Hathaway noted, American Presidents have, for decades, committed violations of international law without any possibility of legal

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<sup>104</sup> Michael Goldfarb & Philippe Sands, *The SCOTUS Presidential Immunity Decision and International Law*, FRDH PODCAST, (July 7, 2024), <https://www.goldfarbpod.com/the-scotus-presidential-immunity-decision-and-international-law/>.

<sup>105</sup> See Chidi, *supra* note 99.

<sup>106</sup> *Id.*; see Mohamad Bazzi, *Khashoggi was killed five years ago. Thanks to Trump and Biden, Saudi Arabia is stronger than ever*, GUARDIAN (Oct. 2, 2023) <https://www.theguardian.com/commentisfree/2023/oct/02/five-years-after-killing-a-journalist-in-cold-blood-saudi-arabia-is-stronger-than-ever>.

<sup>107</sup> See Chidi, *supra* note 99.

<sup>108</sup> Oona A. Hathaway, *For the Rest of the World, the U.S. President has Always Been Above the Law*, FOREIGN AFFAIRS (July 16, 2024), <https://www.foreignaffairs.com/united-states/rest-world-us-president-has-always-been-above-law>.

accountability in either domestic or international courts<sup>109</sup> due to a lack of jurisdiction or non-justiciability.<sup>110</sup>

*Trump v. United States* also has wider implications. Functional immunity is a customary rule, formed through State practice and *opinio juris*.<sup>111</sup> The contours of certain exceptions to such immunity is under discussion in the International Law Commission and the countries' practices are mixed in regards to an exception for serious violations of international law.<sup>112</sup> As the consequences of the Supreme Court's decision are explored, and with a precedent from the leading court of a global power, its impact will be closely watched. There are various countries around the world with leaders who may wish to adopt the same approach of affording former heads of state a broad immunity, even for acts that were not taken in the national interest.<sup>113</sup> It will be for the international community, including those within the United States who believe

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<sup>109</sup> *Id.*

<sup>110</sup> The U.S. has not accepted the compulsory jurisdiction of the ICJ and has not ratified the Rome Statute of the International Criminal Court. Domestic cases in foreign courts are likely to be barred by State immunity and also face issues of non-justiciability under the foreign act of State doctrine. *See Rome Statute of the International Criminal Court, Jul. 17, 1989, 2187 U.N.T.S. 3. See Q&A: The International Criminal Court and the United States*, HUMAN RIGHTS WATCH (Sept. 2, 2020), <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states#2>.

<sup>111</sup> Int'l L. Comm'n, Rep. on the Work of its Seventieth Session at 138, U.N. Doc. A/73/10 (2018) (Draft Conclusions on Identification of Customary International Law, with Commentaries).

<sup>112</sup> In 2022 the ILC adopted on first reading Draft Article 7 in its Articles on Immunity of State officials from foreign criminal jurisdiction, providing an exception to immunity *ratione materiae* for serious international crimes. The ILC Rapporteur noted that this draft article reflects a "discernible trend" towards limiting the application of immunity from jurisdiction *ratione materiae* in respect of certain types of behaviour that constitute crimes under international law, citing jurisprudence from Belgium, Ethiopia, France, Germany, Italy, Netherlands, Spain, Switzerland, and the UK. *See* Draft Articles on Immunity of State Officials, *supra* note 29, at 232, n. 1012. Mixed views have been expressed by governments as to whether this provision has attained the status of customary international law or remains a progressive development. *See* Int'l L. Comm'n, Rep. on the Work of its Seventy-fifth Session 53-100, U.N. Doc. A/CN.4/771 (2024), <https://documents.un.org/doc/undoc/gen/n24/027/87/pdf/n2402787.pdf>.

<sup>113</sup> *See* Goldfarb & Sands, *supra* note 102. *See Russia's Putin signs bill giving ex-presidents lifetime immunity*, AL JAZEERA (Dec. 22, 2020), <https://www.aljazeera.com/news/2020/12/22/russias-putin-signs-bill-giving-presidents-lifetime-immunity>. *See also* the results of a survey by the Law Library of Congress, finding that Kazakhstan, Kyrgyzstan and Turkmenistan grant presidents absolute immunity for acts committed while in office, including after leaving office. Law Library of Congress, *Immunity from Prosecution for Former Presidents in Selected Jurisdictions* (Oct. 2017), <https://stuff.coffeecode.net/www.loc.gov/law/help/immunity-from-prosecution/presidential-immunity-from-prosecution.pdf>. In 2018, Kyrgyzstan's Supreme Court ruled that the immunity enjoyed by the country's former presidents is unconstitutional, and ordered the government to initiate amendments to remove the immunity for ex-presidents from the legislation. *See Kyrgyz Supreme Court Rules Ex-Presidents' Immunity Unconstitutional*, RADIOFREEEUROPE (Oct. 4, 2018), <https://www.rferl.org/a/kyrgyz-supreme-court-rules-ex-presidents-immunity-unconstitutional/29525176.html>.

in accountability for those who occupy the most important office, to unload the gun of unchecked power.