

JIM COMEY PREPARES TO PREVAIL AT SCOTUS

On Nicole's podcast today, I said that many of the criminal issues that will arise from Trump's politicization of DOJ won't be all that controversial at SCOTUS (and SCOTUS is least awful on criminal justice issues). But I said one area would likely break new ground: selective and vindictive prosecution.

Jim Comey's prosecution – and that of everyone else Trump is pursuing – fits poorly in the existing precedents for selective and vindictive prosecution, even while they clearly *are* vindictive.

Plus, I noted, that Trump's penchant for yapping about legal cases even as DOJ attempts to protect him from liability in them conflicts with the language of *Trump v. USA* that – recklessly – puts the President in a prosecutorial function.

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).

Investigative and prosecutorial decisionmaking is “the special province of the Executive Branch,” *Heckler v. Chaney*, 470 U. S. 821, 832 (1985), and the Constitution vests the entirety of the executive power in the President, Art. II, §1. For that reason, Trump’s threatened removal of the Acting Attorney General likewise implicates “conclusive and preclusive” Presidential authority. As we have explained, the 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. *Myers*, 272 U. S., at 106, 176; see *supra*, at 8. The President’s “management of the Executive Branch” requires him to have “unrestricted power to remove the most important of his subordinates”—such as the Attorney General—“in their most important duties.” *Fitzgerald*, 457 U. S., at 750 (internal quotation marks and alteration omitted).

Either Trump is properly in a prosecutorial role, in which case he needs to be at the center of these cases (and interventions like the Eric Adams bribery case), exposed to discovery. Or, his interventions are improper.

The current state of affairs, where DOJ claims the President is immune from discovery, permitted to speak endlessly about criminal cases, yet order up criminal prosecutions, is fundamentally inconsistent with rule of law.

Which is why I’m interested in four people Comey has added to his defense team (while also

getting permission to submit a 45-page selective and vindictive prosecution brief, 15 pages extra).

Comey has added:

- Elias Kim, a Cooley Associate with an appellate focus
- Ephraim McDowell, a Cooley Partner focused on appellate issues
- Rebekah Donaleski, a Cooley Partner who, while at SDNY, was on the Lev Parnas/Rudy Giuliani team, including the Special Master process that exploited all of Rudy's phones
- Michael Dreeben, one of the best SCOTUS litigators out there, who worked on both the Mueller and Jack Smith teams

Donaleski is interesting enough, not least given the loaner AUSA bid to play games with filter teams. Plus, she would have overlapped with Maurene Comey at SDNY (and with some of Jim Comey's old pals when she first got there, probably).

But the others, especially Dreeben, signal that Comey is going into this with a plan and the expectation that he will have to argue this case before SCOTUS.

This team is a signal that Comey intends to reverse some of the damage done by Trump v. USA.