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 U.S. Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* FOR G. ANTAEUS B. EDELSOHN, IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

G. Antaeus B. Edelsohn respectfully submits this brief in support of Respondent, the United States of America.[1] Mr. Edelsohn is a licensed attorney living in Henrico County, Virginia. He has a keen interest in Constitutional Law, the just and limited enforcement of legal authority by the federal government (especially the executive branch), and a just and equitable application of law and the standards of justice against all persons in this country, regardless of wealth, power, or [prior] position.

Given the political and social impact of the matter this case presents, Mr. Edelsohn felt a personal ethical obligation to take a stand on behalf of the U.S. Constitution and the American people, to ensure against any legal precedent which would see some citizens placed above the law.

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than amicus curiae or his counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

There is no disagreement between the parties that former President Donald J. Trump refuses to accept the integrity or the results of the 2020 election, and that he took active measures to prevent certification of election results on January 6, 2021, as evidenced by his statements at the Ellipse: "All of us here today do not want to see our election victory stolen . . . . We will never give up, we will never concede . . . . All Vice President Pence has to do is send it back to the states to recertify and we become president and you are the happiest people. And I actually, I just spoke to Mike."[2] Instead, the disagreement is over: (1) what active measures Trump undertook to prevent then-candidate Joe Biden from being certified the winner of the 2020 election; (2) whether Trump had the legal authority to take the measures he did take; and (3) if Trump did not have the legal authority for those measures, whether he can and/or should be criminally liable for his actions. While the first and second points are questions of fact, best determined by an appropriate determinative body, the third is a question of law, and the fulcrum on which this case rests.

As such, the question for consideration before this Court is: "Whether, and if so to what extent, does a former president enjoy presidential immunity from criminal prosecution for conduct alleged to involve

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[2] Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part Of Impeachment Trial*, NPR (Feb. 10, 2021), https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial.

official acts during his tenure in office?" While the language differs from that in Mr. Trump's petition for a writ of certiorari,[3] the central theme of both are directly tied to 'official acts' of the Office of the President. This very language automatically delineates a distinction between official acts of the President in the capacity of the constitutional office, and acts undertaken by the President which have no bearing on the office or duties of the presidency, or otherwise fall outside of (or contravene) the bounds of the oath taken upon ascension to such office.[4] Since Mr. Trump relies heavily on this Court's opinion in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), specifically as that opinion covered "acts within the 'outer perimeter' of his official responsibility,"[5] basic logical reasoning indicates Mr. Trump grounds his position in the argument he was carrying out an official act, or acting under the aegis of congressional or statutory authority. However, if the acts alleged were not undertaken under such official umbrella, then Mr. Trump's entire argument must unambiguously fail.

One of the defining characteristics of our great experiment in republican democracy is that despite

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[3] The original language in the petition reads: "Whether the doctrine of absolute presidential immunity includes immunity from criminal prosecution for a President's official acts, i.e., those performed within the "'outer perimeter' of his official responsibility."" Application for Stay-Defendant, Trump v. United States, No. 23-939, at i (Feb. 12, 2024).

[4] "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.

[5] *Nixon v. Fitzgerald*, 457 U.S. at 756.

the vast ideological and political differences between candidates for President, either incumbent versus challenger(s), or solely among aspirants, there is an emphasis on the peaceful transition of power. America is not some tin-pot dictatorship or banana republic, where might makes right, but a nation of laws where the mandate of power is derived from "the consent of the governed."[6] This mandate relies on the principle that all citizens have equal privileges and immunities and that the law applies equally to those entrusted to carry out and execute the law, as all others. To this end, this Brief shows Mr. Trump's argument for absolute presidential immunity, even after having left office, is incorrect and should be discarded.

This Brief examines the understanding and intentions of the Framers of the Constitution and the advocates of the Federalist cause, and shows how an originalist reading not only requires a President to be accountable for any criminal acts while in office, but that legal accountability is separate and distinct from the impeachment mechanism addressing political accountability.

This Brief also scrutinizes the legal arguments for and against immunity of governmental officers and reviews the historical record of criminal and impeachment proceedings involving past issues of alleged malversation.[7] The legal arguments and

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[6] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[7] Associate Justice James Wilson explained that the phrase "high Crimes and Misdemeanors" in the Impeachment Clause of Article II, § 4, meant "malversation in office." JAMES WILSON,

historical record do not support Mr. Trump's position, but instead show any immunity protections for presidential actions can only exist during the period of the presidency, and that upon exit from office, the purpose for any immunity ceases to exist.

Finally, this Brief addresses other fatally faulty claims in Mr. Trump's arguments, and shows how the personal criminal accountability for the President for any criminal acts committed while in office is not a fault, but a feature designed to encourage studied and deliberate choices which ought to serve the best interest of the nation.

THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. VOL. II, at 165 (1804).

ARGUMENT

I. The Framers of the Constitution were deliberate in not making the President a King; instead, they wanted to ensure the Chief Executive would be accountable to the people, and not have limitless criminal immunity, even for official acts.

To properly evaluate the scope and powers of the Executive, and especially the powers and privileges of the person who holds the Office of the Presidency, the Court must look to the intentions of the drafters when they created the three separate branches of our government. As this Court has previously noted, when analyzing the intent and meaning of the Constitution, "we are to place ourselves as nearly as possible in the condition of the men who framed that instrument." *Ex Parte Bain*, 121 U.S. 1, 12 (1887). Justice Thomas has reiterated this position, notably at the 2019 Rosenkranz Originalism Conference, stating "Words have meaning at the time they are written. When we read something that someone else has written, we give the words and phrases used by that person natural meaning in context," and arguing to not interpret laws based on their meaning when they were enacted "usurps power from the people."[8]

During the period of the Constitutional Convention,[9] the Framers of the Constitution fiercely debated how the proposed federalist framework would

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[8] *Rosenkranz Originalism Conference Features Justice Thomas '74*, Yale L. Sch. (Nov. 4, 2019), https://law.yale.edu/yls-today/news/rosenkranz-originalism-conference-features-justice-thomas-74.

[9] The Constitutional Convention met in Philadelphia from May through September of 1787. *See e.g.*, *Constitutional Convention and Ratification, 1787–1789*, OFF. HISTORIAN, U.S. SEC'Y STATE, https://history.state.gov/milestones/1784-1800/convention-and-ratification.

work; especially how to prevent the vesting of executive powers in a single individual from devolving into a tyrannical system or arrangement like the one which the colonists had defeated to gain independence.[10] Indeed, the Framers of the constitution were wary of any formulation of an executive power which "would savor too much of a monarchy."[11]

1. **The Framers were aware of the dangers of having a Chief Executive be above the law, with a clear historical precedent.**

The Court should understand the Framers were not acting in a historical or social vacuum, but were instead greatly influenced by events of the past 150 years of British history, including the First and Second English Civil Wars during the reign of Charles I. Despite his defeat in the First English Civil War, King Charles I's belief in his divine right to rule led him to reject the governmental and constitutional reforms presented in the 'Heads of the Proposals,'[12] and instead continued to foment agitation between royalists and parliamentarians which ultimately led to the Second English Civil War.[13] Ultimate blame

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[10] In the debates, even though constitutional delegates acknowledged the governmental strength in some form of monarchical system, there was such strong sentiment of instituting a republican form of government and eschewing a monarchy that even "[a] limited monarchy however was out of the question." THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. I, at 87 (Max Farrand ed., 1911).

[11] *Id.* at 74.

[12] A set of proposed governmental reforms regarding the relationship of the monarchy to parliament.

[13] *See, e.g.*, David Como, *Making 'the Heads of the Proposals': The King, the Army, the Levellers, and the Roads to Putney*, 135 ENG. HIST. REV. 1387 (2020).

and culpability was laid at the feet of Charles I, and he was subsequently charged with treason, convicted, and executed.

Noted writer and political theorist of the time, John Lilburne, argued "no-one should be exempt from responsibility for the shedding of 'England's innocent blood', whether 'kings, princes, dukes ... or gentlemen'."[14] Lilburne's writings would be extremely influential in the development of the Constitution and specifically the Bill of Rights,[15] highlighting not only the familiarity which the Framers had with Lilburne's works, but also the historical and political context in which he produced them, *viz.*, the English Civil Wars and the subsequent trial and execution of Charles I.[16] Indeed, in speaking about the need for accountability of the chief executive to the members of the polity, Benjamin Franklin highlighted how "[h]istory furnishe[d] one example only of a first Magistrate being formally brought to public Justice," referencing Charles I.[17] In reasoning against any monarchical-like system which would place the chief executive

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[14] Edward Vallance, *Testimony, Tyranny and Treason: The Witnesses at Charles I's Trial*, 136 ENG. HIST. REV. 867, 886 (2021).

[15] Michael Kent Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 CONST. COMMENT. 359, 372–374 (1991). Chief Justice Earl Warren even praised the influence of Lilburne, his advocacy, and his writings on the Framers, in his opinion in Miranda v. Arizona, 384 U.S. 436, 459 (1966). Justice Hugo Black was also a keen admirer of Lilburne and his writings. *See*, *e.g.*, Paul R. Baier, *Hugo Black and Judicial Lawmaking: Forty Years in Retrospect*, 14 NEXUS 3, 13 (2009).

[16] *See, e.g.*, Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867–869 (1960).

[17] THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. II, at 65 (Max Farrand ed., 1911).

beyond the reach of the law, Franklin instead argued it would be "best . . . to provide in the Constitution for the regular punishment of the Executive when his misconduct should deserve it . . . ."[18] This is important because by the early 1700's it was well-accepted in English legal circles (and thus in the American Colonies in the late 1700's) that Charles I's execution—despite his moral and legal culpability in all the deaths resulting from the civil wars—constituted murder.[19] This means Franklin was aware of the rare and unique circumstances which had seen a former chief executive (in that case, a monarch) brought to justice, and wanted to ensure a more definite and formalized mechanism for holding such persons accountable when they violated their duties and committed egregious acts.

The Court should take special note of Franklin's phrase "regular punishment,"[20] when describing the means of addressing misconduct. Considering Lilburne's expostulation against anyone being "exempt from responsibility" for their actions, especially by mere dint of their heritage or power,[21] "regular" should best be understood as 'common to all,' *viz.*, general courts of criminal law. Put simply, Benjamin Franklin was clearly articulating that any and all persons who would hold the office of chief executive in the new government which the Congress was constructing, had to be as accountable for their criminal misdeeds as any other person. Applied to the matter at bar, Mr. Trump must enjoy no more

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[18] *Id.*

[19] FREDERIC W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 282 (1st ed. 1908).

[20] THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. II, at 65 (Max Farrand ed., 1911.

[21] *Vallance*, *supra* note 14, at 886.

privilege in the eyes of the law than anyone else facing criminal charges.

2. The Federalists were explicit in addressing anti-Federalist concerns that the Executive would be beyond the reach of the law or accountability.

Franklin was hardly alone in calling to ensure executive accountability. In expressing his thoughts on the matter of a single individual to head the proposed executive branch, George Mason posited "Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice?"[22] Mason not only recognized the danger which one person in such a position of power represented to the interests of the people, but also the possibility that being in such a position of power could effectively put someone above the law. For this reason, Mason was unequivocal in his position that "when great crimes were committed he was for punishing the principal as well as the Coadjutors."[23] As with Franklin, Mason felt it was imperative to the existence and preservation of a republican form of government for the chief executive to be just as accountable for criminal deeds as anyone else.

George Mason was strongly anti-Federalist and expressed his objections to the Constitution in a public letter, including his concern with the possibility of a runaway executive who would use his power to insulate himself from accountability for crime: "The President of the United States has the unrestrained

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[22] THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. II, at 65 (Max Farrand ed., 1911).

[23] *Id.*

power of granting pardon for treason; which may be sometimes exercised to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt."[24] Leading Federalist and future Associate Justice of this august Court's original composition, James Iredell, directly responded to Mason's letter in depth, including the possibility of evading justice after the commission of treasonous acts. While acknowledging a President could commit treason, Iredell nevertheless dismissed the possibility of such a perpetrator escaping justice: "Such a thing is however possible, and *accordingly he is not exempt from a trial*, if he should be guilty or supposed guilty, of that or any other offence."[25] Such a resounding statement against presidential exceptionalism should not be dismissed. Furthermore, this Court should emphatically resist any argument which would see an impeachment proceeding as an acceptable substitute for a criminal trial. Indeed, any insinuation that future Justice Iredell was equating a criminal trial with a political proceeding which "shall not extend further than to removal from Office, and disqualification"[26] from future official office, is fatuous and risible.

Alexander Hamilton, addressing the concerns of anti-Federalists more broadly, was nevertheless equally clear. Writing as Publius in Federalist No. 70, Hamilton argued even under the unitary executive which would be created by the Constitution, the people would still have the "opportunity of discovering with facility and clearness the misconduct of the

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[24] PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-1788, at 330–331 (Paul L. Ford ed., 1888).

[25] *Id.* at 352 (emphasis added).

[26] U.S. CONST. art. I, § 3, cl. 7.

persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it."[27] Hamilton further differentiated the American constitutional executive from the British one:

> In England, the king is a perpetual magistrate; and it is a maxim which has obtained for the sake of the public peace, that he is unaccountable for his administration, and his person sacred . . . . He is the absolute master of his own conduct in the exercise of his office, and may observe or disregard the counsel given to him at his sole discretion . . . . But in a republic, where every magistrate ought to be personally responsible for his behavior in office the reason which in the British Constitution dictates the propriety of a council . . . ceases to apply . . . .[28]

Hamilton's word choice to juxtapose the British system from the nascent American constitutional one is important, specifically how he speaks of a king being "unaccountable for his administration," and "his person sacred." In contrast, Hamilton was advocating for a new American republic, where "every magistrate," including the chief executive, is "personally responsible for his behavior in office." The emphasis on differentiating personal responsibility under the Constitution versus the sanctity of the person of a king was more than just a reference to the ability to remove a leader from power; it was a specific statement to the public that the law would apply

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[27] THE FEDERALIST NO. 70 (Alexander Hamilton).

[28] *Id.*

equally to all persons, and no one was exempt from accountability for criminal activity.

In application to the matter present before this Court, the intentions of the Framers of the Constitution are clear; despite his former position as the 45th President, Mr. Trump must be equally accountable in criminal courts and address criminal charges in the same manner as the public.

II. There is no legal basis to forestall or terminate the current criminal cases against Mr. Trump simply because he was previously acquitted in impeachment proceedings by the U.S. Senate.

1. The lack of a conviction in the impeachment trial is no bar to the present criminal suit.

The Constitutional protections against double jeopardy are limited to situations where one is "in jeopardy of life or limb."[29] Since an impeachment conviction "shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States,"[30] there is no credible argument that either life or limb are put in jeopardy due to an impeachment trial—thus double jeopardy cannot apply to any subsequent criminal prosecution.

Regarding impeachment, the Senate has already decisively spoken about how an impeachment proceeding under Article I of the Constitution, brought subsequent to an acquittal in a criminal case based on the same or similar charges, does not violate the Fifth Amendment protections against double jeopardy, when considering the impeachment of

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[29] U.S. CONST. amend. V.

[30] U.S. CONST. art. I, § 3, cl. 7.

former District Court Judge, Alcee L. Hastings.[31] While no doubt strange to see the U.S. Senate as the final authority on a matter of law, in *Nixon v. United States*, 506 U.S. 224 (1993), this Court found impeachment to be a special case, where the Constitutional grant of "sole Power to try all Impeachments"[32] to the Senate, was one of broad latitude and not subject to judicial review.

If that was not sufficient, in its own review of Hasting's impeachment, the Investigating Committee of the Eleventh Circuit Judicial Council (where Hastings' court sat), averred to Congress that no double jeopardy issue existed.[33] Moreover, prior to the *Nixon* decision, the D.C. District Court twice concluded double jeopardy does not preclude a Senate trial because "impeachment is not a criminal proceeding,"[34] but rather is "a wholly separate proceeding from a criminal trial, and it has an entirely different purpose."[35] If an acquittal in a more serious

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[31] The Senate voted 92-1 against Hastings' motion to dismiss on double jeopardy grounds. *See*, *e.g.* S. REP. NO. 101-156, at 5–6 (1989).

[32] U.S. CONST. art. I, § 3, cl. 6.

[33] *In the Matter of the Impeachment Inquiry Concerning U.S. District Judge Alcee L Hastings. Hearings Before the Subcommittee on Criminal Justice of the House Comm on the Judiciary*, 100TH CONG. APP. 1, at 347–349 (1987).

[34] Hastings v. U.S. Senate, Impeachment Trial Comm., 716 F. Supp. 38, 41 (D.D.C. 1989).

[35] Hastings v. United States, 802 F. Supp. 490, 500 (D.D.C. 1992). While not directly analogous, this Court's jurisprudence shows acquittal in a criminal trial does not preclude a subsequent non-criminal action on the same or similar matters. *See*, *e.g.*, Helvering v. Mitchell, 303 U.S. 391 (1938); One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972); United States v. Ursery, 518 U.S. 267 (1996). The Court should also note the impeachment proceedings brought against Third Circuit judge J.

criminal proceeding does not bar a subsequent impeachment trial, there can be no sound argument how an impeachment acquittal should bar a subsequent criminal proceeding.

This should intuitively make sense since the very foundation of our tripartite system of government relies on the separation of powers among the branches and accords each one a different, distinct function. The role of the legislature is not judicial in nature, with the very narrow exception of impeachments. Impeachment trials, unlike criminal or civil trials, do not have a consistent set procedure, rules of evidence, or the other hallmarks associated with traditional courts of law.[36] Given the seriousness the Constitution gives to the potential loss of life, liberty, or property, the Framers saw fit to ensure proceedings affecting those matters were either completely in the bailiwick of the judiciary or at the very least subject to judicial review, and thus provides a clear differentiation between impeachment versus either civil or criminal trials.[37]

Associate Justice Joseph Story addressed the issue of double jeopardy in the context of

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Warren Davis in 1941, after criminal proceedings resulted in two hung juries.

[36] There have been notable differences across not only the presidential impeachment trials, but also compared to trials of judges and other officials. *See*, *e.g.*, CHARLES W. JOHNSON ET AL., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 619–620 (2017), *and* COMM. R. & ADMIN., SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE 223–231 (2017).

[37] *See, e.g.*, THE FEDERALIST NO. 65 (Alexander Hamilton) (differentiating between impeachment and "prosecution and punishment in the ordinary course of law," and describing this as an "intended" form of "double security.").

impeachment in his *Commentaries on the Constitution*, noting:

> If the court of impeachments is merely to pronounce a sentence of removal from office and the other disabilities, then it is indispensable that provision should be made that the common tribunals of justice should be at liberty to entertain jurisdiction of the offence for the purpose of inflicting the common punishment applicable to unofficial offenders. Otherwise, it might be matter of extreme doubt whether, consistently with the great maxim above mentioned, established for the security of the life and limbs and liberty of the citizen, 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 of official offenders might escape without any substantial punishment, even for crimes which would subject their fellow-citizens to capital punishment*.[38]

After reviewing the text of the Constitution and analyzing different offenses which might lead to impeachment, and considering the dangers of an avowedly political body administering punishment after proceedings of a "political nature," Justice Story firmly concluded an impeachment trial and any

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[38] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, VOL. I, at 571–572 (5th ed. 1905) (emphasis added).

subsequent criminal trial are two wholly different things, and the one does not prevent the other.[39]

This was the same conclusion the Justice Department's Office of Legal Counsel reached, both in a 1973 memo addressing whether the President or Vice-President could face criminal prosecution while in office,[40] and reiterated in 2000 when issuing a formal opinion on the question of whether a former President may be indicted and tried for the same offenses for which he was impeached by the House and acquitted by the Senate.[41] The OLC's opinion is exhaustive, covering documents surrounding the 1973 memo and the associated investigations into former President Richard Nixon and former Vice-President Spiro Agnew, a review of applicable caselaw, a historical review of the Constitution and contextual analysis, and an evaluation of impeachment proceedings, including those of Hastings and former President Bill Clinton. The ultimate conclusion in the OLC's 2000 opinion was unambiguous: "the Constitution permits a former President to be criminally prosecuted for the same offenses for which he was impeached by the House and acquitted by the Senate while in office."[42]

In light of the combined weight of these authorities, the Court must reject Mr. Trump's claim

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[39] *Id.* at 572–573.

[40] Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office*, at 2 (Sept. 24, 1973) [hereinafter *O.L.C. Memo*].

[41] Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. 110 (2000).

[42] *Id.* at 155.

that impeachment and conviction in the Senate is a necessary prerequisite to any subsequent criminal proceeding. Any assertion the impeachment acquittal renders the present criminal case a violation of the protection against double jeopardy, is wholly without merit.

2. The doctrine of judicial estoppel prevents Mr. Trump from asserting immunity to criminal prosecution due to a failed impeachment, when his own defense and argument in the impeachment trial heavily relied on the assertion that a criminal proceeding was the appropriate legal mechanism to try him for alleged crimes.

Another issue vitiating Mr. Trump's claim is the equitable doctrine of judicial estoppel. The American legal system has long held the integrity of the judicial process demands a party not argue materially diametric positions in separate proceedings about the same issue: "The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 743 (2001). Under the judicial estoppel doctrine, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee,* 156 U. S. 680, 689 (1895)).

During the second impeachment trial, on Feb. 9, 2021, Mr. Trump, arguing through his lead counsel, decried the impropriety of conducting an impeachment trial after he had already left the Presidency. Notably, he argued if Congress believed he had committed a crime, they should "go and arrest

him."[43] Mr. Trump further argued, "there is no opportunity where the President of the United States can run rampant into January, the end of his term, and just go away scot-free. The Department of Justice does know what to do with such people. And so far, I haven't seen any activity in that direction."[44] However, now such activity has occurred, in petitioning this Court, Mr. Trump seeks rescue from his own snare.

While the second impeachment trial resulted in an acquittal, with only 57 Senators voting to convict, statements by some of the 43 Senators who voted for acquittal show they believed Mr. Trump is not immune from criminal prosecution. Just minutes after voting to acquit, Senator Mitch McConnell explained he felt impeachment was not the proper venue to try a former president, but was unequivocal in stating his belief Mr. Trump could face criminal charges:

> President Trump is still liable for everything he did while he was in office, as an ordinary citizen—unless the statute of limitations is run, still liable for everything he did while he was in office. He didn't get away with anything yet—yet. We have a criminal justice system in this country. We have civil litigation, and former Presidents are not immune from being accountable by either one.[45]

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[43] 167 CONG. REC. S601 (daily ed. Feb. 9, 2021) (statement of Counsel Bruce Castor).

[44] *Id.*

[45] 167 CONG. REC. S736 (daily ed. Feb. 13, 2021) (statement of Sen. McConnell).

Senator Rob Portman also released a statement shortly after voting, where he too explained he believed impeachment was not the proper venue, but stated "the appropriate place to address former officials' conduct is the criminal justice system."[46] Likewise, Senators John Boozman, Shelly Moore Capito, John Hoeven, Jerry Moran, Dan Sullivan, and John Thune all made statements justifying their acquittal votes on their belief impeachment was not the proper place to try these charges, and making various statements of Mr. Trump's culpability in the events of January 6, 2021.[47] If they were told the only way to bring criminal charges required conviction would the vote change? Based on their statements, his Court must accept the strong likelihood Mr. Trump's arguments in the impeachment trial had an influential effect on these Senators. While obviously impossible to know the result had Mr. Trump not made this argument, equity dictates Mr. Trump must not be allowed to metaphorically point the finger back at the Senate and essentially blame them for getting it wrong.

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[46] Tiffany L. Denen, *Senator Portman releases statement after Senate acquits Trump, ending impeachment trial*, DAYTON 24/7 NOW (Feb. 13, 2021), https://dayton247now.com/news/local/senator-portman-releases-statement-after-senate-acquits-trump-ending-impeachment-trial#.

[47] Ryan Goodman and Josh Asabor, *In Their Own Words: The 43 Republicans' Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JUST SECURITY (Feb. 15, 2021), https://www.justsecurity.org/74725/in-their-own-words-the-43-republicans-explanations-of-their-votes-not-to-convict-trump-in-impeachment-trial/.

III. Presidential immunity while in office is a debatable necessity to ensure the Executive branch of government can function in an unimpeded manner; however this argument fails once the officeholder leaves office.

The basis of our current understanding regarding presidential immunity is largely rooted in the 1973 OLC memo, referenced *supra*, and reinforced by a 2000 OLC opinion, asserting "the conclusion reached by the Department in 1973 still represents the best interpretation of the Constitution."[48] However even the 1973 memo recognizes any "immune[ity] from criminal prosecution" exists only "while [the President] is in office."[49] Indeed, the reasons posited in favor of immunity only hold weight under the consideration that the person occupying the office of the President is still in office. Once their term ends and a new President is sworn in, those considerations cease to exist. For example, one consideration is that "defend[ing] a criminal trial and to attend court . . . would interfere with the President's unique official duties."[50] Another consideration cited is the President is "the symbolic head of the nation" and "[t]o wound him by a criminal proceeding [would] hamstring the operation of the

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[48] A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222 (2000).

[49] *O.L.C. Memo*, *supra* note 40, at 18.

[50] *Id.* at 28. Though in the same breath, the memo also acknowledges the Twenty-Fifth Amendment's incapacitation provision might be applicable in such a situation. *Id.* For a more expansive discussion of Twenty-Fifth Amendment arguments, *see* Saikrishna Bangalore Prakash, *Prosecuting and Punishing Our Presidents*, 100 TEX. L. REV. 55, 92–95 (2021).

whole governmental apparatus."[51] A further consideration cited is the disruption of the "four-year popular mandate" granted by the immediately preceding national election.[52] While learned minds can debate the social and legal value of each of these considerations, there can be no debate such arguments cannot survive the administration upon which they are based. A former President has no "unique official duties," is no longer the "symbolic head of the nation," has no say in the operation of the "governmental apparatus," and has no "popular mandate." This is precisely the situation here with Mr. Trump; formerly President, to be sure, but no longer, and as such, he is no longer entitled to the same considerations he had when occupying that high office.

No less important are the practical and social effects which a temporary immunity provide regarding the leadership of the nation. Mr. Trump erroneously argues anything short of absolute immunity will leave the presidency "weak and hollow," and would be "ruinous for the American political system as a whole."[53] Indeed, Mr. Trump feels so strongly about this point that he asserts this "vital consideration alone resolves the question presented in favor of dismissal of this case."[54] However this Court must not ignore the fundamental bedrock principle which Mr. Trump asks it to so easily forget; "[t]he Government of the United States [is] emphatically termed a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. 137, 163

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[51] *O.L.C. Memo*, *supra* note 40, at 30.

[52] *Id.* at 32.

[53] Brief of Petitioner-Defendant at 7, Trump v. United States, No. 23-939 (Mar. 19, 2024) [hereinafter *Brief of Petitioner*].

[54] *Id.*

(1803). That consideration for the ramifications of the actions of the Chief Executive will influence the decision-making process is not a fault, but a feature designed to encourage studied and deliberate choices which ought to serve the best interest of the nation.

1. The President has a duty to take care the laws are faithfully executed—to violate those same laws would be a violation of his duty and cannot be considered an official act.

One of the elements alleged by Special Prosecutor Jack Smith is that as President, Mr. Trump used "criminal efforts to overturn the results of the Presidential election, including through the use of official power."[55] Mr. Trump seeks to conflate the term 'official power' with the term 'official duty,' but this is a fundamental and fatal mistake.

'Official powers' include those which are listed in Art. II, § 2 of the Constitution, and include the power of pardons, the power of recess appointments, and the power to control the military. Some pundits have attempted to make hay out of a question posed in oral argument before the D.C. Circuit, about the indictability of a President who ordered SEAL Team 6 to assassinate a political rival under Mr. Trump's expansive view of Presidential immunity—Mr. Trump argued immunity attaches up to the point of an impeachment conviction.[56] While some have tried to dismiss the issue by arguing such an order would be

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[55] Response in Opposition to Defendant's Stay Request at 2, Trump v. United States, No. 23-939 (Feb. 14, 2024).

[56] Oral Argument at 07:43 and 08:14, United States v. Trump, No. 23-3228, https://www.cadc.uscourts.gov/recordings/recordings2023.nsf/9A6D28B62A2BE79B85258A9F00497332/$file/23-3228.mp3.

unlawful and thus would not be obeyed,[57] this ignores two key points: (1) Article 77 of the UCMJ, 10 U.S.C. § 877, makes it is illegal to give a command, the doing of which would violate the UCMJ—such as murder—and (2) the argument such an unlawful order would not be carried out explicitly admits to the illegality of the order, which itself is a violation of the UCMJ. Given a hypothetical where a President orders a military unit to commit a crime, grants preemptive pardons for that crime, and seals all information related to the operation (powers which the President holds), so the information only comes out after the President has left office, the idea such a President should be immune to prosecution, absent an impeachment and conviction, is simply a bridge too far. Moreover, it ignores the distinction between powers and duties.

In contrast to the powers inherent in the Presidency, with the exception of the § 2 language regarding a duty to appoint ambassadors, federal judges, and certain public officials, the 'official duties' of the President are primarily laid out in Art. II, § 3, and cover duties to give a State of the Union, receive ambassadors and other dignitaries, commission the officers of the U.S., and most importantly, "take Care that the Laws be faithfully executed." To take care the laws are faithfully executed must, by necessity, start with the conduct of the President, as he can be master of no one and nothing if he is not first master of himself and his own actions. John Lilburne, referenced *supra*, opined statutes "must support the trust implicit in the social contract or they are void. A statute is inherently void if it violates the reason for the establishment of government authority, the public

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[57] Brief for Three Former Military Officers as Amici Curiae Supporting Petitioner at 9, Trump v. United States, No. 23-939 (Mar. 19, 2024).

good."[58] The American system of government is predicated on the consent of the governed,[59] and implies such consent only exists so long as the governing authority serves the public interest. It follows, therefore, that actions which transgress the public good, diminish and weaken the foundation for such authority. While Lilburne was writing about the validity of a law whose text violates the public good, his point is equally valid in the context of someone who is charged with ensuring the law is upheld and respected. A judge who openly flaunts the rules of justice erodes public trust in the justice system; it can be no different for a Chief Executive who decides the nation's laws apply to all but him.

Approached from a historical, instead of hypothetical, direction, the case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), provides a worthy example of the distinction between what is covered by a President's 'official powers,' and what is allowed as part of his 'official duties.' In discussing the scope of President Harry Truman's ability to prosecute the Korean War as Commander in Chief of the U.S. military, Justice Robert Jackson acknowledged the Constitution "puts the Nation's armed forces under presidential command," and remarked how "this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere,

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[58] Diane Parkin-Speer, *John Lilburne: A Revolutionary Interprets Statutes and Common Law Due Process*, 1 L. & HIST. REV. 276, 281-282 (1983).

[59] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

that can be done with an army or navy."[60] However Justice Jackson countered this idea, saying the President's "command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress."[61] This perfectly illustrates how an exercise of Presidential power does not automatically imply that exercise is covered within the 'official duties' of the President. Justice Jackson elucidated three separate categories of Presidential action and the attending authority with which a President acts: (1) the highest when he "acts pursuant to an express or implied authorization of Congress;" (2) middling when he "acts in absence of either a congressional grant or denial of authority;" and (3) lowest when he "takes measures incompatible with the expressed or implied will of Congress."[62] While not identical, this can be reframed in context of Presidential authority in light of actions taken in reference to the Constitution, *viz.*, his constitutional authority is at its maximum when strictly adhering to the textual duties (i.e. nominating candidates for federal judgeships); but the authority is at its lowest/nonexistent when violating an express constitutional duty. There can be no greater example of a violation of an express constitutional duty, than the willful and deliberate commission of multiple felonies. In this light, if Mr. Trump's alleged actions in this case are deemed to fall outside his 'official

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[60] Youngstown, 343 U.S. at 641–642 (Jackson, J., concurring).

[61] *Id.* at 645–646.

[62] *Id.* at 635–637.

duties,' then the rest of this brief is largely irrelevant and Mr. Trump's petition must fail.

2. Donald Trump seeks to hoodwink this Court and the American people by demanding both an ahistorical aggrandizement of post-presidential status, and for the judicial deference only afforded to Executive discretionary decisions expanded so as to obviate presidential requirements to act within the bounds of the law.

The Court must not be drawn off course by Mr. Trump's farfetched arguments, and instead remember the facts which underlie this case, *viz.*, Mr. Trump's return to the status of a private citizen, after the conclusion of his Presidential term. George Washington set the tone for what it meant to be President when he eschewed a third presidential term and returned to private life. In his farewell address, Washington was clear not only in how he saw himself in relation to the public, as a 'fellow citizen,' but expressed how leaving the Presidency meant a return to a coequal status with the populace at large:

> Friends and Fellow-Citizens: The period for a new election of a citizen to administer the executive government of the United States being not far distant . . . I should now apprise you of the resolution I have formed, to decline being considered among the number of those out of whom a choice is to be made . . . . I anticipate with pleasing expectation that retreat, in which I promise myself to realize without alloy the sweet enjoyment of partaking in the midst of my fellow citizens the benign influence of good laws under a free government—the ever favorite object of my heart, and the

> happy reward, as I trust, of our mutual cares, labors and dangers. [63]

Former President Calvin Coolidge was even more direct in his statements about choosing not to pursue a third term:

> We draw our Presidents from the people. It is a wholesome thing for them to return to the people. . . . They have only the same title to nobility that belongs to all our citizens, which is the one based on achievement and character, so they need not assume superiority. It is becoming for them to engage in some dignified employment where they can be of service as others are. Our country does not believe in idleness. It honors hard work. I wanted to serve the country again as a private citizen.[64]

Indeed, the history of former Presidents is replete with examples of how, upon leaving office, these former leading statesmen retired, pursued additional occupations in both private and public capacities, and generally enjoyed no superior status in the eyes of the law.[65]

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[63] GEORGE WASHINGTON, WASHINGTON'S FAREWELL ADDRESS TO THE PEOPLE OF THE UNITED STATES 1 (U.S. Senate ed. 2000) (1796).

[64] CALVIN COOLIDGE, THE AUTOBIOGRAPHY OF CALVIN COOLIDGE 242–43 (1929).

[65] *See,* FAREWELL TO THE CHIEF: FORMER PRESIDENTS IN AMERICAN PUBLIC LIFE (Richard N. Smith & Timothy Walch eds. 1990).

Mr. Trump also brings up a bevy of arguments regarding immunity, which can be easily dismissed in short order. For example, Mr. Trump asserts a general history of common law immunity pertaining to various members of the government including judges and legislators.[66] While he is correct that our system of law generally recognizes judicial immunity for acts committed within the scope of a judge's official duties, the criminal indictments and trials of Third Circuit Judge John W. Davis and District Court Judge Alcee Hastings, *supra*, for alleged misconduct related to cases on which they were presiding,[67] clearly indicate immunity is not absolute, even regarding actions which touch on official judicial duties. Even the 1973 OLC memo stated "criminal proceedings could be instituted against a sitting Justice of the Supreme Court."[68] Regarding, the immunity provided by the 'Speech or Debate clause' of the Constitution, Mr. Trump is remiss for ignoring the caveat where immunity only applies "*except*" in cases of "Treason, Felony and Breach of the Peace."[69] Senator Bob Menendez's current charges serve as merely the latest, if *au courant*, example of a sitting Senator

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[66] *Brief of Petitioner, supra* note 53 at 24–25.

[67] Davis' indictment resulted from alleged misconduct concerning a bankruptcy proceeding. *JOHN W. DAVIS SR., RETIRED U.S. JUDGE Jurist Dies in Hospital at Norfolk—A Figure in Fox Bankruptcy Scandal*, N.Y. TIMES, Feb. 22, 1945, at 27. Hastings' indictment stemmed from allegations of bribery in a racketeering case. Ruth Marcus, *Senate Removes Hastings*, WASH. POST, Oct. 21, 1989, at A01.

[68] *O.L.C. Memo*, *supra* note 40, at 9.

[69] U.S. CONST. art. I, § 6, cl. 1 (emphasis added).

being indicted.[70] This is before taking into account these examples of immunity (or lack thereof, for the cited party) can be differentiated from the present matter in that Mr. Trump is no longer President, but has reverted to being a coequal citizen with the public at large.

Mr. Trump also raises the spectre of a "severe constitutional problem" with the current criminal proceedings, based on the uniqueness of indicting a former President for criminal charges while in office.[71] This bears qualification on two fronts: (1) recently unsealed documents surrounding the Watergate investigation indicate former President Richard Nixon would likely have been indicted on numerous criminal charges had he not been pardoned by his successor one month after resignation;[72] (2) Mr. Trump is the only former President to have been alleged to have criminally interfered with the peaceful transfer of power after losing reelection, and as such will necessarily constitute a matter of first impression.[73] Furthermore, Mr. Trump's reliance on

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[70] Larry Neumeister, *Sen. Bob Menendez enters not guilty plea to latest criminal indictment*, AP (Mar. 11, 2024), https://apnews.com/article/menendez-federal-bribery-indictment-2f4a8945ea113debe54b062dc59d2c88.

[71] *Brief of Petitioner, supra* note 53 at 24 (quoting Trump v. Anderson, 601 U.S. ___ (2024), No. 23-719, slip op. at 9 (Mar. 4, 2024).

[72] GEORGE FRAMPTON, WATERGATE TASKFORCE PROSPECTIVE REPORT 4–5 (1974).

[73] Criminal Indictment, United States v. Trump, No. 1:23-cr-00257-TSC, Doc. 1 (D.D.C. Aug. 1, 2023). On the topic of first impressions, Mr. Trump is also the first former president to been found to have "engaged in insurrection." Anderson v. Griswold, No. 23CV32577, ¶¶ 241, 298 (Dist. Ct., City & Cnty. of Denver, Nov. 17, 2023), *aff'd in part, rev'd in part*, Anderson v. Griswold,

Nixon v. Fitzgerald 457 U.S. 731 (1982) is grossly misplaced, as not only did that case deal solely with civil liability, but it was focused on "discretionary responsibilities."[74] Regarding immunity in general, "this Court has recognized that the sphere of protected action must be related closely to the immunity's justifying purposes."[75] A purpose of ensuring the proper and unhindered functions of the Executive Branch is certainly justifiable; a purpose of allowing indiscriminate commission of felonious activity aimed at undermining the peaceful transition of power is most certainly *not.*

Whether Mr. Trump negligently crafts his argument as if he were still President, or is intentionally trying to muddy the waters with his appeal to caselaw dealing with matters inapposite to these facts, his arguments must fail in the context of this case.

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No. 23SA300, slip op. at 8 (Colo., Dec. 19, 2023), *rev'd on other grounds sub nom.* Trump v. Anderson, 601 U.S. ___ (2024), No. 23-719, slip op. at 12 (Mar. 4, 2024) (though this Court overturned the decision of the Colorado Supreme Court, the rationale was not based on an error of fact or law by the trial court, which felt it lacked the power to apply section 3 to the former President, but merely that "responsibility for enforcing Section 3 against federal officeholders and candidates rests with Congress and not the States.").

[74] 457 U.S. at 756.

[75] *Id.* at 755.

CONCLUSION

For the foregoing reasons, the Court of Appeals for the District of Columbia was correct in its decision that presidential immunity against criminal prosecution for crimes committed while in office does not extend beyond the limit of the presidential term of office. Accordingly, the judgment of the Appellate Court should be affirmed.

Respectfully submitted,

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