IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA Plaintiff, v. SAYFULLO HABIBULLAEVIC SAIPOV Defendant.	)	17 Cr. 722 (VSB)

BRIEF OF PROTECT DEMOCRACY PROJECT, INC. AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI CURIAE

Protect Democracy Project, Inc., ("Protect Democracy") is a nonpartisan, nonprofit organization dedicated to preventing American democracy from declining into a more authoritarian form of government. White House interference in law enforcement matters involving specific people implicate some of our most fundamental constitutional principles. As a result, Protect Democracy engages in litigation and advocacy to ensure that law enforcement agencies remain impartial, nonpartisan, and accountable to the Constitution.

INTRODUCTION AND SUMMARY

In a well-functioning democracy, officeholders do not wield the powers of the state to benefit allies and punish critics.[1] In recognition of this important principle, which is reflected in the text and structure of our Constitution, presidents of both parties have long adhered to strict limits on permissible contacts between the White House and the Department of Justice to avoid improper White House interference in law enforcement matters.

Although the White House has purported to adopt a policy limiting its communications with the Department of Justice, *see* Memorandum from Donald F. McGahn II to all White House Staff, at 1 (Jan. 27, 2017),[2] this administration has repeatedly violated its own policy and the long-established constitutional principles restricting White House interference in specific-party matters. For example, President Trump has called for criminal investigations of his political rivals,[3] suggested that he can instruct the Department to halt investigations into his or his allies

[1] A note on formatting: internal quotation marks and citations are omitted and capitalization is modernized and conformed to sentence structure without notice.
[2] A copy of the memo is available at https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000.
[3] Louis Nelson, *Trump Ratchets Up Call for DOJ to Investigate Hillary Clinton*, Politico (Nov. 3, 2017), *available at* https://www.politico.com/story/2017/11/03/trump-doj-investigate-hillary-clinton-244505.

potential wrongdoing,[4] engaged in Twitter commentary seemingly aimed at polluting the jury pool of his former campaign chairman,[5] and claimed an "absolute right to do what I want to do with the Justice Department."[6]

Protect Democracy takes no position on the underlying merits of this case. Instead, as this case presents yet another apparent instance of presidential meddling in the criminal justice process, Protect Democracy wishes to make two points.

First, President Trump's claim of absolute power over the Department of Justice is inconsistent with the Constitution. Article II does not grant the president absolute control over law enforcement or the power to say whatever he wants regarding a particular criminal defendant; instead, it imposes a series of commands and limitations. The Bill of Rights further protects against unequal and irregular treatment—protections that apply regardless of the nature of the criminal conduct at issue. As a result, when President Trump engages in pre-trial Twitter proclamations urging that the Defendant receive the death penalty, he risks not only exceeding his constitutional powers, but also denying the Defendant due process.

Second, when issues involving potential unlawful presidential interference in criminal enforcement matters come before Article III courts, it is the proper role of the courts to examine whether there has been unconstitutional activity by the executive branch. After all, when the federal government seeks to use the power of the courts to enforce the law, it shouldn't be

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[4] Julie Hirschfeld Davis, *et al.*, *Trump Tells Sessions to 'Stop This Rigged Witch Hunt Right Now'*, N.Y. Times (Aug. 1, 2018), *available at* https://www.nytimes.com/2018/08/01/us/politics/trump-sessions-russia-investigation.html.

[5] Dan Mangan and Kevin Breuninger, *Trump Says Ex-Campaign Chief Paul Manafort is Being Treated 'Worse' than Mob Boss Al Capone*, CNBC (Aug. 1, 2018), *available at* https://www.cnbc.com/2018/08/01/trump-tweets-paul-manafort-is-being-treated-worse-than-al-capone.html.

[6] *Excerpts from Trump's Interview with The Times*, N.Y. Times (Dec. 28, 2017), *available at* https://www.nytimes.com/2017/12/28/us/politics/trump-interview-excerpts.html.

permitted to do so in a manner inconsistent with the Constitution. The Court has a number of doctrinal tools it can use to determine if the president's pre-trial pronouncements in this case violate the law, and, if so, to redress such actions. Protect Democracy urges the Court to employ them.

To be clear, the Department of Justice may well be acting independently and outside the cloud of any White House interference in this matter. Indeed, based on the experiences of Protect Democracy employees who have previously worked in the Department, Protect Democracy hopes and expects that to be the case. Nonetheless, when the president weighs in on Twitter regarding a pending criminal case, it raises serious concerns. Public confidence in the rule of law demands a full inquiry, if for no other reason than to ensure the public that the Department of Justice continues to adhere to its obligation of ensuring the fair and impartial administration of justice for all Americans. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976) ("The federal sovereign . . . must govern impartially.").

RELEVANT BACKGROUND

On October 31, 2017, Defendant Sayfullo Saipov was arrested for murder and terror-related charges for driving a truck onto a busy bike path in New York City. Eight people lost their lives, and eleven more were injured. The Defendant is alleged to have been inspired by ISIS.

The day after the Defendant's arrest, and well before any court adjudication of the Defendant's guilt or any Department of Justice determination about whether to seek capital punishment, President Trump tweeted that the Defendant "SHOULD GET [THE] DEATH PENALTY!" Donald J. Trump (@realDonaldTrump), Twitter (Nov. 1, 2017, 8:43 p.m.).[7] The

[7] *Available at* https://twitter.com/realdonaldtrump/status/925931294705545216?lang=en.

next day, the president repeated his claim, tweeting that the government "[s]hould move fast" in instituting the "DEATH PENALTY!" Donald J. Trump (@realDonaldTrump), Twitter (Nov. 2, 2017, 4:54 a.m.).[8] The following day, President Trump referred to the Defendant, in another tweet, as a "[d]egenerate [a]nimal." Donald J. Trump (@realDonaldTrump), Twitter (Nov. 3, 2017, 5:03 a.m.).[9]

The Defendant has moved to preclude the government from seeking a death sentence against him or, in the alternative, to appoint an independent prosecutor. The motion argues that President Trump's proclamations prevent the Department of Justice from fulfilling its constitutional and statutory obligations to fairly and independently decide whether to seek capital punishment in this case.

ARGUMENT

I. President Trump's Twitter proclamations regarding this case may have been unlawful.

The Constitution permits the president to set overall law enforcement priorities and ensure that the executive departments faithfully execute the laws in order to preserve, protect, and defend the Constitution. But that authority does not excuse the president from complying with the Constitution's demand that defendants receive due process.

The president's tweets imperil that guarantee. They threaten to unconstitutionally inject political considerations into prosecutors' charging decisions, pollute the jury pool, and create a two-track system of justice wherein certain defendants are charged according to decisions made by the Department of Justice's professional prosecutors and others are charged according to presidential whim. Accordingly, Protect Democracy urges the Court to carefully scrutinize the

[8] *Available at* https://twitter.com/realdonaldtrump/status/926054936718307328?lang=en.
[9] *Available at* https://twitter.com/realdonaldtrump/status/926419647708258304?lang=en.

government's conduct because even the perception of unequal, politicized justice is toxic to the foundations of our constitutional republic.

A. Article II doesn't grant the president the "absolute right to do what [he] want[s] with the Justice Department."

The Constitution grants the president awesome powers. But it doesn't give the president the power to influence law enforcement proceedings in an unconstitutional manner. Just the contrary, in fact: Article II, Section 3 requires that the president "shall take Care that the Laws be faithfully executed."

The requirement that the president take care to faithfully execute the law subjects the president to the rule of law. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In *Youngstown*, the Supreme Court held that the president lacked the power to effectively enact his own laws by taking over the nation's steel mills during the Korean War. Justice Black began with the premise that "[t]he president's power . . . must stem either from an act of Congress or from the Constitution itself." 343 U.S. at 585. Rather than taking care that the laws be faithfully executed, the president had become a law unto himself—and, as Justice Black explained, that conduct summoned up all "the fears of power and the hopes for freedom that lay behind" the decision to "entrust the law making power to the Congress alone in both good and bad times." *Id.* at 589.

Justice Jackson's famous *Youngstown* concurrence further bolsters the view that the Take Care Clause imposes constraints on presidential power. Justice Jackson rejected the argument that Article II's Vesting Clause constitutes "a grant of all the executive powers of which the Government is capable." 343 U.S. at 640 (Jackson, J., concurring). "If that be true," Jackson reasoned, "it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones," such as the power to require written opinions of cabinet members

or to commission officers. *Id*. at 640-41 & n.9. "Matters such as those," Jackson observed, "would seem to be inherent in the Executive if anything is." *Id*. at 641 n.9. As a result, Justice Jackson "[could not] accept the view that this clause is a grant in bulk of all conceivable executive power." *Id.* at 641.

Justice Jackson further explained that any authority conferred by the Take Care Clause "must be matched against words of the Fifth Amendment that 'No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .' One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther." *Id*. at 646 (alterations in original). This approach envisions a president constrained by law and doubly checked by the right of private citizens to enforce the requirements of due process. These two provisions, Justice Jackson added, "signify . . . that ours is a government of laws, not of men," and that "we submit ourselves to rulers only if under rules." *Id*.

The text and structure of the Take Care Clause provide further guidance on the president's proper role in enforcing the laws. The passive phrasing of the Clause is unique and significant. Nowhere else does the document employ a similar construction to describe the duties of a constitutional officeholder. This phrasing suggests that the president oversees the execution of the laws, but does not execute them himself. *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 Yale L. J. 1836, 1875-76 (2015). If the president were personally charged with executing the Laws, the Clause should read: "*he shall faithfully execute the laws*." Instead, the Constitution leaves actual hands-on execution to the officers of the executive departments—a conclusion that is reinforced by the fact that the Constitution authorizes the president to supervise those officers by requiring written opinions from them "upon any Subject relating to

the Duties of their respective Offices," U.S. Const., Art. II, § 2, cl. 1. It is the president's job to ensure that *they* "faithfully execute" the laws.

And what does "faithfully" mean? The phrase "faithfully execute" appears only one other time, in the president's oath of office:

> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

U.S. Const., Art. II, § 1, cl. 8. The oath leaves no doubt that at least one component of "faithfully executing" is to uphold the Constitution to the *best* of one's ability. Thus, when the president intervenes in an individual law enforcement matter to influence it for unlawful purposes, he violates his oath: he is not preserving, protecting, and defending the Constitution; he is undermining it. The president, as the name of the office itself suggests, is supposed to exercise the executive power by *presiding over* the departments and serving as their constitutional conscience—not by reaching down *into* the departments to place a preferential finger on the scales of their deliberations.

Accordingly, the president may direct generally applicable law enforcement policies and priorities—if he does so "faithfully." For example, if the president concludes that there is an opioid crisis, he can instruct the Attorney General to prioritize law enforcement efforts against the illegal opioid trade. But the president violates Article II if he directs the Department of Justice to pursue an enforcement action against a particular party in that industry because the party supported his opponent. And so too it would violate Article II if the president were to intervene in an individual criminal prosecution in such a way that would deny a defendant due process—a result that, as will be explained, is highly likely whenever the president intervenes in charging decisions in individual cases.

B. The president's tweets may have violated the Due Process Clause.

1. The president's tweets risk unconstitutionally politicizing the criminal justice process.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Therefore, the government must follow fair and neutral procedures before depriving criminal defendants of their liberty or their lives. A central guarantee of that requirement is a disinterested prosecutor. *See, e.g.*, *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810-11 (1987); *id*. at 815 (Blackmun, J., concurring) (explaining that "due process" mandates "a disinterested prosecutor"). Thus,

> a prosecutor . . . must be both impartial in fact and appear to be so. The avoidance of impropriety, the court explained, is necessary to maintain public confidence . . . . [U]nder certain circumstances a government attorney may lack the impartiality and appearance of impartiality that our system of justice demands of its prosecutors.

Fed. Trade Comm'n v. Am. Nat'l Cellular, 868 F.2d 315, 319 (9th Cir. 1989).

The requirement of a disinterested prosecutor means more than simply a prosecutor without a financial self-interest in a case. *See, e.g.*, *In re Sasson Jeans, Inc.*, 104 B.R. 600, 606 (S.D.N.Y. 1989). Rather, a prosecutor must not be subject to external forces that present an undue risk of "cloud[ing] his [or her] judgment" in prosecuting a case. *United States v. Terry*, 17 F.3d 575, 578 (2d Cir. 1994); *see also U.S. ex rel. Sec. & Exch. Comm'n v. Carter*, 907 F.2d 486 (5th Cir. 1990) (prosecutors should not "have an extraneous interest in the case that may create the *appearance* of impropriety").

President Trump demands no less when he is a defendant. As he argued to a New York court just last month, "fundamental fairness" requires that "criminal enforcement powers should be wielded in a rigorously disinterested fashion." Mem. of Law in Supp. of Resp'ts' Mot. to Dismiss, *People v. Trump*, No. 451130/2018, Dkt. 91, at 24 (N.Y. Sup. Ct. Aug. 30, 2018).

Therefore, as President Trump explained, it is critical that "those wielding the power of the state" be "independent[:] free from political motivations, political consequences, public opinions, . . . fear or favoritism" in order to avoid "discourag[ing] public confidence in our government and the system of law to which it is dedicated." *Id.* at 24-25.

President Trump's proclamations may deny the Defendant that very right in two ways. *First*, a prosecution cannot be controlled by an interested person. *See United States v. Siegelman*, 786 F.3d 1322, 1329 (11th Cir. 2015) ("*Young* categorically forbids an interested person from *controlling* the defendant's prosecution . . . ."). And the presidency is, quite simply, too political an office—and the temptation to make prosecutorial decisions for political ends too great—for the president to be seen as sufficiently impartial to exercise any significant degree of control over a prosecution. As then-Professor, now-Justice Kagan explained:

> These considerations . . . make me set the appropriate boundaries on presidential direction . . . when . . . the government exercises prosecutorial authority. Resolution of prosecutorial questions usually is conceived as lying at the heart of the executive power vested in the President. But it is in this area, because so focused on particular individuals and firms, that the crassest forms of politics (involving, at the extreme, personal favors and vendettas) pose the greatest danger of displacing professionalism and thereby undermining confidence in legal decisionmaking.

Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2357-58 (2001).

Those difficulties are further heightened by the structural differences between the White House and the Department of Justice. In particular, Congress has specifically "reserved to officers of the Department of Justice" the authority to conduct "litigation in which the United States . . . is a party." 28 U.S.C. § 516. As a result, it is the Department of Justice—not the White House—that exercises prosecutorial discretion and represents the United States in litigation.[10]

[10] That conclusion was reinforced in *United States v. Nixon*, where the Court observed that "Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government." 418 U.S. 683, 694 (1974) (citing 28 U.S.C. § 516). In that case, the

Consistent with that role, the Department of Justice maintains extensive policies and procedures to safeguard the proper, fair, and neutral enforcement of the law. With respect to the death penalty in particular, the Department of Justice has implemented a detailed protocol requiring multiple levels of careful review and final approval by the Attorney General. *See* Justice Manual § 9-10.000 *et seq.* (formerly U.S. Attorneys' Manual). By contrast, the White House has had no reason—thanks to the policies strictly limiting White House communications—to develop a set of rules and guidelines to govern law enforcement. So when the White House weighs in on specific criminal prosecutions, it lacks any sort of guidelines to ensure that it is complying with the Constitution. And it lacks an internal inspector general or professional responsibility office to ensure that it is complying with those guidelines and treating like cases alike.

That lack of safeguards is further compounded by a lack of expertise. Unlike the Department of Justice, where thousands of non-political civil servants in specialized departments represent the United States and develop subject-matter expertise, the White House has a small staff (hired and fired at the president's whim) that represents the White House. White House officials lack the bandwidth to specialize in specific areas or to ensure consistent application of the law. Thus, White House control over matters involving specific parties is best avoided because it carries with it an unacceptable risk of irregular processes; political favoritism; and vindictive, arbitrary, and unequal justice.

Second, presidential intervention in criminal prosecutions can also deny a defendant a disinterested prosecutor by posing a threat to line prosecutors' "personal and professional"

Court rejected President Nixon's assertion that "that a President's decision is final in determining what evidence is to be used in a given criminal case." *Id.* at 693.

interests. *United States v. Heldt*, 668 F.2d 1238, 1275 (D.C. Cir. 1981). Indeed, such a threat is particularly acute with this president: he has repeatedly attacked civil servants he views as insufficiently loyal and presidential enmity can end a career.

Accordingly, when President Trump intervenes in—or even issues Twitter commentary—regarding a pending criminal case, he puts the line prosecutors in a no-win situation. If they don't follow the president's recommendations, they risk condemnation and career suicide. If they do follow the president's recommendations, then there is no way to know (absent at least some judicial scrutiny) whether the president's conduct affected the Justice Department's conduct or evaluation of the merits of a case. That's deeply problematic for the public's perception of the nonpartisan nature of federal law enforcement, a concept that is unfortunately increasingly called into question with each and every attempt by President Trump to interfere with federal law enforcement decisions.

2. Presidential pronouncements of guilt and the appropriate punishment are antithetical to due process.

Because statements by law enforcement officials regarding the guilt and deserved punishment of charged and uncharged individuals implicates basic notions of due process,[11] the local rules of this Court, *see* Local Crim. R. 23.1, the Justice Manual, *see* Justice Manual § 1-7.610, and the New York State Rules of Professional Conduct, *see* N.Y. Rules of Prof. Cond. § 3.6,[12] limit out-of-court statements by those involved in criminal proceedings. As the Rules of

[11] *See United States v. Esso*, 684 F.3d 347, 351 (2d Cir. 2012) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences . . . . Justice demands that jurors decide the case solely on the evidence before them . . . ."); *see also Doe v. Hammond*, 502 F. Supp. 2d 94, 101 (D.D.C. 2007) ("The Due Process Clause . . . protects an individual from governmental accusations of criminal misconduct without providing a proper forum for vindication.").

[12] The New York State Rules of Professional Conduct apply "to federal prosecutors in New York State and to non-attorney government law enforcement officers when they act as the alter ego of government prosecutors." *United States v. Binday*, 804 F.3d 558, 593 (2d Cir. 2015) ("DOJ

Professional Conduct explain, prosecutorial officials must take care to avoid making statements that have no legitimate law enforcement purpose:

> In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium against the accused.

N.Y. Rules of Prof. Cond. § 3.8 cmt. 5. This Court's local rules specifically discuss the danger of labeling a particular defendant as guilty:

> Statements concerning the following subject matters presumptively involve a substantial likelihood that their public dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice within the meaning of this rule: . . . Any opinion as to the accused's guilt or innocence or as to the merits of the case . . . .

Local Crim. R. 23.1(d)(7); *see also* Justice Manual § 1-7.610(F) ("DOJ personnel should refrain from disclosing . . . [a]ny opinion as to the defendant's guilt . . . ."). Under that standard, it is hard to imagine a comment more inappropriate than an unsolicited pre-trial proclamation by a law enforcement office that a particular defendant is guilty and should be swiftly executed.

The constitutional official charged with presiding over the faithful execution of the laws should not be excused from complying with those requirements, particularly when the president chooses to act as some sort of super-line prosecutor. After all, the president has a megaphone that federal prosecutors could never hope to equal. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2417-18 (2018) (explaining that the president "possesses an extraordinary power to speak to his fellow citizens and on their behalf"). So, if anything, the president should be held to a *higher* standard

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personnel must avoid making public statements that violate . . . legal requirements . . . imposed by . . . applicable bar policies . . . .").

than a line prosecutor when it comes to pre-trial statements. And it is hard to imagine any legitimate law enforcement purpose for running presidential proclamations on criminal enforcement proceedings in a United States district court. Indeed, this is a line that not even President Nixon—not normally known for his narrow view of presidential prerogatives—was willing to cross. After accidentally asserting during Charles Manson's trial that Manson "was guilty," the president issued a retraction shortly thereafter that "the last thing I would do is prejudice the legal rights of any person, in any circumstances . . . . All of the facts in the case have not yet been presented. The defendants should be presumed to be innocent at this stage of their trial."[13]

3. The president's tweets may also result in a denial of equal protection.

The Due Process Clause precludes the federal government from denying any person the equal protection of the laws. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 215-18 (1995). That means that the Department of Justice cannot exercise its prosecutorial discretion contrary to the Constitution's guarantee of equal protection. *See, e.g.*, *Wayte v. United States*, 470 U.S. 598, 608 (1985); *United States v. Al Jibori*, 90 F.3d 22, 25 (2d Cir. 1996).[14] Thus, in

[13] Robert B. Semple, *Nixon Calls Manson Guilty, Later Withdraws Remark*, N.Y. Times (Aug. 4, 1970), *available at* https://www.nytimes.com/1970/08/04/archives/nixon-calls-manson-guilty-later-withdraws-remark-refers-to-coast.html.

[14] That equal protection requirement is not limited to race, gender, or large classes. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Accordingly, it would be unconstitutional for the Department of Justice to irrationally single out an individual for differential treatment, *see Geinosky v. City of Chi.*, 675 F.3d 743, 747 (7th Cir. 2012)—for example, to investigate a political opponent based on pressure from the White House. Although the executive branch is "necessarily afforded wide discretion . . . , that discretion does not extend to discriminating against or harassing people." *Id.*; *cf. United States. v. Windsor*, 570 U.S. 744, 770 (2013) ("A bare . . . desire to harm . . . cannot justify disparate treatment . . . ."). Thus, the White House can't intervene in a criminal prosecution to force (1) the prosecution of disfavored persons or groups or (2) the non-prosecution of favored ones. *See Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886); *see, e.g.*, *United States v. Alleyne*, 454 F. Supp. 1164, 1174 (S.D.N.Y. 1978).

turn, it would also violate the Constitution for the White House to insist that the Justice Department seek the death penalty here on account of an unjustifiable standard such as race, religion, or other arbitrary classification. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). As discussed further below, the president's tweets about the Defendant include statements related to his national origin (namely, that he entered the United States through the Diversity Visa Lottery program). This raises concerns that the president's immediate call for him to receive the death penalty was motivated, in part, by the Defendant's national origin, which could violate the guarantee of equal protection of the laws.

* * *

President Trump waived his right to freely comment on pending criminal cases when he took an oath to faithfully execute the office of President of the United States and to preserve, protect, and defend the Constitution of the United States. Neither his Article II authority nor the Bill of Rights permit him to intervene in a criminal case in such a way that denies the Defendant due process of law.

It is the responsibility of this Court to hold President Trump to the promise he made in January 2017. The Defendant here is accused of heinous conduct, conduct which may merit the ultimate punishment under Department of Justice guidelines. Yet, by providing this Defendant with due process while his guilt and punishment are being determined, this Court will reaffirm a central principle of our Constitution: that we have a "government dedicated to equal justice under law." *Cooper v. Aaron*, 358 U.S. 1, 19 (1958). That way "everyone can see, truly see that justice" in the United States of America "is administered fairly, individually, and discretely." *Colloquy and Statement of the Hon. William G. Young*, Experience, vol. 20, no. 3, at 34-35 (2010) (statement on sentencing Richard Reid).

II. This Court should not turn a blind eye to potential interference by the president in a death penalty charging decision.

As explained above, White House interference in death penalty charging decisions raises significant constitutional concerns. Now we to turn to what the Court should do in response to the suggestion of improper interference. We suggest three steps.

First, the Court should remind the government, including the executive branch, of its obligation to avoid making public statements that deny the Defendant a fair trial. *Second*, if the government pursues the death penalty, the Court should ascertain whether the decision was unconstitutionally influenced by the president. *Third*, if the Court determines that improper interference took place, then the Court should provide an appropriate remedy.

A. The Court should ensure that the government will not make any further public statements regarding the Defendant's guilt or the appropriate punishment to be imposed.

Due process requires that the federal government seek to convict defendants in a United States district court—not on Twitter. And, as explained above, presidential commentary regarding a particular defendant's guilt or deserved punishment can pollute the jury pool and deny due process.

There should be no further presidential proclamations about the Defendant's guilt or proper punishment. Hopefully, all that is needed is a reminder from the Court to the government regarding the requirements of due process. However, should the president continue to make statements that have a reasonable likelihood of polluting the jury pool—as he did during the recent trial of Paul Manafort—the Court should consider imposing a gag order. *See, e.g.*, *In re Application of Dow Jones & Co.*, 842 F.2d 603, 610 (2d Cir. 1988).

B. The Court should take steps to ensure that law enforcement processes have not been unconstitutionally politicized.

If the Department of Justice decides to pursue the death penalty in this case, this Court should take steps to ensure that the Department's decision-making process has not been unlawfully influenced by the White House. To do so, the Court could either (1) borrow the burden-shifting approach used to evaluate claims of vindictive prosecution and require the government to justify its decision by objective means or (2) allow the Defendant limited discovery to probe the government's decision-making process. Either approach would allow the Court to make an informed decision as to whether a constitutional violation has occurred.

1. The Court could borrow the burden-shifting scheme used to evaluate claims of vindictive prosecutions.

In evaluating whether the president's tweets influenced the Department of Justice's charging decisions, the Court could borrow the burden-shifting scheme used to handle vindictiveness claims by criminal defendants.

Vindictiveness claims seek to examine whether a defendant is being subjected to an increased punishment as a result of a defendant's exercise of his constitutional rights. *See Blackledge v. Perry*, 417 U.S. 21, 25-27 (1974). Such conduct "is a due process violation of the most basic sort," *United States v. Goodwin*, 457 U.S. 368, 372 (1982), and vindictiveness is unconstitutional whether committed by line attorneys or by the person ordering the retaliation, *see United States v. Bourque*, 541 F.2d 290, 293 (1st Cir. 1976). Moreover, because the very perception of vindictiveness can deter the exercise of constitutional rights, *see Blackledge*, 417 U.S. at 28, if the prosecution creates a public impression that "a reasonable likelihood of vindictiveness exists," *Goodwin*, 457 U.S. at 373, then the government has the burden to show that it is not acting vindictively, *North Carolina v. Pearce*, 395 U.S. 711, 725-26 (1969), *companion case overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). The

government may carry its burden by providing "objective information" establishing the "constitutional legitimacy" of its actions. *Pearce*, 395 U.S. at 726; *see also United States v. Weingarten*, 713 F.3d 704, 713-14 (2d Cir. 2013).

Such a test would also be appropriate to apply when White House interference in a criminal prosecution creates the public impression that law enforcement is not acting independently and impartially. After all, the perception of politicized justice likely deters the exercise of constitutional rights just as much—if not more—than retaliation for their exercise.

If the Court were to borrow the vindictiveness framework for analyzing claims of unlawful White House interference, the first step would be determining whether the Defendant can either: (1) provide "objective evidence [of] an improper prosecutorial motive," *Goodwin*, 457 U.S. at 380 n.12, or (2) demonstrate that there should be a presumption of unlawfulness by showing "a reasonable likelihood" that the White House interference resulted in irregular processes, political favoritism, or vindictive, arbitrary justice, *id.* at 373.

Here, the president's tweets may well create a sufficient appearance of improper interference to carry the Defendant's initial burden. If so, then the Court should consider applying a presumption of unlawful interference. That does not mean the Defendant automatically wins—instead, the government must justify its position by providing "objective information" establishing that, in fact, its decision was not subject to undue interference by the president. *Pearce*, 395 U.S. at 726.

The burden would then shift to the government to prove that it in fact acted properly. Typically, the government might satisfy this burden by proving that the Department of Justice arrived at its position before any interference by the White House. *See Texas v. McCullough*, 475 U.S. 134, 141 (1986) (explaining government's burden in rebutting presumption of

vindictiveness); *Pearce*, 395 U.S. at 726 (noting timing's relevance to vindictiveness analysis). That is likely impossible here; President Trump's first tweet came just hours after the crime. Nonetheless, the government could attempt to rebut the presumption by demonstrating that the Defendant's conduct satisfied the criteria set forth in the government's death penalty charging guidelines and that the government's decision was consistent with its actions in other cases.

2. In the alternative, the Court should grant the Defendant limited discovery into the government's decision-making process.

If the Court declines to impose a presumption of improper interference, the Court could grant the Defendant limited discovery into the government's decision-making process to allow him to make out a due process claim. The Supreme Court has recognized that proving claims of improper prosecutorial motive often requires discovery. *See United States v. Armstrong*, 517 U.S. 456, 468 (1996). In order to establish a right to discovery, the defendant must introduce "some evidence tending to show" the existence of an improper prosecutorial motive. *Id.* In the equal protection context, for example, that usually requires evidence of differential treatment of similarly-situated members of other races or protected classes. *Id.* at 470.

With respect to a due process claim based on improper presidential interference, a showing of "some evidence" of interference should be enough to entitle the Defendant to discovery. Here, the president's tweets about the Defendant should likely clear that bar. The president's interference was repeated and public. Within a day of Mr. Saipov's arrest, the president tweeted that he "SHOULD GET [THE] DEATH PENALTY!" Donald J. Trump (@realDonaldTrump), Twitter (Nov. 1, 2017, 8:43 p.m.).[15] He repeated the sentiment the following day, urging the government—of which he is the head—to "move fast" towards the "DEATH PENALTY!" Donald J. Trump (@realDonaldTrump), Twitter (Nov. 2, 2017, 4:54

[15] *Available at* https://twitter.com/realdonaldtrump/status/925931294705545216?lang=en.

a.m.).[16] The president's explicit direction to prosecutors surely warrants further exploration to determine whether it influenced those in his chain of command.

It does not make sense to require the Defendant to show differential treatment of similarly-situated members of other groups in order to obtain discovery on his due process claim. Unlike an equal protection claim, *see Armstrong*, 517 U.S. at 465-67, proving a due process violation does not require a showing that the claimant was treated differently from members of another group. For example, a defendant alleging that a prosecutor had an improper interest in a case doesn't have to show that a defendant of another race was provided with an impartial prosecutor.

Moreover, even if *Armstrong*'s similarly-situated defendant requirement generally governs all allegations relating to unlawful prosecution, there are two reasons why *Armstrong* might be satisfied.

First, there is an exception to *Armstrong*'s similarly-situated requirement when there are "direct admissions . . . of discriminatory purpose." *Al Jibori*, 90 F.3d at 25; *see also Armstrong*, 517 U.S. at 469 n.3 (leaving open the possibility of exception to the similarly-situated requirement in such a situation); *cf. Geinosky*, 675 F.3d at 748-49 (plaintiff doesn't need to comply with the similarly-situated requirement in analogous "class of one" equal protection claim when the government's action is obviously discriminatory). That exception makes sense: courts should not persist in assuming that the government is acting in good faith if the defendant—without the aid of any discovery—can already show some direct evidence of wrong-doing by an executive branch official potentially in control of the enforcement action.

[16] *Available at* https://twitter.com/realdonaldtrump/status/926054936718307328?lang=en.

Adjusting this direct-admissions exception to the due process context, it may justify further discovery in this matter. The president repeatedly and publicly asserted that the death penalty should not just be pursued against, but should be imposed on, the Defendant. *See supra* Relevant Background. His statements short-circuited the ordinary, thorough due process protocol put in place by the Justice Department to ensure a decision that comports with the Constitution. Those statements should open the door to discovery to help determine whether the president's potentially unconstitutional influence has infected the handling of this matter. *See Al Jibori*, 90 F.3d at 25 (governmental "admissions should sometimes justify further inquiry").

Second, the Defendant may *also* be able to establish an entitlement to discovery based on what may be an emerging equal protection violation. The president's tweets about Mr. Saipov included unmistakable references to his national origin. The day after Mr. Saipov's arrest, the president identified him as a "terrorist [who] came into our country through what is called the 'Diversity Visa Lottery Program.'" Donald J. Trump (@realDonaldTrump), Twitter (Nov. 1, 2017, 7:24 a.m.).[17] Two days later, the president referred to the Defendant as a "Degenerate Animal," Donald J. Trump (@realDonaldTrump), Twitter (Nov. 3, 2017, 5:03 a.m.),[18] repeating a slur he has repeatedly used in reference to immigrants, *see* Eugene Scott, *In Reference to 'Animals,' Trump Evokes Ugly History of Dehumanization*, Wash. Post (May 16. 2018).[19] And, as noted above, in the same series of tweets, the president called for him to receive the death penalty.

[17] *Available at* https://twitter.com/realdonaldtrump/status/925684982307348480.
[18] *Available at* https://twitter.com/realdonaldtrump/status/926419647708258304?lang=en.
[19] *Available at* https://www.washingtonpost.com/news/the-fix/wp/2018/05/16/trumps-animals-comment-on-undocumented-immigrants-earn-backlash-historical-comparisons/?utm_term=.ab426de4f16b.

In contrast, the president has not made the same calls for death penalty prosecutions with respect to a native-born American alleged to have engaged in a similar vehicular attack. James Fields Jr. is alleged to have driven his car into a crowd of protestors at the August 2017 white supremacist rally in Charlottesville, Va. *See* Deirdre Shesgreen, *President Trump Calls Ohio Driver in Charlottesville Attack a 'Murderer' and a 'Disgrace'*, USA Today (Aug. 15, 2017).[20] At a news conference, President Trump called Mr. Fields a "disgrace" and a "murderer"—but never called for him to receive the death penalty. *Id.* The seemingly differential treatment accorded thus far suggests the potential beginnings of an equal protection problem. The Charlottesville defendant largely appears to be receiving the benefit of an impartial evaluation by the Department of Justice of whether the government should seek the death penalty. The Defendant here, by contrast, may be currently subjected to a different process of presidential justice. At the very least, the unusual situation presented here should lead to a heightened degree of judicial attention. *Cf. United States v. Steele*, 461 F.2d 1148, 1151-52 (9th Cir. 1972) (deferring less to the government in analyzing selective enforcement defense where government followed "a discretionary procedure not followed with any other offenders"); *see also United States v. Ojala*, 544 F.2d 940, 943 (8th Cir. 1976); *United States v. Falk*, 479 F.2d 616, 622 (7th Cir. 1973) (en banc).[21]

[20] *Available at* https://www.cincinnati.com/story/news/politics/2017/08/15/donald-trump-calls-ohio-driver-charlottesville-attack-murderer/570392001/.

[21] There is not a large body of case law dealing with White House meddling in specific-party law enforcement matters. That's because in the wake of the Watergate scandal, a long-standing bipartisan consensus developed that such meddling should not occur. When the executive ceases to comply with post-Watergate norms, it should be limited in its ability to claim the shield of post-Watergate precedents such as *Armstrong*.

C. If the Court determines that the president has unduly interfered with the Department of Justice's charging decision, it should take remedial action.

If the Court finds that the Department of Justice's decision has been unlawfully influenced by the president, the Court should provide a remedy. The appropriate remedy will depend on the facts found through the vindictiveness inquiry or discovery.

First, if the Court determines that political interference has occurred, but that preventative measures could allow Department of Justice staff to make a new decision free from the taint of unlawful interference, it could disqualify the current prosecutors from the death penalty charging decision and direct the Department to appoint a new team of prosecutors to reconsider the propriety of seeking the death penalty in this case. *See United States v. Stewart*, 294 F. Supp. 2d 490, 494 (S.D.N.Y. 2003) (disqualification of prosecutor may be an appropriate remedy to conflicts of interest).

Second, if the Court determines that unlawful political interference has so infected the Department of Justice that the Department cannot fairly apply its usual decision-making process to the death penalty charging decision, the Court could preclude the government from seeking the death penalty. Such a remedy—though extreme—could be justified by the fact that in a traditional selective prosecution case, the appropriate remedy is dismissal of the tainted charges. *See Blackledge*, 417 U.S. at 31 n.8. Here, we do not dispute that it was appropriate for the government to charge Mr. Saipov with a crime. The only question is whether the government might be seeking a harsher sentence because of the president's interference. So the analogous remedy would be to bar the government from seeking the death penalty if there is no other way to purge the taint of presidential interference.

CONCLUSION

The freedom from political influence in specific law enforcement matters is paramount to our democracy. To ensure that the government fulfills its obligation to do equal and impartial justice based on facts and law, and not the personal or political preferences of any particular president, this Court should allow the parties to conduct an inquiry into whether there has been unconstitutional political interference in this enforcement matter and should order an appropriate remedy if there has been.

Respectfully submitted,

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