COMMENTS

FIT FOR A KING: PRESIDENT TRUMP'S UNDEMOCRATIC IMMUNITY FROM INSURRECTION*

"A republic, if you can keep it."[1]

I. INTRODUCTION

The United States Supreme Court made a fatal error in its 2024 decision *Trump v. United States*.[2] In what the Supreme Court convinced itself was a careful and methodical approach to protect the dignity and efficacy of the office of the President of the United States, the Court created a precedent that poses a direct risk to the foundation of American democracy and our grand republic. In *Trump*, the Court potentially granted President Donald Trump immunity for his conduct following the 2020 election by establishing a presumption of immunity for sitting Presidents who exercise powers that do not stem from their core constitutional charter of authority. In doing so, the Court directly undermined the intentions of our Founders in creating a President distinct from a monarch. Unlike a monarch, presidential power is not without limit, and the People are not without remedy for violations. Further, not even English jurists who revered monarchy would have imagined that a ruler could wield such immense power without divine right. Yet, the Supreme Court gave its stamp of approval—a stamp that will permit Presidents to violate the Constitution; a stamp that will enable a President seeking undemocratic, authoritarian powers to defy the will of the People and violate the framework that makes our republic democratic and free; a stamp that could lead to the downfall of a nation that our Founders worked tirelessly to ensure could timelessly prevail. The Supreme Court made a perilous and grave error—one that may very well live in infamy and contribute to our esteemed democracy's undoing.

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* Micha Kerbel, J.D. Candidate, Temple University Beasley School of Law, 2026. Thank you to my advisor, Professor Jacob Schuman, and my fellow *Temple Law Review* editors for the invaluable feedback, guidance, and support they provided me in drafting this Comment. Thank you to my parents, for instilling in me the values to advocate for moral clarity and to fight for our democracy, and to my partner, Morgan, who has supported me throughout this process and always makes me a better person. I also want to extend my gratitude to the U.S. Capitol Police and D.C.'s Metropolitan Police Department for protecting our Capitol from insurrection on January 6, 2021, and to all members of the 116th U.S. Congress who voted in favor of certifying the results of the 2020 election after having their lives put at risk. This Comment is dedicated in memory of all those who lost their lives that day, and every other human around the world who lost their life due to political violence and persecution or risked their life to resist it.

1. *September 17, 1787: A Republic, If You Can Keep It*, NAT'L PARK SERV. (Sep. 22, 2023), https://www.nps.gov/articles/000/constitutionalconvention-september17.htm [https://perma.cc/H5EX-FBX3] (quoting Benjamin Franklin's reply to Elizabeth Willing Powel's question, "[w]ell, Doctor, what have we got, a republic or a monarchy?").

2. 144 S. Ct. 2312 (2024).

This Comment's thesis is not only prudent but necessary. It is incumbent upon politicians, judges, and legal scholars to understand various historical views on monarchy, the reason our nation flatly rejected it, how our courts began to interpret immunity, and how the *Trump* Court crossed into a threshold that may undermine everything our nation has worked for leading up to it. This is not a case note focused on critiquing *Trump*. Rather, it is a Comment analyzing an originalist view of how the Founders intended to shape the presidency within the context of their contemporary framework—the powers of the British monarch.[3] It then discusses how immunity doctrine evolved over time to show how this general evolution,[4] culminating in *Trump*, does two things. First, it does not comport with the understanding of the limits and remedy against a President as our Founders may have envisioned. Second, it leads to a dangerous path: the consequences of a President who may abuse the goodwill granted by the stretching fabric of immunity doctrine. This Comment examines exactly what President Trump did back in 2020 and 2021,[5] conduct that does not warrant a presumption of immunity, and takes a glimpse into the beginning of President Donald Trump's second term to prove just how bad it can get.[6] Then, this Comment concludes with how the Supreme Court can fix the bug in its immunity doctrine and highlights that while no single court can ensure a perfect decision is made, the Court can contribute to a sounder jurisprudence that, over time, will allow our courts to protect the Constitution and ensure the security of this union and the people who comprise it.[7]

"Who saves his country violates no law."[8]

II. OVERVIEW

Understanding why the Supreme Court made an error in *Trump* and its preceding immunity doctrine requires understanding the power a President should have. It also requires understanding the risks involved in giving the President too much unchecked power. Harm has been committed, and harm will continue to worsen if the Court does not reverse course at its next opportunity. Therefore, this Section ambitiously attempts to cover immense ground. It explores the powers of an executive from the perspectives of a British monarchy and the views of the Founding Generation because these are key

3. *See infra* Part II.A.

4. *See infra* Part II.B.

5. *See infra* Part II.C.

6. This Comment was drafted before President Donald Trump's second election and finalized a few months into his second term. While many of the President's actions—such as efforts to weaken federal agencies—raise questions about the scope of presidential power, this Comment focuses on the repercussions of January 6, 2021, and on specific actions and statements by the President through the beginning of his second term that some might view as "king-like."

7. *See infra* Sections III, IV.

8. Napoleon Bonaparte, First Emperor of France, *cited in* HONORÉ DE BALZAC, MAXIMES ET PENSÉES DE NAPOLÉON 339, 358 maxim 97 (1838), https://archive.org/details/balzac-maximes-et-pensees-de-napoleon/page/358/mode/2up [https://perma.cc/H7TU-R5UM], and *translated in* JULES BERTAUT, NAPOLEON IN HIS OWN WORDS 2 (Chicago, A.C. McClurg & Co. ed., Herbert Edward Law & Charles Lincoln Rodes trans., 1916) (photo reprt. 2007) (1912), https://archive.org/details/napoleoninhisown00naporich/page/2/mode/2up [https://perma.cc/2F58-D4BY].

ingredients to understanding how to better shape the Court's jurisprudence on immunity. This Section then unpacks the concept of immunity as established by the Court as it carved out different types of immunity over time. It goes on to discuss how the Court applied immunity specifically to Presidents pre-twenty-first century before explaining the case on President Trump and the unlawful conduct he committed. While the Court in *Trump* did explore previous presidential immunity decisions, this Section provides additional context the Court did not consider. Section II explains the detriment behind this lack of consideration. It is only through considering perspectives of the Founding Generation and the original application of immunity law, in light of exactly what President Trump did, that those who care about protecting democracy can begin to understand why the Court's application failed to consider crucial foundational principles of executive immunity and why serving one's country is not an excuse to violate the laws that protect it.

A. Early Modern Perspectives of the Unitary Executive

Part II.A considers how early modern England viewed its own monarchy from a contemporaneous perspective and compares that perspective to the Founders' to show how the former influenced the latter.[9] One of the leading scholarly sources on English monarchy is Sir William Blackstone's[10] eminent work titled the *Commentaries on the Law of England*. Sir Blackstone's *Commentaries* offer "[a] more fully developed understanding of our historical inheritance from [England] . . . provid[ing] important insights into the modern debate" surrounding the meaning and purpose behind the provisions of Article II of the U.S. Constitution.[11]

In many respects, the state constitutions created after the colonies declared independence, and the resulting federal Articles of Confederation entered into by those states, considerably influenced the Framers in creating the Federal Constitution as we know it today.[12] Therefore, "it likely would be myopic to focus exclusively on the English understanding or experience" of the executive's prerogative,[13] since "the executive power, as understood in England, was not equivalent to the royal prerogative."[14] At the same time, "there is no doubt" that the laws and customs of the king's powers, whether executive or prerogative, informed our Framers' model in constructing this nation's system of government and its laws because "[l]awyers and

9. See *infra* Parts II.A.1, II.A.2 for discussions about Sir William Blackstone's *Commentaries* and the *Federalist Papers* as they capture the perspective of our Founders.

10. Sir Blackstone (1723–1780) was a prominent English jurist and legal scholar. Ellen Holmes Pearson, *William Blackstone*, OXFORD BIBLIOGRAPHIES (Feb. 20, 2024), https://www.oxfordbibliographies.com/display/document/obo-9780199730414/obo-9780199730414-0406.xml [https://perma.cc/8HZV-4N4Q].

11. Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 183 (2021) (discussing the role England's monarchy played in establishing Article II powers of the U.S. Constitution).

12. *Id.* at 184 n.52; CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY 25–53, 56–71 (1922); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 329, 336–37 (2016).

13. Birk, *supra* note 11, at 184 n.52 (describing the less-than-useful efforts to extract Article II executive powers like the Removal Clause solely from the Royal Prerogative and English executive power).

14. *Id.* (citing Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1172–73, 1181–84 (2019)).

politicians of the Founding Generation read and studied Blackstone," despite not necessarily adopting his or his nation's specific beliefs, customs, or laws.[15]

Sir Blackstone has also been heavily cited by our nation's highest Court in interpreting our Constitution through the history and traditions that supported the Framers' reasoning.[16] The Supreme Court cited to Sir Blackstone in "eight percent of its signed opinions" between 1990 and 2018, "the highest rate since 1810."[17] Throughout time this nation's preeminent legal scholars have relied on Sir Blackstone to shape the law at the nation's founding, or to inform modern interpreters of what our Founders likely intended.

This Part also briefly surveys the Founding Generation's perspective on immunity as discussed in the *Federalist Papers*. Gaining this vantage point will help inform how later immunity jurisprudence has either aligned or misaligned with the recorded assurances and warnings heeded by Alexander Hamilton and his contemporaries. While no one person can represent an entire generation, the *Federalist Papers*, similar to Sir Blackstone's work, have been frequently cited by Supreme Court Justices to justify originalist readings of the Constitution.

1. Sir Blackstone & Monarchical England

Monarchies, headed by powerful individuals that create and enforce laws, date back over four thousand years to King Sargon of Akkad.[18] The idea of power vested in a sole executive heading a government therefore is an ancient one, with its monarchal roots long predating modern democracy.[19] For over a millennium, England was under the rule

15. *Id.*; RALPH C. CHANDLER, RICHARD A. ENSLEN & PETER G. RENSTROM, BLACKSTONE'S COMMENTARIES, CONST. LAW DESKBOOK § 1:4 (1987) ("The legal theory of Blackstone largely shaped the political attitudes of the American colonists.").

16. *See generally* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (sovereign immunity); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (ex post facto law); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (writs of mandamus).

17. Martin Jordan Minot, Note, *The Irrelevance of Blackstone*, 104 VA. L. REV. 1359, 1360 (2018); Jessie Allen, *Reading Blackstone in the Twenty-First Century and the Twenty-First Century Through Blackstone*, *in* RE-INTERPRETING BLACKSTONE'S COMMENTARIES 215, 217, 218 (Wilfrid Prest ed., 2017).

18. Joshua J. Mark, *Akkad and the Akkadian Empire*, WORLD HIST. ENCYC. (Apr. 28, 2011), https://www.worldhistory.org/akkad [https://perma.cc/W4GV-3JAA] (attributing Sargon the Great as the founder of the first international empire in 2334 BCE by unifying Mesopotamia); Kristin Baird Rattini, *King Sargon of Akkad—Facts and Information*, NAT'L GEO. (June 18, 2019), https://www.nationalgeographic.com/culture/article/king-sargon-akkad (on file with the Temple Law Review) (claiming that King Sargon of Akkad was the world's first emperor around 2330 BCE).

19. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *190.

of a single monarchy[20] and eventually became a constitutional monarchy in 1689.[21] It is this history, as well as the American colonists' inheritance of the English common-law system[22] and reliance on figures like Sir Blackstone,[23] that informed the modern view of the executive as enshrined in the U.S. Constitution.[24] Of England's sole executive, Sir Blackstone wrote:

> The executive power . . . being vested in a single person, by the general consent of the people . . . became necessary to the freedom and peace of the state, that a rule should be laid down, uniform, universal, and permanent; in order to mark out with precision, who is that single person, to whom are committed (in subservience to the law of the land) the care and protection of the community; and to whom, in return, the duty and allegiance of every individual are due. It is of the highest importance to the public tranquility, and to the consciences of private men, that this rule should be clear and

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20. *Heptarchy*, ENCYC. BRITANNICA (July 27, 2023), https://www.britannica.com/topic/Heptarchy [https://perma.cc/6W4J-VGFQ]. England's monarchy began in the Anglo-Saxon period known as the Heptarchy, with several divided kingdoms that lasted from the withdrawal of the Roman Empire from Britain until the Norman Conquest in 1066 CE. *Id.* William the Conqueror (King William I) changed the course of English history, implementing the feudal class system. Frank Barlow, *William I*, ENCYC. BRITANNICA (Jan. 6, 2026), https://www.britannica.com/biography/William-I-king-of-England [https://perma.cc/Q756-7UDV]; *What Was the Legacy of William the Conqueror?*, ENG. HERITAGE (Oct. 14, 2018), https://www.english-heritage.org.uk/visit/inspire-me/blog/blog-posts/what-was-the-legacy-of-william-the-conqueror/ [https://perma.cc/W3AS-VCUN]. However, Æsthelstan was in fact the first king to rule over all of England a little more than a hundred years prior to the Norman Conquest. *Athelstan*, ENCYC. BRITANNICA (Dec. 12, 2024), https://www.britannica.com/biography/Athelstan [https://perma.cc/CK6Q-YDNY].

21. *The Monarchy*, CONST. SOC'Y, https://consoc.org.uk/the-constitution-explained/the-monarchy/ [https://perma.cc/ZQN2-5V9D] (last visited Jan. 19, 2026). Longstanding restraints on the monarchy culminated in the emergence of a legislative parliament and the signing of Magna Carta in 1215. *Id.* Although monarchs retained significant power, their authority was gradually curtailed. *Id.* Parliament and the people seized greater power following the late seventeenth-century Glorious Revolution, which established the joint rule of Queen Mary II and William of Orange (King William III) and led to the enactment of the English Bill of Rights. *Id.*; *Glorious Revolution*, ENCYC. BRITANNICA (Jan. 10, 2026), https://www.britannica.com/event/Glorious-Revolution [https://perma.cc/M7MV-XLVH].

22. ARMY JROTC: LEADERSHIP EDUCATION & TRAINING (LET 2) 229 (photo. reprt. 2013) (Pearson Custom Publ'g ed. 2005), https://www.scribd.com/document/131899844/Core-LET-2-Student-Text (on file with the Temple Law Review) (noting that "[t]he Founders began their lives as loyal subjects of the British Crown" and inherited the "English common law [which] provides the historical foundation of our American legal system").

23. District of Columbia v. Heller, 554 U.S. 570, 593–94 (2008) ("Blackstone['s] works, we have said, 'constituted the preeminent authority on English law for the [F]ounding generation.'" (quoting Alden v. Maine, 527 U.S. 706, 715 (1999))); *William Blackstone's Influence on the American Founders: Back-to-Basics Part 10*, CTR. FOR CIVIC EDUC. (Aug. 18, 2021), https://civiced.org/back-to-school-basics-episode-4411 [https://perma.cc/T8F7-6UAZ] ("William Blackstone's explanations of English law, published between 1765 and 1769, were incredibly influential on the formation of basic rights in America.").

24. Jed H. Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J.L. & HUMANS. 125, 129–30 (2022) (citing AKHIL AMAR, THE WORDS THAT MADE US 22, 37, 439, 566 (2021)) ("[T]he founders were breaking away from the English model.") (arguing, ultimately, against reliance on Sir Blackstone); Minot, *supra* note 17, at 1362 ("The appeal of Blackstone's *Commentaries* is the ease with which the work can serve as a proxy for the status of legal doctrines and principles at the time the Constitution was ratified. To put it in more familiar originalist terms, Blackstone's *Commentaries* serves as evidence of 'public meaning' at the Founding.") (challenging that reliance on Blackstone's *Commentaries* as evidence of Founding-era public meaning).

> indisputable[,] and our constitution has not left us in the dark upon this material occasion.[25]

Even under the rule of a monarch, who would be chosen by heredity rather than democratic disposition,[26] Sir Blackstone emphasized the importance that executives have the consent of the people, and that this authority should be indisputable.[27]

For Sir Blackstone, and most people before the rise of modern democracy, the power to create and enforce a nation's laws was traditionally considered to be derived from divine right, granting the ruler extraordinary prerogative and sovereignty.[28] In his editorial discussion of Sir Blackstone's treatise, Michigan Supreme Court Chief Justice Cooley described the role that unwritten laws, based in local customs, played in the formation of English common law.[29] To determine which customs should become law, courts established "rules relating to particular customs" with concern to "proof of their existence; their legality when proved; or their usual method of allowance."[30] The legality of customs was of chief concern due to the maxim "*malus usus abolendus est*"—"an evil custom is to be abolished"—suggesting the general approval to discard customs that are no longer "good" or valid.[31] Customs considered valid met seven requisite conditions: (1) the custom had been in place so long, no one could recall it not being in place or show its origin; (2) it must have been continuous; (3) it must have been peaceably adopted without dispute; (4) it must be reasonable, or not unreasonable; (5) it must be certain; (6) enforcement or cooperation must be compulsory or expected; and (7) it may not contradict other similarly legitimized customs.[32]

Before this time, it was considered treasonous to even consider that a king or queen's power had limitations.[33] King James I warned that "it is presumption and sedition in a subject to dispute what a king may do in the height of his power."[34] It is no wonder then that Sir Blackstone venerated the advent of an era that permitted such discourse of customs, when conducted with humility.[35] But dialogue had not always been so restrained in Britain. Sir Blackstone observed that centuries earlier, medieval English jurist Henry de Bracton more freely opined "*rex debet esse sub lege, quia lex facit regem*"[36]—"[t]he king ought to be subservient to the law, for the law makes the king."[37]

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25. 1 WILLIAM BLACKSTONE, COMMENTARIES *190–91.

26. *Id.* at *191.

27. *Id.* at *190–91 (noting that monarchs derive consent from silent acquiescence implicitly evidenced by "long and immemorial usage").

28. *See* Matthew Wills, *Making Sense of the Divine Right of Kings*, JSTOR DAILY (Dec. 18, 2020), https://daily.jstor.org/making-sense-of-the-divine-right-of-kings/ [https://perma.cc/ZJ7U-U8E8].

29. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *73 (Thomas M. Cooley ed., Chi., Callaghan & Cockcroft 1871) (1765) [hereinafter BLACKSTONE, COOLEY ED.].

30. *Id.*

31. *Id.* at *76.

32. *Id.* at *76–78.

33. 1 WILLIAM BLACKSTONE, COMMENTARIES *238.

34. *Id.* (quoting KING JAMES I, WORKS 294 (1609)).

35. *See id.* at *237.

36. *Id.* at *239.

37. JOHN N. COTTERELL, A COLLECTION OF LATIN MAXIMS AND PHRASES LITERALLY TRANSLATED 61 (3d ed. 1913) (1894), https://www.gutenberg.org/files/68465/68465-h/68465-h.htm [https://perma.cc/592K-Q342] (second emphasis omitted).

However, Sir Blackstone, along with other jurists and philosophers, rejected the proposition of limiting the rule of the Crown under the common law because the sovereign was viewed as being the framework of society, and therefore above the law.[38] This is in contrast to the principles of American democracy: that no person, even a nation's chief executive, is above the law.[39] A major limitation contemplated in this dichotomy is whether the sovereign's prerogative can restrict the people's liberty: "The king hath a prerogative in all things, that are not injurious to the subject."[40]

Unlike a democratically elected President, however, Sir Blackstone viewed England's monarch as emperor-like, above the law in all regards, "the king to be the supreme head of the realm . . . inferior to no man upon earth, dependent on no man, accountable to no man."[41] Sir Blackstone further remarked:

> [N]o suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. . . . even [if] the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment.[42]

In discussing the sovereign's prerogative, specifically his privilege and immunity from litigation, Sir Blackstone made clear that no court had jurisdiction over the executive.[43]

Sir Blackstone also commented on the types of prerogatives that the sovereign enjoys—direct and incidental.[44] Direct prerogatives are rooted in the sovereign's political role and are a part of their royal character.[45] These prerogatives include appointing ambassadors, diplomacy, and military oversight.[46] Incidental prerogatives, on the other hand, are extrinsic from the sovereign's official duties.[47] They are exceptions for the sovereign from abiding by the laws the rest of the community are subject to.[48] These include limiting a royal sovereign's civil liability by preventing the ability to recover costs against monarchs as compulsory by law.[49] In a sense, rather than official duties or rights, they are special privileges the sovereign enjoys.[50]

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38. 1 WILLIAM BLACKSTONE, COMMENTARIES *238. *But see Magna Carta Legacy*, NAT'L ARCHIVES, https://www.archives.gov/exhibits/featured-documents/magna-carta/legacy.html [https://perma.cc/S7AX-PRKA] (Dec. 14, 2019) (stating that England's Magna Carta, signed in 1215, established that no one, including the monarch, is "above the law").

39. Rachel Reed, *Are Presidents 'Above the Law'? 50 Years Ago, the Supreme Court Said No*, HARV. L. TODAY (July 31, 2024), https://hls.harvard.edu/today/are-presidents-above-the-law-50-years-ago-the-supreme-court-said-no/ [https://perma.cc/RD7F-3UV8].

40. 1 WILLIAM BLACKSTONE, COMMENTARIES *238.

41. *Id.* at *242.

42. *Id.*

43. *Id.*

44. *Id.* at *239.

45. *Id.* at *239–40.

46. *Id.* at *240.

47. *Id.*

48. *Id.*

49. *Id.*

50. *See id.*

Sir Blackstone divided direct prerogatives into three categories: royal character, royal authority, and royal income.[51] The categories of these prerogatives respectively served to preserve "reverence to his person, obedience to his commands, and an affluent supply for the ordinary expenses of government."[52] Without these prerogatives, it would be "impossible to maintain the executive power in due independence and vigor."[53] Sir Blackstone underscored the onus of placing checks on each branch of government including the sovereign to "curb it from trampling on those liberties which it was meant to secure and establish."[54] A prerogative without limitation or with arbitrary boundaries "spreads havoc and destruction . . . but, when [judiciously] balanced and [timely] regulated . . . its operations are then equable and certain."[55]

Sir Blackstone viewed the sovereign's royal character as more than just aesthetic majesty, explaining that an intrinsic quality of a king or queen's nature is that they are "distinct from and superior to . . . any other individual in the nation."[56] Sir Blackstone contemplated that many rational minds would consider a sovereign to be an ordinary person, chosen by mutual consent, to preside over the nation, and accordingly receive a societally proportional degree of reverence.[57] Sir Blackstone disapproved of this theory, cautioning that "the mass of mankind will be apt to grow insolent and refractory, if taught to consider their prince as a man of no greater perfection than themselves."[58] This reason not only warrants the belief that the sovereign is entitled to immense power and purse, but prescribes the sovereign with a transcendent nature, leading the people to "consider him in the light of a superior being."[59] This light, per Sir Blackstone, aids in the sovereign's ability to perform his duties and execute the government's business.[60]

The Crown's subjects were not without remedy, however, in the cases of both private injuries and public oppression committed by a sovereign.[61] At least for private injuries, Sir Blackstone viewed that all private wrongs should have remedy or redress.[62] Sir Blackstone divided private injuries first into property and contract claims, and second into torts.[63] For property and contract claims, subjects could petition for remedy in courts of chancery, whereby the sovereign's chancellor may administer relief "as a matter of

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at *241.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at *243 ("Are then . . . the subjects of England totally destitute of remedy, in case the crown should invade their rights, either by private injuries, or public oppression? To this we may answer, that the law has provided a remedy in both cases.").

62. 3 WILLIAM BLACKSTONE, COMMENTARIES *109 ("For it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress."), *quoted in* Akhil Amar & Neal Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 707 (1995) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147, 163 (1803)).

63. 1 WILLIAM BLACKSTONE, COMMENTARIES *243.

grace though not upon compulsion."[64] The goal for any petitioner is therefore "not to *compel* the [sovereign] . . . but to *persuade* him."[65] Sir Blackstone noted that any remedy was subject to the will and grace of the sovereign.[66] Yet according to records of natural law, "no wise prince [would] ever refuse to stand to a lawful contract."[67]

Sir Blackstone, looking to philosopher John Locke, offered less redress for torts committed by the sovereign.[68] Locke asserted that, due to a sovereign's innate sacredness,[69] the rule of law "exempts him from all inconveniencies."[70] Locke reasoned that the harm a sovereign could commit is unlikely to be frequent or substantial because the sovereign alone cannot "subvert the laws, nor oppress the body of the people."[71] Locke doubted whether a sovereign could even be "ill[-]nature[d]" enough to do so.[72] Such misfeasance would be few and far between, according to Locke, and the inconveniences stemming from a reckless sovereign "are well recompensed by the peace of the public, and security of the government."[73] Locke concluded that the community is safer when "some few private men should be sometimes in danger to suffer, than that the head of the republic should be easily, and upon slight occasions, exposed."[74]

Locke added that there are limitations to a sovereign's immunity and commission.[75] Locke stated that "the king's authority being given him only by the law, he cannot impower any one to act against the law, or justify him, by his commission, in so doing."[76] A sovereign does not have the power to command a subordinate to violate the law; in doing so, anyone acting on a sovereign's command is still subject to penalty, even where the sovereign is otherwise immune.[77]

Locke's basis for the immunities of the sovereign rests in their sanctity.[78] Where a sovereign is not sacred, the sovereign is not justified in the use of unlawful force and could be held liable in theory.[79] But if only a few are harmed by the sovereign, the public would benefit more from the government's stability than from repercussions for the sovereign.[80] This social balancing that Locke provides is predicated on a social contract, wherein the people are provided remedy and the king or queen ultimately protects the people.

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* (internal quotation marks omitted) (quoting 8 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM 1342 (C.H. Oldfather & W.A. Oldfather trans., Oxford Clarendon Press 1934) (1672)).

68. *Id.* (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 205 (Dave Gowan & Chuck Greif eds., Project Gutenberg 2005) (1690)).

69. LOCKE, *supra* note 68, § 205.

70. *Id.*

71. *Id.*; 1 WILLIAM BLACKSTONE, COMMENTARIES *243.

72. LOCKE, *supra* note 68, § 205.

73. *Id.*

74. *Id.*

75. *Id.* § 206.

76. *Id.*

77. *Id.*

78. *See id.* § 207.

79. *Id.*

80. *Id.* § 208.

The ultimate questions remaining are what happens when a sovereign uses unlawful force to harm the people, and what results when a ruler is ill-natured enough to undermine the rule of law, such that neither the government nor the courts can provide the people or the nation with civil redress. The answers to these questions, according to Locke, rest in the hands of the people through the use of force. Locke clarified that force is not permitted where "damages [may be] repaired by appeal to the law."[81] Force is only justified as lawful resistance where a person is physically prevented from seeking legal recourse.[82] However, when the sovereign acts unlawfully at the cost of the majority of the public, it would be harder to protect the sovereign from consequence.[83] When the majority is "persuaded in their consciences, that their laws, . . . their estates, liberties, and lives are in danger," the government may suffer from "inconvenience" when the people resist illegal actions by the sovereign.[84] Locke discerned that such a scenario should easily be avoided though, and "impossible for a [sovereign]," as long as "he really means the good of his people, and the preservation of them, and their laws together," and so long he makes the people feel a kind of paternal fidelity by showing them that "he loves, and takes care of them."[85] Distilling this, Locke remarked that a sovereign's prerogative is an "arbitrary power" based in the public's trust that the sovereign, in conducting their duties, will "do good, not harm[,] to the people."[86] But when the sovereign violates that trust and uses their powers for harm, it cannot be expected that such a violation of the social contract goes without recourse or accountability.[87]

Adopting Locke's view on a sovereign's immunity from tort liability, Sir Blackstone also considered how acts of public oppression might implicate the sovereign.[88] These wrongs are divided twofold between those that do not violate Britain's Constitution and those that do.[89] For wrongful acts committed by the sovereign but not concerning the constitution, the sovereign's counsellors should be held accountable because the sovereign relies on their advice when abusing his powers.[90] It is the advice of the sovereign's advisors that keeps the sovereign in check, and because the sovereign retains immunity from the law, "it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress."[91]

Wrongs that undermine the constitution are trickier.[92] Sir Blackstone feared that if one branch of government held the power to correct the abuse of power by another branch, the branch with the oversight power would become a "superior coercive authority."[93] The oversight branch would de facto enjoy complete sovereignty, and all

81. *Id.* § 207.
82. *Id.*
83. *Id.* § 209.
84. *Id.*
85. *Id.*
86. *Id.* § 210.
87. *Id.*
88. 1 WILLIAM BLACKSTONE, COMMENTARIES *244.
89. *Id.*
90. *Id.*
91. *Id.*
92. *See id.*
93. *Id.*

other branches would "cease to be part of the supreme power" with equal authority.[94] In other words, Sir Blackstone cautioned against checks and balances on executive authority because he believed that they would lead to an imbalance of power—a notion the Framers and the Founding Generation later rejected.[95]

If such a violation were to occur, Sir Blackstone advised that "the prudence of the times must provide new remedies upon new emergencies," and in such rare and extreme situations, the people should not "sacrifice their liberty by a scrupulous adherence to those political maxims, which were originally established to preserve it."[96] Sir Blackstone points to King James II's "inva[sion of] the fundamental constitution of the realm," that led to his subjects declaring his abdication and vacating the crown.[97]

Sir Blackstone's perspective was that even where the positive law is silent (or perhaps inadequate), redress, even in the form of revolt against the oppressive sovereign, should remain available for the most serious transgressions.[98] In these most severe scenarios, the appropriate redress should not be formulated by precedent alone; rather, it must be conceived through nature and reason, because no particular circumstance of past oppressions should limit or compel future redress for a sovereign's constitutional subversion.[99] Sir Blackstone, out of necessity, entrusted future generations to resolve such oppressions "whenever necessity and the safety of the whole shall require it" if a future sovereign were to violate "the original contract between [the] king and [the] people."[100] Resolving this violation, which would result in overthrowing the sovereign, constitutes the "inherent, though latent, *powers of society*, which no climate, no time, no constitution, [and] no contract, can ever destroy or diminish."[101]

But, apart from monarchical sovereigns, what is the appropriate response when a democratically elected executive violates the law or even commits acts of treason against the nation?[102] Does he or she have the powers of kings and queens?[103] Analysis of the Framers' own words on the issue can provide the clear answers that recent Supreme Court rulings have failed to recognize.[104]

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94. *Id.*

95. *See, e.g.*, *ArtI.S1.3.1 Separation of Powers and Checks and Balances*, CONGRESS.GOV: CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S1-3-1/ALDE_00013290/#ALDF_00022297 [https://perma.cc/BKW9-S5T5] (last visited Feb. 7, 2026) (describing support for powers to be separated through a system of checks and balances, with support in the Constitution and the *Federalist Papers*).

96. *Id.* at *245.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* (emphasis added).

102. *See 2024 Trump Disqualification Lawsuit*, COMMON CAUSE: COLO., https://www.commoncause.org/colorado/work/trump-disqualification-lawsuit/ [https://perma.cc/Y53S-CR3P] (last visited Jan. 19, 2026).

103. *See* Michael Waldman, *The Supreme Court Gives the President the Power of a King*, BRENNAN CTR. FOR JUST. (July 1, 2024), https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-gives-president-power-king [https://perma.cc/UK29-HNR3] ("When the [P]resident does it, that means it's not illegal." (quoting President Richard Nixon in an interview with journalist Sir David Frost)).

104. See *infra* Parts II.B, II.C.2.c for a discussion of presidential immunity and constitutional eligibility. *See* Waldman, *supra* note 103 (asserting that, in *Trump v. United States*, 144 S. Ct. 2312 (2024), the Supreme Court "grant[ed] the [P]resident the power of a monarch").

2. Hamilton on America's Executive

In arguing for the strong foundation of a new nation, it was important to the authors of the Federalist Papers to differentiate their new republic from England's monarchy.[105] Alexander Hamilton admitted in the *Federalist* No. 69 that there would naturally be at least one similarity between the forms of government because, like in a monarchy, the President would act as the sole executive.[106] However, in urging that America's executive would be similar to a state governor, Hamilton quickly pointed out the distinctions between the President and a monarch: America's sole executive would be an official elected every four years, rather than a hereditary monarch.[107] Further, America's President would be answerable to the legislature and the courts as they "would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law."[108] The Framers enshrined these values in Article II of the U.S. Constitution.[109] Hamilton further distinguished the President from a monarch who "is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution."[110]

Hamilton went on to describe how the authority of the President—much of which would later be adopted in the Constitution—would be unlike the sovereignty of England's monarch.[111] The presidential veto of a legislative act can be overridden; Presidents can only command militias called into service by the legislature and cannot declare war; and while Presidents can pardon those who commit treason, they cannot pardon any official who has been impeached and convicted.[112] Hamilton made clear that in some ways the President may be less powerful than the governor of New York, a position that at the time had more authority than other state governors.[113] He then clarified that "there is no pretense for the parallel which has been attempted between [the President] and the king of Great Britain."[114] As a result, Hamilton successfully advocated that the President should have enough power to be an effective executive but should not have the ability to wield the same authoritarian or tyrannical power over their constituents as a monarch.[115]

105. THE FEDERALIST NO. 69 (Alexander Hamilton) ("This will scarcely, however, be considered as a point upon which any comparison can be grounded . . . to the king of Great Britain.").

106. *Id.* ("[T]he executive authority . . . is to be vested in a single magistrate.").

107. *Id.*

108. *Id.*

109. U.S. CONST. art. II, §§ 1, 4.

110. THE FEDERALIST NO. 69, *supra* note 105.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *See id.*

B. Presidential Immunity Through the Twentieth Century

This Part reviews the source of presidential immunity in the United States to understand how, from the Constitution and the early common law through twentieth-century Supreme Court cases, the law has developed over time. To do that, it is important to know the sources of presidential immunity under American law and the types of immunity afforded. This Part tracks how immunity's scope and purpose were distilled and shaped over time, and how the Court eventually applied it to the presidency.

1. The Source of Immunity

The U.S. Constitution does not expressly provide executive branch officials with either civil or criminal immunity.[116] Nor has such immunity been conferred by acts of Congress.[117] According to some scholars, the notion of immunity for the executive was flatly rejected by the Framers during the Constitutional Convention.[118] But immunity for government officials, as with any legal doctrine, has been developed over history through the judicial interpretation of constitutional text and legislative acts.[119]

Immunity for congressional officeholders in the federal legislative branch is expressly granted by the Constitution to create a separation of powers and has precedent rooted in English traditions that carried into the pre-Revolutionary common law.[120] The Court in *United States v. Nixon* remarked that this privilege is "inextricably rooted in the separation of powers under the Constitution."[121] The Court added that immunity for *judicial* and *executive* branch officials was "long a creature of the common law" and remained so committed.[122]

> The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine—that the "[k]ing can do no wrong"—did not protect all government officers from personal liability, the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability.[123]

Over the course of the twentieth century, the Supreme Court carved out two categories of immunity for executive branch officials, absolute immunity and qualified immunity.[124]

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116. Amar & Katyal, *supra* note 62, at 702 ("The Constitution nowhere explicitly describes what litigation immunity, if any, the President merits by dint of his unique constitutional role."); *accord* U.S. CONST. art. II.

117. Amar & Katyal, *supra* note 62, at 717 n.62 ("*Nixon* recognized presidential immunity in the absence of an express congressional statute to the contrary." (citing Nixon v. Fitzgerald, 457 U.S. 731, 748 n.27 (1982)).

118. Laura H. Burney, *The President Is Absolutely Immune from Civil Damages Liability for Acts Done Within the "Outer Perimeter" of His Official Capacity*, 14 ST. MARY'S L.J. 1145, 1152 (1982).

119. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974), *overruled by*, Davis v. Scherer, 468 U.S. 183 (1984).

120. *Id.* at 240–41.

121. United States v. Nixon, 418 U.S. 683, 708 (1974). The Supreme Court later extended this theory to all Presidential privilege. *Fitzgerald*, 457 U.S. at 753.

122. *Scheuer*, 416 U.S. at 241 (citing Spalding v. Vilas, 161 U.S. 483, 498–99 (1896)).

123. *Id.* at 239.

124. *See generally Nixon*, 418 U.S. at 683 (addressing immunity for the President's communications in a criminal trial); *Fitzgerald*, 457 U.S. at 731 (addressing immunity for the President's noncore duties in civil

2. Absolute Immunity

Absolute immunity, the legal protection that shields government officials from liability for civil lawsuits (even for malicious or bad faith actions) when performing official duties, has long been applied to legislative officers as protected by the Constitution[125] and to judicial officers as developed in the common law.[126] As the Supreme Court extended absolute immunity to prosecutors,[127] the Court in *Imbler v. Pachtman* reasoned that although "genuinely wronged defendant[s]" would be left "without civil redress against a prosecutor whose malicious or dishonest action deprive[d] him of liberty," this did not "leave the public powerless to deter misconduct" because *civil* immunity would not place government officials out of the scope of liability for *criminal* conduct.[128]

The concept of absolute immunity for federal executive branch officials first came to the Court in the late nineteenth century. Before the 1896 case *Spalding v. Vilas*, immunity for federal executive branch officials was limited to civil damages from harm stemming from official acts and communications while executing their duties as legally required.[129] In *Spalding,* the Court examined whether an official of the executive branch could be sued for damages from exercising official duties, or failing to act at all.[130] If the official did not exceed his authority in making this decision, then no matter how disagreeable his conduct was or the lack thereof, the official enjoyed absolute immunity from suit.[131] The Court relied on English common-law immunity doctrine[132] in finding civil immunity existed as a matter of public policy for official acts of executive officials, because absolute civil immunity for actions within the scope of the official duties of cabinet officials was necessary for "[t]he interests of the people."[133] This absolute immunity for executive officials was further extended by the Court in *Barr v. Matteo* to protect lower executive branch officials from all private lawsuits arising from common-law causes of action.[134] The Court announced this broad sweeping rule while acknowledging that in many instances it may prevent remedy where due, but as a matter

lawsuits); Clinton v. Jones, 520 U.S. 681 (1997) (addressing immunity for the President's actions before assuming office in civil lawsuits).

125. *See* U.S. CONST. art. I, § 6, cl. 1 (Speech and Debate Clause).

126. *See* Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

127. *Id.* at 424–27 (finding a common-law absolute immunity for prosecutors).

128. *Id.* at 427–29.

129. 161 U.S. 483, 498 (1896).

130. *Id.* at 498–99 ("[The official] may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested.").

131. *Id.* at 499 ("But if [the official] acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals.").

132. Nixon v. Fitzgerald, 457 U.S. 731, 744 (1982) (interpreting the basis for immunity in *Spalding*).

133. *Id.* (alteration in original) (quoting *Spalding*, 161 U.S. at 498).

134. 360 U.S. 564, 572–73 (1959) ("We do not think that the principle announced in [*Spalding*] can properly be restricted to executive officers of cabinet rank . . . and we cannot say that [their] functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy."); *id.* at 575–76 ("The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint . . . .").

of social policy, that "price [is] a necessary one to pay for the greater good."[135] The Court would eventually settle that not all executive branch officials are entitled to absolute immunity.[136]

3. Qualified Immunity

Qualified immunity is a more basic category of immunity.[137] It is an immunity enjoyed to a degree by most public officials when performing their discretionary duties in good faith.[138] Under federal jurisprudence, qualified immunity is seen as a "good faith" affirmative defense based on an objective element presuming "knowledge of and respect for 'basic, unquestioned constitutional rights.'"[139] Before 1982, the Court recognized a subjective element, such that qualified immunity would not be available if the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate . . . constitutional rights . . . or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury."[140] Additionally, in *Butz v. Economou*, the Court was not concerned with the costs of litigating subjective elements, given "[i]nsubstantial lawsuits can be quickly terminated" by courts under the Federal Rules of Civil Procedure.[141]

The *Harlow v. Fitzgerald* Court, however, worried that the subjective test undermined the interest of courts to dispose of frivolous or inadequate claims.[142] Typically, inadequate claims are dismissed through motions of summary judgment,[143] but Rule 56 of the Federal Rules of Civil Procedure requires that to grant summary judgment, there be no genuine dispute of material fact.[144] Subjective elements of a claim, however, typically state a fact that is disputed, and resolution of that fact is a task for the jury.[145] Therefore, the subjective elements test from *Butz* would almost always survive summary judgment, which would increase the number of trials and drive up litigation costs.[146] Even more worrisome than the cost of litigation, in the Court's perspective, was the consequence of subjugating executive branch officials to trials. The Court did not want trials over subjective inquiries to distract officials from their duties, prevent them

135. *Id.* at 576. *Contra id.* ("We are told that we should forbear from sanctioning any such rule of absolute privilege lest it open the door to wholesale oppression and abuses on the part of unscrupulous government officials. It is perhaps enough to say that fears of this sort have not been realized . . . ."); *id.* at 571 ("There must indeed be means of punishing public officers who have been truant to their duties.").

136. *See generally* Pierson v. Ray, 386 U.S. 547 (1967) (establishing qualified immunity as a less restrictive alternative to absolute immunity).

137. *See* Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974), *overruled by*, Davis v. Scherer, 468 U.S. 183 (1984).

138. *See Pierson*, 386 U.S. at 555; *Scheuer*, 416 U.S. at 247–48.

139. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975), *abrogated by*, *Harlow*, 457 U.S. at 817–18).

140. *Wood*, 420 U.S. at 322.

141. Butz v. Economou, 438 U.S. 478, 507–08 (1978).

142. *Harlow*, 457 U.S. at 815–16.

143. *Cf. id.* at 816 ("[I]nsubstantial claims should not proceed to trial.").

144. FED. R. CIV. P. 56(a).

145. *Harlow*, 457 U.S. at 816.

146. *Id.* at 815–16.

from taking discretionary action, or deter capable individuals from seeking careers in public service.[147]

Rather, the *Harlow* Court felt that an objective test would properly deter unlawful conduct "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights."[148] Additionally, the *Harlow* Court reiterated *Butz* in holding that "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."[149] Unless this burden is met, only qualified immunity applies to subordinates of the President, whether the official is a White House aide or a cabinet official.[150]

4. Judicial Oversight Extends Federal Law Over All Persons

In developing the immunity doctrine jurisprudence in its seminal twentieth-century immunity decisions, the Court laid out a few noteworthy findings. The *Butz* Court rejected the notion that lower-ranking civil servants could be held civilly liable for actions directed by senior officials who enjoyed immunity from the same conduct.[151] The Court rationalized that,

> It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct.[152]

The *Butz* Court added that the legal system inherently assumes that, regardless of their role or rank, courts can exercise jurisdiction and enforce federal law over any person.[153] The Court looked to pre-twentieth-century cases to reaffirm the principle that "[n]o man in this country is so high that he is above the law."[154]

The *United States v. Lee* Court, which the *Butz* Court looked to for this integral perception, also discussed what would happen if the President, due to expansive immunity, could wrong citizens who would be left without redress.[155] The *Lee* Court retorted "[i]f such be the law of this country, it sanctions a tyranny [that] has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights."[156] The *Butz* Court however

147. *Id.* at 816.

148. *Id.* at 819.

149. *Id.* at 808 (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

150. *Id.* at 809–13.

151. *Butz*, 438 U.S. at 505–06 (addressing whether executive branch officials are personally immune from damages claims arising from violations of citizens' constitutional rights).

152. *Id.*

153. *Id.* at 506 ("[A]ll individuals . . . are subject to federal law.").

154. *Id.* (quoting United States v. Lee, 106 U.S. 196, 220 (1882)); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 149–50 (1803) ("It is true he is a high officer, but he is not above law. It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer having public duties to perform, should be above the compulsion of law in the exercise of those duties.").

155. *Lee*, 106 U.S. at 220–21.

156. *Id.* at 221.

clarified that "officials who are required to exercise their discretion" would be protected in "the vigorous exercise" of their official duties.[157] Rather, as held in previous cases, it would be fair to find liability for "the official who knows or should know he is acting outside the law."[158] In reaching this conclusion, the *Butz* Court qualified that executive branch officials would not be found liable for "mere mistakes."[159] Nonetheless, the Court saw "no substantial basis" to allow federal officials to act with impunity in carrying out their duties in a manner that knowingly violates the U.S. Constitution or "transgresses a clearly established constitutional rule."[160]

The *Butz* Court further qualified that certain officials may merit absolute immunity due to their "special functions."[161] In discerning the circumstances to apply this higher standard, the Court weighed the "immunity historically accorded [to] the relevant official at common law."[162] To decide which officials should be afforded this absolute immunity, the Court took a historical approach, establishing that when a principle of immunity, or lack thereof, has been settled doctrine over the course of many generations without being denied, the common law would afford this exemption.[163] In particular, the Court had an interest in protecting judges, prosecutors, grand jurors, petit jurors, and witnesses, to shield them from harassment or threats in carrying out their functions.[164] The key here was that courts did not want these officials to be coerced or compelled to act in a favorable fashion, lest the official acts in an otherwise unfavorable manner.[165] However, this absolute immunity for special functions was limited to federal officials performing judicial acts and adjudicatory functions.[166]

5. Presidential Immunity

Despite the Court cautiously refining its immunity doctrine for executive branch officials in *Lee* and *Butz*, it took a sharp turn when it began to apply these doctrines to a sitting President and his aides. In *United States v. Nixon*, President Richard Nixon broadly argued that the separation of powers precluded the Court from judicial review of the President's asserted absolute privilege, or alternatively that the privilege supersedes a subpoena for his communications.[167] The Court rejected this first claim, asserting its power of judicial review in interpreting the presidency's constitutional privileges and the authority to evaluate claims concerning enumerated powers.[168] President Nixon's second claim contended that the separation of powers and the importance of confidential "high-level communications" required that there be absolute privilege of presidential

157. *Butz*, 438 U.S. at 506.

158. *Id.* at 506–07 (holding that officials are only granted "qualified immunity" rather than "absolute immunity").

159. *Id.* at 507.

160. *Id.*

161. *Id.* at 508.

162. *Id.* (quoting Imbler v. Pachtman, 424 U.S. 409, 421 (1976)).

163. *Id.* at 508–09.

164. *Id.* at 509.

165. *Id.* at 509–10.

166. *Id.* at 514.

167. United States v. Nixon, 418 U.S. 683, 703 (1974).

168. *Id.* at 703–04.

communication and the conduct of the executive branch generally.[169] The Court again rejected this claim, holding that neither argument alone was sufficient to substantiate "absolute, unqualified presidential privilege of immunity from judicial process under all circumstances."[170] Regarding confidentiality, the Court saw no reason that public interest or the Constitution would bar federal district courts from reviewing protected material in camera, unless the issue would compromise sensitive intel regarding the military, diplomacy, or national security.[171] Shielding the executive branch from judicial review under any mere assertion of privilege, the Court reasoned, would completely undermine Article III checks and balances.[172] The Framers designed a system of separation of powers that inherently included checks on powers to prevent any branch from achieving "absolute independence."[173]

While the Court seemingly limited immunity to a degree, it left a small carveout—a tear that began as a small hole and would be ripped open over time. The Court, along with both litigants, did find merit in a claim of *presumptive* privilege for presidential communications.[174] The Court expounded that this privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers."[175] However, it weighed the interest for this privilege against the constitutional demands of a thorough and transparent criminal justice process.[176] Where the interest in conducting a fair criminal trial is specific, and the need for executive privilege is general, the specific demands of the Constitution will prevail against broader and more general constitutional provisions.[177] The Court concluded that the presumptive privilege allowed Presidents to claim an exemption from providing sensitive evidence in criminal proceedings.[178] However, unless the President could show an interest *specifically* protected by privileged communications, the prosecutor may rebut the presumption and federal courts would be free to inspect the evidence in camera.[179] The notion of presumptive privilege would soon swallow the remaining immunity doctrine whole.

In *Nixon v. Fitzgerald*, the Supreme Court held that Presidents enjoy absolute immunity from civil damages concerning the President's "outer perimeter" duties.[180] The Court conducted its analysis through a history- and policy-based inquiry.[181] For its gloss of history, the Court insisted it look to pre-Revolutionary practices and understandings,

169. *Id.* at 706.

170. *Id.*

171. *Id.*

172. *Id.* at 707.

173. *Id.*

174. *Id.* at 708.

175. *Id.*

176. *Id.* at 708–13.

177. *Id.* at 713.

178. *Id.*

179. *Id.* at 713–14.

180. 457 U.S. 731, 749, 756 (1982) ("In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute [p]residential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility.").

181. *Id.* at 745, 747–48.

including considering the views of immunity under English monarchy.[182] For its policy considerations, the Court valued the implied nature of the executive's role "to achieve effective government under a constitutionally mandated separation of powers."[183] The Court extended considerable weight to the "unique position" held by the President and the "grant of authority" that established the office, which is "entrusted with . . . [the] utmost discretion and sensitivity."[184] The Court added that "a President must concern himself with matters likely to arouse the most intense feelings."[185] In shielding the President from civil liability for official acts, the Court emphasized the risk posed by distracting the President from performing the office's duties if exposed to lawsuits.[186] Such a consequence would be "to the detriment of . . . the Nation that the Presidency was designed to serve."[187]

While the Court again contended that "[p]residential privilege is 'rooted in the separation of powers under the Constitution,'"[188] it recognized that this constitutional doctrine "does not bar every exercise of jurisdiction over the President of the United States."[189] In exercising its authority, the Court cautioned that the judiciary "must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch."[190] Such oversight must "serve broad public interests" in maintaining the "proper balance" in the separation of powers.[191]

When absolute privilege is justified, its scope is not unlimited.[192] The Court must evaluate whether the "sphere of protected action" is closely related to the "immunity's justifying purposes."[193] For civil litigation against the President, the immunity will extend to "outer perimeter" conduct, in addition to the President's core constitutional functions.[194] In justifying this approach, the Court insisted the rule would not "leave the Nation without sufficient protection against [presidential] misconduct."[195] The Court offered remedies, deterrents, and incentives, like congressional oversight and the threat of impeachment, public scrutiny from the press, running for reelection, the "prestige" of the President's influence, and "traditional concern" for the President's "historical

182. *Id.* at 748 ("Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure.").

183. *Id.*

184. *Id.* at 749–50 (listing the President's powers to "take Care that the Laws be faithfully executed," conduct foreign affairs, and manage the executive branch (quoting U.S. CONST. art. II, § 3)).

185. *Id.* at 752 (internal quotation marks omitted) (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).

186. *Id.* at 753.

187. *Id.*

188. *Id.* (quoting United States v. Nixon, 418 U.S. 683, 708 (1974)).

189. *Id.* at 753–54.

190. *Id.* at 754.

191. *Id.*

192. *Id.* at 755.

193. *Id.*

194. *Id.* at 756.

195. *Id.* at 757.

stature."[196] These safeguards, the Court reassured, would not allow Presidents to rise "above the law."[197]

Finally, in *Clinton v. Jones*, the Court held that sitting Presidents do not enjoy temporary immunity from lawsuits arising from conduct committed before taking office.[198] In 1994, then-President Bill Clinton was sued by Paula Jones, an Arkansas state employee, for allegedly subjecting her to "abhorrent sexual advances" while he was serving as the state's governor in 1991.[199] The civil lawsuit against President Clinton was filed a year into his first term as President.[200] President Clinton initially moved to dismiss the claim on grounds of immunity in district court,[201] and after the appellate court found no reason to stay the trial,[202] the President petitioned the Supreme Court, arguing for *temporary* immunity, at least until he left office.[203]

The Court did not take the challenge of addressing "the dimensions of the President's power" lightly.[204] In the words of Justice Robert H. Jackson, determining what the Framers intended or how they would have resolved these questions "must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoah [sic]."[205] Justice Jackson continued, "A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side."[206] In affording immunity for an officer's official acts, the Court explained that its "principal rationale . . . is inapplicable to unofficial conduct" since only the former, and not the latter, ensure that an officer "functions effectively without fear that a particular decision may give rise to personal liability."[207] Even as far as official acts go, the Court distinguished an actor from his functions.[208] For actions within an officer's "official capacity," the Court has held that "absolute immunity should extend only to acts in performance of particular functions of his office."[209] The Court added that anything outside of those particular functions would not be shielded from liability.[210] The Court therefore found its duty to carefully examine immunity based in "the nature of the function performed, not the identity of the actor who performed it."[211]

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196. *Id.*

197. *Id.* at 758.

198. 520 U.S. 681, 692 (1997) (concerning a civil lawsuit against President Bill Clinton during his presidency for private acts committed before he became President).

199. *Id.* at 684–86 (internal quotation marks omitted) (footnote omitted).

200. *Id.* at 684.

201. *Id.* at 686.

202. *Id.* at 687–88.

203. *Id.* at 692.

204. *See id.* at 696–97.

205. *Id.* (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (referring to *Genesis* 41:1–57)).

206. *Youngstown*, 343 U.S. at 634–35 (Jackson, J., concurring); *Clinton*, 520 U.S. at 696–97.

207. *Clinton*, 520 U.S. at 692–93.

208. *Id.* at 694–95.

209. *Id.* at 694 (quoting Nixon v. Fitzgerald, 457 U.S. 731, 755 (1982)).

210. *Id.* at 694–95 ("Hence, for example, a judge's absolute immunity does not extend to actions performed in a purely administrative capacity.").

211. *Id.* at 695 (quoting Forrester v. White, 484 U.S. 219, 229 (1988)).

President Clinton contended that his bid for temporary immunity while in office was not based on his identity as the President; rather, that the "the nature of the office" demanded it be based on the office's unique "powers and responsibilities" that were integral to the public well-being.[212] While the Court acknowledged the importance of the President's role,[213] the Court had little concern with the burden the lawsuit would impose on President Clinton in terms of constraint on his time and resources.[214] Further, while it agreed with the legitimate need to maintain separation of powers, the Court determined there was no risk of violating the separation of powers where the Court's decision on immunity is not a traditional function of the executive branch.[215] The Court further pushed that the checks and balances imposed by the separation of powers doctrine may sanction "even quite burdensome interactions" between the judicial and executive branches without completely preventing the President from completing constitutional duties.[216] Therefore, if the courts may review a President's official conduct or require him to testify or comply with a subpoena, it follows that the judiciary may adjudicate the legality of unofficial acts.[217] While parts of the holdings in President Nixon and President Clinton's respective cases provide a basis for limiting immunity, the Court would ultimately use the presumptive immunity, outer perimeter duties, policy-based inquiry, and official capacity rules to strengthen immunity for President Trump under the following facts[218] and in his subsequent Supreme Court case.[219]

C. The 2020 Election & the January 6 Insurrection

With the understanding of early modern perspectives of executive official immunity in mind, along with the Court's developed jurisprudence, it is important to consider how these legal perspectives and historical ideals play out in high-stakes scenarios. While there were real harms involved in earlier immunity cases, the *Trump* case presented new facts not previously considered by the Supreme Court that in 2024 forced the Court to apply new theories in choosing whether to limit or extend presidential immunity. The 2020 election and the insurrection that followed should be understood in the context of the discussion provided thus far, because the events that took place are unlike any other previously considered by American courts.

1. Events Following the 2020 Election

The United States held its fifty-ninth presidential election on November 3, 2020, with former Vice President Joseph R. Biden Jr. as the Democratic Party nominee challenging the Republican nominee and incumbent President Trump.[220] On November

212. *Id.* at 697.

213. *Id.* at 698–99.

214. *Id.* at 691–92.

215. *Id.* at 699–701.

216. *Id.* at 702.

217. *Id.* at 703–05.

218. *See supra* Part II.C.1.

219. *See supra* Part II.C.2.a.

220. Jonathan Martin & Alexander Burns, *Biden Wins Presidency, Ending Four Tumultuous Years Under Trump*, N.Y. TIMES (Apr. 26, 2021), https://www.nytimes.com/2020/11/07/us/politics/biden-election.html (on

7, Pennsylvania finally counted enough votes for media outlets to declare that the Commonwealth's electors would belong to Vice President Biden, electing him as the forty-sixth President of the United States—nearly four days after Election Day.[221] Vice President Biden handily defeated President Trump with over eighty million votes nationwide and 306 electoral votes.[222] States began to certify their results to make them official,[223] and on December 4, 2020, California's certification led Vice President Biden to become the official president-elect.[224] The last legal ritual before inauguration on January 20, 2021, was scheduled for January 6, 2021,[225] when both chambers of Congress would gather to approve the electoral votes cast by the states and to certify the election results.[226] What is normally a formality,[227] however, became widely contested.[228]

For months leading up to the election, President Trump made baseless claims about the threats of a fraudulent, stolen election[229] based on mail-in and absentee votes,[230] which were especially high in 2020 due to the COVID-19 pandemic[231] when much of the United States was avoiding indoor contact in order to slow and stop the spread of the

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file with the Temple Law Review); Jonathan Lemire, Zeke Miller & Will Weissert, *Biden Defeats Trump for White House, Says 'Time To Heal*,*'* AP NEWS (Nov. 7, 2020, at 22:32 ET), https://apnews.com/article/joe-biden-wins-white-house-ap-fd58df73aa677acb74fce2a69adb71f9 [https://perma.cc/ZQ82-4BXM].

221. Marc Levy & Michael Rubinkam, *Native Son Joe Biden Takes Pennsylvania and the Presidency*, AP NEWS (Nov. 7, 2020, at 19:30 ET), https://apnews.com/article/election-2020-joe-biden-donald-trump-pennsylvania-elections-48ecc3dfb11a91020aef5dc3fb8d22de [https://perma.cc/Y5JT-5EX2]; Sophie Lewis, *Joe Biden Breaks Obama's Record for Most Votes Ever Cast for a U.S. Presidential Candidate*, CBS NEWS (Dec. 7, 2020, at 14:20 ET), https://www.cbsnews.com/news/joe-biden-popular-vote-record-barack-obama-us-presidential-election-donald-trump/ [https://perma.cc/72G8-XH4S]; FED. ELECTION COMM'N, FEDERAL ELECTIONS 2020: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 5 (2022) [hereinafter FEC ELECTION RESULTS], https://www.fec.gov/resources/cms-content/documents/federalelections2020.pdf [https://perma.cc/H9UX-86J2].

222. FEC ELECTION RESULTS, *supra* note 221, at 7.

223. *Election Results, Canvass, and Certification*, U.S. ELECTION ASSISTANCE COMM'N (Nov. 4, 2024), https://www.eac.gov/election-officials/election-results-canvass-and-certification [https://perma.cc/7Y6M-TKF4].

224. Michael R. Blood & Nicholas Riccardi, *Biden Officially Secures Enough Electors To Become President*, AP NEWS (Dec. 4, 2020, at 20:06 ET), https://apnews.com/biden-officially-secures-enough-electors-to-become-president-3e0b852c3cfadf853b08aecbfc3569fa [https://perma.cc/5MVD-WD8L].

225. Devan Cole & Paul LeBlanc, *An Inauguration Like No Other: Notable Moments of a Momentous Day*, CNN (Jan. 21, 2021, at 02:35 ET), https://www.cnn.com/2021/01/20/politics/biden-inauguration-notable-moments/index.html (on file with the Temple Law Review).

226. Blood & Riccardi, *supra* note 224.

227. *Id.*

228. *See* Kat Lonsdorf, Courtney Dorning, Amy Isackson, Mary Louise Kelly & Ailsa Chang, *A Timeline of the Jan. 6 Capitol Attack — Including When and How Trump Responded*, NPR (Jan. 5, 2024, at 16:25 ET), https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when [https://perma.cc/TNC7-4XD9].

229. Martin & Burns, *supra* note 220; Christina A. Cassidy & Anthony Izaguirre, *Explainer: Election Claims, and Why It's Clear Biden Won*, AP NEWS (Jan. 19, 2021, at 17:45 ET), https://apnews.com/article/election-claims-biden-won-explained-bd53b14ce871412b462cb3fe2c563f18 [https://perma.cc/LQ3W-T7XP]; Levy & Rubinkam, *supra* note 221; Lemire et al., *supra* note 220.

230. Cassidy & Izaguirre, *supra* note 229.

231. *Id.*; Martin & Burns, *supra* note 220.

deadly global virus.[232] Following the election, President Trump continued to promulgate theories that the election was "stolen"[233] and filed lawsuits in multiple battleground states to prevent the certification of results in states he had hoped to win.[234] When officials from the Republican Party in those states continued to support certification for President-elect Biden against President Trump's demands,[235] President Trump condemned them, leading to death threats against the officials.[236] Despite losing legal challenge after legal challenge, President Trump and his allies did not stop spreading lies about the election results.[237] To help his cause, he called for his supporters to gather in Washington, D.C., on January 6, 2021,[238] the day of the congressional certification.[239]

President Trump gathered tens of thousands of supporters outside the White House,[240] delivering an impassioned speech with a rally cry to let Congress know how

232. Drew DeSilver, *Mail-In Voting Became Much More Common in 2020 Primaries as COVID-19 Spread*, PEW RSCH. CTR. (Oct. 13, 2020), https://www.pewresearch.org/short-reads/2020/10/13/mail-in-voting-became-much-more-common-in-2020-primaries-as-covid-19-spread/ [https://perma.cc/CH3K-W47M]; Samuel Absher & Jennifer Kavanagh, *The Impact of State Voting Processes in the 2020 Election: Estimating the Effects on Voter Turnout, Voting Method, and the Spread of COVID-19*, 11 RAND HEALTH Q., no. 1, 2023, https://www.rand.org/pubs/periodicals/health-quarterly/issues/v11/n1/07.html [https://perma.cc/4SF5-8MZK].

233. Donald J. Trump (@realDonaldTrump), X (Nov. 8, 2020, at 09:17 ET), https://x.com/realDonaldTrump/status/1325442336957018112 [https://perma.cc/DZ4C-DUQE] ("Best pollster in Britain wrote this morning that this clearly was a stolen election."); *id.* (Nov. 14, 2020, at 15:07 ET), https://x.com/realDonaldTrump/status/1327704841964183552 [https://perma.cc/Z725-BWSB] ("People are not going to stand for having this Election stolen from them . . . !"); *id.* (Nov. 24, 2020, at 07:33 ET), https://x.com/realDonaldTrump/status/1331214247955738624 [https://perma.cc/49C8-9QYG] ("79 Percent of Trump Voters Believe 'Election Was Stolen' . . . They are 100% correct, but we are fighting hard. . . . RIGGED ELECTION!"); *id.* (Dec. 19, 2020, at 09:41 ET), https://x.com/realDonaldTrump/status/1340306154031857665 [https://perma.cc/6GXE-BJBJ] ("[Biden] didn't win the Election. . . . Republican politicians have to fight so that their great victory is not stolen."); *id.* (Jan. 5, 2021, at 17:12 ET), https://x.com/realDonaldTrump/status/1346580318745206785 [https://perma.cc/6XRA-AGXR] ("[T]housands of people pouring into D.C. . . . won't stand for a landslide election victory to be stolen.").

234. Blood & Riccardi, *supra* note 224; Lemire et al., *supra* note 220.

235. Blood & Riccardi, *supra* note 224 (Pennsylvania); Cassidy & Izaguirre, *supra* note 229 (Arizona and Georgia).

236. Amara Walker, Chris Youd & Ray Sanchez, *Family of Georgia's Secretary of State Was Still Getting Death Threats Months After Election, Report Says*, CNN (June 11, 2021, at 20:46 ET), https://www.cnn.com/2021/06/11/politics/georgia-raffensperger-family-death-threats-election/index.html (on file with the Temple Law Review) (describing threats against the family of Georgia Republican Secretary of State Brad Raffensperger).

237. Robert Yoon, *Trump's Drumbeat of Lies About the 2020 Election Keeps Getting Louder. Here Are the Facts*, AP NEWS (Aug. 27, 2023, at 09:43 ET), https://apnews.com/article/trump-2020-election-lies-debunked-4fc26546b07962fdbf9d66e739fbb50d [https://perma.cc/3ZA6-V6YG].

238. Dan Barry & Sheera Frenkel, *'Be There. Will Be Wild!': Trump All but Circled the Date*, N.Y. TIMES (July 27, 2021), https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html (on file with the Temple Law Review).

239. Lonsdorf et al., *supra* note 228.

240. *Compare* Olivia Rubin, Alexander Mallin & Will Steakin, *7 Hours, 700 Arrests, 1 Year Later: The Jan. 6 Capitol Attack, by the Numbers*, ABC NEWS (Jan. 6, 2022), https://abc7.com/jan-6-insurrection-us-capitol-riot/11428976/ [https://perma.cc/8ZBC-WJMV] (citing about 10,000 protestors involved), *with* Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021, at 14:43 ET), https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial [https://perma.cc/8UYX-WPHG] ("We have hundreds of thousands of people here." (claim made by President Trump)).

they felt.[241] President Trump encouraged his supporters to march to the U.S. Capitol and "fight like hell."[242] The events that unfolded shocked the nation.[243] After arriving at the Capitol grounds, his supporters broke down police barricades,[244] assaulted Capitol Police officers,[245] and smashed windows to force their way into the Capitol Building.[246] Upon breaching the building, members of the mob headed first for the U.S. Senate Chamber.[247] At this time, then-Vice President Mike Pence, who earlier upheld his oath to the Constitution by refusing to overturn electoral votes, was taken to a secure location by U.S. Secret Service officers.[248] As the mob approached the U.S. Senate Chamber, Capitol Police Officer Eugene Goodman diverted the mass that chased after him.[249] The Senate Chamber was evacuated,[250] and on the way out, aides managed to grab the chests that held the official electoral votes and certificates.[251]

Meanwhile, some members of Congress and their staff, who sheltered in place in the U.S. House Chamber, began to evacuate while others barricaded themselves in various offices.[252] Attempting to reach the chamber, a portion of the mob gathered outside the Speaker's Lobby, which, along with the chamber, was blocked off by furniture.[253] Ultimately, five people died in connection with the events of that day, including a Capitol Police officer, while about one hundred and forty other officers were injured.[254] Ultimately, nearly sixteen hundred rioters would be criminally charged and 1,270 would be convicted.[255] President Trump pardoned all but fourteen of them when he later retook office in 2025.[256]

It took several hours just for law enforcement to secure the inside of the complex, and another two hours passed before each chamber of Congress reconvened to vote on the states' electoral certifications.[257] Several Republican senators who originally planned to object to the results reversed course, citing the physical harm and violence that took

241. *See* Naylor, *supra* note 240.

242. *Id.*

243. Barry & Frenkel, *supra* note 238.

244. Lonsdorf et al., *supra* note 228.

245. Evan Hill, Arielle Ray & Dahlia Kozlowsky, *'They Got a Officer!': How a Mob Dragged and Beat Police at the Capitol*, N.Y. TIMES (Apr. 21, 2021), https://www.nytimes.com/2021/01/11/us/capitol-mob-violence-police.html (on file with the Temple Law Review).

246. Lonsdorf et al., *supra* note 228.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*; Luke Broadwater & Emily Cochrane, *Inside the Capitol, the Sound of the Mob Came First*, N.Y. TIMES (Jan. 17, 2021), https://www.nytimes.com/2021/01/06/us/politics/photos-capitol-building-protesters.html (on file with the Temple Law Review).

251. Broadwater & Cochrane, *supra* note 250.

252. *Id.*; Lonsdorf et al., *supra* note 228.

253. Lonsdorf et al., *supra* note 228; Broadwater & Cochrane, *supra* note 250.

254. Rubin et al., *supra* note 240.

255. Annette Choi, Alex Leeds Matthews & Marshall Cohen, *Trump Gave Broad Clemency to All Jan. 6 Rioters*, CNN (Jan. 26, 2025, at 05:00 ET), https://www.cnn.com/2025/01/26/politics/january-6-rioters-charges-convictions-dg (on file with the Temple Law Review).

256. *Id.*

257. Lonsdorf et al., *supra* note 228.

place that day.[258] Yet, a handful of Senate Republicans and the majority of House Republicans continued working toward President Trump's goal to "stop the steal" by overturning the results of the 2020 election.[259] Six senators and 121 House members voted to reject Arizona's certification while seven senators and 138 House members voted to reject Pennsylvania's.[260] Republican House members, without support from any senators, also filed challenges against Georgia, Michigan, and Nevada.[261] The contesters, however, found themselves in the minority and lost all of their battles.[262] After the day's chaos and violent unrest, Congress finally completed its legal duty, certifying the 2020 election results early the following morning, at 3:44.[263] With certification complete, Vice President Biden was inaugurated as the forty-sixth U.S. President two weeks later on January 20, 2021.[264] President Trump notably did not attend the historic ceremony[265] that symbolized our nation's peaceful transition of power.[266]

2. Litigation and Prosecution Against President Trump

A year and ten months into President Biden's term, Attorney General Merrick Garland appointed Special Counsel Jack Smith to manage two major criminal investigations.[267] The first concerned President Trump's alleged attempts to overturn the results of the 2020 election, and the second involved seemingly illegal possession of classified documents by then-former President Trump at his Mar-a-Lago residence.[268] After issuing dozens of subpoenas and interviewing key figures close to the former President, including his former chief of staff and Vice President, then-former President Trump was indicted in June 2023 on the classified documents charges.[269] A year later, the United States District Court for the Southern District of Florida dismissed the

258. Miles Parks, *Some Republican Senators Walk Back Objections to Election Results*, NPR (Jan. 6, 2021, at 22:53 ET), https://www.npr.org/sections/congress-electoral-college-tally-live-updates/2021/01/06/954251826/some-republican-senators-begin-to-walk-back-objections-to-election-results [https://perma.cc/33SS-J7VG].

259. Barbara Sprunt, *Here Are the Republicans Who Objected to the Electoral College Count*, NPR (Jan. 7, 2021, at 16:26 ET), https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/07/954380156/here-are-the-republicans-who-objected-to-the-electoral-college-count [https://perma.cc/ZBC7-DUDL]; Naylor, *supra* note 240.

260. Sprunt, *supra* note 259.

261. *Id.*

262. *See 2020 Electoral College Results*, U.S. NAT'L ARCHIVES & REC. ADMIN. (Apr. 16, 2021), https://www.archives.gov/electoral-college/2020 [https://perma.cc/79QE-ZFQF].

263. *Id.*

264. Cole & LeBlanc, *supra* note 225.

265. *Id.*

266. Maureen MacDonald, *Peaceful Transition of Power: American Presidential Inaugurations*, U.S. NAT'L ARCHIVES & REC. ADMIN., PROLOGUE MAG., Winter 2000, https://www.archives.gov/publications/prologue/2000/winter/inaugurations [https://perma.cc/7JQX-EUGS].

267. Katherine Faulders, Alexander Mallin, Luke Barr & Peter Charalambous, *Timeline: Special Counsel's Probe into Trump's Efforts To Overturn 2020 Election*, ABC NEWS (Oct. 14, 2025, at 20:45 ET), https://abcnews.go.com/US/timeline-special-counsels-probe-trumps-efforts-overturn-2020/story?id=10153703 [https://perma.cc/XZX9-2VBK].

268. *Id.*

269. *Id.*

indictment after determining that Special Counsel Smith's appointment was unconstitutional.[270]

a. Trump v. United States

In August 2023, then-former President Trump was indicted on charges for his role in undermining the results of the 2020 election.[271] This included efforts to compel former Vice President Pence to refuse to or falsely certify the electoral college results,[272] and for President Trump's role in enabling the events of January 6, 2021, by repeating false claims that the election was stolen while his supporters violently interrupted the electoral college certification process.[273] Special Counsel Smith, on behalf of the United States, charged then-former President Trump with four felonies: "conspiracy to defraud the United States, conspiracy to obstruct an official proceeding, obstruction of and attempt to obstruct an official proceeding, and conspiracy against rights."[274]

The Supreme Court would later focus on five ways that this indictment alleged that President Trump "conspired to overturn [the 2020 election] by spreading knowingly false claims of election fraud to obstruct the collecting, counting, and certifying of the election results."[275] The government claimed that President Trump lobbied state lawmakers and election officials to change electoral votes based on fraudulent claims that President Trump, not then-candidate Biden, won their states.[276] It next claimed that President Trump organized fraudulent slates of electors to submit false certificates of electoral college results to then-Vice President Pence to be counted.[277] It also claimed President Trump used the Department of Justice to conduct false election crime investigations by sending letters to the states regarding concerns with their results.[278] It further claimed that President Trump attempted to coax Vice President Pence into abusing his strictly ceremonial role in presiding over the counting and certifying of the electoral votes.[279] Allegedly, President Trump asked Vice President Pence to not count votes cast for then-candidate Biden and instead count them for President Trump.[280] When Vice President Pence refused, and President Trump's plan seemed doomed to fail, President Trump assembled his supporters, to whom he continued to lie about the results of the election results and the Vice President's ability to overturn the Electoral College, and ordered them to march to the Capitol to obstruct the official proceedings.[281] Finally, the government alleged that after President Trump's supporters descended on the Capitol,

270. United States v. Trump, 740 F. Supp. 3d 1245, 1252 (S.D. Fla. 2024).

271. See *supra* Part II.C.1 for a discussion on the January 6 insurrection, which constitutes the basis of the President's indictment.

272. Faulders et al., *supra* note 267.

273. See *supra* Part II.C for a discussion detailing these claims.

274. Faulders et al., *supra* note 267.

275. Trump v. United States, 144 S. Ct. 2312, 2324 (2024).

276. Indictment ¶ 10(a), United States v. Trump, 704 F. Supp. 3d 196 (D.D.C. 2023) (No. 23-257), *cert. denied before judgment*, 144 S. Ct. 539 (2023), *vacated and remanded*, 144 S. Ct. 2312 (2024).

277. *Id.* ¶ 10(b).

278. *Id.* ¶ 10(c).

279. *Id.* ¶ 10(d).

280. *Id.*

281. *Id.*

he refused to quell the violent mob and instead deliberately continued broadcasting false election fraud claims, while enlisting members of Congress to needlessly contest the certification.[282]

Judge Chutkan in the U.S. District Court for the District of Columbia set a jury trial date for March 2024, which was later postponed for the U.S. Court of Appeals for the D.C. Circuit to answer whether a former President enjoys presidential immunity from prosecution for acts while in office.[283] On February 6, 2024, the circuit court denied President Trump's claim of immunity.[284] On February 28, the Supreme Court granted certiorari, and on July 1, the Court announced its holding, vacating the circuit court's judgment.[285] In a five-part opinion, the Court reviewed, for the first time, the scope of presidential immunity from criminal prosecution for official acts while in office.[286]

In its holding, the majority first discussed President Trump's actions and the events that created the grounds for the federal indictment.[287] The Court noted President Trump's defense that the alleged conduct fell within "the core of his official duties" and that the district court did not yet answer whether the allegations involved official acts.[288] It also acknowledged the D.C. Circuit's reliance on *Marbury v. Madison* in finding that President Trump did not possess total immunity for criminal acts that defy the laws of the nation.[289] The D.C. Circuit acknowledged *Marbury*'s distinction between discretionary acts, which are "only politically examinable," and ministerial acts, which are reviewable by the judiciary.[290] Ministerial acts, the circuit court explained, are duties where an executive officer has no discretion because the duty to complete an act is mandated by law, including acts of Congress.[291] The Court reasoned that violating criminal law is not a discretionary act, and that any supposed ministerial act that would constitute a crime would be judicially reviewable.[292] Therefore, *Marbury* enables the "[j]udiciary to oversee the federal criminal prosecution of a former President for his official acts because the fact of the prosecution means that the former President has allegedly acted in defiance of the Congress's laws."[293]

The Court began its analysis by considering when a President is immune from prosecution.[294] In guiding its analysis, the Court emphasized the need to "focus on the

282. *Id.* ¶ 10(e).

283. Faulders et al., *supra* note 267.

284. *Id.*; United States v. Trump, 91 F.4th 1173 (D.C. Cir.), *cert. granted*, 144 S. Ct. 1027 (2024), *vacated and remanded*, 144 S. Ct. 2312 (2024).

285. Faulders et al., *supra* note 267; Trump v. United States, 144 S. Ct. 2312, 2347 (2024).

286. *Trump*, 144 S. Ct. at 2324, 2326.

287. *Id.* at 2324–26.

288. *Id.* 2325–26.

289. *Id.*

290. *Id.* at 2326 (quoting United States v. Trump, 91 F.4th 1173, 1189–90 (D.C. Cir. 2024)).

291. *Id.*; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 141 (1803) (describing that to comply with acts of Congress and legal orders, executive officers may be "liable to be compelled to perform" their ministerial duties).

292. *See Trump*, 144 S. Ct. at 2326.

293. *Id.* (quoting *Trump*, 91 F.4th at 1191).

294. *Id.* at 2332–41.

enduring consequences upon the balanced power structure of our Republic."[295] To conduct its analysis, the Court reviewed the three categories of presidential conduct, and the three degrees of immunity offered under the Court's existing jurisprudence based on the President's constitutional authority to act.[296] A President's conduct can be official or unofficial, and official acts can be either a "core power" official act or an "outer perimeter" official act.[297] Presidential immunity can be absolute, presumptive, or absent based on the type of act at issue.[298]

In labeling the various powers a President does or does not hold, the Court relied on three scenarios provided by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*.[299] Justice Jackson provided that there are areas where (1) the President has "conclusive and preclusive" authority to act, (2) the President and Congress share "concurrent authority," and (3) the President lacks authority to act.[300] The Court announced that Presidents enjoy absolute immunity for criminal acts taken while exercising core constitutional powers in the first area and have no immunity for acts in the third area, but that it is left to be determined whether a President enjoys absolute or presumptive immunity for noncore powers in the second area.[301]

Core acts are specifically prescribed by the U.S. Constitution, falling within the President's sole authority.[302] For these acts, Congress and the courts may not interfere by regulating or reviewing the President's conduct from an oversight perspective, nor may they criminalize or adjudicate the President's conduct from a criminal liability standard.[303] This is because the President's core powers are "conclusive and preclusive."[304] Specifically, core powers include Article II provisions of the Constitution, including the power to grant pardons and to take care to faithfully execute the laws of the United States.[305]

Because Congress can make no laws to abridge these powers, and the courts have no authority to adjudicate disputes over exercise of these powers, the President's immunity here is absolute.[306] The Court reasoned that:

> [A]n Act of Congress—either a specific one targeted at the President or a generally applicable one—may not criminalize the President's actions within his exclusive constitutional power. Neither may the courts adjudicate a criminal prosecution that examines such [p]residential actions. We thus

295. *Id.* at 2326 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)).

296. *Id.* at 2326–32.

297. *See id.*

298. *See id.*

299. *See id.* (citing *Youngstown*, 343 U.S. at 634).

300. *Youngstown*, 343 U.S. at 635, 637, 638.

301. *Trump*, 144 S. Ct. at 2332.

302. *Id.* at 2327–28.

303. *Id.* at 2327–28, 2335.

304. *Id.* at 2327 (quoting *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring)).

305. *Id.*

306. *Id.* at 2327–28.

> conclude that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority.[307]

For these reasons, the Court concluded that any indictment alleging criminality based in an exercise of a core duty cannot be presented at trial, and the trial court must dismiss any claims in this area by conducting pretrial review of the justiciability of the claims.[308]

On the opposite end of the spectrum lie unofficial acts, where the President is not acting based on any constitutional or legal authority, or more plainly, is acting in an individual or personal capacity.[309] The parties did not dispute whether a former President can be criminally liable for unofficial acts committed while in office and they agreed that some of the allegations involved unofficial conduct.[310] Determining whether an act is official or unofficial will be an important undertaking for the trial court as the court of first instance,[311] and this determination should be based in "the nature of the function performed, not the identity of the actor who perform[s] it."[312] The President's claim of authority when supposedly exercising a core power, however, can also be rebutted by the courts when exercising "mere 'individual will' and 'authority without law.'"[313] In these scenarios, a President is effectively acting in an unofficial capacity.[314] The Court firmly asserted that there is no immunity for unofficial acts and noted that both parties agreed that some of the indictments against President Trump involved unofficial acts.[315]

The murkier terrain lies in between these two areas—in the outer perimeter of a President's official conduct, in what is often referred to as a "zone of twilight."[316] This zone is an area of concurrent authority between the President and Congress.[317] To navigate these rather uncharted waters in the context of presidential immunity for criminal liability, the Court looked to the original intent of the Framers in designing the presidency within the separation of powers, precedential civil presidential immunity cases, and cases where Presidents refused to comply with criminal discovery.[318]

The Court first explained that the Framers "sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many."[319] The need for this, the Court suggested, comes from the need to act swiftly to ensure national security.[320] In handling

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307. *Id.* at 2328.

308. *Id.* at 2342–44 ("[T]he essence of immunity is the entitlement not to be subject to suit.").

309. *Id.* at 2332.

310. *Id.* at 2326.

311. *Id.* at 2332–34, 2339.

312. *Id.* at 2332 (alteration in original) (quoting Forrester v. White, 484 U.S. 219, 229 (1988)).

313. *Trump*, 144 S. Ct. at 2327 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring)).

314. *Cf. id.* at 2327, 2332 (noting that when a President claims authority to act but no such authority exists, the act is unofficial and not entitled to immunity).

315. *Id.* at 2326, 2332, 2347.

316. *Id.* at 2328 (quoting *Youngstown*, 343 U.S. at 635, 637 (Jackson, J., concurring)).

317. *Id.*

318. *Id.* at 2329.

319. *Id.* (quoting Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in judgment)).

320. *See id.*

consequential power to resolve grave situations, the President needs to be fearless and impartial in acting.[321] The Court reasoned that because of the unique responsibilities imparted onto the executive, the fear of litigation would risk hindering or incapacitating the President from acting as necessary.[322]

In civil immunity cases, the Court cited the significance of the President's role and duties as a basis for finding immunity "to avoid diversion of the President's attention during the decision-making process" from concerns over legal damages that could arise out of one decision or another.[323] For this reason, the Court previously held that Presidents are "absolutely immune from damages liability for acts within the outer perimeter of [their] official responsibility" in the civil context.[324] The question remains, what, if any, immunity applies for criminal liability.[325]

While Presidents have absolute immunity for civil liability for outer perimeter conduct of official acts,[326] there is historic precedent for limiting this immunity to presumptive in certain contexts, allowing the presumption of immunity to be rebutted in limited cases.[327] The Court brought to light examples where the Court rejected claims of absolute immunity when prosecutors subpoenaed a President for evidence that did not endanger public safety.[328]

In a historic line of cases involving the prosecution of former Vice President Aaron Burr for acts of treason, the Court ruled that President Thomas Jefferson could not exert privilege in refusing to hand over papers to aid the case solely on the grounds that a President retains absolute immunity from cooperation in the trial.[329] Similarly, the Court denied President Nixon's claim of absolute immunity from handing over recordings and documents that would allow the judiciary to constitutionally adjudicate prosecutions.[330] The Court reemphasized the need for an unwavering executive who can act without hesitation.[331] However, in the case of President Nixon, the Court felt that protecting a President's communications with a presumptive, and not an absolute, immunity achieved this critical criterion.[332] This level of immunity allows the President to have some degree of checks on authority when the requirement stems from another branch's constitutional duty and there is no danger of intruding on the executive's authority.[333]

The Court declined to answer whether a President's outer perimeter is afforded absolute or presumptive immunity from criminal liability.[334] Rather than making that

321. *Id.*

322. *Id.*

323. *Id.* (internal quotation mark omitted) (quoting *Clinton*, 520 U.S. at 694 n.19).

324. *Id.* at 2330 (internal quotation marks omitted) (quoting Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982)).

325. *Id.* at 2327.

326. *Id.* at 2329–30.

327. *Id.* at 2330.

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.* at 2330–32.

333. *Id.* at 2331–32.

334. *Id.* at 2332, 2339, 2347.

determination at this juncture, the Court reserved resolution for the trial court on remand to determine which acts the President took were unofficial, and how the appropriate immunity should be analyzed for the outer perimeter official acts.[335]

Justice Thomas focused his concurrence on the claim that Special Counsel Smith was not appointed constitutionally and therefore lacked prosecutorial power.[336] While his argument is mostly outside the scope of this Comment, it is worth pointing out his reliance on American history and tradition, as well as the practices the colonies inherited from England,[337] showing the importance of our historical antecedent understanding of the executive's powers and limitations under the law. Ultimately, Justice Thomas argued that the President's immunity "secures liberty" in line with the Framers' stated intentions in drafting the Constitution.[338]

In her partial concurrence, Justice Barrett clarified why she did not join the majority in full.[339] Justice Barrett disagreed with the Court's decision that the Constitution might foreclose any presidential prosecution for official acts.[340] Justice Barrett would distinguish between acts that exclusively fall in the President's purview versus those that may be held concurrently by Congress.[341] She explained that Article II does not prevent Congress from enacting criminal statutes to regulate official presidential acts.[342] Accordingly, the judiciary has to evaluate the validity of the charges to determine whether they were constitutionally authorized.[343]

Justice Barrett proposed a two-step analysis, checking first whether Congress passed the proper legislation to allow for criminal prosecution over the official act, and second whether prosecution might dangerously intrude on the President's authority.[344] Her first step would require statutory interpretation, noting that murder, defined as an "unlawful" killing, does not extend to certain military and law enforcement actions.[345] Her second step exemplifies how certain acts may facially seem official, as opposed to personal or political; yet, if the act is not within the President's Article II powers, then the act is not protected since there would be no intrusion into the President's authority.[346]

Justice Barrett further disagreed with the holding that protected conduct could not be introduced as evidence in criminal prosecution.[347] Instead, like the dissent, she would have held that evidence of protected acts may be introduced in proving allegations of corresponding illegal acts.[348] Justice Barrett defended this position by citing the Federal

335. *Id.* at 2337, 2339–40, 2347.

336. *Id.* at 2347–48 (Thomas, J., concurring).

337. *Id.* at 2348–50.

338. *Id.* at 2351; *accord* U.S. CONST. pmbl. ("We the People . . . in Order to form a more perfect Union . . . and secure the Blessings of Liberty, do ordain and establish this Constitution . . . .").

339. *Trump*, 144 S. Ct. at 2352–55 (Barrett, J., concurring in part).

340. *Id.* at 2352.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.* at 2352–53.

345. *Id.*

346. *Id.* at 2353.

347. *Id.* at 2354–55.

348. *Id.*

Rules of Evidence as the proper mechanism to regulate the admission of evidence at trial, and that specific uses can be constitutionally challenged on a case-by-case basis.[349] Justice Barrett forcefully concluded that while an indicted President may challenge the validity of the underlying criminal statute, "[i]f that challenge fails . . . he must stand trial."[350]

Justices Sotomayor, Kagan, and Jackson dissented,[351] and Justice Jackson independently authored an additional dissenting opinion.[352] In their joint dissent, the Justices condemned the majority's holding for shielding the presidency from criminal liability, even in instances of treasonous offenses.[353] The seven-part dissent outlined the myriad actions that the former President took in an unprecedented attempt to hold onto power by undermining and overturning the results of the 2020 election as cited by the prosecution's indictment.[354] The dissenting Justices exposed flaws and fiction in the majority's reasoning to reach that the then-former President retained immunity for criminal conduct.[355] Rather, the dissent felt that constitutional precedent and history do not shield U.S. Presidents from immunity, and in fact support the existence of liability.[356] They claimed that a finding of liability would not intrude on the President's ability to exercise executive authority and conduct constitutional duties.[357] The dissent lamented the majority's creation of an expansive "exclusive sphere" core immunity[358] and the extension of the immunity to private criminal acts committed while in office.[359] Finally, they warned of the serious consequences of applying this new doctrine.[360]

Justice Jackson in her lone dissent then considered the foundational principles underpinning immunity and liability.[361] She cautioned the dangers of a paradigm that yields little accountability of a President's criminal conduct.[362] She worried this paradigm would negatively impact the nation's balance of power between the federal government's three branches and constrain deterrence against abuses of power, potentially resulting in cognizable harm.[363]

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349. *Id.* at 2355.

350. *Id.*

351. *Id.* at 2355–72 (Sotomayor, J., dissenting).

352. *Id.* at 2372–83 (Jackson, J., dissenting).

353. *Id.* at 2355 (Sotomayor, J., dissenting).

354. *Id.* at 2355–56; *see supra* notes 239–46 and accompanying text. *See generally* Indictment, United States v. Trump, 704 F. Supp. 3d 196 (D.D.C. 2023) (No. 23-257), *cert. granted*, 144 S. Ct. 1027 (2024), *vacated and remanded*, 144 S. Ct. 2312 (2024) (providing examples of the actions taken by the President to retain power).

355. *Trump*, 144 S. Ct. at 2356–57 (Sotomayor, J., dissenting).

356. *Id.* at 2357–60.

357. *Id.* at 2360–67.

358. *Id.* at 2367–69.

359. *Id.* at 2369–70.

360. *Id.* at 2370–72.

361. *Id.* at 2372–73 (Jackson, J., dissenting).

362. *Id.* at 2374–78.

363. *Id.* at 2378–83.

b. Aftermath of the Supreme Court Ruling

After the Supreme Court issued its decision, the case was remanded to the U.S. District Court for the District of Columbia to resume the trial proceedings.[364] In response to the decision, Special Counsel Smith issued a new indictment tailored to the Supreme Court's holding.[365] The district court then began scheduling a new timeline of briefs and replies on the issue of immunity to resolve legal questions as a matter of law before trial.[366] However, the issue before the district court never reached trial.[367] On November 4, 2024, President Trump was elected to his second term as President, following his defeat of Vice President Kamala Harris.[368] Following the election, Special Counsel Smith dropped the charges[369] and resigned from his position, more than four years after the events that gave rise to the criminal charges against President Trump.[370] The charges were dismissed without prejudice, which would allow future prosecution on the merits, although the statute of limitations will likely expire before President Trump's second term ends.[371]

Since President Trump's second election, concerns have mounted over his authoritarian rhetoric.[372] After asserting he saved Manhattan by overturning a New York City traffic congestion toll, President Trump declared "long live the king!"[373] The White House social media post containing the quote attributed to the President included an AI-generated magazine cover resembling *Time*, with the title replaced by "Trump," depicting the President wearing a crown.[374] At the 2025 Conservative Political Action Conference, alt-right political activist Jack Posobiec proclaimed that "Trump is not

364. Faulders et al., *supra* note 267.

365. *Id.*

366. *See* Kyle Cheney & Josh Gerstein, *Trump's Federal Election Prosecution Isn't Going to Trial Anytime Soon. But It Could Still Produce Damaging Revelations Before Nov. 5.*, POLITICO (Sep. 5, 2024, at 17:54 ET), https://www.politico.com/news/2024/09/05/trump-federal-election-case-chutkan-schedule-00177619 [https://perma.cc/B5MP-ZLXU].

367. Katherine Faulders, Alexander Mallin & Peter Charalambous, *Trump Election Case Is Tossed After Special Counsel Jack Smith Requests Dismissal Citing 'Categorical DOJ Policy*,*'* ABC NEWS (Nov. 25, 2024, at 16:55 ET), https://abcnews.go.com/US/special-counsel-jack-smith-moves-dismiss-election-interference/story?id=116207758 [https://perma.cc/3A49-YJKM].

368. Jonathan Allen, *Donald Trump Defeats Kamala Harris To Become the Next U.S. President, NBC News Projects*, NBC NEWS (Nov. 6, 2024, at 18:31 ET), https://www.nbcnews.com/politics/2024-election/trump-wins-election-president-harris-defeat-2024-race-rcna176107 [https://perma.cc/UH3J-FRXH].

369. Ryan J. Reilly & Ken Dilanian, *Judge Agrees To Dismiss Donald Trump's 2020 Election Interference Case*, NBC NEWS (Nov. 25, 2024, at 17:00 ET), https://www.nbcnews.com/politics/justice-department/jack-smith-files-drop-jan-6-charges-donald-trump-rcna181667 [https://perma.cc/GXQ3-SFGF].

370. Carrie Johnson, *Special Counsel Jack Smith Says Evidence Against Trump Was Enough To Convict Him*, NPR (Jan. 14, 2025, at 09:40 ET), https://www.npr.org/2025/01/14/g-s1-42358/trump-jack-smith-election-report [https://perma.cc/Q3JC-9E6F].

371. Faulders et al., *supra* note 267.

372. See *infra* notes 373–75 and accompanying text for a discussion of actions since the 2024 presidential election that have given rise to concerns over abuse of the President's constitutional mandate.

373. The White House (@WhiteHouse), X (Feb. 19, 2025, at 14:31 ET), https://x.com/whitehouse/status/1892295984928993698?s=46 [https://perma.cc/D28G-KWCC].

374. *Id.*

violating the Constitution. . . . [He] is the living embodiment of the American Constitution."[375]

c. Trump v. Anderson

This Part discusses the eligibility requirements to run for federal office under Section 3 of the Fourteenth Amendment and its application to immunity from acts the amendment considers disqualifying. While *Trump v. Anderson* is not the focus of this Comment, it is relevant in understanding constitutional liability for treason. The idea behind immunity is to shield the officer from worrying about official acts that are necessary, but may ordinarily render criminal liability in order to do what is necessary for the well-being of the government and its people.[376] However, criminal acts like treason and insurrection are already punishable under the Constitution.[377] In fact, such a provision of the highest law in this land directly abrogates any court from creating, or even finding, such an immunity under the law. Understanding the eligibility of a President under the Fourteenth Amendment will help analyze the events of January 6, 2021, against Sir Blackstone's views of monarchy and the immunity proposed by the Supreme Court to show how heightened immunity goes against the ideals set out by our Founders in trying to differentiate a President from a king or queen.

In September 2023, a group of voters in Colorado (including Republicans) sued the state, claiming that then-former President Trump was ineligible from seeking a second term in office because he violated Section 3 of the Fourteenth Amendment following the events of January 6, 2021.[378] The provision of the Amendment in question, known as the Insurrection Clause, declares:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[379]

The Colorado Supreme Court found that President Trump violated this provision.[380] In the U.S. Supreme Court's words, the Colorado high court held that "the former President . . . after taking the Presidential oath in 2017 . . . intentionally incited the breaching of the Capitol on January 6 in order to retain power."[381] Therefore, the

375. RIGHT WING WATCH, *Jack Posobiec Says Trump Is the 'Living Embodiment of the American Constitution,'* at 00:00–00:13 (YouTube Feb. 21, 2025), https://www.youtube.com/watch?v=1A0S6jQelig (on file with the Temple Law Review).

376. See *supra* Part II.B for a discussion of the balancing concerns of immunity and national well-being.

377. U.S. CONST. art. III, § 3, cl. 1; *id.* amend. XIV, § 3.

378. Trump v. Anderson, 144 S. Ct. 662, 664–65 (2024). See *supra* Part II.C.1 for a detailed description of the events on January 6.

379. *Anderson*, 144 S. Ct. at 665 (quoting U.S. CONST. amend. XIV, § 3).

380. *Id.* at 664.

381. *Id.* at 665.

Colorado Supreme Court determined that President Trump was ineligible to seek a second term and appear on the state's primary election ballot.[382] The Colorado Supreme Court ordered the President's exclusion from the ballot, which the Supreme Court of the United States ultimately reversed.[383]

The Court determined that the Constitution reserves the ability to enforce the provision to Congress, not the states.[384] This disqualified Colorado's judiciary, or any other branch of state government, from excluding President Trump from the ballot.[385] Inherent in this decision was the determination that the provision is not self-effectuating—rather, Congress must pass legislation to activate the Insurrection Clause.[386] The Court reasoned that the clause, which was passed after the Civil War, was originally intended to "expand[] federal power at the expense of state autonomy" so as to prevent states from "depriv[ing] any person of life, liberty, or property, without due process of law."[387] Further, Section 5 of the Fourteenth Amendment confers on Congress with the power to enforce the Fourteenth Amendment "by appropriate legislation."[388] According to the Court, this means that only Congress may enforce this provision, and that it must pass legislation to enforce it.[389] Without an act of Congress, the Fourteenth Amendment's Insurrection Clause cannot be imposed on a potential violator.[390]

The Court did concede differences between Section 3, which severely penalized officeholders, and other sections of the Amendment, which "grant[ed] rights to all."[391] The Section at issue here was designed to protect the federal government by keeping out former Confederate officers.[392] Despite the severity of the consequences of allowing Confederates to regain power, the Section was not deemed to be automatic.[393] Senator Lyman Trumbull remarked that after the Civil War, "hundreds of men [were] holding office in violation" of Section 5.[394] This was because the amendment "provide[d] no means for enforc[ement]," and instead requiring Congress to pass a "bill to give effect to the fundamental law embraced in the Constitution."[395] Later, Senator Trumbull helped pass the Enforcement Act of 1870 "pursuant to the power conferred by [Section] 5 of the [Fourteenth] Amendment."[396]

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382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. *See id.*

387. *Id.* at 666 (second alteration in original) (quoting U.S. CONST. amend. XIV, § 1).

388. *Id.* (quoting U.S. CONST. amend. XIV, § 5).

389. *Id.* at 667.

390. *Id.* at 666.

391. *Id.*

392. *Id.*

393. *See id.*

394. *Id.* at 667 (alteration in original) (internal quotation mark omitted) (quoting CONG. GLOBE, 41st Cong., 1st Sess. 626 (1869) (statement of Sen. Trumbull)).

395. *Id.* (first alteration in original) (quoting CONG. GLOBE, 41st Cong., 1st Sess. 626 (1869) (statement of Sen. Trumbull)).

396. *Id.* (alteration in original) (quoting Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 385 (1982)).

After explaining that the States do not have the right to enforce the Amendment as a matter of federalism,[397] the Court rejected the delegation of power to the States in this context as a matter of the Elections and Electors Clauses.[398] The Court omitted other provisions of the Constitution that mention the States' roles, responsibilities, or prohibitions in federal elections, such as the Twelfth Amendment,[399] the Fifteenth Amendment,[400] and the Nineteenth Amendment.[401] It did note that Section 3 permits Congress to "remove" a Section 3 "disability."[402] Section 3 does not mention how the disability is enforced, and the Court provided no explanation other than turning to Congress's broad Section 5 powers to enforce the entire Amendment.[403] The Court further reasoned that "a lack of historical precedent" of state enforcement weakened Colorado's argument, but the Court did not mention whether this same argument would apply to a state enforcing a law if it was deemed automatic.[404]

The Court also noted important statutes, both those enacted following the Civil War and one still in force today.[405] Sections 14 and 15 of the Enforcement Act of 1870,[406] which Congress has since repealed,[407] criminalized holding or attempting to hold federal office in violation of Section 3 of the Fourteenth Amendment.[408] Congress also passed the Confiscation Act of 1862 before ratifying the Fourteenth Amendment, which criminalized acts of insurrection or incitement thereof, and disqualified anyone convicted of such crimes from ever holding an office of the United States.[409] The successor of this law is still in effect.[410] The caveat with the current law is that in order to be disqualified, the perpetrator must first be convicted.[411] This would make it seem likely that a trial in

397. *See id.* at 667–68.

398. *Id.* at 668–71; *see also id.* at 675 n.1 ("[T]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." (quoting U.S. CONST. art. I, § 4, cl. 1)); *id.* ("[E]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, who in turn elect the [P]resident." (internal quotation marks omitted) (quoting U.S. CONST. art. II, § 1, cl. 2)).

399. U.S. CONST. amend. XII ("The Electors shall meet in their respective states and vote by ballot for President.").

400. *Id.* amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

401. *Id.* amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

402. *Anderson*, 144 S. Ct. at 668 (quoting U.S. CONST. amend. XIV, § 3).

403. U.S. CONST. amend. XIV, § 3; *Anderson*, 144 S. Ct. at 668–69.

404. *Anderson*, 144 S. Ct. at 669.

405. *Id.* at 669–70.

406. Enforcement Act of 1870, ch. 114, §§ 14–15, 16 Stat. 140, 143–44 (codified at Rev. Stat. §§ 1786–87 (1874) and 5 U.S.C. § 14a (1925) (repealed)).

407. Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL RTS. J. 153, 206 n.365 (2021).

408. *Anderson*, 144 S. Ct. at 669–70.

409. Confiscation Act of 1862, ch. 195, §§ 2–3, 12 Stat. 589, 590.

410. *See* 18 U.S.C. § 2383 ("Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.").

411. *Id.*

Trump v. United States would have been prudent, if not necessary, in order for Congress and the federal courts to consider President Trump's lack of qualification to seek reelection.

"It is not your duty to complete the work, but neither are you free to desist from it."[412]

III. DISCUSSION

Based on the common-law origins of a monarch's royal prerogative and the intention of the Framers in distinguishing the President from a king or queen, it is clear that American Presidents were only meant to be afforded a limited degree of immunity for their official acts.[413] They were not intended to be immune for crimes, constitutional violations, or acts against the nation's security and its people's peace.[414] Because President Trump's conduct following the 2020 election constituted each of these, the *Trump* Court afforded him too much immunity. This, in turn, counsels in favor of advocating that the Court revisit not only its decision in *Trump*, but its presidential immunity jurisprudence more broadly. In doing so, the Court should look to prevailing understandings of executive immunity and the sovereign's prerogative in the pre-Founding common law, as well as to how the Court's earlier decisions developed the doctrine throughout the nineteenth and twentieth centuries. From there, the Court can begin to reshape its jurisprudence.

The Framers of the Constitution undoubtedly concerned themselves with monarchical power when debating, drafting, and ratifying the nation's cornerstone legal text.[415] It was pivotal to ensure that, following the Articles of Confederation, the chief executive would have enough power to effectively govern, but not so much that the officer's power would go unchecked, lest the executive become king-like.[416] While some scholars debate the degree to which Sir Blackstone directly influenced the Framers,[417] the Framers were aware of his *Commentaries* and aspects of both the breadth and limits of the royal sovereign's powers influenced their constitutional views.[418] For this reason, the Court should rely on Sir Blackstone's views on the legal customs regarding a royal sovereign's prerogative in determining both the maximum immunity and the minimum liability for a President.

If a threshold of immunity is higher than a monarch would have, no President should have it. If a bar for liability is so low a monarch would have been found liable, or

412. Matt Derrenbacher, *Torah, Ubuntu, and Tikkun Olam*, JEWISH CMTY. OF LOUISVILLE (July 24, 2025), https://jewishlouisville.org/word-of-the-month-torah-ubuntu-and-tikkun-olam/ [https://perma.cc/X55K-AXUC] (quoting *Pirkei Avot* [*Ethics of Our Ancestors*] 2:16).

413. See *supra* Part II.A for a discussion of Sir Blackstone and Hamilton's views on the King and President's powers, respectively.

414. See *supra* Part II.A for a discussion of the King and President's limits of power.

415. See *supra* Part II.A.2 for a discussion of how to limit the presidency with respect to the powers of monarchs.

416. See *supra* Parts II.A, II.A.2 for a discussion of where to draw the line in fashioning a usefully powerful, but not unchecked, President.

417. *See* Shugerman, *supra* note 24, at 129–30; Minot, *supra* note 17, at 1362.

418. See *supra* Part II.A.2 for the acknowledgement of England's governing system by the Founders. *See* Birk, *supra* note 11, at 183.

if a monarch would have been liable if not for their divine right, then a President should be vulnerable and accountable to the same liability and redress, because if a monarch is subservient to the law in some regard, then so the President must be. Otherwise, the United States runs the risk of allowing tyranny to conquer our rule of law. As the *Lee* Court admonished, allowing a President to wrong citizens without redress would "sanction[] a tyranny" unthinkable even under Europe's monarchies.[419]

The Court then needs to consider and formulate a new way to examine what a President may do in the height of their power, or at minimum, when to restrict immunity. Even Sir Blackstone found limits on a royal sovereign's immunity both in private matters that harmed citizens and in exercising duties that oppressed the public.[420] Since President Trump's actions harmed citizens,[421] he should be held accountable—not immune—and suits should be able to be brought against a President for both civil and criminal matters. Therefore, President Trump should be liable for the events that followed the 2020 election.

The alleged acts committed on January 6, 2021, by supporters of President Trump, are criminal in nature based on the claims in the indictment.[422] In addition to the charges being criminal, they specifically relate to violence perpetrated in the halls of Congress, and violence was threatened against members of our federal legislature.[423] Sir Blackstone unequivocally declared that "to assault by violence a member of either house [of parliament], or his menial servant, is a high contempt of parliament, and there punished with the utmost severity."[424] Further, his actions, as well as the actions of his supporters, were *contra pacem*—against the peace—a notion that, as Sir Blackstone described, would not afford criminal immunity to members of Parliament.[425] Sir Blackstone also noted exceptions to privilege were provided for conviction of "indictable crimes" or for "treason, felony, and breach . . . of the peace."[426] It seems likely therefore that under Sir Blackstone's doctrine, even to the extent the President has some degree of immunity, this shield would not protect a nation's nondivine leader from perpetrating violence against Congress or any acts that go against the peace of the nation.[427] It would therefore be shortsighted to think our Founders would have expected anything less than holding that leader accountable, no matter how unthinkable the conduct may be.

The crimes alleged against President Trump constituted "treason, felony, and breach . . . of the peace."[428] Attempting to intentionally and falsely overturn the

419. United States v. Lee, 106 U.S. 196, 220–21 (1882).

420. See *supra* notes 51–94 and accompanying text for a discussion of Sir Blackstone's description of immunities.

421. See *supra* Part II.C.1 for a discussion of President Trump's harmful actions leading up to and following the 2020 election.

422. *See generally* Indictment, United States v. Trump, 704 F. Supp. 3d 196 (D.D.C. 2023) (No. 23-257) (charging President Trump with crimes in connection with the January 6 insurrection), *cert. granted*, 144 S. Ct. 1027 (2024), *vacated and remanded*, 144 S. Ct. 2312 (2024).

423. See *supra* Part II.C for a discussion of the events of January 6, 2021, and the charges that followed.

424. 1 WILLIAM BLACKSTONE, COMMENTARIES *165.

425. *Id.* at *166.

426. *Id.*

427. *See id.*

428. *Id.*

legitimate results of the Electoral College,[429] a staple of our republic since the adoption of our Constitution,[430] is without question an act of insurrection against the Constitution of the United States that breached the peace. Meanwhile, his incitement of the violent mob at the Capitol and failure to act to stop it[431] qualifies as treason, criminal felony, and a breach of peace. None of the actions he took were ministerial, because nothing in his constitutional duties or powers prescribed it. Our jurisprudence from *Marbury* to *Nixon v. Fitzgerald* would clearly support this conclusion based on a historical and originalist approach.

While President Trump, as any citizen, should be afforded a trial whereby the government would carry the burden to prove that the acts he committed are consistent with crimes of this nature, that burden of proof and his ordinary defenses should be the only safeguards he has against criminal liability. To claim he enjoys immunity for the most severe acts a person, no less a President, could commit against this nation simply because the acts were ostensibly in the outer perimeter of their powers is no standard to set for the most powerful figure in the nation. It effectively puts the President above the law and sanctions any action taken, even when it involves a direct assault on our nation's own government. This aligns with *Butz* Court's perspective that the judiciary should protect "vigorous exercise" of official duties, while permitting liability when the President acts outside the law.[432] Undermining the integrity of election results, ordering officials to abandon their responsibility to certify the results, and inciting his supporters to overrun the Capitol is clearly outside the law, and not part of the President's exercise of his duties.

At the end of the day, these could be considered among the most severe crimes any person, let alone a government official, could commit against this nation. Not prosecuting the chief perpetrator of this conduct provides carte blanche to future Presidents to act however they please—so long as they are eligible for reelection. Providing this degree of immunity for a President sets a dangerous precedent. Immunity alone is not the issue. Presidents and other officials understandably should not be worried about civil liability for each of the many decisions they make in a day that are necessary to the well-being of the nation.[433] It also seems wise to make sure the President can be fully dedicated to the task at hand, and to avoid clogging both the judicial and executive branch's time with frivolous lawsuits. But just as the President is not free to violate the Constitution in executing official duties,[434] neither should whoever holds the office be able to escape

429. See *supra* Part II.C.2.a for a discussion of the charges brought against President Trump for attempting to overturn the Electoral College.

430. *See* U.S. CONST. art. II, § 1.

431. See *supra* Part II.C.2.a for a discussion of the charges brought against President Trump for inciting insurrection.

432. *See* Butz v. Economou, 438 U.S. 478, 506–07 (1978).

433. See *supra* notes 113, 132, 145, 172, 174–75, and 195 and accompanying text for a discussion of the drawbacks of imposing civil liability.

434. See *supra* notes 156 and 204 and accompanying text for a discussion examining the dimensions of the President's powers and acts that no nation-securing liberty would ever sanction.

judicial review of their criminal conduct that is not essential to the core functions of the office.[435] This was perhaps the biggest error made by the Court in the early 1980s.

The *Nixon v. Fitzgerald* Court cracked opened the door to this idea of carte blanche, a door that the *Trump* Court would later swing wide open. In providing Presidents with absolute immunity from civil damages concerning their "outer perimeter" duties,[436] the *Fitzgerald* Court severely damaged the fabric of executive immunity in the common law. The problem here is not that the Court left a door open, but rather it left the *wrong* door open. The Framer's intended to leave open the door of liability, rather than immunity. This can be established based on the very history and policy glosses that the *Fitzgerald* Court undertook.

As a matter of history, we only need to look to Blackstone, Locke, and the Framers to understand how liability was established under the common law, and how the President was meant to be held more accountable than the Crown.[437] History and tradition are useful to a degree, particularly when determining why the Framers may have been silent on presidential immunity.[438] Courts likewise for over a century hardly contemplated the topic because liability was so rare, and when it did come up, it was minor in scale and resolved both effectively and privately.[439] But neither the Framers nor the twentieth-century courts could have imagined the actions committed by President Trump.[440] In fact, it was the view of some that such action would be wholly inapposite to holding the office, to the point that the formation of immunity jurisprudence has heavily relied on the fact that no such action would be a concern.[441]

Even philosophers like Locke could hardly imagine it.[442] To Locke, the harm a sovereign would commit would be at worst an "inconvenience" and would be offset by the "peace of the public."[443] In President Trump's instance, however, the harm was not minor, and there is no benefit of public peace when it is this exact notion that the President criminally disrupted. As a result, the basic assumption of wrongs a President may be accused of has changed. When the underlying premise of the jurisprudence has

435. See *supra* notes 300–01 and accompanying text for a discussion of Justice Jackson's classification of the President's degrees of authority and the respective degree of immunity described in *Trump*.

436. Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982).

437. *See* Scheuer v. Rhodes, 416 U.S. 232, 240–41 (1974) (discussing immunity grounded in the separation of powers having precedent in English common law), *overruled by*, Davis v. Scherer, 468 U.S. 183 (1984); *Fitzgerald*, 457 U.S. at 748 (discussing the need to look toward pre-Revolutionary practices); Trump v. United States, 144 S. Ct. 2312, 2348–50 (2024) (Thomas, J., concurring) (using history to discuss the lack of justification for the appointment of the Special Counsel).

438. See *supra* Part II.B.1 for a discussion of the silence of presidential immunity in Article II of the Constitution.

439. *See* Clinton v. Jones, 520 U.S. 681, 692 (1997) (discussing civil complaints against President Theodore Roosevelt, President Harry S. Truman, and President John F. Kennedy).

440. See *supra* notes 68–87 and accompanying text for a discussion of Locke's lack of concern that a President would do harm to the People. See *supra* notes 196–201 for a discussion of the *Nixon v. Fitzgerald* Court assuring that the nature of the office would restrain a President and that misconduct would not go without remedy.

441. *Id.*

442. See *supra* notes 68–87 and accompanying text for a discussion of Locke's lack of concern that a President would do harm to the People.

443. LOCKE, *supra* note 68, §§ 205, 209.

changed, so too should one reconsider how to apply it. To do so, it would be wise to look back to the nation's history to see if what happened today would have been contemplated then, how would the outcome have changed, and what caveats may have been set?

Marbury enshrined the perspective of the Founding Generation in not constitutionalizing immunity for sitting Presidents.[444] In the dawn of this nation's independent, democratic government, the Supreme Court opined that "every right, when withheld, must have a remedy, and every injury its proper redress," suggesting the immunity, if it exists at all, should be rather limited.[445] The Court directly recognized the importance of Sir Blackstone's doctrines.[446] The tenet that each redress should be afforded a remedy provides direct support against the judicial creation of immunity for officials, except when the need is high and the harm is low. While this Comment does not argue for the adoption of such an extreme view, it does pose the question of what scenarios warrant the abridgement of this tenet: When is it appropriate to limit redress for injuries? There are many justifications, but this Comment herein argues that committing the most severe harms against this nation, its Congress, and the security of its democratic government should not be among them.

One of Sir Blackstone's underlying reasons for the sovereign's prerogative was that the judiciary did not have jurisdiction to review the sovereign's actions.[447] This doctrine however has long been undermined by our nation's standard of judicial review from *Marbury* to *Youngstown*.[448] It is clear that in establishing a nondivine executive with lesser power than a monarch, our nation has affirmed time and again that the President, unlike a king or queen, is subject to the laws of the nation and review by its courts.[449] It seems equally sensible that, like Sir Blackstone discussed regarding members of Parliament who took an oath of office, the President should have clear exceptions to privilege for acts that could constitute treason, felony, or breach of the public's peace,[450] given that Framers like Hamilton directly intended for the President to be distinguished from a monarch and to be liable to prosecution.[451] Therefore, shielding the President from judicial review for criminal and civil liability in the wake of an attempted insurrection aligns more with the Crown's prerogative than Article III checks and balances.[452]

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444. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (recording perspectives on redress for actions Presidents take in violation of their mandate just shortly after the founding).

445. *Id.* at 147, 163 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *109); Amar & Katyal, *supra* note 62, at 707.

446. *Marbury*, 5 U.S. (1 Cranch) at 147, 163.

447. 1 WILLIAM BLACKSTONE, COMMENTARIES *242.

448. *See generally Marbury*, 5 U.S. (1 Cranch) 137 (establishing judicial review); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (exercising judicial review to determine the constitutionality of the President's official actions).

449. *Compare supra* Part II.A.1 (discussing the divine nature and broad power of monarchs), *with supra* Part II.A.2 (discussing how the President ought not be unlimited in power and thereby differentiated from a British monarch), *and supra* Part II.B (evaluating cases from the nineteenth and twentieth centuries advising that a president should not have total immunity from all actions).

450. 1 WILLIAM BLACKSTONE, COMMENTARIES *166.

451. THE FEDERALIST NO. 69, *supra* note 105 ("The President of the United States would be . . . liable to prosecution and punishment in the ordinary course of law.").

452. *See* United States v. Nixon, 418 U.S. 683, 707 (1974).

Locke also gave an important basis for limiting a President's immunity. First, Locke provided that not even royal sovereigns can compel a person, whether a citizen or a subordinate officer, to violate the law.[453] Any royal sovereign who did so would in theory be subject to legal liability, even if the act would otherwise be subject to immunity.[454] Logically, if a royal sovereign should have this limitation, then it seems our Framers would have contemplated the President would fall well within this boundary as well.[455] Therefore, in instructing Vice President Pence to deny the electoral vote count and in inciting his supporters to attack the Capitol, President Trump, according to Locke, would be criminally liable and would not enjoy immunity.

Of course, where redress is not commonly available judicially due to the rarity or unpredictability of certain crimes, Sir Blackstone provided a solution.[456] He advised that in unprecedented situations like these, legal precedent is no guide to follow.[457] Rather, each generation must answer the question for itself, ignoring history but adhering to its values when the time calls for it.[458] Because President Trump violated the public's trust and disturbed the public's peace by inciting a violent insurrection,[459] the Court should not entirely rely on precedent or history because neither could the Framers and their predecessors who embodied our principles of law,[460] nor could the legislators who enacted and ratified the Fourteenth Amendment,[461] could have imagined President Trump's conduct.

This lack of foresight is once again exemplified by the *Nixon v. Fitzgerald* Court. That Court chartered a new and dangerous path when it fashioned a doctrine more or less premised on the fact that a President is unlikely to do no wrong because of safeguards our nation has on place.[462] This rule is only as valuable as the endurance of its reassurances. These reassurances have dissipated because the safeguards that underpin them have failed the American people. Impeachment, public scrutiny, and prestige for the stature of the presidency have all proven unreliable. A President can now incite attacks against the federal government, violating their oath to office, and still be eligible to be elected to this nation's highest office. The Supreme Court's most vital promise to our democracy, that the President is not above the law, rings hollow. Because the foundation of the Court's reasoning has crumbled, we now have a rule without any

453. LOCKE, *supra* note 68, § 206.

454. *Id.*

455. See *supra* Part II.A.2 for a discussion addressing Hamilton's acknowledgement of the lines between a monarch and President, and how the President would be held more accountable.

456. 1 WILLIAM BLACKSTONE, COMMENTARIES *245.

457. *Id.*

458. *Id.*

459. *Compare id.* at *266 (addressing limits on immunity for "treason, felony, and breach (or surety) of the peace"), *with supra* Part II.C.1 (recounting the events of January 6, 2021, that could plausibly constitute treason, felony, and breach of the peace).

460. *See* LOCKE, *supra* note 68, § 205 (doubting whether a king, no less a President, could have enough power and be ill-natured enough to "oppress the body of the people"); *id.* at 209 (claiming that almost every executive is wont to show parental love to their constituents).

461. See *supra* Part II.C.2.c for a discussion addressing the limits on applying and implementing the Insurrection Clause to disqualify presidential candidates.

462. Nixon v. Fitzgerald, 457 U.S. 731, 757–58 (1982).

supporting foundation. Therefore, the Court must find refuge in new, more sound doctrine.

Going forward, the Court should consider how to address a situation like this in a manner *not* based on precedent or history alone, but rather on "the prudence of the times."[463] The Court's power to forge its own basis for limiting immunity, based on exigencies that were unforeseeable to our Founders or any previous generation, is the "inherent, though latent" power and no political environment or rule of law "can ever destroy or diminish" it.[464] It is an approach rooted in our history that allows us to not exclusively rely on our history.

In refining its jurisprudence, it will not be possible for the Court to discern a one-size fits all solution. From Sir Blackstone and Locke to Justice Robert H. Jackson, jurists have reaffirmed understanding what past generations would have done, and what will benefit future generations, is an arduous and often unrewarding task. Rather, it is incumbent upon each generation to continue molding the clay in a way that serves our contemporary needs. It is not our job to rebuild the doctrine all at once, but we must take up the responsibility to begin. In fact, each generation must reassess our immunity doctrine not despite adhering to history and tradition, but because this was a key feature immunity doctrine from the outset to check against tyranny.

Ultimately, when solving new and unforeseen crises, the courts should use their judicial acumen and discretion to select good customs to follow.[465] The value of good customs, after all, is one of several reasons the American judiciary places immense value on stare decisis.[466] Justices and judges should be comfortable however in acknowledging when the jurisprudence is wrong or inadequate, and they should find solace in correcting bad customs by discarding them for better ones. The Court should do the same here.

While our standards for keeping legal customs are looser than Sir Blackstone suggested,[467] this does not mean we should refrain from getting rid of longtime bad customs nor refrain from adopting newer good ones.[468] Given that kings and queens had prerogative in any matter so long as they did not injure their subject,[469] it would seem sensible in a nation where we attempted to give our President less power than monarchs[470] that we would hold our executive at minimum to the same, if not a higher,

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463. 1 WILLIAM BLACKSTONE, COMMENTARIES *245.

464. *Id.*

465. *See generally* BLACKSTONE, COOLEY ED., *supra* note 29, at *73, *76–78 (discussing, inter alia, the length, continuity, unanimity, reasonability, certainty, enforceability and compliance, and conformity of the custom).

466. *Contrast supra* notes 116–24, 181–82 and accompanying text (emphasizing the value of precedent and history), *with supra* notes 188–91 and accompanying text (advising to balance these customs with the general welfare).

467. BLACKSTONE, COOLEY ED., *supra* note 29, at *76.

468. *Id.* Where, unlike as Sir Blackstone suggested, we are not unable to remember the origins of some of our common-law legal precedent, particularly for presidential immunity, the ability to remember a custom does not per se make it bad and the inability to remember its origins does not make it good. Similarly, where our precedent in dictating the holding of *Trump v. United States* has not been adopted without dispute and to some degree contradicts our custom that the President is not above the law, we should consider more appropriate customs for immunity.

469. 1 WILLIAM BLACKSTONE, COMMENTARIES *245.

470. THE FEDERALIST NO. 69, *supra* note 105.

standard as a monarch. The Court should return to a more reassuring doctrine, one that actually functions as a safeguard for American democracy. The slight burden that may be imposed on Presidents by allowing exposure to liability for outer perimeter acts and core powers the flagrantly violate the Constitution is at most a minor inconvenience on the executive that will be worth the price for protecting the peace of the public.[471] There should be no hesitation to consider a President's culpability when they abuse their power to perpetuate criminal conduct and violate the Constitution with impunity.[472] President Trump's actions, and the actions of others incited by him, harmed citizens.[473] The events of January 6, 2021, resulted in five deaths, hundreds of injuries, and immense property damage.[474] As a result, a new custom must be set: commit such treasonous felonies in the breach of our peace, and immunity will not shield you from prosecution and liability.

"Even the darkest night will end and the sun will rise."[475]

IV. CONCLUSION

The Framers made clear that no President should be above the law. No person or law is superior to the Constitution of the United States, and it is the law that makes a President. President Trump intentionally misinformed the public about the 2020 election results, claiming they were fraudulent. He also solicited government officials to subvert their constitutional duties in upholding the results and reverse the Electoral College. This intentional misinformation and failed solicitations proximately caused his supporters to violently attack the Capitol and government officials within, and he then refused to call off the mob that was committing acts of political violence in the President's name. This conduct is criminal in nature and directly subverts the law of the Constitution in aiding a rebellion. As a result, President Trump should not have enjoyed presumptive immunity for noncore actions, and the courts should have provided the opportunity to try the former President so that Congress could determine whether he was ineligible as a matter of law to seek election for violating his oath of office and the Fourteenth Amendment. Yet, the Court has blessed the President with an undemocratic veil of immunity. This has cloaked the nation in darkness because it has taken us away from the light of democracy down a path toward tyranny.

Going forward, the Court must do two simple things: (1) no longer assume automatically that every action taken by a President is taken in good faith, and (2) acknowledge that when the actions taken in dispute involve violence or directly attack our government, as they did here in a physical manner, that the Founders would never have envisioned a presumptive veil of immunity. When the President incites or enables political violence and assaults on our government, and does not act in good faith, the

471. *See* LOCKE, *supra* note 68, §§ 205, 209.

472. *See* Butz v. Economou, 438 U.S. 478, 505–06 (1978).

473. See *supra* Part II.C for a discussion of President Trump's harmful conduct.

474. Lonsdorf et al., *supra* note 228; Barry & Frenkel, *supra* note 238; Rubin et al., *supra* note 240; Hill et al., *supra* note 245.

475. HERBERT KRETZMER, *Finale "Les Miserables," on* Les Misérables (Original Broadway Cast Recording), at 03:17–03:24 (UMG Recordings, Inc. May 11, 1987).

People should not be without remedy, as even Sir Blackstone may have envisioned a people's right to take corrective action. Going forward, the courts must hold all future Presidents liable for any actions that subvert the Constitution and threaten the fabric of our provenly fragile republic. Only then can we return to the path of democracy and ensure that no person, and certainly no President, is above the law.