No. 19-635

In the Supreme Court of the United States

DONALD J. TRUMP, PETITIONER

v.

CYRUS R. VANCE, JR., IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, ET AL., RESPONDENTS

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

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF RESPONDENTS

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is an American citizen who feels every American would be endangered if the President were free from criminal investigation or prosecution. So, he writes to show how perverse it is to put the Chief Magistrate above the law, lest lawlessness take root at the top of the Government, and the proverbial fish rot from the head down.

After all: "If you can't take the heat, get out of the kitchen." (allegedly said by President Harry S. Truman) That quote reminds us that political leaders who are incapable of doing their jobs well—say, leaders who are *criminals*—might best serve themselves and the Nation by leaving their office(s), rather than being "distracted" by the criminal investigation, indictment, and/or incarceration they deserve. Thus, mere "distraction" is no excuse to prevent criminal proceedings, since the President can simply "pull a Nixon" and ride a helicopter away into the sunset, leaving the People better off.

(By the way, this brief is not primarily about the particular subpoenas in question, in the instant case or linked cases. Amicus will just briefly observe that if the subpoena(s) is/are somehow excessive, there is the possibility of cabining, restricting, them, instead of overturning them entirely. Or if they must somehow be overturned entirely, the Court could leave guidelines as to how more correct subpoenas could proceed.)

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[1] No party or its counsel wrote or helped write this brief, or gave money for the brief, *see* S. Ct. R. 37. Blanket permission to write briefs is filed with the Court.

Finally: while Amicus, for simplicity's sake, is filing only in *Trump v. Vance*, not in the two related "Trump" cases, he may refer to some of the briefs in those cases, since some arguments in those briefs might be used in the instant case—and some of Amicus' arguments here, may have resonance in those cases or beyond.

SUMMARY OF ARGUMENT

The "soft statism" of allowing average, non-governmental amici only 8000 words of argument, is not nearly as bad as the deep statism of letting the President's office immunize him from criminal process.

A President above criminal investigation is a one-man "Deep State", which is un-American.

The Constitution's Article II, Section 3, Clause 5 implies that laws can be executed against the President himself, instead of his being the sole and untouchable executor of the laws.

The Executive Branch, being partially stocked by lesser officers Congress chooses, is therefore hardly so "unitary" a branch as to let the President claim total supremacy, much less immunity to the law.

A hypothetical, adduced here, of the President being a rapist, gives reason for him not to be spared from either federal or State criminal proceedings.

Trenchant examples are adduced as to why States' criminal process should be allowed to encompass the Presidency, though not to the level of harassment or pettifoggery.

Even if the President is somehow immunized against prison or formal charges, it would be fitting at least to allow investigation of his behavior, so the public may know who he really is and what he really does.

Respondent claims that indictment/trial/prison is undue for a President under Article II, but he may not be correct here, or correct that the President needs to be immunized against "stigma". And Court avoidance of considering various privileges against criminal process for the President, if consideration of those particular privileges is not needed, may be appropriate.

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), is apposite, too, in that its protection against oppressive government reminds us that the President should not be an unpunished oppressor and criminal himself.

John Ronald Reuel Tolkien has lessons not only re national injunctions (as a Court Member may have noted), but also re the danger of letting the President cloak himself in invisibility and arrogance, if he insists he is above criminal proceedings.

A Biblical view, seeing King David repenting after Nathan revealed his sin to him, and the Lord telling Ezekiel to warn people of their sins, is relevant here.

Given the current Chief Executive's proclivities towards unlimited power, the current moment is a strikingly poor time to further allow him—or all future Presidents—further license.

Finally, Shakespeare's *Coriolanus* illustrates the evil and chaos that happen when leaders betray their country's best interests, and lack of legal process to try those leaders properly makes things even worse. The Court should take heed.

ARGUMENT

I. NOTES ON CHANGE IN AMICUS PRACTICE: OR, THE SOFT STATISM OF REDUCING AMICUS BRIEFS TO 8000 WORDS

First off, a quick procedural comment or two: Amicus notes he has had, "for whatever reason", a hiatus of some years since writing the Court. He also notes that mysteriously, the rules have changed so that the average amicus or amica—one who is not part of a state entity—is now limited to 8000 words, instead of the 9000 he/she used to have. Amicus wonders if this new rationing of core legal and/or political (since law and politics overlap) speech is a good idea.

Inter alia, state entities, being large, established, and powerful, have plenty of ways of making themselves heard. By contrast, it is, say, the small-time country lawyer, writing her first and only brief to this Court, who may need all 9000 words to make important and complicated arguments to the Court. Maybe the government amici, not the "little people", so to speak, should have been restricted to 8000 words, Thus, there is arguably a sort of statism, even if soft statism, in the new 8000-word wall. Perhaps the Court can revisit its unnecessary speech-rationing at some point.

(Amicus is not "resentful" of the 8000-word limit; if he were, then, like Achilles sulking in his tent, Homer, *The Iliad*, he might have refused even to write this brief, or any amicus brief. But sulking may achieve little, so here is Amicus, with his brief.)

…True, some amici may be able to shoehorn their entire brief into, say, the length of a 17-syllable *haiku*. This is not always going to happen, though.

Enough on that point for now: speaking of statism, far more important forms of statism exist to be criticized here, such as the deep state of corruption created at 1600 Pennsylvania Avenue if the President is deemed immune to criminal proceedings during his tenure in office.

II. NONACCOUNTABILITY FOR CRIMES MAKES THE PRESIDENT A ONE-MAN "DEEP STATE", WHICH IS UN-AMERICAN

A theme or "meme" of recent decades, a "urban legend" of sorts, has been the ""Deep State"", a possibly-legendary bunch of sneaky, shadowy D.C. bureaucrats running everything in secret. Whether this umbrageous gang exists or not, what would be even worse, maybe, is if in open view, one member of our society is made into a temporary god, or idol, free from criminal investigation or prosecution. Such a paragon of lawlessness, a perfidious President beyond his own society's limitations, a Nietzschean "Superman" of sorts—"beyond good and evil", at least in his own troubled mind—, would be a one-person "Deep State" incarnate: dark, untouchable, un-American.

The hard and heavy glitter of Article II power would be vested in him…but not the commensurate

responsibility, since he would be above the law. This is a problem, in a democracy where all people "are created equal", Decl. of Independence, pmbl. (U.S. 1776). *Cf., e.g.*, Stan Lee and Steve Ditko, *Amazing Fantasy* No. 15, "Spider-Man," p. 11 (1962), "[I]n this world, with great power there must also come - - great responsibility", *id.*, often popularized as "With great power comes great responsibility."

See also, e.g., "The buck stops here", a favorite saying of Harry Truman, even featured on his desk:

(*Available at* https://www.canadianbusiness.com/blogs-and-comment/the-buck-stops-here-why-leadership-requires-taking-responsibility/) The 33rd President's wisdom resonates today, when some people allege that "inconveniencing" or "distracting" the President by actually holding him accountable for his crimes, is a terrible thing. Rather, it may be a

terrible thing to have a President *who commits crimes*, and gets away with them.

Indeed, if a President can gloat for the 4-8 years of his tenure that he can commit crimes and go unaccountable for that time (or longer), that violates the presidential-responsibility principle of "The buck stops here", *supra*. What would Truman say? He might take gloating, irresponsible Presidents by the scruff of the neck and "give them hell", so to speak.

Americans are supposed to be *under* the law, not above it. (This is also a reason, by the way, why Presidential electors should not be free to vote for whomever they want to; rather, they should be bound to vote for the candidate for whom the People actually chose them to vote, if the State in question binds the electors so to do.) Hence, the Court should uphold lawfulness for all.

III. THE PASSIVE WORDING OF ARTICLE II, SECTION 3, CLAUSE 5 HELPS SHOW THE PRESIDENT IS NOT THE SOLE WIELDER OF EXECUTIVE POWER, BUT IS MORE OF A CONDUIT, AND EVEN POTENTIAL TARGET, OF SUCH POWER

Keeping everyone under the law is crucial, even though some pundits would have it that the President, like a 1000-megaton political H-bomb of sorts, is Executive Power Incarnate. That latter notion sounds a little *French*: in particular, like "*L'état, c'est moi"* ("I am the State"), Louis XIV, France's "Sun King". But the American President is no king, but rather, a mere hired servant (like the Members of the Court…) of "We the People", U.S.

Const., pmbl. He is no sun or other heavenly body—thank goodness.

Sycophants and fantasists of unlimited executive power, the so-called "Unitary Executive", have cited Article II of the Constitution, section 1, clause 1, the "Vesting Clause", as proof. However, for alternative context, the passive wording of section 3, clause 5, the "Take Care Clause", is worth noting. It does not say, *see id.*, that the President actively "executes the laws", faithfully or otherwise. It says, in a grammatically more passive voice, that he/she must "take care that the laws be faithfully executed", *id.* *Inter alia*, that means or implies that the laws—including criminal ones—may be executed *upon the President himself*, whether he likes it or not.

Indeed, how would the President execute all the laws himself? He would have to be like a virtual Hindu god, with millions of hands. Rather, the Executive Branch and its various departments and officers/workers do the real work, though the President may get the credit, and have a supervisory, "presiding" role. (If he or she is even supervising at all, rather than, say, playing golf and twittering away on "social media".)

(*See* a fuller version of some of the Constitutional language above: "[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States." U.S. Const. art. II, § 3, cls. 5-6. It is those "Officers", *id.*, and their manifold underlings, who really bear the main burden of "execut[ing]", that is, doing the actual on-the-ground work.)

So, the "quip" of Jay Bybee—a man famed for association with torture—that the President is "the

only person who is also a branch of government", *in* Br. for Pet'r at 20 (Jan. 27, 2020) (citation partially omitted) is, in large part, absurd. For example, how many arrests does this paragon of puissance, this "walking one-man branch", the President (or any President), personally make at the border? How much time does he personally spend doing medical research at the Centers for Disease Control? Etc.

As for "…the President never sleeps[; he] must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people," Akhil Reed Amar & Neal Kumar Katyal *in* Br. for Pet'r at 20 (citation quasi-omitted): exactly. "[P]rotect . . . . the American people", *id.* That is why he cannot be free from criminal process, lest he become the Predator-in-Chief, rather than the Protector-in-Chief.

And, as for "No single prosecutor, judge, or jury should be able to accomplish what the Constitution assigns to the Congress", Brett M. Kavanaugh *in* Br. for Pet'r at 20 (citation partly omitted): that may be true narrowly, in that prosecutor/judge/jury cannot impeach the President or try him in a removal-from-office trial. But prosecutor/judge/jury may have even more important duties than the Congress, *see infra* Section V of this brief, Amicus' hypothetical about criminally investigating a rapist President.

So, the Court should not allow the Chief Magistrate to play Judge Dredd, of the British comic strip *Judge Dredd*, with its eponymous lawman who is judge, jury, and executioner, and wields a frightening four-word tagline, "I AM THE LAW!"

(*Available at* https://www.nerdkungfu.com/judge-dredd-i-am-the-law-t-shirt/) Unlike Judge Dredd, *supra*, the President is not even a judge at all; but the Members of this learned Court are judges, and sound judgment militates against giving the President a suit of armor to thwart the legitimate reach of criminal justice.

IV. THE EXECUTIVE BRANCH IS NOT EVEN A FULLY SELF-RULING BRANCH, SEEING, E.G., OTHER BRANCHES' CHOOSING OR INCLUDING EXECUTIVE OFFICERS

There is further proof that the executive branch is not a one-man band, despite some people's illusions regarding that matter. *See* "[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. So, the Executive Branch is not even fully staffed, or run, by the Chief Executive, if Congress doesn't want it that way, *see id.* So much for the "unitary executive", or the "indispensability" of the President.

The President may be all the more dispensable, of course, for each crime he commits, e.g., sexually assaulting his staff…

V. THE "PRESIDENT IS A RAPIST" SCENARIO; OR, MAKING THE PRESIDENT A PROTECTED PREDATOR IS A BAD IDEA

Let us say, *arguendo*, that the President decides to rape somebody, say, a White House intern—maybe for the pleasure of seeing if he can get away with it. (At this point in American history, can we really rule out the possibility of a rapist or psychopathic President?) So, he does so, and when there is the inevitable media storm (assuming the victim survives, and is sane and brave enough to talk to the media…), he says that the victim actually victimized *him*, and slipped a drug into a friendly drink they were having to celebrate a political victory, and raped *him* while he was semi-conscious.

He brings up her supposedly promiscuous or drug-ridden background, and a complaisant House and/or Senate refuse(s) to impeach and/or remove

him from office. Should a criminal investigation be ruled out, then? Amicus does not think so.

If the investigation were to be delayed until after the President had left office, and there were no convenient "blue dress" with a deposit of the President's bodily fluids, then the evidence might be gone, and the chance for justice gone as well. *See, e.g.*, Teresa Magalhães, Ricardo Jorge Dinis-Oliveira, Benedita Silva, Francisco Corte-Real, & Duarte Nuno Vieira, *Biological Evidence Management for DNA Analysis in Cases of Sexual Assault*, Oct. 26, 2015, The Scientific World J., *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4637504/ (run by the National Center for Biotechnology Information, U.S. National Library of Medicine, National Institutes of Health),

> Sexual aggression constitutes a serious social and public health problem that calls for an urgent forensic medical examination (FME), particularly in acute cases, that is, when the elapsed time between the assault and the FME is less than 72 hours, in the generality of cases . . . .
>
> . . . .
>
> . . . In postpubertal girls spermatozoa may remain motile in the vaginal secretions for 6 to 12 hours and in the cervix for as long as 5 days[;] nonmotile spermatozoa may be found in stains of vaginal secretions from 12 to 48 hours after ejaculation . . . .
>
> . . . .

> . . . The fingernail hyponychium is an isolated area where evidence may accumulate and can provide a valuable source of evidential material for investigation. During the course of a sexual assault, trace amounts of skin (especially if the victim scratched the perpetrator), body fluids, hairs, fibers, and vegetation may collect under the nails of either the victim or perpetrator . . . . The persistence of foreign DNA did not tend to last beyond 6 h[.]

Id. (citations omitted) Thus, seeing the very limited times for effective forensics listed above (6 hours in some cases, etc.), a prompt examination by law enforcement can be helpful before decay or removal of inculpating material (seminal fluid, etc.) occurs, *see id.*

If, though, there is no criminal investigation possible until after the President's term in office, i.e., probably for years, and evidence decays, e.g., not just bodily fluids, but also victims or witnesses disappear (including death, which may comprise, *inter alia*, being murdered by the President's cronies, or committing suicide), this can make justice for a victim of a rapist President very difficult, or impossible. And one can imagine similarly disheartening and nightmarish scenarios for other crimes besides rape, whether violent or non-violent crimes. (What if the President, on a visit to Manhattan, got out a pistol and started shooting people on Tenth Avenue? Would this maybe, just maybe, be subject to criminal investigation/ punishment, or would the "Slaughter on Tenth

Avenue"—apologies to Richard Rodgers and George Balanchine—go unremarked by the law?) All told, the Court should not compromise justice for any potential victim of the President, including the Nation as a whole.

VI. THE PRESIDENT SHOULD BE SUBJECT TO STATES' CRIMINAL PROCESS, BUT NOT TO AN EXCESSIVE OR NEEDLESS EXTENT. (WITH EXAMPLES)

As for "federalism issues": it has been broached that the President, as a (supreme) federal officeholder, should not be subject to States' criminal process. There is some limited truth to this, if the purpose of such criminal proceedings is just harassment or other abuse. However, total immunity sounds excessive. Amicus shall use a bit of *reductio ad absurdum*, a useful tool, in the following examples.

Let us imagine, first off, that Sheriff Bobby Jack Turnpike, a corrupt local politician/lawman, urges his also-corrupt local D.A. to indict President X for having gone a half-mile over the speed limit when making a presidential visit to Turnpike's county. In fact, the Sheriff urges other indictments, for the President allegedly littering, failing to meet every minute requirement of the county's local public-assembly or waste-disposal laws, etc.

Indictments do ensue, and Turnpike goes on TV to announce not only his intent to arrest the President if he visits the county again, but also his intent to travel to the White House in person to

arrest the President. Does this all sound like a good idea? or just narcissistic abuse of local power?

Presumably, readers may think that Sheriff Turnpike is going too far, and that the President should not be subject to petty-seeming prosecution. Thus, there is some degree of merit to complaints that State prosecutors can go too far when prosecuting, or persecuting, the President.

However, as a counterexample: imagine female Sheriff Billie Joe MacAlister investigating an allegation that President Y has an underage paramour in the Sheriff's county, and that the President recently visited, sexually assaulted (rape or otherwise), and battered the paramour, and even threw their secret "love child" off the Tallahatchee bridge to hide it, and the affair, from the public. Should the President really be immune from criminal investigation and prosecution? What would the victims say?

Some critics may argue that with issues of the magnitude of rape or murder, that shame, private or public, might drive the President from office, or that informal investigation by the news media should be enough to let the public know what is going on. That is, these critics might say, criminal investigation would be (allegedly) unnecessary. But are their assertions true? Does every President have shame, or the willingness to bow to public shaming? And, can journalists always do as good a job at investigating as an actual law enforcement agency can? Maybe not.

Everything considered, it seems that there should not be total presidential immunity from State (or

federal) criminal investigation/prosecution, lest the Sheriff Billie Joes of the Nation be deterred from fighting serious crimes. However, on a case-by-case basis, if necessary, some prosecutions, e.g., for Presidential littering or speeding (if the speeding does not result in anybody's death or serious injury…), may be overturnable by the courts, lest any Sheriff Bobby Jack, any petty State (or federal) politician/sheriff/district attorney with an invidious grudge against the President, be able to harass him with endless "nuisance" charges.

Some critics might say that the 25th Amendment can be relied upon to remove the President, if he is really heinous—not to mention impeachment and Senate trial. Or that federal law enforcement is enough to deal with him. But what is there is a particularly supine Senate (or House) or Department of Justice, unwilling to deal with his wrongdoing? Again, the States and their legal departments may be useful in holding the President accountable.

What if, though, some observers would insist that the President can never serve jail time while he is the sitting President? An obvious argument those observers might use, would be that a President in jail might be too "distracted" to do his job, being busy with other things like finding soap on a rope, etc. Is their argument enough to prove the point that Presidents should be immune from criminal investigation and imprisonment?

VII. ONE ALTERNATIVE: IF NECESSARY, THE PRESIDENT COULD BE INVESTIGATED

WITHOUT BEING INCARCERATED, OR EVEN INDICTED

If the President is seen to be such a "snowflake" that he cannot take the heat of risking jail time (or even indictment, maybe): the public should still be able to see the light about his misdeeds, so they can, e.g., punish him at the ballot box.

Even if the President is given the privilege of not being jailed during his term in office, that does not mean he cannot be investigated or indicted. The indictment process, including possible "mug shots", "perp walk", etc., may be humiliating, but if there is enough evidence to indict a President for something more than littering or speeding, the President may deserve that kind of public humiliation. After all, commonsensically, if there is less pressure on the President to behave well, he may behave worse. *Cf.* Boyle's Law (famous chemistry principle by which gas under lower pressure may tend to expand more).

As for investigation, should not the American people know if their President has behaved criminally? Is it not part of the "state of the Union" if the President has behaved criminally? So, investigation offers "light without heat", in a sense: there is the illumination the public receives about Presidential behavior, but without jail time for the President until he has left office, possibly.

…Some *de minimis* jail time, literally going into a safe, security-checked jail cell, having it locked, and then having it immediately unlocked so the President can exit, if he has been sentenced to jail, may not be objectionable, as it would show the President is just another citizen, not above the law.

(Or maybe, "White House house arrest" could be done?) The burden should be on those opposing jail time for a sitting President, to prove that he should not have jail time, not even less than a minute in a secure cell, to show that no one is above the law. The symbolism of the President's brief time in jail might well be worth it, since the humiliation of being behind bars would encourage him and other Presidents not to commit crimes in the first place.

VIII. RESPONDENT NEEDLESSLY CEDES THAT TRIAL/PRISON WOULD VIOLATE ARTICLE II, WHEN THAT MAY NOT BE TRUE AT ALL

While Respondent submitted an excellent brief last Wednesday, February 26, Amicus must differ with his claim that, "Certainly, a criminal trial and incarceration would infringe Article II." *Id.* at 26. Regardless of what the Office of Legal Counsel or others have said, Amicus is not sure that trial/ prison would infringe Article II, since, e.g., a President could always pardon himself (and take the heat of public opinion for doing that) if a federal crime; and if a State crime, say, for rape or murder, the President can always resign from office, or, possibly, plea-bargain for a sentence suspended until after his tenure as President. Why should the People even have to accept a criminal as President in the first place?

Respondent also says that an "indictment and criminal prosecution" leads to a "distinctive and serious stigma" tending to "threaten the President's ability to act as the Nation's leader in both the

domestic and foreign spheres", *id.* at 28 (citation omitted). One is almost tempted to say, so what? If there is sufficient reason to charge the President with a crime, and put him in prison, maybe the President deserves that stigma. Some scarlet letters are earned, so to speak. And there are many other officers (including ones who didn't commit crimes) who can replace the President, either in whole or in part. —What is worse, "stigmatizing" the President, or having him commit crimes and go unpunished?

If the Court must decide whether the President is immune to indictment, trial, and incarceration (as opposed to mere investigation), it should be deeply skeptical about offering any of those immunities. And if the Court wants to employ any canons of constitutional avoidance that there are, Brandeis-ian or otherwise, to avoid, for now, dealing with those particular immunities that Petitioner is alleging, the Court may do so.

(Amicus also notes that in the instant case, private conduct is at issue. …The Department of Justice brief in *Trump v. Mazars USA, LLP*, 19-715, and *Trump v. Deutsche Bank AG*, 19-760, says, at 16, that "the Arrest Clause protects legislators from civil arrests for private conduct while attending and traveling to and from sessions of Congress. U.S. Const. Art. I, § 6, Cl. 1." *Id.* But what the Clause—a.k.a. the "Speech or Debate Clause"—actually says is that "Senators and Representatives . . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same"[.] *Id.*

But "Treason [and] Felony", *id.*, may be private conduct, in that Congresspeople could be privately passing secrets to foreign spies, committing embezzlement, even stealthily committing murder or other outrages out of public view. So the "DOJ" may be incorrect, or seriously overbroad, in their assertion that "the Arrest Clause protects legislators from civil arrests for private conduct"; and this reminds us in turn that plenty of misdeeds done by the President, may really be private conduct, not public conduct—even if the public is hurt badly by the misconduct.)

IX. *CITIZENS UNITED* AND THE SCENARIO OF A PRESIDENT HILLARY CLINTON WHO AVOIDS CRIMINAL PROCESS FOR 8 YEARS

By the way, Amicus is not going to cite much case law in this brief, as Respondent has done an excellent job in that category. However, Amicus will mention *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), for its use in combatting government oppression.

In very broad brush, that case was about people not having to be punished if, say, they wrote or disseminated a book attacking Hillary Clinton too close to an election. *See id. passim*. Amicus, though he supports campaign finance reform and thinks there is too much big money in politics, can still agree with much of the message of *Citizens United*, *supra*, since punishing someone for writing or distributing a book is not always a good idea.

However, what if Clinton had become President? Under the views of Petitioner in the instant case,

she, once in office, could literally shoot anyone who criticized her, and go not just unpunished, but even uninvestigated, for up to eight years (two terms in office). On a more realistic level than shooting people, she could indulge in spying, harassment, Watergate-style break-ins, criminal libel, financial fraud and skulduggery, etc., against any critic, and be free from criminal process while "enthroned" as President. So, under *Citizens United*, a critic cannot be harassed for merely writing a book about Mrs. Clinton; but if she is President, then, per Petitioner, Clinton can *kill* that same critic, or perform other abuses against him, for years, without being subject to investigation/indictment/incarceration. That result cannot be right, and Amicus urges common sense on the Court.

Speaking of books, one famous trilogy may have lessons here, just as one prominent judge may have thought it had lessons in another issue…

X. THE CORRUPTIVE "RING OF INVISIBILITY" THAT THE COURT SHOULD NOT GIVE TO CRIMINAL PRESIDENTS

Rumor has it that a junior Member of the Court recently compared nationwide injunctions to the domineering effect of the "One Ring" from J.R.R. Tolkien's *Lord of the Rings* trilogy. Such a comparison may or may not be accurate (e.g., if Sauron of Mordor is considered as an oppressive government power; and injunctions *prevent* (putatively-)oppressive government powers from being wielded: then injunctions hardly further the Dark Lord's purposes…); but an even more apt use

for the Ruling Ring is to describe the exemption of the President from criminal process or punishment.

That is, the Ring has traditional powers not just of dominion, but also of invisibility, and moral corruption (meanness, egotism, etc.) of the wielder—even the markedly virtuous Frodo Baggins—, *see id. passim*. As previously discussed, lack of criminal investigation leaves the public in the darkness about what evil the Chief Executive may have done; and that darkness, with its temptation to the President to do evil acts invisibly, without fear of punishment (at least until his presidency is over—and he may not even live long after that anyway), has obvious potential to corrupt. (The whole Enlightenment project represented by these democratic United States, cannot work in the dark.)

And Lord Acton chimes with *Lord of the Rings* when he says that "absolute power corrupts absolutely." Letter to Archbishop Mandell Creighton (Apr. 5, 1887). The Court should not create occasions for the corruption of the President, who should be a devoted leader, not a dark lord.

Indeed, who needs an invisible man lurking at the heart of the State? a walking black hole or black box, who cannot even be investigated for his crimes? *Cf.* the current film *The Invisible Man* (Blumhouse Productions 2020; from the H.G. Wells novel (1897)), which, *see id.*, updates Wells' story by having the eponymous transparent troublemaker be a man who stalks and abuses his wife, whom people tend to disbelieve when she describes her invisible stalker. Amicus would hope that time's up for abusers of all stripes, including any hypothetical Abuser-in-Chief in the White House.

We now turn from *Lord of the Rings* to the Lord:

XI. A BIBLICAL VIEW OF ALLOWING A CHIEF EXECUTIVE TO RUN AMOK

By the way, the Scriptures can be of some use in considering whether the President can be reined in by the law—even for his own good. *See, e.g.*, the story of King David and his prophet Nathan in the Bible. After David kills Uriah and takes his wife Bathsheba for himself, Nathan tells him a story about a rich man who steals a lamb from a poor man. David is incensed, but Nathan reveals that he is really talking about David's own atrocious behavior. David then repents for his sin. 2 *Samuel* 12:1-13. (While Nathan may not have been able to have the King criminally investigated, the story still resonates in a modern, democratic context.) Criminal (or civil) law enforcement can play Nathan to the President, and let him know he has gone too far.

See also, e.g., *Ezekiel* 3:18-19, where God says to the prophet,

> If I say to the wicked man, "You will surely die," but you do not warn him or speak out to warn him from his wicked way to save his life, that wicked man will die in his iniquity, and I will hold you responsible for his blood. But if you warn a wicked man and he does not turn from his wickedness and his wicked way, he will die in his iniquity, but you will have saved yourself.

Id. (Berean Study Bible) Criminal process is a way, even if *post facto*, to tell the President that he has

been wicked, *see id.*, or at least that there is reason to investigate him. This is doing the President a favor, in a sense, whether spiritual or otherwise. So, no decent President should seek to place himself above criminal law, for the sake of the Nation, or even for the sake of his own soul.

XII. THE CURRENT PRESIDENCY IS A PARTICULARLY BAD TIME TO LOOSEN THE REINS ON THE CHIEF EXECUTIVE, DUE TO THAT OFFICIAL'S LACK OF RECOGNITION OF HIS PROPER BOUNDARIES

In his recent year-end report, the Chief Justice bemoans, in nicely alliterative fashion, the violence and chaos resulting from "a rock thrown by a rioter motivated by a rumor." John G. Roberts, Jr., *2019 Year-End Report on the Fed. Judiciary* at 2, *available at* https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf. He is right to do so. But what would happen if a *President* were a rioter, or close to that? Rapist, ruffian, Russian asset, etc. …

The current President, while not apparently a rioter, has shown a very loose conception of the boundaries of his office. *See, e.g.*, Michael Brice-Saddler, *While bemoaning Mueller probe, Trump falsely says the Constitution gives him 'the right to do whatever I want'*, Wash. Post, July 23, 2019, 6:46 p.m., https://www.washingtonpost.com/politics/2019/07/23 /trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/,

> Trump lamented the duration and cost of the investigation of Russian

> interference in the 2016 presidential election led by special counsel Robert S. Mueller III, which he has repeatedly said found "no collusion, no obstruction."
>
> "Then, I have an Article II, where I have to the right to do whatever I want as president," he said. "But I don't even talk about that."
>
> . . . .
>
> William C. Banks, a professor of law at Syracuse University, told The Washington Post on Tuesday that Trump's comments are an affront to "basic points that every schoolchild learns in civics." Trump took an oath to support and defend the Constitution when he became president, Banks noted, meaning he can only do what the Constitution permits him to.
>
> "It's certainly not a grant of unlimited power," Banks said. "He's not a monarch, he's the chief executive ... and he's bound to uphold the rule of law."
>
> . . . .
>
> . . . Speaking to ABC News in June about allegations that Trump wanted to fire Mueller, the president said: "Article II allows me to do whatever I want. Article II would have allowed me to fire him."

Id. See also, e.g., Toluse Olorunnipa & Beth Reinhard, *Post-impeachment, Trump declares*

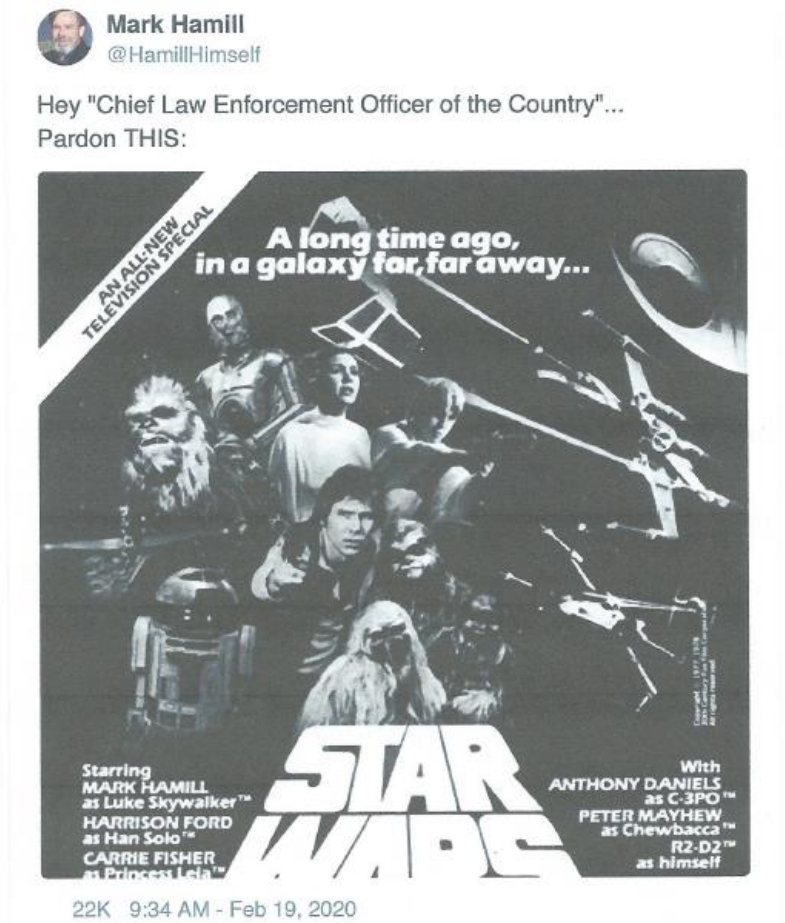
himself the 'chief law enforcement officer' of America, Wash. Post, Feb. 19, 2020, 4:41 a.m., https://www.washingtonpost.com/politics/post-impeachment-trump-declares-himself-the-chief-law-enforcement-officer-of-america/2020/02/18/b8ff49c0-5290-11ea-b119-4faabac6674f_story.html,

> On Tuesday, Trump granted clemency to a clutch of political allies, circumventing the usual Justice Department process. . . .
>
> Trump defended his actions, saying he has the right to shape the country's legal systems as he sees fit.
>
> "I'm allowed to be totally involved," he told reporters . . . . "I'm actually, I guess, the chief law enforcement officer of the country. But I've chosen not to be involved."

Id. Amicus thought that the Attorney General is "the chief law enforcement officer of the country", *id.*, but the President has other ideas—incorrect ones. This being so, it is a particularly inopportune time for the Court to further loosen the reins on the Oval Office by declaring a perpetual presidential holiday from criminal process.

Trump's declaration about his putative law-enforcement supremacy, *supra*, was seen as so outrageous that from far, far away, Mark Hamill—an average American like Amicus—used his precious First Amendment rights and weighed in on the President's trumpery, in the following Twitter "tweet", https://twitter.com/HamillHimself/status/

1230183868885417984, Feb. 19, 2020, 9:34 a.m., *embedded in* Mary Papenfuss, *Mark Hamill Mocks Law 'Chief' Trump, Demands Pardon For Bad 'Star Wars' TV Special*, Huffington Post, Feb. 20, 2020, 7:44 p.m., https://www.huffpost.com/entry/mark-hamill-star-wars-donald-trump-holiday-pardon_n_5e4f082fc5b629695 f57cef0:



Id. Hamill's mockery, *id.*, is legally valid regardless of the merit(lessness) of *Star Wars* holiday specials:

the President does not know what his own job is, re law enforcement; and Citizen Hamill, an employer of the Chief Executive like over 300 million other of the C.E.'s employers, has a right to complain publicly. If Trump has fallen on the dark side of Hamill's estimation, that is the President's fault.

(Amicus' views here are nonpartisan, naturally: no matter whether the President is named Trump, Mr. Clinton, Mrs. Clinton, Romney, Pence, Sanders, Colonel Sanders, Buttigieg, or Whatchamajig, any President, regardless of party or other identity, is not entitled to be above criminal process. At a time when the governments in China and Iran are under fire for secrecy about the deadly coronavirus ravaging their countries, it is very inopportune to argue that any President here, or elsewhere in the world, should be free to avoid transparency and investigation when he is behaving criminally. —Or, otherwise put: especially when there is an ultra-virus ravaging the world, the President should be held criminally accountable when he is acting *ultra vires*.)

…Briefly, while we are on the note of *Star Wars*: that series, *see id.*, is largely about an evil emperor who has contempt for the people, but is eventually overborne by the force of their righteous power. In real life, the democratic force of "We the People" is deposited, in part, in the President, he being a conduit, a presider, and a potential target of the laws, as discussed earlier. If any President mistakes himself for the actual force itself, sees himself as being the law, or being above the law, rather than seeing himself as a temporary wielder of the force for the good of the People who provide the force to

government, this would not be American. The force is not he, and would not truly be with him if he placed himself above the People. The force is eventually from and with the People, U.S. Const. pmbl.; and if the Court recognizes that, it should not let a criminal President be immune to the force of the People's justice, since free societies properly honor the People above their hired servant the State.

* * *

"If you can't take the heat, get out of the kitchen." That tough Trumanesque truism deserves to be repeated near-endlessly, when one discusses whether to make the President free from criminal inquiry or interment. (If the sequelae of criminal acts distract the criminal: don't commit criminal acts in the first place! or, leave the kitchen if the heat is too great.) After all, it is a sort of treason for the President to be committing crimes in the first place—when he is supposed to be the First Role Model for Americans—, or for him even to want to disrespect the American people by putting himself above investigation of his possible crimes.

On that note: *The Tragedy of Coriolanus* tells the story of one poignantly tragic traitor, the noble Roman called Caius Martius Coriolanus. As Shakespeare relates, Coriolanus, *see id.*, fights fiercely for Rome, but loses his political position because of his arrogance; then defects to the Volscians of Corioles and leads them against Rome, and finally turns and betrays the Volscians. (If readers want to see parallels in any current American leaders allegedly kowtowing to foreign powers and hurting the Nation, readers are free to

do so. …And should criminal treasonous, or quasi-treasonous, acts really be beyond punishment if you are President?)

Coriolanus awaits punishment in Corioles, an angry crowd nearby and in lynching mood; but a lord of the Volscians says, "His last offenses to us/Shall have judicious [judicial] hearing." *Id.*, act 5, sc. 6. Unfortunately, Coriolanus then starts viciously insulting other Volscians, who ragefully kill him, *id.* He should probably have settled for the "judicious hearing."

But the *right* to a judicial or legislative hearing, or investigation, can also be seen as a *duty* for the accused to submit to the legal process. Coriolanus died by mob lawlessness because he would not take the lifeline the law offered him; but a President who refuses to submit to the State's judgment, who claims he is above criminal investigation/ prosecution (and who does not need a lifeline, because he will not be assassinated like a Coriolanus if he refuses to submit to government criminal process), still partakes of Coriolanus' arrogance, of thinking he is too good for the law. And thinking you are too good for the law, is unfitting for an official whose duty is to "take care that the laws be faithfully executed", U.S. Const. art. II, § 3, cl. 5.

So, for now, the buck stops with the Court, who will decide whether the President must live by the law, or, by contrast, he is allowed to be the living negation, or nemesis, of the law.

If the Court were to be fooled into falling for the un-American notion of putting the President above the law, Amicus is not sure how much hope there

would be for the Republic and its core principle of limited government under law. And if the First Citizen is permitted to be the First Criminal and First Abuser, sans criminal process or penalty, that hardly embodies "justice for all", Pledge of Allegiance of the U.S., or "equal justice under law", a concept under which this Court sits.

CONCLUSION

The Court should not place the President above the criminal (or civil) law, whether during his tenure in office or otherwise; and Amicus humbly thanks the Court for its time and consideration.

March 4, 2020 Respectfully submitted,

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