No. 23-939

In The
Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF FORMER UNITED STATES ATTORNEY GENERAL JOHN D. ASHCROFT AND CONSTITUTIONAL COALITION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether, and if so to what extent, does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office?

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INTEREST OF *AMICI CURIAE*[1]

John D. Ashcroft is the former Attorney General for the United States, having served in the Administration of President George W. Bush between 2001 and 2005. General Ashcroft was serving as U.S. Attorney General on September 11, 2001, when terrorists attacked the United States. General Ashcroft advised President George W. Bush in responding to these attacks and in other actions President Bush took during his tenure in office. General Ashcroft also served as Missouri's Attorney General from 1976 to 1985, Governor of Missouri from 1985 to 1993, and United States Senator representing Missouri from 1995 until 2001.

The Constitutional Coalition is a not-for-profit 501(c)(3) public charity, established in 1978 for "charitable and educational purposes" dedicated to promoting an awareness of, and appreciation for, the United States Constitution and the principles upon which the United States was founded.

INTRODUCTION

To perform the constitutional duties as Chief Executive and Commander-in-Chief, the President must not fear criminal prosecution for official acts taken

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part. No party or counsel for a party, or any other person, other than *amici curiae*, made a monetary contribution intended to fund the preparation or submission of this brief.

during the President's tenure in office. This is not to say that the President is or should be unaccountable or "above the law." Rather, the Impeachment Clause of the Constitution provides the exclusive procedure by which the President can be prosecuted for official acts the President takes during the President's tenure in office by instructing, "the Party" convicted upon impeachment "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. CONST. art. I, § 3, cl. 7.

The answer to the Question Presented is this: to be subject to criminal prosecution for official acts taken during a former President's tenure in office, the President must first be impeached by the House of Representatives and convicted by the Senate, as provided in the Impeachment Clause of Article I. Such a holding is consistent with this Court's decision in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

The question before the Court is constitutionally foundational; its resolution will have the permanent significance of Chief Justice John Marshall's decision in *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137 (1803). In answering the Question Presented, this Court must either confirm or weaken the longstanding authority of the President as our nation's Chief Executive and Commander-in-Chief, necessarily and permanently impacting the relationship of the Legislative, Executive, and Judicial branches of our federal government.

STATEMENT OF THE CASE

A. Procedural background.

1. The House of Representatives impeached President Trump, and the Senate acquitted President Trump.

January 13, 2021 (one week before President Trump's term as the nation's forty-fifth President ended), the House of Representatives of the 117th Congress, under then-Speaker Nancy Pelosi, introduced a bill seeking to impeach President Trump for "incitement of an insurrection." The House of Representatives voted 232 to 197 to impeach President Trump.

The House impeachment of President Trump was referred to the Senate. The trial was set in the Senate for February 9, 2021, which was after President Trump left office and President Biden had assumed the office of President. The Constitution provides that the Chief Justice of the United States presides over an impeachment trial of a sitting President. But, as President Trump had already left office, Chief Justice Roberts did not preside over the Senate trial. The Senate voted 57 to convict and 43 to acquit. This fell short of the two-thirds majority required for conviction under Article I.

2. Attorney General Garland criminally prosecutes President Trump.

President Joseph Biden was inaugurated on January 20, 2021. President Biden appointed Merrick

Garland to be Attorney General of the United States on March 11, 2021. Notwithstanding the Senate's vote acquitting President Trump, Attorney General Garland, without referencing the Constitution's Impeachment Clause, appointed a "Special Counsel" to pursue an "ongoing investigation into whether a person or entity [including President Trump] violated the law in connection with efforts to interfere with the lawful transfer of power following the 2020 presidential election or the certification of the Electoral College vote held on or about January 6, 2021."[2]

Acting on Special Counsel Smith's presentment, a federal grand jury in the District of Columbia indicted former President Trump alleging President Trump violated four federal criminal statutes.[3] Importantly, the

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[2] Office of the Attorney General "appointment of John L. Smith as Special Counsel," Order No. 5559-2022 (Nov. 18, 2022). Attorney General Garland cited 28 U.S.C. §§ 509, 510, 513 and 515 as authority to appoint a Special Counsel. Special Counsel Smith's authority to criminally prosecute a former President is disputed. See Brief of Former Attorney General Edwin Meese III, Law Professors Steven Calabresi and Gary Lawson, and Citizens United as *Amici Curiae* in Support of Applicant, *Donald J. Trump v. United States of America*, No. 23-939 (filed Feb. 20, 2024).

[3] These include: (1) Conspiracy to Defraud the United States [by attempting to overturn the 2020 presidential election results], in violation of 18 U.S.C. § 371; (2) Conspiracy to Obstruct an Official Proceeding[, *i.e.*, Congress's certification of the electoral vote], in violation of 18 U.S.C. § 1512(k); (3) Obstruction of, and Attempt to Obstruct, an Official Proceeding, in violation of 18 U.S.C. §§ 1512(c)(2), 2; and (4) Conspiracy Against Rights [to vote and have votes counted], in violation of 18 U.S.C. § 241.

United States v. Donald J. Trump, No. 23-257 (TSC) (D.D.C. Dec. 1, 2023), slip op., p. 5.

Special Counsel's indictment did *not* allege President Trump committed "insurrection" against the United States, nor that President Trump "incited an insurrection" against the United States. If convicted on all four counts, former President Trump could be incarcerated for the rest of his life.[4]

The gravamen of Special Counsel Smith's indictment is that, on January 6, 2021, while still in office, President Trump made statements from the Ellipse outside the White House encouraging supporters to advocate that the joint session of Congress not accept the results of the Electoral College vote in the 2020 Presidential Election. President Trump declared, "I know that everyone here will soon be marching over to the Capitol Building to peacefully and patriotically make your voices heard." These statements were made on the day the United States Congress was convened to consider whether to accept and affirm the results of the Electoral College vote as provided in Article II, Section 1, Clause 3 of the Constitution.

There is no doubt that President Trump questioned the conduct and the results of the 2020 Presidential Election. But, questioning the results of a presidential election is not *a criminal act*. Nor is the expression of a political opinion a criminal act, nor calling upon citizens to petition Congress for grievances (real or imagined). The First Amendment guarantees

[4] The severity of the threatened penalty demonstrates the necessity for protecting the President from criminal prosecution for official acts without the safeguard of requiring the President to be first impeached and convicted.

"the freedom of speech" and "the right of the people to . . . petition the Government for a redress of grievances." And a President who has credible evidence that the laws of the United States have been broken in the process of determining the election of his successor has a sworn duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

The *amici* do not take any position on the conduct or outcome of the 2020 Presidential Election. The merits of President Trump's statements on January 6, 2021, are not relevant to this brief or the Question Presented, nor are the merits of any dispute regarding the result of the 2020 Presidential Election. Passing political questions and partisan passions should not influence how this Court answers the Question Presented, given the permanent constitutional importance of whether the President, absent impeachment and conviction, is immune from criminal prosecution for official acts during the President's tenure in office.

B. Presidential elections frequently generate constitutional disputes this Court must resolve.

Challenging the outcome and conduct of elections, especially presidential elections, has been a feature of American history and law since the dawn of our nation. The 1800 Presidential Election between John Adams and Thomas Jefferson was the first example. Historian Paul Johnson explained:

> The 1800 election is often referred to as the first contested presidential election but evidence of the contest is scarce. Jefferson, true to his determination to 'stand' rather than 'run,' remained at his home, Monticello, throughout. Adams, now toothless, was incapable of making a public speech. The issue was decided by Jefferson's standing mate, Burr, whose Tammany organization carried New York, the swing state. So Jefferson beat Adams by seventy-three [Electoral College] votes to sixty-five. . . . After much skullduggery, the federalists voted for Jefferson, after private assurances that he would allow many federalist officeholders to keep their jobs.
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> Paul Johnson, A HISTORY OF THE AMERICAN PEOPLE (1997), p. 241.

The 1876 Presidential Election between Rutherford B. Hayes and Samuel Tilden was similarly disputed.[5]

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[5] Historian Paul Johnson wrote,

> The corruption within and close to the Grant administration, following on the disastrous attempt to impeach Andrew Johnson, did a great deal to discredit the presidency itself, following its high point under Lincoln. But worse was to come.
>
> For the 1876 election, the Republicans nominated Rutherford B. Hayes (1822-93). He was a lawyer, a former Union general and a respectable three-term governor of Ohio, now emerging as the heartland of the Republican Party. Unfortunately for him, he was a dull campaigner who could not get enough votes.

The outcomes of both the 1800 and 1876 Presidential Elections were ultimately decided by the House of Representatives.

More recently, the present generation endured the presidential election between George W. Bush and Albert Gore that resulted in *Bush v. Gore*, 531 U.S. 98

> By contrast, the Democratic nominee, Samuel Jones Tilden (1814-86), was a popular campaigner, a member of the Barnburners, the radical and progressive wing of the New York Democratic Party, who had broken the grip of the Boss Tweed Ring on Tammany Hall and settled in as a reforming governor of New York State in 1875.
>
> Tilden won the popular vote easily, by 4,284,020 to 4,036,572 for Hayes. He also led in the electoral college, by 184 to 165. But twenty electoral votes were in dispute. Nearly all were in South Carolina, Louisiana, and Florida, which were 'natural' Democratic states but still ruled, in effect by force, by the Republicans.
>
> In view of Tilden's plurality, the obvious democratic course was to declare him the winner. The Republicans insisted the disputed returns go to a fifteen-member commission, composed of ten members of Congress and five Supreme Court justices – in effect, of eight Republicans and seven Democrats. It operated, as might have been expected, on party lines and found for the Republicans in each state. The House was divided but the Senate, where the Republicans were in a majority, concurred, so Hayes was declared elected. This was a legalized fraud, a result even more unrepresentative than the 'corrupt bargain' election of 1824-5. It meant Hayes had little moral authority even at the start, since even many Republican members of Congress felt he had no right to be in the White House, and still less after the Republicans lost Congress in 1878.
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> A HISTORY OF THE AMERICAN PEOPLE, p. 549.

(2000). In *Bush v. Gore*, this Court held that disparate vote-counting procedures in different Florida counties violated the Fourteenth Amendment and Equal Protection and Due Process clauses. This Court wrote:

> None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.
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> 531 U.S. at 111.

This Court is often unwillingly brought into the political fray and required to resolve partisan political disputes. This term the Court has been called to resolve even more presidential-election disputes than in past presidential elections. See, *e.g.*, *Trump v. Anderson*, 601 U.S. ___, 144 S.Ct. 662 (2024). Justice Barrett wrote:

> The Court has settled a politically charged issue in the volatile season of a Presidential election. Particularly in this circumstance, writings on the Court should turn the national temperature down, not up. For present purposes, our differences are far less important than our unanimity: All nine Justices agree on the outcome of this case. That is the message Americans should take home.
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> *Id.* at 671-72 (Barrett, J., concurring).

C. The weaponization of law as a partisan tool.

Since the 2020 Presidential Election, the Special Counsel and other Democratic prosecutors have brought criminal indictments alleging more than ninety separate criminal violations in state and federal court seeking penalties that would put President Trump in jail for more than one hundred years.

In addition to having been elected the forty-fifth President in 2016, President Trump is presently the presumptive Republican candidate for President in the 2024 election.

Sitting President Joe Biden is the Democrat Party's presumptive candidate for President, seeking reelection to a second term. For the administration of the sitting President to criminally prosecute his predecessor and current political opponent presents constitutional concerns of the gravest magnitude.

Weaponizing criminal statutes to prosecute a political opponent undermines the rule of law and our Constitution. Criminally prosecuting a President for official acts a President takes without the President first being impeached and convicted is contrary to the Constitution. The threat of after-the-fact criminal prosecution for official acts during a President's tenure in office impairs the President's ability to make those critical and often controversial decisions the President

is required to make as Chief Executive and Commander-in-Chief.[6]

SUMMARY OF ARGUMENT

For the reasons this Court identified in *Nixon v. Fitzgerald*, the President of the United States cannot be subject to criminal prosecution for official acts the President takes during the President's tenure in office unless the President is first impeached by the House of Representative and convicted by the Senate.

[6] "Lawfare" is a recently-coined portmanteau combining *law* and *warfare*. *Lawfare* refers to the use and misuse of the law and legal process to achieve a political objective. See, *e.g.*, Michael P. Scharf & Elizabeth Andersen, *Is Lawfare Worth Defining? Report of the Cleveland Experts Meeting September 11, 2010*, 43 CASE W. RES. J. INT'L L. 11 (2010); Charles J. Dunlap. Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146 (2008); Orde F. Kittrie, LAWFARE: LAW AS A WEAPON OF WAR (2016); Daniel Henninger, *The High Price of Democrats' Anti-Trump Lawfare*, THE WALL STREET JOURNAL (March 13, 2024). While the word "lawfare" is relatively new, the concept of perverting the law for use as a tool against a political opponent is not.

ARGUMENT

I. *Nixon v. Fitzgerald* supports this Court holding the President of the United States to be immune from criminal prosecution for official acts the President took during the President's tenure in office.

A. Ernest Fitzgerald was a federal employee whom we would now call a "whistleblower." In 1968, Fitzgerald testified before Congress about malfeasance in the Air Force's purchase of the C-5A transport aircraft, alleging the federal government wasted tens of millions of dollars. See *Nixon v. Fitzgerald*, 457 U.S. 731, 734 (1982). The Department of Defense found Fitzgerald's congressional testimony to be "embarrassing" and wanted Fitzgerald fired. President Nixon personally approved Fitzgerald's firing. This Court found, "Mr. Nixon took the opportunity [at a press conference] to assume personal responsibility for Fitzgerald's dismissal." *Id.* at 735. Justice Powell recounted the details. *Id*. at 733-41.

After President Nixon resigned the Presidency, Fitzgerald amended his lawsuit in federal district court to add President Nixon as a party-defendant in President Nixon's personal capacity. *Fitzgerald*, 457 U.S. at 740. President Nixon responded by asserting his presidential immunity from civil damages for official acts he took during his tenure in office. The Court of Appeals for the D.C. Circuit rejected President Nixon's appeal, and the matter came before this Court. *Id.* at 740-41.

This Court described the issue in *Fitzgerald* as follows: "[Fitzgerald's] claim rests on actions allegedly taken in the former President's official capacity during his tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States." 457 U.S. at 733. This Court then held:

> Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.
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> *Id.* at 749.

Special Counsel Smith, in his indictment of President Trump, does not explain how this Court held President Nixon was immune from civil liability for official acts he took while in office, but President Trump may be subject to criminal prosecution for official acts he took while in office.

Again, the *amici* emphasize that this constitutional moment is not about President Trump *per se*. Rather, abandoning the principle of immunity that guided this Court's decision in *Nixon v. Fitzgerald* rather than applying it to former President Trump's official acts will do far more than harm President Trump. It will harm the foundations of the American Republic and harm our national interest. The Question Presented – which could be rephrased as "whether

principles of immunity apply equally no matter how unpopular or vilified the officeholder or his actions" – goes to the foundation of how our nation will be governed by generations of future presidents. *Immunity exists only to be applied in situations when officeholders and their actions are unpopular.* If it is abandoned selectively, it no longer functions at all as a safeguard of our constitutional balance of powers.

Amici urge upon the Court that it is imperative that the Court hold that, consistent with *Nixon v. Fitzgerald*, *no* President may be criminally prosecuted for *any* official acts the President takes during his or her tenure in office unless and until that President is first impeached and convicted as provided in Article I of the Constitution.

II. Immunity from civil and criminal prosecution is necessary for the President to fulfill the President's duties as Chief Executive.

A. In *Fitzgerald*, this Court explained that public policy requires the President be immune from liability for the President's official acts.

In *Fitzgerald*, this Court affirmed the President's absolute immunity and discussed the principles and traditions of English law that "required a grant of absolute immunity to public officers." 457 U.S. at 744. Because "[i]n the absence of immunity, the Court reasoned, executive officials would hesitate to exercise their discretion in a way 'injuriously affecting the

claims of particular individuals' even when the public interest required bold and unhesitating action." *Id.* (quoting *Spalding v. Vitas*, 161 U.S. 483, 499 (1896)). This Court then held, "considerations of 'public policy and convenience' therefore compelled a judicial recognition of immunity from suits arising from official acts." *Id.* at 744-45.

By analogy to the absolute immunity afforded prosecutors and judges, this Court explained that American jurisprudence (and English law before that) "recognized the continued validity of the absolute immunity of judges for acts within the judicial role." *Fitzgerald*, 457 U.S. at 743. The Court reaffirmed its prior holding that "the especially sensitive duties of certain officials – notably judges and prosecutors – required the continued recognition of absolute immunity." *Id*. at 746 (citing *Imbler v. Pactman*, 424 U.S. 409 (1976), and *Stump v. Sparkman*, 435 U.S. 349 (1978)).

This Court applied this rationale to extend immunity to federal executive officials in *Butz v. Economou*, 438 U.S. 478 (1978). In *Fitzgerald*, Justice Powell explained that in *Butz*, "we considered for the first time the kind of immunity possessed by *federal* executive officials who are sued for constitutional violations." 457 U.S. at 747 (emphasis in original). Justice Powell, for the Court in *Fitzgerald*, then noted, "[i]n *Butz* itself we upheld a claim of absolute immunity for administration officials engaged in functions analogous to those of judges and prosecutors. We also left open the question whether other federal officials could show 'that

public policy requires an exemption of that scope.'" *Id.* (quoting *Butz*, 438 U.S. at 506).[7]

Arguing from the lesser to the greater, if the President must be immune from civil actions for monetary damages arising from the President's official acts, the President must be immune from criminal prosecution for his official acts. The public policy and historical principles upon which this Court premised its finding of presidential immunity in *Fitzgerald* apply with even greater vigor to a criminal prosecution of a former President for official acts during the President's tenure in office.

B. History demonstrates the President should be immune from criminal prosecution for official acts.

Virtually all Presidents have taken or directed an official act that a political opponent could subsequently criticize and prosecute as criminal.[8] American history provides many examples.

John Adams signed and enforced the Alien and Sedition Acts. The Alien and Sedition Acts suppressed

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[7] Footnote 37 in *Fitzgerald* states, "[t]he Court has recognized before that there is a lesser public interest in action for civil damages than, for example, in criminal prosecutions." 457 U.S. at 754 n.37. This footnote cannot be read to hold that the principles upon which the Court in *Fitzgerald* recognized the President had absolute immunity from "civil damages" does not extend to immunity from criminal prosecution.

[8] The one exception may be William Henry Harrison, who was President for only thirty-one days before he died in office.

free speech and restricted the right to vote. In *New York Times v. Sullivan*, this Court wrote, "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." 376 U.S. 254, 276 (1964). See also *Watts v. United States*, 394 U.S. 705, 710, 712 (1969) (Douglas, J., concurring) ("The Alien and Sedition laws constituted one of our sorriest chapters; and I had thought we had done with them forever. . . . Suppression of speech as an effective police measure is an old, old device, outlawed by our Constitution."). Nonetheless, President John Adams signed the Alien and Sedition Acts and directed these laws be enforced.

Could Thomas Jefferson's administration have criminally prosecuted former President Adams for signing and enforcing the Alien and Sedition Acts?

On February 19, 1942, two months after Japan attacked Pearl Harbor, President Franklin Delano Roosevelt signed Executive Order 9066. President Roosevelt's Executive Order directed those persons of Japanese ancestry to be forcibly incarcerated in concentration camps. Fred Korematsu challenged the constitutionality of President Roosevelt's Executive Order 9066. This Court, in a 6-to-3 decision written by Justice Hugo Black, upheld the constitutionality of President Roosevelt's Executive Order 9066. See *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944), *abrogated by Trump v. Hawaii*, 585 U.S. 667, 710 (2018) (Executive Order at issue in *Korematsu* was "objectively unlawful," "outside the scope of Presidential authority," and "morally repugnant").

Justices Murphy, Roberts, and Jackson dissented in *Korematsu*. Justice Murphy said the majority's decision "falls into the ugly abyss of racism." 323 U.S. at 233 (Murphy, J., dissenting). Justice Murphy continued, "[r]acial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life." *Id.* at 242. Justice Jackson agreed:

> If any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. . . . But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.
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> *Id.* at 243 (Jackson, J., dissenting).

President Roosevelt's Executive Order 9066 has since been roundly repudiated and overturned. See *Trump v. Hawaii*, 585 U.S. at 710. Chief Justice Roberts wrote, "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and to be clear – 'has no place in the law under the Constitution.'" *Id.* (quoting Justice Jackson's dissent in *Korematsu*, 323 U.S. at 248).[9]

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[9] Chief Justice Roberts explained in *Trump v. Hawaii* that "[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority." 585 U.S. at 710. Chief Justice Roberts continued and described President Roosevelt's order relocating U.S. citizens of Japanese race, and the Supreme Court's affirmance of this practice, to be "morally repugnant." *Id.*

Executive Order 9066 was clearly wrong, unconstitutional, and a blatant violation of Japanese Americans' civil rights. Could President Roosevelt have been criminally prosecuted for issuing and directing the enforcement of Executive Order 9066?

President Harry S. Truman directed a B-29 bomber to drop an atomic weapon on Hiroshima on August 6, 1945. President Truman then directed a second atomic bomb to be dropped on Nagasaki three days later. The bomb dropped on Hiroshima killed an estimated 80,000 people, many of whom were non-combatant civilians. The bomb President Truman ordered the American military to drop on Nagasaki killed another 40,000 people, many of whom were also non-combatant civilians. President Truman's official act directing the United States military to drop these two nuclear weapons on Japan was and remains profoundly controversial. See Kai Bird & Martin J. Sherwin, AMERICAN PROMETHEUS: THE TRIUMPH AND TRAGEDY OF J. ROBERT OPPENHEIMER (2006) (inspiration for the Academy Award-winning 2023 film *Oppenheimer*).[10]

Could President Truman have been criminally prosecuted for his decision to drop atomic bombs on Hiroshima and Nagasaki? Could a special counsel in a

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[10] The weight of authority holds that President Truman's decision to drop atomic bombs on Japan was justified even though it resulted in the death of tens of thousands of Japanese civilians. The broad consensus is that, given the intransigence of Japan's military leadership, a conventional invasion of mainland Japan would have resulted in the loss of millions more lives than were lost in Hiroshima and Nagasaki.

subsequent administration (or a state attorney general, or even a local district attorney) have indicted, prosecuted, and put President Truman in jail for directing that atomic bombs be dropped on Japan?

President Johnson personally met with military officials on most Tuesday afternoons at the White House for a "lunch at which he [President Johnson] determined targets and bomb weights" the military would then drop on North Vietnam and Cambodia.[11] President Johnson's decisions directing the bombing of Vietnam and Cambodia were decried as war crimes. The 1967 Stockholm International War Crimes Tribunal accused President Lyndon Johnson of genocide. The war crimes tribunal, also known as the "Russell-Tribunal" or the "Russell-Sartre Tribunal," was organized by British philosopher Bertrand Russell and French philosopher Jean-Paul Sartre to investigate and evaluate American foreign policy and military intervention in Vietnam. Crowds protesting President Johnson's conduct of the Vietnam War gathered around the White House chanting, "Hey. Hey. LBJ, how many kids did you kill today?"[12]

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[11] Johnson, HISTORY OF THE AMERICAN PEOPLE, p. 882 (citing Doris Kearns Goodwin, LYNDON JOHNSON AND THE AMERICAN DREAM (1976), p. 264). See also Tor Krever, *Remembering the Russell Tribunal*, 5 LONDON REV. INT'L L. 483 (Nov. 2017).

[12] Lindsay M. Chervinsky, *Vietnam Protests at the White House*, White House Historical Association (June 15, 2020), available at: https://www.whitehousehistory.org/vietnam-war-protests-at-the-white-house.

Should President Johnson's decision directing this bombing of North Vietnam and Cambodia have been subject to criminal prosecution?

President Biden has authorized hundreds of millions of dollars to be paid to the Ukrainian government. The Republican-controlled House is currently conducting an impeachment inquiry investigating payments that Ukrainian and other foreign interests made to President Biden's family members, including President Biden's son, Hunter Biden.

Should President Trump be elected in 2024 to a second term, could the Justice Department, under a second Trump administration, criminally prosecute former President Joe Biden for official acts President Biden made concerning Ukraine and other foreign nations that have paid President Biden's family members?

Amici do not weigh into the merits of any of these current or past disputes, other than to demonstrate the overarching conclusion that, absent immunity for official acts, every President of the United States from George Washington to Joe Biden could be subject to criminal prosecution by a political rival (or a political rival's cohorts) after leaving office.

If the President is not immune from criminal prosecution for the President's official acts (absent impeachment and conviction as provided by Article I of the Constitution), the President will be greatly curtailed in the free exercise of the President's duties as our nation's Chief Executive and Commander-in-Chief.

The President's personal interest in avoiding future criminal prosecution by a political rival may deter some bad decisions, but it will also interfere with free consideration of many good decisions the President must make in the interest of the American people.

The Founders presciently considered the necessity of providing the President the latitude necessary to act as our nation's Chief Executive while still holding the President accountable for official acts. The Founders resolved this dilemma by including the Impeachment Clause in Article I. History demonstrates the Founders' wisdom in how they resolved this dilemma.

III. The President is not "above the law" because the President is subject to the Impeachment Clause.

"No man is above the law." This is a trope frequently recited by those overlooking the Constitution's impeachment provisions. But as this Court noted in *Fitzgerald*, "[t[his contention is rhetorically chilling but wholly unjustified." 457 U.S. at 758 n.41. "It is simply error to characterize an official as 'above the law' because a particular remedy is not available against him." *Id.*

No one disputes the point that, under our Constitution and the Rule of Law, no person, including the President of the United States, is "above the law." No one argues the President is a King or Sovereign, immune from accountability.

The Special Counsel's resort to the phrase, "no one is above the law," misses the point. *The law*, the supreme law governing our nation, is our *Constitution*. That includes the Impeachment Clause of Article I. James Madison observed in FEDERALIST NO. 51:

> It may be a reflection of human nature, that such devices [as the separation of powers and checks and balances] should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[13]

In keeping with Madison's observation, "We the People" have divided political power among three branches, the Legislative, Executive, and Judicial. The Founders intended to create tension between these three branches. The Constitution, therefore, defines the responsibility of each branch *and* protects each branch from encroachment by the other branches. For

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[13] THE FEDERALIST NO. 51 (C. Rossiter ed. 1961), p. 322.

example, Article III judges are appointed for life, their salary cannot be reduced, and they cannot be removed from office other than by impeachment.

In this carefully-balanced constitutional structure, the person elected President is not just an *individual* or a *member* of the Executive Branch. The President of the United States *is the Executive Branch*. Upon his or her election and inauguration as President of the United States, the individual assuming this office is vested with the full authority, responsibility, and privileges of the Executive Branch.

Even so, no one argues the President is immune from prosecution, nor that the President is unaccountable. Far from it. As Madison recognized in FEDERALIST NO. 51, men are not angels.

Recognizing this reality, the Founders provided a political process by which the President may be held to account for official acts taken during the President's tenure in office. That constitutional structure requires that, before the President can be civilly or criminally sued or prosecuted for official acts the President takes during his (or her) tenure as President, the House must first impeach the President, and the Senate must then convict the President.

CONCLUSION

This Court asked "whether, and if so to what extent, does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office?"

The answer to the Question Presented is this: a former President is immune from criminal prosecution for official acts taken during the President's tenure in office except after conviction for such acts under the Impeachment Clause in Article I of the Constitution.

To allow the President of the United States to be criminally prosecuted for official acts (without the safeguard of first requiring impeachment and conviction by the House and Senate) would limit the constitutionally-protected authority of Presidents to take official actions without fear of politically-motivated reprisals from rivals and successors. This would open Pandora's Box, throwing our Nation into an abyss in which the threat of criminal prosecution becomes a cudgel political rivals use to intimidate, harass, and retaliate against rivals. The result would prove a great harm to our Nation and our constitutional Republic by compromising the President's ability to act considering our national interest without having to consider the

possibility of a criminal prosecution by political opponents after leaving office.

Respectfully submitted,

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