No. 23-939

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* SCHOLARS OF THE FOUNDING ERA IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES:

CONSTITUTIONAL AND STATUTORY PROVISIONS:

Page

Page

OTHER AUTHORITIES:

Page

Cited Authorities

Page

Page

Page

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professional historians and professors who hold appointments in university departments of history and law schools. Their published writings cover the origins of the American Revolution, the adoption of state and federal constitutions during the Revolutionary era, and the developments that gave the American constitutional tradition its distinctive character. They believe that the developments described herein will provide the Court with an understanding of critical aspects of Founding Era ideas about executive authority and presidential immunity.

Individual *amici curiae* are listed and described in the attached Appendix in order of their contributions.

SUMMARY OF ARGUMENT

Former President Trump is charged with conspiring to thwart the peaceful transfer of power following the 2020 election. In his defense, he asserts that a doctrine of permanent immunity from criminal liability for a President's official acts, while not expressly provided by the Constitution, must be inferred. To justify this radical assertion, he contends that the original meaning of the Constitution demands it. But no plausible historical case supports his claim.

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1. Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to fund its preparation or submission. This brief does not purport to convey the position of New York University School of Law.

The Constitution does not expressly confer any presidential immunity, even though it does for members of Congress in limited cases. The Court must discern whether that silence indicates that permanent presidential immunity was so integral as to need no description (as Petitioner contends), or whether it reflects an intention not to confer immunity.

That inquiry, in turn, would benefit from an examination of the historical record, including the Framers' own statements and evidence of their views on accountability, the rule of law, and democracy. While "a page of history" may not always be "worth a volume of logic,"[2] history provides valuable insight into the meaning and context of the words and principles at issue in Petitioner's claim.

Sometimes history speaks ambiguously. But here, it speaks with surpassing clarity: The principle that a President may be prosecuted—which informed President Nixon's 1974 pardon and President Clinton's 2001 plea bargain—began in the beginning. As James Iredell, one of this Court's inaugural justices, explained, "If [the President] commits any crime, he is punishable by the laws of his country."[3] The only thing novel about the case before the Court is Petitioner's conduct, which violated a principle as old as the United States of America itself.

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2. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

3. *Address to the North Carolina Ratifying Convention* (July 28, 1788), *in* 30 The Documentary History of the Ratification of the Constitution Digital Edition 327 (John P. Kaminski et al. eds., 2009) [hereinafter DHRC].

While the Founders had a range of ideas about the scope of executive power, none of those ideas included conferring immunity on the President in the circumstances at issue here. Petitioner's argument to the contrary is not historically credible. It violates common understandings of executive power in the new republic and contradicts basic values that have defined American democracy.

A review of the historical evidence makes five points clear:

First, early Americans held a deep antipathy to and distrust of executive power. Their experience of abuse by colonial governors and the British Crown helped spark the Revolution, and they were determined not to replicate the British monarchical system in America. The result was a radical change in the law, as the new states stripped power and privilege away from royal governors and subjected their new governors, elected under new state constitutions, to the rule of law.

Second, the Founders came to the Constitutional Convention determined to create a new kind of executive without the powers and privileges of a king. Even those Founders who hoped to establish a comparatively strong executive never advocated placing the executive above the law. While the Framers differed over the exact contours of the President's power, they all agreed that the President's powers should be limited, and he should be accountable for his actions.

Third, the Framers never contemplated giving the President any role in the conduct of elections or transfer of power. They designed an electoral system in which

the current President would play no role—"official" or otherwise—to ensure that a sitting President could not use his power to preserve office.

Fourth, the Founders were careful to limit and make explicit the few privileges that they attached to constitutional offices. They explicitly provided limited immunity for members of Congress, consistent with the immunities enjoyed by members of Parliament. But they declined to provide any immunity for the President, much less a former President. James Madison suggested that the Convention consider presidential privileges, but there was no interest in discussing the subject. Given their distrust of executive power, no Framers advocated, either within the Constitutional Convention or during the ratifying conventions, for any presidential immunity.

Fifth, advocates for the new Constitution sought to assure state ratifying conventions that the new President would not be an elected king. Key participants in the ratification debates expressly emphasized that the President would remain subject to criminal prosecution, and that check was important to the ratifiers' understanding of the constitutional order they were approving.

This historical record creates a heavy presumption against Presidential immunity. There is no evidence that any Framer intended for a President (much less a former President) to be immune from prosecution. The motivations, experiences, and statements of the Framers and ratifiers all support an understanding that the President would, unlike a king, be subject to the law.

Against the weight of history, it would take a clear statement in the Constitution to support a claim of immunity. The Impeachment Judgment Clause states the opposite, providing that the President *can* be accountable for his actions before courts of law. The Clause was intended to ensure only that criminal conviction would remain available regardless of impeachment. Petitioner's alternative reading, that the Clause grants immunity unless Congress first impeaches and convicts, is inconsistent with the text and structure of the Constitution, and the expressed opinions, intentions, values, and practices of the Framers.

Finally, former President Trump stands accused of exactly the lawlessness that was foremost in the Framers' minds: conspiring with others to retain power despite the nation's democratic, legally ascertained vote. Conscious of that risk, the Framers took pains to ensure that the President would remain subject to the law, and not arrogate for himself an American kingship. Immunity in this case would upset the foundations on which the Constitution rests.

ARGUMENT

I. PETITIONER'S IMMUNITY CLAIM CONTRAVENES OVERWHELMING HISTORICAL EVIDENCE OF A FOUNDING GENERATION CONCERNED WITH ABUSE OF EXECUTIVE POWER

Although the Framers debated a variety of designs for the executive branch—ranging from a comparatively strong, unitary President to a comparatively weaker

executive council—they all approached the issues with a deep-seated, anti-monarchical sentiment. There is no evidence in the extensive historical record that any of the Framers believed a former President should be immune from criminal prosecution. Such a concept would be inimical to the basic intentions, understandings, and experiences of the Founding Generation.

A. Rejection of Monarchical Privilege Spurred a Radical Change in Early American Law

A central theme of early American history is the rejection of monarchy and monarchical privilege.

Prior to the Revolution, Americans absorbed the lessons from seventeenth- and eighteenth-century English struggles over power. The Declaration of Rights of 1689 and the writings of John Locke and other theorists expressed a persuasive idea: The foundation of government rested on the consent of the people. The King should not have unbounded discretion to act, and he could be forcibly removed for abuse of power.

It was against this backdrop that the Revolutionaries built the case for independence. For the Founding Generation, life under British rule involved "bitter struggles with crown-appointed royal governors and their minions that flared up throughout the eighteenth century and reached a boiling point prior to the Revolution."[4] Colonial governors, serving at the pleasure of the

4. Jonathan Gienapp, *National Power and the Presidency*, *in* Political Thought and the Origins of the American Presidency 127, 135 (Ben Lowe ed., 2021).

Crown, possessed and liberally used "archaic and, to eighteenth-century Britons, self-evidently arbitrary and threatening executive powers," including powers that had been denied to, or were otherwise rarely used by, the King. These included the power to veto legislation; prorogue and dissolve the legislature; and appoint and dismiss the judiciary, which served at the Crown's pleasure.[5] Americans grew increasingly sensitive to such limits on their elected assemblies, culminating in their rebellion against the Crown itself. The Declaration of Independence signaled the rejection of monarchical privilege and a demand that the King be held accountable for his transgressions.

The Founding Generation was committed to the concept that in America, no one was above the law. As Thomas Paine stated, "in America *the law is king*. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other."[6]

At the outset of the Revolution, state constitution writers radically upended traditional governance by stripping governors of their independence and virtually all "those badges of domination called prerogatives."[7] The prevailing view was that executives are inherently prone to tyranny and should be entrusted only with sharply and

5. Bernard Bailyn, The Origins of American Politics 66-70 (1968).

6. Thomas Paine, Common Sense (1776).

7. John Adams, *Thoughts on Government* (April 1776), *in* 4 The Adams Papers Digital Edition 86 (Sara Martin ed., 2008-2024).

explicitly limited power.[8] Legislatures, not executives, were seen as more responsive to the people's sentiments and wishes. And so early constitutions shifted to the legislatures traditionally executive powers such as that over appointments, including for judges and patronage positions.

Left to the executive was the simple power to execute the law, which meant serving as "an agen[t] for carrying out the will of a supreme and dominant legislature."[9] The new state constitutions limited governors, typically elected directly by the legislature, to one-year terms.[10] One of the most important powers, the power to veto state laws, was in most instances removed from the executive.[11]

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8. Gienapp, *National Power and the Presidency*, at 135.

9. Jack N. Rakove, *Taking the Prerogative out of the Presidency: An Originalist Perspective*, 37 PRESIDENTIAL STUD. Q. 85, 91 (2007).

10. *E.g.*, Ga. Const. of 1777 art. XXIII; Vt. Const. of 1777 ch. II, § XVII; N.C. Const. of 1776 art. XV.

11. Only Massachusetts and New York gave governors a legislative veto. Those two states embraced a stronger executive, after their experiences during wartime underscored the importance of energetic leadership. But even in these states executive power remained limited and their respective executives were responsible under the law for their actions. Mass. Const. of 1780, Part the Second, ch. I, § 2, art. VIII (describing impeachment and prosecution); N.Y. Const. of 1777 art. XXXIII (same). The New York Constitution of 1777 established a Council of Revision that could review and veto laws. But the governor alone did not have that power—another sign of mistrust of the executive. *Id.* art. III; *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 132-61, 435-36, 452-53 (1998); DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 104-07 (1988);

To hold executives accountable, several of the early state constitutions specifically contemplated the criminal prosecution of the governor. Maryland provided that the governor could, for certain corruptions or bribery, "suffer the punishment for wilful and corrupt perjury" after "conviction in a court of law."[12] North Carolina provided for the criminal prosecution of a range of potential crimes by the governor.[13] Other state constitutions acknowledged the governor's accountability under the criminal laws. Virginia had annual elections for governor, and made the governor subject to impeachment and criminal penalties via the General Court "when he is out of office."[14] Delaware provided that the governor "shall be impeachable . . . according to the laws of the land" and "[i]f found guilty . . . subjected to such pains and penalties as the laws shall direct."[15]

B. The Framers' Construction of a New, Accountable Presidency

The Framers came to the Philadelphia Convention of 1787 determined not to replicate the British monarchy they had defeated. They argued among themselves about the appropriate balance of power between the executive

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Marc W. Kruman, Between Authority and Liberty: State Constitution-Making in Revolutionary America 123-26 (1997).

12. Md. Const. of 1776 art. LIII; *see also id.* art. LIV (bribery).

13. N.C. Const. of 1776 art. XXIII.

14. Va. Const. of 1776.

15. Del. Const. of 1776 art. XXIII.

and legislative branches, and the specific powers attached to each. But at no point did they seek to endow the President with prerogatives that would make him an "elective King."[16]

Even those Federalists who endorsed a strong executive—such as Alexander Hamilton, Gouverneur Morris, and James Wilson—were careful to distinguish their vision from monarchy.[17] Hamilton, for example, proposed a lifetime-term for an elected executive, but also specified that he should serve only "during good behaviour" and therefore be subject to removal and prosecution.[18] Informed by the difficulties presented by unchecked legislatures in some states, these Framers argued for an energetic and efficient chief executive at the federal level to counterbalance the power of a federal Congress.[19] Yet they explained their support by suggesting that a strong President, in the form of a single individual with circumscribed powers, would be easier to hold accountable.[20]

Accountability was necessary because these Federalists recognized that presidential power was liable to abuse. As James Madison warned, a chief executive

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16. James Madison, *Notes on the Constitutional Convention* (July 24, 1787), *in* 2 Records of the Federal Convention of 1787 101 (Max Farrand ed., 1911) [hereinafter Farrand's Records].

17. Gienapp, *National Power and the Presidency*, at 138.

18. *Plan* (June 18, 1787), *in* 1 DHRC 254.

19. Gienapp, *National Power and the Presidency*, at 136.

20. *See, e.g.*, *id.* at 138.

"might pervert his administration into a scheme of peculation or oppression." A President's corruption, he noted, "might be fatal to the republic."[21] Indeed, the Framers were acutely aware that every prior republic, from Rome to the English Commonwealth, had failed due to executive overreach. Accordingly, even the most pro-executive Federalists conceived of a presidency bounded by the rule of law.

The Founders paid substantial attention to the limits of the presidential office, making use of the state constitutional models even as they carved their own path.[22] The President was prohibited from accepting a title or foreign or domestic emoluments, and could appoint judges and executive officers only with the advice and consent of the Senate. Congress's power to override a presidential veto meant that Congress could enact law entirely on its own and over presidential opposition, a departure from the colonial tradition.[23] Impeachment gave Congress the power to hold a President accountable by removing him from office. And the Founders gave the people the ultimate check by constraining Presidents to four-year terms, with the obligation to seek re-election for any subsequent term. All these limits sought to guard against a redux of

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21. *Notes on the Constitutional Convention* (July 20, 1787), *in* 2 Farrand's Records 65-66.

22. *E.g.*, The Federalist No. 39 (Madison) (referring to "the example of the State constitutions").

23. Wood, The Creation of the American Republic 553. The King had veto power not only in England, but over all colonial legislation, and he used it frequently. *E.g.*, Elmer Russell, The Review of Colonial Legislation by the King in Council 145-46 (1915).

the abuse of power by royal governors during the colonial period and the tyranny of the Crown.

C. Exclusion of the President from the Electoral Process

Well-versed in the history of other republican governments sliding into tyranny, the Framers were anxious about the prospect of a President usurping his successor. To avoid that possibility and preserve the electoral check on the President, they designed and detailed an electoral system in which the President would have no role—"official" or otherwise.[24]

The electoral procedure was the result of intense debate and hard-fought compromises. But no one advocated including the sitting president in the process.[25] The design limited the sitting President's ability to corrupt the process by ensuring that he would have no role in overseeing or determining the election.

Maintaining peace and avoiding violence was critical to the Framers as they designed this system. The peaceful transition of power, Hamilton observed, would "be secured, by making [the President's] re-election to depend on a special body of representatives, deputed by the society

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24. U.S. Const. art. II, § 1, cls. 2-4. The Twelfth Amendment, ratified in 1804, revised the Electoral College and reiterated the complete exclusion of the President.

25. John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 Am. Pol. Sci. Rev. 799, 810-11 (1961); Max Farrand, The Framing of the Constitution of the United States 160-75 (1913); Michael J. Klarman, The Framers' Coup 226-38 (2016).

for the single purpose of making the important choice."[26] As Gouverneur Morris wrote—referencing a history of executive interference in European governments—the Constitution's electoral process was the least "liable to objection. . . . least favorable to intrigue and corruption, . . . [and] least likely to terminate in violence and usurpation[.]"[27]

D. Rejection of Implicit Privileges and Immunities

The Framers also took care to delineate the few privileges that would accompany federal offices.

Members of Congress were expressly provided with immunity from arrest while travelling to and from Congress, and immunity for "any Speech or Debate" made in Congress.[28] Both were privileges traditionally recognized as necessary to the power of the assembly. By recognizing these privileges, the Founders empowered the legislators and showed their awareness of monarchical abuses of power in the seventeenth century, when kings had interfered with Parliament by punishing or arresting legislators.[29]

At the same time, these immunities were explicitly limited in time and application. The arrest privilege

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26. The Federalist No. 68.

27. *Letter to the President of the New York Senate* (Dec. 25, 1802), *in* 3 The Life of Gouverneur Morris 174 (Jared Sparks ed., 1832).

28. U.S. Const. art. 1, § 6.

29. *See United States v. Johnson*, 383 U.S. 169, 178 (1966); *United States v. Gillock,* 445 U.S. 360, 368-69 (1980).

applies only "during their Attendance at the Session of their respective Houses, and in going to and returning from the same," implying that Members are subject to criminal prosecution at other times. And the speech and debate privilege applies only to utterances "in either House," implying that the Members lack immunity outside that context.

The record of the Constitutional Convention suggests that this asymmetry—recognizing immunities for Congress but not the President—was intentional. At the end of a debate on privileges and immunities for Congress, James Madison suggested, almost as an afterthought, a discussion of the privileges of the executive.[30] The Framers declined to take up Madison's suggestion. There was no discussion of any privileges or immunities for the President.

The Founders' disinterest in taking up executive immunity is not surprising. The constitutional debate was framed by the Federalists, who sought to include an executive that was strong but whose powers were not boundless, and those who were concerned that any executive would be too inherently dangerous. The Federalists retained their concern that a President must be subject to constraints on his ambition.[31] They certainly were not advocating for increasing a President's privileges

30. *Journal of the Constitutional Convention* (Sept. 4, 1787), *in* 4 The Writings of James Madison 369 (Gaillard Hunt ed., 1903).

31. Bernard Bailyn, The Ideological Origins of the American Revolution 379 (1967); *see also* Madison, *Notes on the Constitutional Convention* (July 20, 1787), *in* 2 Farrand's Records 65-66.

or immunities. The Framers did not ignore the subject, they rejected it. On this point, there are no credible competing original understandings.

Charles Pinckney of South Carolina, a delegate to the Constitutional Convention, confirmed this understanding in a speech in the Senate in 1800. He explained that he and his fellow Framers, aware of historic abuses of undefined privileges, sought to ensure that the immunities granted to Congress were express but limited:

> [I]t was the design of the Constitution, and that not only its spirit, but letter, warrant me in the assertion, that it never was intended to give Congress, or either branch, any but specified, and those very limited, privileges indeed. They well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here.

Pinckney went on to explain that the Framers did not intend any privilege or immunity for the President:

> Let us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect. . . . No privilege of this kind was intended for your Executive, nor any except that which I have mentioned for your Legislature.[32]

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32. *Address in the United States Senate* (Mar. 5, 1800), *in* 3 FARRAND'S RECORDS 384-85.

After this explicit discussion of how the President was to be allowed no privileges or immunities, Pinckney discussed the question of privileges in general, and the potential for abuse of power. "The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more."[33]

E. Ratification Depended on Express Promises that the New President Would be Subject to Criminal Conviction

The President's susceptibility to prosecution was an express theme of the ratification debates, reflecting acute interest on the ratifiers' part in the very issue before the Court. Critical figures in multiple conventions converged on the same understanding: The President can be prosecuted.

In advocating for ratification, the Founders sought to reassure the ratifying conventions that "Our President is not a King, nor is our Senate a house of Lords."[34] Tench Coxe devoted the first substantive essay published in favor of the Constitution largely to contrasting the "nature and powers" of the President with those of the British king. Whereas the King could not "be removed, for '*he can do no wrong*,'" the President would be a creature of the people.[35]

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33. *Id.*

34. Richard Law, *Speech in the Connecticut Ratifying Convention* (Jan. 9, 1788), *in* 15 DHRC 316.

35. An American Citizen, *On the Federal Government I* (Sept. 26, 1787), *in* 2 DHRC 140.

And if he did do wrong, Coxe assured his readers that the President "*may be proceeded against like any other man in the ordinary course of law.*"[36]

The ratifying conventions emphasized the importance of the President remaining a creature of the people and devoid of special or permanent privilege. As James Wilson, another inaugural Supreme Court justice, asked rhetorically:

> Does even the first magistrate of the United States draw to himself a single privilege or security that does not extend to every person throughout the United States? Is there a single distinction attached to him in this system more than there is to the lowest officer in the republic?[37]

Wilson's implicit answer was no.

Several key figures specifically stated that the President would be subject to the legal process. Iredell, for example, explained that the President was accountable to the people under the law because he could be prosecuted in addition to being impeached. At the North Carolina ratifying convention, Iredell explained:

> If [the President] commits any misdemeanor in office, he is impeachable, removable from office, and incapacitated to hold any office of honour,

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36. *Id.* at 141.

37. *Address to the Pennsylvania Ratifying Convention* (Dec. 12, 1787), *in* 2 DHRC 579.

> trust or profit. If he commits any crime, he is punishable by the laws of his country, and in capital cases may be deprived of his life.[38]

Similarly, Alexander Contee Hanson of Maryland, writing as "Aristides," reassured skeptics: any President who engaged in bribery, corruption, or other crimes would have to face the legal consequences of his actions because "[l]ike any other individual, he is liable to punishment."[39]

* * *

The historical record creates a heavy presumption against Presidential immunity. The Framers were focused on ensuring that the President would be unable to exercise the privileges of a king. They drew on the models of state constitutions, which made the chief executive accountable including through criminal prosecution. Keenly aware of the monarch's abuse of implicit privileges, they were careful that any privileges and immunities attending the presidential office be explicitly stated and carefully limited. As noted above, when Madison suggested a discussion of privileges for the President, the Framers did not pursue his suggestion. The record of the ratifying conventions confirms the understanding that the President is subject to the law through prosecution.

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38. *Address to the North Carolina Ratifying Convention* (July 28, 1788), in 30 DHRC 327.

39. *Remarks on the Proposed Plan* (Jan. 31, 1788), *in* 11 DHRC 233.

II. PETITIONER'S ARGUMENT DEPENDS ON A FUNDAMENTAL HISTORICAL ERROR

Petitioner has, throughout this matter, erroneously argued that criminal immunity for the executive is "deeply rooted in the common law" that the Framers drew upon when they drafted the Constitution.[40]

In fact, post-Revolution common law departed from British assumptions of monarchical immunity. As described above, the early states grappled with the question of which aspects of British law to retain and which to revise. In doing so, as the early state constitutions show, they clearly rejected the common-law conception of monarchical prerogatives and immunities.

The change in the common law of executive privilege is most clearly articulated in the first "Americanized" edition of Blackstone's Commentaries on the Laws of England (1765-69), an essential source for early American jurists. St. George Tucker, one of the most prominent jurists and legal scholars in the new United States, recognized a need to update the treatise to reflect the ways American common law rejected the British system's hierarchies.

Tucker's new edition, published in 1803,[41] took care to distinguish the sections of Blackstone that addressed the

40. Pet'r Br. at 7; *see* Reply in Supp. of President Trump's Appl. for a Stay at 7-8 (Feb. 15, 2024), *Trump v. United States* (No. 23A745) ("criminal immunity for the Chief Executive was the well-established default rule, to which the Founders created a carefully crafted exception – impeachment and conviction").

41. Tucker's 1803 edition is the "most important early American edition of Blackstone's Commentaries." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 245 (2022).

King's powers and prerogatives. Tucker retained those sections in his American edition, yet made clear that they were no longer part of the American common law. On the chapter relating to the King's Prerogative, Tucker cautions the American reader that "the title 'prerogative' it is presumed was annihilated in America with the kingly government." He encourages students studying the chapter to observe "how many of the flowers of the crown, which were formerly stiled prerogatives, have been rejected as nuisances, by our own constitutions; or, where necessarily retained, have been confided to" the hands of the legislature.[42]

Tucker also contrasted a President's susceptibility to punishment to a King's presumed immunity. Of treason, for instance, Tucker wrote that "every person whatsoever, owing allegiance to the United States, may commit treason against them. This includes *all citizens*, . . . from the president of the United States to the beggar in the streets."[43] As Tucker explained: "If a president of the United States should, *by his own authority*, presume to raise an army; . . . . if coupled with evidence of a sinister design and intention in so doing, [that] would, I conceive, amount to an overt act of treason against the United States." Such a President would be subject to impeachment and to criminal punishment.[44]

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42. 2 St. George Tucker, Blackstone's Commentaries 237-38 n.1 (1803). On the privileges of king and lords, Tucker states: "The fundamental principle of the American Constitutions and governments, being the perfect equality of rights, there was no room to admit any thing therein, that should bear the most distant resemblance to the subject of this chapter." *Id.* at 219 n.1.

43. *Id.* vol. 5, App'x Note B at 31-32.

44. *Id.* at 32.

Chief Justice Marshall likewise emphasized that the Constitution rejected implicit privileges for the President. In 1807, Marshall rejected President Jefferson's argument that he should have a special privilege to withhold evidence from the trial of Aaron Burr. Marshall noted that unlike the King, who could "do no wrong" under English common law and therefore had discretion to withhold evidence from the court, such traditions had no place in the Republic. Instead, there were "many points of difference . . . between the first magistrate in England and the first magistrate of the United States."[45] Justice Marshall found no general immunity from providing evidence, and instead held that the judicial branch must decide for itself whether a particular claim of privilege is warranted.[46]

III. THE IMPEACHMENT JUDGMENT CLAUSE CANNOT BE READ TO CREATE IMMUNITY

The text and silences of the Constitution must be read in light of the dominant eighteenth-century presumption that the President would have no implicit immunity. Against the weight of history, only a clear statement in the Constitution could establish the permanent presidential immunity that Petitioner asks this Court to find.

No such clear statement is found anywhere in Article II. The Vesting and Take Care Clauses make no reference to immunity. And in light of the Framers' expressed desire to avoid unstated immunities, an immunity from criminal law cannot reasonably be inferred into the duty to faithfully execute those same laws.

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45. *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807).

46. *Id.*; *see also United States v. Zubaydah*, 595 U.S. 195, 248-49, (2022) (Gorsuch, J., dissenting).

That leaves the Article I Impeachment Judgment Clause, which states that the "Party convicted [in an impeachment trial] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." The consensus view among early commentators was that this Clause was intended solely to ensure that nothing in the impeachment process would prevent subsequent criminal prosecution. As Joseph Story wrote, because the Senate could impose only removal as a punishment, "it is indispensable, that provision should be made, that the common tribunals of justice should be at liberty to entertain jurisdiction of the offence." Otherwise,

> it might be [a] matter of extreme doubt, whether . . . a second trial for the same offence could be had, either after an acquittal, or a conviction in the court of impeachments. And if no such second trial could be had, then the grossest official offenders might escape without any substantial punishment, even for crimes, which would subject their fellow citizens to capital punishment.[47]

The Clause was "designed to overcome a claim of double jeopardy rather than to require that impeachment must

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47. 2 Story, Commentaries on the Constitution of the United States § 780 (1833) [hereinafter Commentaries on the Constitution]; *see also, e.g.*, William Rawle, A View of the Constitution of the United States of America 215 (Philip H. Nicklin, 2d ed. 1829) [hereinafter A View of the Constitution] ("the ordinary tribunals, as we shall see, are not precluded, either before or after an impeachment, from taking cognizance of the public and official delinquency").

precede any criminal proceedings."[48]

The historical record overwhelmingly supports this interpretation and refutes Petitioner's tortured reading of the text.

First, Petitioner's argument depends on an illogical reading of the Clause. There is no evidence that any Framer intended or understood the phrase "the Party convicted shall nevertheless be liable and subject to" criminal judgment to mean that a President *not* impeached and convicted is *not* subject to criminal prosecution. Had that been their intention, the Founders would have stated so directly.

Petitioner points out that Hamilton wrote in Federalist 69:

> The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law.

Petitioner's argument relies in large part on the word "afterwards," which did not make its way into the

48. Amenability of the President, Vice President, and other Civil Officers to Federal Criminal Prosecution while in Office, Op. O.L.C. 4 (1973) [hereinafter 1973 O.L.C. Memo]; Whether a Former President May Be Indicted After Acquittal by Senate, 24 Op. O.L.C. 110, 134-48 (2000) [hereinafter 2000 O.L.C. Op.].

Impeachment Judgment Clause.[49] The quote must also be read in the context of Federalist 69's overall purpose of distinguishing the President, who is not "sacred and inviolable," from a king, who is. Hamilton also wrote in Federalist 69 that when it comes to criminal liability, "the President of Confederated America would stand upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware." In other words, on this topic, even Hamilton believed that the President is equally situated to governors who had at best very limited immunity during their term—not permanent immunity. Since Hamilton wrote that in 1788, several governors have been criminally convicted.

Second, the notion that the Framers would use such an offhand phrase in Article I to create immunity for the Article II Executive makes no sense given their approach to immunity for Congress. The drafters considered privileges "an important point, [as] no subject had been more abused than privilege," and were careful to ensure that any privileges were express and limited "to what was necessary, and no more."[50] They expressly provided for limited immunity for Congress in the Speech and Debate Clause.

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49. Petitioner makes a similar argument relying on the use of the word "subsequent" in Federalist 77. Pet'r Br. at 18. But Hamilton does not use the term to prescribe a necessary order to impeachment and prosecution, and, in any event, such a term is not used in the Impeachment Judgment Clause.

50. Pinckney, *Address in the United States Senate* (Mar. 5, 1800), *in* 3 Farrand's Records 384-85.

If the Framers had intended to grant immunity to the President, they would have done so explicitly. Paradoxically, Petitioner purports to find in the "sounds of legislative silence" a far broader and permanent presidential immunity than the limited immunity the Framers *expressly* granted to Congress.

Third, the nature of American impeachment suggests that it was never meant to be the exclusive means for holding the President legally accountable. The Impeachment Judgment Clause presupposes criminality by the President, departing from the British tradition that a king could commit no crime. Having recognized the potential for criminality, the Constitution provides for a *political* remedy of impeachment, while acknowledging the *criminal* remedy that could be accorded just as with any other citizen.

The narrow, political nature of impeachment is found in the text providing for removal only for "Treason, Bribery, or other high Crimes and Misdemeanors."[51] The "high crimes and misdemeanors" language was narrower than "malpractice" or "maladministration," two other phrases that were proposed.[52] As Hamilton explained, this focused impeachment on serious political crimes "as they relate chiefly to injuries done immediately to the society itself."[53]

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51. U.S. Const. art. II, § 4.

52. Jack N. Rakove, *Impeachment, Responsibility and Constitutional Failure*, *in* British Origins and American Practice of Impeachment 206, 214-16 (Chris Monaghan & Matthew Flinders eds., 2023).

53. The Federalist No. 65.

At the same time, the Founders provided that punishment on conviction "shall not extend further than to removal from Office, and disqualification to hold" future office.[54] The British House of Lords had imposed criminal sanctions, including the death penalty, in cases of impeachment of officers (such as lord chancellors) and judges. The limiting language used in the Constitution is widely understood to reflect the Founders' belief that impeachment in the United States would be a *political* remedy, with solely political consequences.[55] Impeachment for the most serious political crimes would provide for removal of the offender from office, and thereby end the harm being done to the body politic. At the same time, "Indictment, Trial, Judgment and Punishment, according to the Law," would remain available regardless (or nevertheless), as provided in the final clause of Article I, Section 3.

Petitioner acknowledges that impeachment was designed as a political remedy, but he fails to acknowledge the Framers' description of the criminal law as a parallel process. James Wilson, for example, described impeachment as entirely separate from court trials:

> Impeachments . . . come not . . . within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims, and are directed to different objects: for this reason, the trial and punishment of an offence on an impeachment,

54. U.S. Const. art. I, § 3.

55. 2 Commentaries on the Constitution § 393; A View of the Constitution 217.

> is no bar to a trial and punishment of the same offence at common law.[56]

Tench Coxe further explained the differences between impeachment and criminal prosecution by noting that if the President is "convicted on impeachment . . . he cannot be fined, imprisoned or punished, but only may be *disqualified* from doing public mischief by losing his office." But "[i]f the nature of his offence, besides its danger to his country, should be *criminal* in itself . . . he may be tried for such crime."[57]

Contrary to Petitioner's argument, Hamilton did not suggest that a President's official acts can only be adjudged through impeachment. In Federalist 65, Hamilton merely defends the allocation of judging impeachment to Congress and criminal prosecution to the court. There is no evidence that the Impeachment Judgment Clause represents the Founders' weighing of political enforcement against criminal enforcement, as Petitioner claims.[58] They saw impeachment and criminal law as separate processes intended to serve different purposes.

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56. *Lectures on Law*, *in* 1 The Works of James Wilson 324 (Robert Green McCloskey ed., 1967); *see also Barker v. People*, 3 Cow. 686, 705 (N.Y. 1824) (if the impeachment of a "public officer[]" is for "a public offence, he may be also, indicted, tried, and punished").

57. An American Citizen, *On the Federal Government IV* (Oct. 21, 1787), *in* 13 DHRC 434.

58. Pet'r Br. at 21-22.

Story drew this same conclusion in his important 1833 treatise on constitutional law (notwithstanding Petitioner's claims to the contrary).[59] Story emphasized that the President is bound by his obligation to "take care" that the laws be upheld; indeed, "[t]he great object of the executive department is to accomplish this purpose."[60] Any President who fails to do so may be impeached or prosecuted. Impeachment, Story explained, "is confined to a removal from, and disqualification for, office; thus limiting the punishment to such modes of redress, as are peculiarly fit for a political tribunal to administer, and as will secure the public against political injuries." But, "[i]n other respects, the offence is left to be disposed of by the common tribunals of justice, according to the laws of the land, upon an indictment found by a grand jury, and a trial by jury of peers." The President, like other officials, "is to stand for his final deliverance, like his fellow citizens."[61]

Fourth, Petitioner's proposed reading cannot be reconciled with the fact that all civil Officers of the United States are subject to the same process of impeachment. Scores of officers have been tried for acts of official conduct without having been impeached, and without some inquiry into whether their crime was potentially impeachable.[62]

The Framers were themselves involved in such cases. In 1790, Congress passed and President Washington signed

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59. *Id.* at 12 (quoting Story).

60. 3 Commentaries on the Constitution § 1558.

61. *Id.* vol. 2, § 407; *see also id.*, § 347; 2000 O.L.C. Op. at 125-26.

62. *See, e.g.*, 1973 O.L.C. Memo at 4.

an act providing that a judge convicted of bribery should be permanently disqualified. The provision anticipated criminal trials for bribery (an impeachable offense) prior to a judgment by the Senate of disqualification.[63] In 1796, Attorney General Lee advised the House of Representatives, and a Committee of the House agreed, that a judge could be removed by the Senate following criminal conviction.[64] Early commentators concluded that the Framers did not intend civil officers to be immune from prosecution for official acts.[65]

Petitioner's response, that impeachment was meant to apply differently to Presidents, as opposed to inferior officers, lacks any historical support. Petitioner is correct that discussion of impeachment at the Constitutional Convention focused almost exclusively on the President. But that indicates only that the Framers' desire for accountability was most acute when it came to the President, particularly because the executive power was vested in him alone. The Framers chose to extend the impeachment process to inferior officers, and in doing so gave no indication that the implications of impeachment should be any different among categories of officers.[66]

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63. Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117 (repealed 1875); *see also* 1973 O.L.C. Memo at 5.

64. *Inquiry Into the Official Conduct of a Judge of the Northwestern Territory* (May 9, 1796), *in* 1 *American State Papers: Miscellaneous* 151; *see also* 1973 O.L.C. Memo at 5-6.

65. *E.g.*, A View of the Constitution 169, 215.

66. The Framers specified that the Vice President and "all civil Officers of the United States" would be subject to impeachment and provided that the Chief Justice shall preside

Finally, Petitioner's proposed interpretation, that an officer holds full and permanent immunity unless he is impeached and convicted, would change the nature of Congressional power in a manner never contemplated by the Founders. It would on the one hand increase Congress's power over the other branches by placing solely in Congress's hands total control over immunity for present or former officers. Contrary to the express text placing the power over clemency in the hands of the President, Congress could grant or withhold immunity on officers by acquittal or mere inaction. Congress's power in this regard would be purely political, without any clear constitutional or judicial standards. On the other hand, such an interpretation would place a significant burden on Congress, obligating it to investigate and judge those in office or no longer in office, despite the lack of any provisions that would equip them to make such immunization decisions with regularity.[67]

In sum, the historical record nowhere indicates that the Founders intended for conviction by the Senate to be a prerequisite to criminal prosecution. Such an interpretation would run contrary to the text

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over presidential impeachment trials, demonstrating that they considered the special position of the President in the impeachment context. U.S. Const. art. I, § 3, art. II, § 4. But they otherwise made no distinction, or said anything to support a distinction, between the President and other officers with respect to impeachment. *Plan* (June 18, 1787), *in* 1 DHRC 254.

67. *See* Mem. for the United States Concerning the Vice President's Claim of Constitutional Immunity at 10 n.* (filed Oct. 5, 1973), *In re Proceedings of the Grand Jury Impaneled December 5, 1972* (D. Md.) (No. 73-965); *see also* 1973 O.L.C. Memo at 17 (making similar point).

and structure of the Constitution, and the expressed understandings and practices of the Framers. Petitioner's reading cannot overcome the weight of history showing that the Founders did not understand the President to be immune from prosecution.

IV. THE ALLEGATIONS IN THIS CASE GO TO THE HEART OF THE FOUNDERS' CONCERNS ABOUT EXECUTIVE POWER

The allegations against former President Trump go to the heart of the Founders' concerns about executive power. The Framers specifically contemplated that a President might conspire with others to remain in power after the end of his term. This fear compelled them to carefully construct checks on presidential power.

The Framers were clear that "the Executive should be independent for his continuance in office on all but the people themselves."[68] To protect the people's power, the Framers ensured that the President would have no role in the election process. They crafted a detailed process in which the states, not the federal government, would determine electors. The federal role would be conducted by the Congress and Vice President. The President, by design, has no role.

The people's power to vote out a President was essential to the ratification of the Constitution. Opponents of the Constitution stressed the risk of a President refusing to leave office. Luther Martin of Maryland, for example, feared that although the President "was to be

68. The Federalist No. 68 (Hamilton).

chosen but for a limited time, yet at the expiration of that time, if he is not re-elected, it will depend entirely on his own moderation whether he will resign that authority with which he has once been invested." Anticipating that the sitting executive might have amassed "very numerous" supporters, Martin predicted that "these circumstances combined together, will enable him, when he pleases, to become a king in *name*, as well as in substance."[69]

These concerns were overcome by the assurance that the people would always have the power to remove a President by electing a new one. As Edmund Randolph pointed out at the Virginia Ratifying Convention, there was "another provision against the danger" of presidential corruption: "If he be not impeachable he may be displaced at the end of the four years."[70] St. George Tucker agreed, explaining that if the people chose an unfaithful President, "the lapse of four years enables them to correct their error, and dismiss him from their service."[71]

The crime alleged here, a failure to respect the election of a new President, is the ultimate crime against the people, who are the basis of government. The President, by constitutional design, should have no role—official or unofficial—in the determination of the people's

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69. *Genuine Information* (Nov. 29, 1787), *in* 3 Farrand's Records 218. Adopting Petitioner's theory would transform the wildest fears of the Constitution's Anti-Federalist opponents into the controlling reading of the constitutional text.

70. *Address to the Virginia Ratifying Convention* (June 17, 1788), *in* David Robertson, Debates and Other Proceedings of the Convention of Virginia 345 (1805).

71. 1 Tucker, Blackstone's Commentaries 321.

vote. Immunity for the crimes here alleged would be most abhorrent to the Framers, because immunity would upset the constitutional scheme and aid a President in overriding the people's power over him.

The Framers would also have been appalled that former President Trump, despite having left office, seeks permanent immunity. As a Federalist wrote for the Maryland ratifying convention:

> It seems, however, that the president may possibly be continued for life. He may so, provided he deserve it. If not, he retires to obscurity, without even the consolation of having produced any of the convulsions, attendant usually on grand revolutions. Should he be wicked or frantic enough to make the attempt, he attones for it, with the certain loss of wealth, liberty or life.[72]

The Founding Generation sought to ensure that, unlike a king, the President would not acquire any special status that would carry forward after the end of his term. Instead, the President would be "elected from the mass of the people, and, on the expiration of the time for which he is elected, return[] to the mass of the people again."[73]

Former President Trump evidently does not wish to bear the burdens of "the mass of the people" again. That's understandable; no one enjoys being held to account. But

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72. Aristides, *Remarks on the Proposed Plan* (Jan. 31, 1788), *in* 11 DHRC 238-39.

73. *Burr*, 25 F. Cas. at 34.

Founding Era history provides former President Trump no solace in his efforts to evade the ordinary operation of law.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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1. The *amici curiae* listed herein are participating in their individual capacity, not as representatives of their institutions. Institutions are listed for affiliation purposes only.

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