Moreover, the court below was right to emphasize the "implausibility" of any reading of the Clause that would "prohibit the Executive Branch from prosecuting current and former civil officers for crimes committed while in office, unless the Congress first impeached and convicted them." Appl. App. 48a.

As an initial matter, many of the Constitution's framers and ratifiers assumed that officers could be subject to prosecution—regardless of whether they had been impeached. For example, James Iredell opined that officers could be "tried by a court of common law . . . for common-law offenses, *whether impeached or not*." 4 *Elliot's Debates* 36-37 (James Iredell) (emphasis added). During ratification debates in North Carolina, James Iredell addressed Joseph Taylor's concern that impeachment would be impractical for citizens seeking "redress" against malfeasant federal officers by noting that Taylor would have a point "if there were no other mode of punishing," but that an officer could always be tried at common law. *Id.* Archibald Maclaine agreed, reassuring Taylor that officers could be "tried and indicted" in common law courts, "[n]otwithstanding the mode pointed out for impeaching and trying." *Id.* at 45; *id.* (adding that "no offender can escape the danger of punishment").



Furthermore, the "indictment of sitting judges was accepted as proper both before the adoption of the Constitution and in the decades following its

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Nixon, Jr., Judge of the United States District Court for the Southern District of Mississippi, for high crimes and misdemeanors after he was previously prosecuted and convicted); H. Res. 499, 100th Cong., 2d Sess. (1988) (impeaching Alcee L. Hastings, Judge of the United States District Court for the Southern District of Florida, for high crimes and misdemeanors after he was previously prosecuted and acquitted).

ratification," *see* Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 Hastings Con. L.Q. 7, 25-26 (1992) (describing proceedings against judges in Virginia, Pennsylvania, and eighteenth-century England); Burbank, *supra*, at 672 ("criminal proceedings were not a threat to judicial independence unknown to the framers"), even when those judges were not first convicted via impeachment. For example, in 1796, Attorney General Charles Lee, opining on the "oppressions" caused by Judge George Turner of the Northwest Territory, told members of the House of Representatives that federal judges "may be prosecuted . . . by indictment before an ordinary court, or by impeachment before the Senate of the United States," and recommended that Judge Turner be indicted rather than impeached, given the "difficulty" and "expense" posed by bringing witnesses to the Senate. *See* Letter of May 9, 1796, *in* 1 *American State Papers (Misc.)* 151.

In the years that followed, prosecutors have continued to levy charges against sitting judges even though they have not been convicted via impeachment. *See* Berger, *supra*, at 317 n.9 (noting the opinion of then-Assistant Attorney General William Rehnquist regarding the prosecution of Abe Fortas); *see generally* Gerhardt, *supra*, at 87-91; *United States v. Claiborne*, 727 F.2d 842, 846 (9th Cir. 1984) (rejecting Judge Claiborne's argument for immunity based on Impeachment Judgment Clause and collecting cases). And courts have also permitted the indictment of federal officers even though they were not first impeached. *See, e.g.*, Anthony Ripley, *Kleindienst Admits Misdemeanor Guilt*, N.Y. Times, May 17, 1974, at 1, 24, https://www.nytimes.com/1974/05/17/archives/kleindienst-admits-misdemeanor-guilt-accused-of-

keeping-data-from.html (describing indictment of former Attorney General for allegations involving his tenure as Deputy Attorney General, and noting indictments of former officers Harry M. Daugherty and John N. Mitchell for actions taken in office); Appl. App. 49a n.12 ("history reveals examples of prosecutions preceding impeachment").

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As the framers and ratifiers of our Constitution recognized, no man is "above the laws," *Clinton*, 520 U.S. at 696 (quoting James Wilson), nor "better than his fellow-citizens," 4 *Elliot's Debates* 109 (James Iredell). Even the president, therefore, is "punishable by the laws of his country." *Id.* This Court should reject the former president's arguments to the contrary.

## CONCLUSION

For the foregoing reasons, this Court should deny the application for a stay.

Respectfully submitted,

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