No. 23-939

In The

SUPREME COURT OF THE UNITED STATES

Donal J. Trump,

Petitioner,

v.

United States,

Respondent.

Amicus Brief in Support of Respondent

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Interests of Amicus.

I know neither party nor have financial stake. I am a member of this Court's bar and a CA Certified Appellate Law Specialist. I am one of several hundred holding a US law license and on the Roll of Solicitors, England, and Wales. My unique skill set allows me to offer insight.

I write based on reading the lower court record. I support the DOJ's reference to English law as it is a foundational line of material inquiry. That support, however, extends no further as the reference is incomplete. With a complete reference, the President has absolute criminal immunity as the office was modeled on the British Monarchy.

The Speech and Debate Clause does not fit. The Monarch's absolute immunity was the actual model.

The Framers mathematically intended each Congressperson to function as a miniscule percent of Art. I. (Senator = 1% of Senate; Senate is 50% of Congress. Senator = is .25% of Art. I power. Art I. is one-third of the government. A Senator is endowed with 0.0825% power of the constitutional pie). Trying to glean Presidential immunity from the Speech and Debate Clause that protects Congresspeople is a fool's errand as the President is 100% of Art. II power. The better characterization is the Framers endowed each part of government with no more/no less the immunities needed to fulfill the particularized constitutional role. The Speech and Debate Clause's relative weakness in a Presidential context simply confirms that observation. As the President is

mathematically more powerful than a miniscule member of Congress, then the President needs more robust immunities.

The Monarch is head of state and absolutely immune from criminal liability for official acts. This seems nowhere mentioned but is material as it was an operating parameter in the Framers' mind. The Monarch's immunity is as true today as it was eons ago. (See,https://time.com/6275480/king-charles-iii-privileges-laws-exempt/; See also *Halsbury's Laws of England*, Vol. 20., on Lexis).

Respondent may argue the Monarch's absolute criminal immunity stems from the fact the Crown Courts (i.e., criminal courts) in England & Wales are in the name of the Monarch, and that the Monarch cannot be summoned before his/her own courts. That is, indeed, one rationale why the Monarch has absolute criminal immunity. But the effect of the Separation of Powers doctrine may have been an intended analogue to that rationale that a President—like the Monarch-- cannot be summoned criminally.

Respondent's camp will argue the President is different as a head of state is ceremonial, and the President is both head of state and government. Indeed, but wearing both hats of state means the President should be endowed with more immunity, rather than less to achieve the intent of the President's broader and deeper office.

Respondent's camp will argue the U.S. was formed in rejection of having a monarch. Not quite. The U.S. was created in response to a failed Articles

of Confederation that had no executive. The Articles was the experiment in government without a monarch (aka, executive). The U.S.A. on the other hand, unquestionably represents the regression back to having an executive resembling a monarch. It is telling the major checks in the Constitution on a Presidency lapsing into a tyrannical monarchy are elections and impeachment, with such checks irrelevant to the British Monarchy. Tyranny, in other words, is a by-product of absolute criminal immunity. If a tyranny was feared—and the Framers knew absolute criminal immunity was foundational to tyranny—then why is the Constitution silent on a President's criminal immunity as a check on tyranny? The result of the Constitution is the President is the "elected kingship" as aptly described by acclaimed British historian David Cannidine.

The President and Monarch's Pardon Power Offers a Simple Thought Experiment.

The Monarch's absolute immunity was known in 1789, when former English lawyers framed the Constitution codifying unwritten English constitutional conventions. The Framers intentionally endowed the President with powers modeled on the Monarch's "Royal Prerogatives." The Monarch and President have the peculiar pardon power. The Framers were cognizant when the Monarch exercised pardon powers he did so with full criminal immunity. It is puzzling the Framers would believe the President could effectively conduct the controversial pardon power without the shield of criminal immunity. If the Framers' intended otherwise, they would have made

clear the President exercised its analogous "Royal Prerogatives" without full criminal immunity.

The pardon power provides a straight-forward "official act" example to logically evaluate out the Court's question presented. If criminal immunity necessarily extends to the pardon power to make that power effective, immunity must also extend to all other presidential powers. Hypotheticals with the pardon power as the President's "official act" also yield absurd results when the pardon is exercised with/without criminal immunity. (E.g., President Trump preemptively pardons the rioters on Jan. 7, but is still facing a related criminal trial. Illogical.)

The only real debate over the pardon power was whether Congress or the President should have it. In Federalist No. 74, Hamilton argues the individual, rather than mob, was better equipped:

> The reflection, that the fate of a fellow creature depended on his sole fiat, would naturally inspire scrupulousness and caution: The dread of being **accused of weakness or connivance** [my emphasis] would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy…

(https://founders.archives.gov/documents/Hamilton/01-04-02-0226). Hamilton argues the President would be cautious for fear of being accused of "weakness or connivance." In other words, fear of political retribution that elections seem intended to deal with

would govern the President's act of pardoning. Hamilton nowhere states fear of criminal retribution would regulate the President. If criminal retribution curbed a President's use of the pardon power that would've, by far, been Hamilton's strongest point to argue the pardon power should be in the hands of the President. Hamilton assumed when writing the President had criminal immunity when pardoning.

An Opinion Determining no Absolute Immunity will be Short-Lived due to the 25th Amendment.

The lower court screams "Eureka!" absolute immunity does not exist because Ford pardoned Nixon. That is conclusory as Nixon may have confirmed the immunity in court without Ford's pardon. Although Ford was President, the better use of that history is to observe what happened was a loyal Vice President pardoned his President consistent with human nature.

There is constant chatter about whether a President can pardon himself. Again, based on British law, this is a non-discussion point as the Monarch would never have to consider self-pardoning given absolute criminal immunity. A Presidential self-pardon is also absurd from the Framers' perspective. If the Framer's intended limited Presidential immunity, then the possibility of a Presidential self-pardon should not exist. That is, if the Framers intended Presidential prosecution, then one would expect the Constitution to explicitly state the act of self-pardoning is barred. How could the Framer's miss the self-pardon loophole if they intended possible criminal prosecution? The clean answer is the

Framer's never contemplated a President would need to consider self-pardoning given absolute immunity.

If the President cannot self-pardon, then consider the President can temporarily transfer power to his V.P. under the 25th Amendment as Bush II did with Cheney. There is nothing in the 25th Amendment stopping the V.P. from then preemptively pardoning the President during that temporary transfer of power. In exchange, the President would then pardon the loyal V.P. afterwards.

An opinion here determining no absolute criminal immunity will be short-lived as every honest regime going forward will game pardons out of necessity based on the new political lawfare paradigm. The pardon games will cause further disdain of government as the country will be reminded that it was only President Trump who faced presidential criminal prosecution as he did not participate in pardon games. Respondent should explain if there is not *de jure* criminal immunity, then how does *de facto* criminal immunity not exist due to the pardon power? Respondent should explain if *de facto* immunity exists, then why should the Court allow prosecution to continue against President Trump who will be the only President ever to be prosecuted for simply failing to game the pardon power when he had the chance at the end of his term?

Respectfully Submitted,

s/Thomas Ogden, Esq.

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Certificate of Compliance and Service

I, Thomas Ogden, filed the attached Amicus Brief in Support of Respondent and hereby certify that the brief is less than 1,500 words in total and was written in Century 12 pt. font.

I further certify that the Petitioner and Respondent in this matter were served with copies of this brief via US first-class mail and email, as follows:

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