

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 *AMICUS CURIAE* OF EUGENE H.
GOLDBERG IN SUPPORT OF RESPONDENT**

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IDENTIFICATION OF AMICUS¹

Eugene H. Goldberg, an attorney admitted to the bar of this court, has no interest or relationship with any party to this appeal. He specializes in construction law and insurance coverage. He is a student of common law federal constitutional separation of power jurisdictions, their roots in 17th-18th Century England and America, and American history.

This appeal is submitted in support of Respondent Cyrus R. Vance, Jr.

DEFINITIONS

Many words in this brief are used repeatedly. They are defined and/or described below.

“Constitution” means the United States Constitution.

“DA” means the New York County District Attorney, an officer created by New York Constitution Article 13 §13(b) separate from New York’s Attorney General.

“Federal” refers to a governmental system with independent states/provinces and a national government, as opposed to a unitary system in which the national government delegates powers to local or regional subsidiary governments. The United States, Canada,

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

and Australia are, for example, federal governmental systems. The United Kingdom is a unitary government, even though it has devolved powers to Scotland, Wales, and Northern Ireland.

“Foreign Head of State” means a president, Prime Minister or King of a Foreign State.

“Foreign State” means another country.

“Head of Government” means a President, a Foreign Head of State, or a State governor.

“President” means the US chief executive pursuant to the United States Constitution.

“State” means one of the original 13 states in 1776 and/or one of the 50 states in the United States.

Trump is the individual, as opposed to his official capacity as President.

“US” refers to the national government in the United States.

SUMMARY OF ARGUMENTS

The public has a right to every man’s evidence, even the President’s.

A President, before taking office, may have evidence regarding a State crime. His becoming President has no bearing on his duty in his personal capacity to present his evidence in a State criminal investigation. Postponing his presentation of evidence until the President leaves office can have an effect on a State criminal justice system.

While the President may be on call every day to perform his Presidential functions, the demand of office is not unremitting. Presidents take vacations, make long speaking tours, and relax. Under proper time management, the President can respond to a State criminal investigation. A court would use docket control techniques to prevent impairing Presidential functions.

State prosecution of State crime is expressly recognized in the Constitution. Congress by statute allows State prosecution of a State crime against a US officer. The US officer has a defense, if he can show his actions were in the course of performing a US function.

There is no executive Presidential prerogative to postpone giving evidence until the President is out of office. The Revolution rejected executive prerogative, in favor of equality of application of the law.

The State criminal justice system is part of a double security created by the Constitution. The independent State criminal justice system, a bulwark against abuse, would be threatened if Trump's appeal is upheld.

ARGUMENT

I. INTRODUCTION

A. TWO BASIC PRINCIPLES

First, the public has a right to every man's evidence, except where protected by privilege. United States v. Nixon, 418 U.S. 683, 709 (1974). This applies in State and US courts.

Second, a President was not always the Head of Government.

B. A CENTURY OLD *NISI PRIUS* PRECEDENT

Before taking office, a Head of Government may commit crimes.²

Lennington Small, then sitting Illinois governor, was indicted by an Illinois grand jury in 1921 for alleged crimes committed when he was Illinois State Treasurer.³ Small unsuccessfully asserted temporary immunity because he was the sitting governor. People v. Small, (Illinois Sangamon County Circuit Court July 27, 1921). The facts, argument, and *nisi prius* decision are reported in The Chicago Daily News Almanac and Year-Book for 1922 at 522-526, <https://books.google.com/books?id=JQ8fAQAAMAAJ&pg=PA522&lpg=PA522&dq=%22purchasers+of+the+notes+large+profits%22&source=bl&ots=WuUaMcAZQl&sig=ACfU3U1w1yhVR7KgD7h5QGUGY2R6sGitw&hl=en&sa=X&ved=2ahUKEwjv3db98TnAhVOl3IEHWW4DgAQ6AEwBXoECAYQAQ#v=onepage&q=%22purchasers%20of%20the%20notes%20large%20profits%22&f=false>.

The case generated academic writing. Note, Immunity of State Executive from Arrest, 35 Harv. L. Rev. 185 (1921); 93 Central L. J. 111, 149, 237 (1921); 54 Chicago Legal News 51, 54 (1921). Periodicals commented.

2. Lesotho's Thomas Thabane, prime minister since June 2017, was indicted on February 20, 2020. He was charged with involvement in the murder of his estranged wife 2 days before he assumed office.

3. The crimes involved misuse of State funds.

Small was acquitted. Illinois then sued Small, still in office, to account for interest earned on Illinois funds. People v. Small, 319 Ill. 437, 150 N.E. 435 (1925).

The Harvard Law Review Note analyzes well many issues on this appeal.

C. IMMUNITY FOR FOREIGN HEADS OF STATE—A SHORT INTERNATIONAL COMPARISON

In courts in the United States, temporary immunity is accorded a Foreign Head of State; Wei Ye v. Zemin, 383 F3d 620, 625-627 (7th Cir. 2004); Foreign State ambassadors; Vienna Convention on Diplomatic Relations Article 29 (1961); and their families.⁴ Vienna Convention on Diplomatic Relations Article 36 (1961). This is based on international comity.

No comity exists between the US and the States. The US has indicted 8 sitting State governors.⁵ No State has indicted a sitting President.

Temporary immunity is conferred by at least 32 Foreign State constitutions on current and former Foreign Heads of State. Immunity From Prosecution for Former

4. Here, protection is sought for family, business affiliates, and trusts. If Trump succeeds personally, the Court must determine whom else is protected.

5. John Quitman, 1851, Mississippi; Warren McCray, 1924, Indiana; Richard Leche, 1939, Louisiana; Marvin Mandel, 1977, Maryland; Jim Guy Tucker, 1996, Arkansas; Fife Symington, 1997, Arizona; Rod Blagojevich, 2009, Illinois.

Presidents, Library of Congress, <https://www.loc.gov/law/help/immunity-from-prosecution/index.php>.

Not mentioned is Nigeria Constitution §308(1) (1999).⁶ Applying a narrow construction, the Nigerian Supreme Court held the section did not bar investigation. Fawehinmi v. Inspector-General, (2002) 5 S.C. (Pt. 1) 63 (Sup. Ct. Nigeria). Policy reasons offered deserve mention.

That a person protected under Section 308 ..., going by its provisions, can be investigated by the police for an alleged crime or offence is, in my view, beyond dispute. To hold otherwise is to create a monstrous situation whose manifestation may not be fully appreciated until illustrated. I shall give three possible instances. Suppose it is alleged that a Governor, in the course of driving his personal car, recklessly ran over a man, killing him; he sends the car to a workshop for the repairs of the dented or damaged part or parts. Or that he used a pistol to shoot a man dead and threw the gun into a nearby bush. Or that he stole public money and kept it in a particular bank or used it to acquire property. Now, if the police became aware, could it be suggested in an open and democratic society like ours that they would be precluded by Section 308 from

6. Appendix A. §308 grants temporary immunity to sitting governors and presidents. Nigerians debate the merits and demerits of the section. E.g., Olasunkanmi and Agulanna, *Interrogating the Immunity Clause and Democratic Governance in Nigeria*, 4(7) *Journal Advances in Social Science and Humanities* 181 (2018).

investigating to know the identity of the man killed, the cause of death from autopsy report, the owner of the car taken to the workshop and if there is any evidence from the inspection of the car that it hit an object recently, more particularly a human being; or to take steps to recover the gun and test for ballistic evidence; and generally to take statements from eye-witnesses of either incident of killing. Or to find out (if possible) about the money lodged in the bank or for acquiring property, and to get particulars of the account and the source of the money; or of the property acquired? The police clearly have a duty ...to do all they can to investigate and preserve whatever evidence is available. The evidence or some aspect of it may be the type which might be lost forever if not preserved while it is available, and in the particular instances given it can be seen that the offences are very serious ones which the society would be unlikely to overlook if it had its way. The evidence may be useful for impeachment purposes ... It may no doubt be used for prosecution of the said incumbent Governor after he has left office. But to do nothing under pretext that a Governor cannot be investigated is a disservice to the society.⁷

7. Accord, Rotunda, May 13 1998 Memorandum to Kenneth Starr at 49-51, <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1032&context=usjusticematls>. A New York grand jury, under New York Criminal Procedure Law §190.85, could petition/report findings to Congress under Constitution First Amendment.

Temporary immunity is sometimes conferred, by domestic statute, on Foreign Heads of State. Some statutes have been struck down. Quigley, *Immunity, Italian Style: Silvio Berlusconi Versus The Italian Legal System*, 34 *Hastings Internat'l & Comp. L. Rev.* 435 (2011).

D. THE KING'S IMMUNITY IN ENGLAND

Immunity from being a witness and arrest is part of the King's prerogative. "The King can do no wrong."⁸ Blackstone opined the King in the exercise of his prerogative was irresistible and absolute. If prerogative were exercised to the "grievance or dishonor of the kingdom", he was immune. Blackstone, Commentaries on the Law of England *243(1753) citing Locke, An Essay Concerning the True Original Extent and End of Civil Government §205 at 344-345 (4th ed. 1713). Locke felt it is better for a few to suffer than to allow the head of government to be exposed. According to Blackstone, the King's exercise of prerogative was unreviewable.

A later text opined that the King's immunity was based on the "dignity of the sovereign and the safety of the state..." Chitty, The Law of The Prerogative of the Crown 374 (1820).

"Dignity" reflected the King's place in government. The King is the fount of justice. Criminal prosecution is in the King's courts and in the King's name. "Safety" reflected police and/or defense powers.

8. The maxim has four meanings. Seidman, *The Origins of Accountability: Everything I Know About The Sovereign's Immunity, I Learned From King Henry III*, 49 *St. Louis U.L.J.* 393, 396 (2005).

Prerogative is construed narrowly. It does not abridge third party rights. Thomas v. Sorrell, 124 Eng. Rep. 1098 (K.B. 1674); Nenner, By Colour of Law 90-99 (1975). After 1689, prerogative did not permit statute to be suspended or dispensed with (unless allowed by statute). Schwoerer, The Declaration of Rights 1689 at 59-64 (1981); English Bill of Rights, 1 William & Mary Sess. 2 c 2.

E. IMMUNITY OF THE PRINCE OF WALES BEFORE BECOMING KING AND THE QUESTION OF IMMUNITY AFTER BECOMING KING FOR CONDUCT BEFORE BECOMING KING

Until the Prince of Wales became King, he had no immunity. In the early 15th Century, the Prince of Wales (the future Henry V) was jailed for contemptuous conduct in the immediate presence of William Gascoyne, the Chief Justice of England. Mackintosh, 1 The History of England 351 (1830); Coke's Third Institutes of the Law of England at 225; Shakespeare, Henry IV, Part II, Act V. Scene II Lines 64-122.

The Prince of Wales testified in 1891 in the Baccarat Case. Lowndes, H.R.H. The Prince of Wales 131 (1898). He became King in 1901.

All, peers and commoners, are equal before the law⁹
--except for the King.

The King's special status raises an interesting question. What of his conduct before becoming King, not raised until after becoming King? The issue arose (as to witness immunity) because in 1623 (regarding the Spanish Match), the Prince of Wales (the future Charles I) secretly traveled to Madrid to woo the King of Spain's daughter. The Earl of Bristol, England's ambassador to Spain, tried to negotiate a marriage contract with Spain. The Prince refused to become a Catholic. His romantic suit failed. The Prince became King in 1625. In 1626, the Earl was indicted (during Parliament) in the House of Lords for treason for trying to convert the Prince. The Earl asked if Charles I (the principal accuser) would testify, or would royal prerogative bar this. After debating the issue, the House of Lords asked the English judges to rule. Gardiner, Notes of the Debates in the House of Lords 185-186 (1889); British History Online, Historical Collection; 1626, May, <https://www.british-history.ac.uk/rushworth-papers/vol1/pp248-302>. Charles I ordered the judges to abstain as it would affect royal prerogative. Gardiner, Notes of the Debates in the House of Lords 191 (1889). See generally Watson, II Constitution of the United States 1021-22

9. Dicey, Introduction to the Law of the Constitution at 198 (1885) says:

[The rule of law] means ... equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by Law Courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals....

(1910). The indictment abated when Charles I dissolved Parliament.

The Earl's case, viewed from an American lens, involved capacity. The Prince had one capacity as a natural human being. When King, he had two capacities: one body natural and one body politic. Kantorowicz, The King's Two Bodies at 7-23 (1985). The Earl faced a treason charge punishable by death based upon the unsworn statement of his accuser--the Prince of Wales in 1623, then King Charles I in 1626. This involved the natural body. The body politic required dignity—it would be unseemly for the King, the source of justice, to descend from the throne to testify under oath, subject to prosecution in the King's name for perjury. The judges ought to have weighed the competing policies.¹⁰

The President has two capacities: official and personal/unofficial. Jones v. Clinton, 72 F.3d 1354, 1359 (8th Cir. 1996), rev'd on other grounds, 520 U.S. 681 (1997). The President is not the source of justice, especially not in State courts. Conduct before becoming President is within his unofficial capacity. Id.; cf. People v. Small, 319 Ill. 437, 150 N.E. 435 (1925).

II DISTRACTION –THE DEMAND OF OFFICE IS NOT UNREMITTING

Beginning with George Washington, Presidents absented the seat of government for months. Henderson,

10. For a 1909 case raising King as witness issues, see Smith, The Missing Witness? George V, Competence and Compellability and The Criminal Libel Trial of Edward Frederick Mylius, 33 Journal of Legal History 209 (2012).

George Washington's Southern Tour 1791 (1923)
(Philadelphia departure March 21, 1791, return to Mt. Vernon June 12, 1791). Mail did not reach him for a month.

Air conditioning not being invented, fear of disease (e.g., Philadelphia's yellow fever in summers in the 1790s, cholera in Washington in the 1830s and thereafter) persuaded Congress to adjourn for summer months. Presidents also left. Examples follow.

John Adams--left Philadelphia July 25, 1798, Rosenfeld, American Aurora at 199-200 (1997), arrived in Newark on July 27, 1798, id. at 200, returning November 1798, Channing, IV A History of the United States 194 (1917);

James Monroe--June 1, 1817 to September 15, 1817, Waldo, The Tour of James Monroe (1818);

Andrew Jackson--trips to Tennessee in 1830, 1832, 1834, and 1836, Hannaford, Presidential Retreats 42 (2012), Green, On Tour with President Andrew Jackson, 36 New England Quarterly 209 (1963), Spence, Andrew Jackson Donelson: Jacksonian and Unionist 48-50, 67, 73 (2017) (trip to Hermitage each way 3-4 weeks);

Martin Van Buren--left about July 1, 1839 returned mid-October 1839 from trip to Kinderhook, NY, Calendar of the Papers of Martin Van Buren 387-392;

Rutherford B. Hayes--left home in Canton, Ohio for western tour September 1, 1880-October

30, 1880 returning to Canton, Ohio, Davison, Travels of President Rutherford B. Hayes, Ohio History Journal, [https://resources.ohiohistory.org/ohj/browse/displaypages.php?display\[\]=0080&display\[\]=60&display\[\]=72;](https://resources.ohiohistory.org/ohj/browse/displaypages.php?display[]=0080&display[]=60&display[]=72;)

Warren G. Harding--left Washington on June 20, 1923 for a western tour including a trip to Alaska, Telecommunications History Group, <https://www.telcomhistory.org/santee.shtml>, expecting to return in late August, 1923, died in San Francisco on August 2, 1923;

Calvin Coolidge--1924, 1925, 1926, 1927, 1928, Ferrell, The Coolidge Summer White Houses, <https://www.coolidgefoundation.org/blog/6661/>.

Early Presidents, absenting from the seat of government, transacted government business by mail. Means of communication changed. For example, Woodrow Wilson departed the United States for the Versailles Peace Conference on December 4, 1918, returned on February 24, 1919, departed again on March 5, 1919, and returned finally on July 8, 1919. US Department of State Office of the Historian, Travels of the President Woodrow Wilson, <https://history.state.gov/departmenthistory/travels/president/wilson-woodrow>. While away, Wilson dealt with government business by wireless and cable. Woodrow Wilson, State of the Union Address December 2, 1918, <http://www.let.rug.nl/usa/presidents/woodrow-wilson/state-of-the-union-1918.php>. The President's absence from the seat of government does not interrupt his undertaking the business of government. Watson, II Constitution of the United States 1010-11(1910).

When away, Presidents relaxed. Andrew Jackson rode his horse at the Hermitage. Grover Cleveland fished in the Adirondacks. Lyndon Johnson drove his car in the Texas foothills.¹¹ Others golfed.

John Marshall stated

If, upon any principle, the president could be construed to stand exempt from the general provisions of the constitution, it would be, because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting...

United States v. Burr, 25 F. Cas. 30, 34 (D. Va. 1807)¹²

The nation may require the President be *available* every day to perform Presidential functions; it does not require he *perform* Presidential functions every minute. Time management permits response to a State investigation.

11. There is a story, attributed to Robert Caro, that President Lyndon Johnson was stopped in the Texas foothills outside of Austin for speeding, but was not ticketed. When realizing who he stopped, the policeman said “My God!” LBJ said “You better remember that.”

12. Clinton v. Jones, 520 U.S. 681, 689 (1997) commented but neither rejected nor accepted the remark.

III. DISCRIMINATORY ENFORCEMENT: A DEFENSE TO CRIMINAL CHARGES BUT NOT AN INVESTIGATION

Politically motivated prosecution is a rare defense after indictment. Clear and convincing evidence must be shown to displace the presumption that a prosecutor acted lawfully. Reno v. American-Arab Anti-discrimination Committee, 525 U.S. 471, 489 (1999); Wayte v. United States, 470 U.S. 598, 607-08 (1985).

The DA's statutory authority to investigate is neutral in content, not aimed at any sitting US official much less aimed at the President. Trump argues discrimination *in application*. This requires a greater factual showing than Trump provided.

After the subpoenaed documents are produced, the State grand jury may indict conspirators. The indictment may refer to Trump as a co-conspirator obliquely.¹³ Trump may not be indicted.

The discrimination defense is therefore not ripe.

IV. CONSTITUTION ARTICLE I §3 CLAUSE 7 CONCERNS HOUSE IMPEACHMENT AND SENATE TRIAL, NOT A STATE INVESTIGATION

Constitution Article I §3 clause 7 deals with the US Senate. It also deals with a partial overlapping of US judicial power. The US House and US Senate are granted a small aspect of US judicial power—impeachment and

13. Presidents have been described obliquely as co-conspirators in US indictments, but not indicted.

trial of US officers. The Senate is somewhat analogous to the House of Lords in the process. But the House of Lords, after conviction at the impeachment trial, can also impose fines, imprisonment and death. Story, 2 Commentaries on the Constitution of the United States §782 (1833). Constitution Article I §3 clause 7 denies the Senate such power; US judicial power is otherwise committed to courts pursuant to US Constitution Article III.

There is little mention of States in Constitution Article I §3 except in State election of Senators. Clause 7 does not discuss States in the impeachment process.

There is a reason why States are not mentioned: a US officer committing a State crime is not necessarily committing an impeachable offense. Story, 2 Commentaries on the Constitution of the United States §799 at 270 (1833) citing Rawle, A View of the Constitution 215 (1829) describes this stating:

In general, those offenses, which may be committed equally by a private person, as a public officer, are not the subjects of impeachment. Murder, burglary, robbery, and indeed all offenses not immediately connected with office, except the two expressly mentioned, are left to the ordinary course of judicial proceeding.¹⁴

For crimes which are not subject to impeachment, State courts can take cognizance. Prosecution of such State crimes need not await until the President left office.

14. Professor Dershowitz's argument at the 2020 President's impeachment trial.

History supports this conclusion. When Story and Rawle wrote, the US Criminal Code was thin. See Story 2, Commentaries on the Constitution of the United States §794 at 264 (1833). States prosecuted most crimes. Since the Civil War, the US Criminal Code ballooned. Cf. Gamble v. United States, 139 S. Ct. 1960, 1980 n.1 (2019) (Thomas, J., concurring).

V. SUPREMACY ISSUES

The issue revolves around intergovernmental immunity (overlapping jurisdictions) between US and a State. McCulloch v Maryland, 17 U.S. 316, 426-27 (1819). This issue arises in federal Foreign States; Dixon, Limiting The Doctrine of Intergovernmental Immunity, 9 Queensland Univ. Tech. L.J. 1, 10-13 (1993); but does not arise in modern unitary Foreign States.

The Supremacy Clause addresses the issue of overlap. The Constitution and law passed by Congress prevail over State law. As to temporary immunity, there is no law passed by Congress. The Constitution does not contain express language giving the President temporary immunity.

On the other hand, there is express constitutional language that a State can prosecute State crimes. The fugitive clause in Constitution Article IV § 2 clause 2 provides “*A person charged in any State with treason, felony, or other crime...*” The greater power, prosecution, implies the lesser, investigation.

Congress has not generally exempted US officers from State court criminal process for State crimes.

United States v. Kirby, 74 U.S. 482, 486 (1868). Thus, President Grant was arrested in the District of Columbia for speeding while driving his horse and buggy. Grant posted a bond and did not defend. Bell, The Presidency: Office of Power 75 (1967); WTOP News October 6, 2012, <https://wtop.com/news/2012/10/dc-police-once-arrested-a-us-president-for-speeding/>

The question is whether the US officer is charged for a crime while performing a US function. If US law authorized the US officer's action, US law excused him (the "Excuse Defense"). Another defense flows from Cunningham v. Neagle, 135 U.S. 1 (1890): the defense is that US law authorized the US officer to perform the actions and they were necessary and proper to fulfilling his US duties. Municipal traffic offense cases contain the best analysis. United States v. Hart, 26 Fed. Cas. 193 (Cir. Ct. Pa. 1817) (Bushrod Washington, J.); see Johnson v. State of Maryland, 244 U.S. 51 (1920).

The Excuse Defense (as expanded by Congress) is found today in 28 U.S.C. §1442. After the US officer pleads the Excuse Defense, a criminal prosecution can be removed to US District Court for trial on the Excuse Defense. The removal statute is Congress's judgment on when and under what circumstances a State investigatory subpoena to a US official becomes reviewable.

US regulation (regarding municipal traffic offenses) recognizes the Excuse Defense. 41 CFR §§102-34.235, 102-34.245 (US official use of US owned vehicles).¹⁵

15. Appendix B.

Trump does not assert the Excuse Defense. He contends that his current US office accords temporary immunity for past personal acts. This is without basis. Before taking the Presidential oath, Trump was a New York citizen, duty bound to comply with New York criminal law. See Pirrie v. McFarlane, 36 Commw. L. Rep. 170, 219 (High Court Australia 1925). The Presidential oath is not like baptismal holy water; the oath does not temporarily immunize from prior sins.¹⁶

Trump argues that threat of State investigation for past personal conduct will divert his attention and cause hesitancy in the fearless performance of Presidential duties. Cf. Nixon v. Fitzgerald, 457 US 731 (1982). He confuses personal/private conduct with official conduct. Conduct occurring before becoming President was on his own behalf and benefitted him personally. After assuming office, Trump's official conduct is on behalf of and benefits the nation. Undampened ardor in performing *arguably official actions* is therefore protected.¹⁷ Trump v. Zervos, 171 A.D.3d 110, 121-22, 94 N.Y.S.3d 75, 83 (2019), appeal pending (immunities are grounded in nature of function performed, not identity of actor who performed it).

There is another policy reason for denying Trump's implied form of immunity. Trump resurrects *absolute* executive prerogative.

16. Cf. Kantorowicz, The King's Two Bodies 12 n.9 (1985) describing apologia for Byzantine Emperor John Tzimisces (929-976) who assumed office by murdering predecessor.

17. Conduct on behalf of the US while President-elect might be retroactively ratified.

There is a historical presumption in America against any form of constitutional executive prerogative, unless expressly stated. Thomas Paine's Common Sense, first published in late 1775, decried the King.¹⁸ The Declaration of Independence denounced prerogative exercised by royal governors and the King. Between 1776 and 1786, New York, Maryland, and Virginia in their new constitutions abolished all executive prerogatives.¹⁹ Other States severely curtailed executive prerogatives. The Constitution expressly stated few executive prerogatives, abolished others or blended them by involving the US Senate and/or US House in the checking process or by allowing executive action to be overruled.

The court in which the State crime is prosecuted must manage the case with due respect to the office and the circumstances using its inherent docket control power. See Clinton v. Jones, 520 U.S. 681, 706-07 (1997). The court must assess, inter alia, the charge (e.g., misdemeanor, felony, malum prohibitum, traffic offense, parking ticket, littering) against the possible punishment (e.g., penalty, fine, injunction, imprisonment).

Management requires awareness that Presidential functions may be affected. A President can only be removed from office by the Senate. One State by prosecution cannot displace the President. Therefore, a

18. "[T]hat so far as we approve of monarchy, that in America THE LAW IS KING." Paine, Common Sense 67 (1776).

19. The Constitutions of the Several Independent States of America published by order of Congress 94 (New York), 166 (Maryland), 178 (Virginia) (1786).

State cannot imprison²⁰, impose corporal punishment²¹, nor execute a sitting President.

Presidential functions affecting the “safety of the [nation]” may be involved. George Washington, as Commander in Chief, led troops to put down the 1794 Whiskey Rebellion. A pending war or police action may require Presidential oversight. On the other hand, Wilson attended the Versailles Peace Conference in 1919 while American doughboys skirmished with Bolsheviks in Archangel, Russia.

Other Presidential functions can be postponed. Constitution Article II §3 provides the President shall from time to time give information to Congress as to the state of the union. Presidents today personally address Congress. Past Presidents submitted a written address. The Constitution omits any particular date.

The factors considered will depend upon the circumstances. See Wigmore, Evidence §2371(d) (testimony of executive).

Amicus will not repeat other policy reasons recited in Respondent’s merits brief, but will add a few additional ones. A State has a compelling interest in the speedy prosecution of its criminal laws. Justice delayed may be justice denied. Court ordered restitution and reparation

20. To the contrary, An Open Season for Governors, *The New Republic*, August 24, 1921, at 339 (“[P]rison as a seat of government has great advantages in a democracy...”).

21. To the contrary, England’s Henry II voluntarily subjected himself to scourging by Canterbury’s bishops and monks in 1174. This was penance for Saint Thomas Becket’s death in 1170.

to third parties under New York Penal Law §60.27 may be delayed. To the extent that third parties depend upon adjudged criminal findings to pursue their own remedies against Trump and others, remedies will be delayed. The interplay between State and US crime, if any, cannot be explored until an indictment is filed. E.g., 18 U.S.C. §§659-660.

VI. ENFORCEMENT IS NOT AN ISSUE

A deep issue lurks. If a US Court issues an order against Trump, can the order be enforced? Some believe the judicial function involves, at its most basic, declaring the law. Compliance and enforcement are two further aspects. Compare Glidden Co. v. Zdanok, 370 U.S. 530, 568-571 (1962) (Harlan, Brennan, Stewart, concurring); Texas v. New Mexico, 482 U.S. 124, 131 (1987); and Virginia v. West Virginia, 246 U.S. 565 (1918); with Mississippi v. Johnson, 71 U.S. 475, 499 (1866).

Unlike United States v. Nixon, 418 U.S. 683 (1974), the records are in the possession of a third party, Mazars USA LLP. Mazars USA LLP agreed to comply with an order.

Trump, the plaintiff, sought the aid of a US Court. Trump, in Complaint and Amended Complaint ¶18, sought a declaratory judgment under 28 U.S.C. §2201. Trump also sought an injunction. He who seeks Equity must be prepared to do Equity. In Mississippi v Johnson, 71 U.S. 475 (1866), the President was defendant.

Whether a US Court's order is enforceable against Trump is not an issue here.

CONCLUSION

The Constitution created checks and balances between the 3 US branches of government. It also created checks and balances between the US and the States.

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people, the different governments will control each other, at the same time that each will be controlled by itself.

Madison, Federalist Papers No. 51

This Court recognizes the States' role in checks and balances. "A healthy balance of power between the States and the federal government [reduces] the risk of tyranny and abuse from either front". Murphy v. NCAA, 138 S. Ct. 1461, 1477 (2018).

A State justice system's independence is a bulwark against abuse.

The DA is a State officer. The President does not appoint and the US Senate does not confirm the DA. The DA, not the US Attorney, investigates State crimes. The DA, not the US Attorney, empanels and presents evidence of State crimes to a State grand jury.

The President has no control over a State's investigation of a purely State crime.

The President does not appoint and the Senate does not confirm a State judge. The President (and Congress) cannot reduce or increase a State judge's salary to punish or reward. The US House cannot impeach and the US Senate cannot try a State judge. A State judge is independent of the President and Congress.

The President cannot unilaterally suspend State enforcement of, or dispense with State prosecution of, State criminal laws.

If a New York grand jury indicts, the DA, not the US Attorney, prosecutes an accused for a New York crime before a State jury or a State judge. The State judge imposes sentence.

The President has no control over a State's prosecution of a purely State crime.

The President has no temporary immunity from a State investigation of a State crime arising out of his personal conduct before he was President. His prior conduct is not absolved by the Presidential oath.

If a President is indicted for a purely State crime, he can assert as a defense the excuse that he was authorized by the Constitution or US law. The issue will be tried by the United States District Court.

If Trump's appeal were granted, it would upset this "healthy balance between the States and federal

government.” The President’s invoking temporary immunity could block State prosecution of State crimes committed by the President’s associates before the President took office.

The District Attorney for New York County should therefore be allowed to proceed with his investigation pursuant to a duly authorized grand jury subpoena issued to Mazars USA LLP.

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APPENDIX

**APPENDIX — STATUTES AND
OTHER REGULATIONS**

NIGERIA CONSTITUTION (1999) §308

(1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section - (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office; (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and (c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued: Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.

(3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to “period of office” is a reference to the period during which the person holding such office is required to perform the functions of the office.

Appendix

41 CFR § 102–34.235 Am I bound by State and local traffic laws?

Yes. You must obey all motor vehicle traffic laws of the State and local jurisdiction, except when the duties of your position require otherwise. You are personally responsible if you violate State or local traffic laws. If you are fined or otherwise penalized for an offense you commit while performing your official duties, but which was not required as part of your official duties, payment is your personal responsibility.

41 CFR § 102–34.245 Who pays for parking fines?

If you are fined for a parking violation while operating a Government motor vehicle, you are responsible for paying the fine and will not be reimbursed.