No. 23-939

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICI CURIAE* OF CLAIRE FINKELSTEIN AND FOURTEEN NATIONAL SECURITY PROFESSIONALS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI

Amici are national security and military experts signing this brief in their individual capacities.[1] Amici are listed in the Appendix.

Amici are filing this brief to address the vital national security interests that may be impacted by the Court's decision in this case. As national security experts, amici have an interest in ensuring that the Court recognizes the import of presidential accountability for the integrity of the chain of the command of the U.S. military.

SUMMARY OF ARGUMENT

Petitioner argues that as former President of the United States, he is immune to all criminal charges, even after leaving office. Brief of Petitioner President Donald J. Trump at 10, United States v. Trump, 91 F.4th 1173 (D.C. Cir. 2024) (No.23-3228), *cert. granted*, No. 23-939 (U.S. Feb. 28, 2024) ("Brief of Petitioner"). He asks this Court to embrace a theory of presidential authority, according to which no prosecutor or court can hold a former president accountable for either private or official capacity crimes committed while he is in office, and he claims this blanket immunity should endure permanently, including after a president has left office. As national

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

security professionals and military experts, amici argue that Petitioner's broad view of immunity would imperil U.S. national security, weaken the authority of the President, and throw confusion into the chain of command of the armed forces, which the President, as Commander-in-Chief, commands. This Court must unequivocally reject the proposed doctrine of presidential immunity and leave no doubt in the minds of Petitioner, the public, and all future occupants of the Oval Office that the President, like all individuals subject to the reach of the U.S. legal system, is not above the law.

Of particular concern is the potential adverse impact of presidential immunity on the principle of military obedience to civil authority, the foundation for our civil-military relations since the inception of the Republic. Allowing a president to issue orders requiring subordinates to commit criminal acts or omissions would wreak havoc on the military chain of command and result in an erosion of confidence in the legality of presidential orders. It would also create the potential for disparate interpretations of the duty to obey orders, thereby risking military discipline. While the duty of obedience does not extend to patently illegal orders, an order issued by the President himself would exert a powerful gravitational pull and thus even if of dubious legality would create uncertainty in the ranks. Holding everyone in the chain of command, including the President, to the same principles of accountability under the criminal laws of the United States is essential for assuring the legality of military orders and for providing the reassurance for all levels of the chain of command of that legality.

Amici also unequivocally urge this Court to reject any doctrine of qualified immunity for which Petitioner may now be arguing in his brief to the Court. Any form of immunity doctrine is both unnecessary to protect the interests of the presidency and ultimately dangerous for U.S. national security. This Court should reject Petitioner's theory of absolute criminal immunity and should resist any temptation to adopt a weaker version of this same doctrine in the form of a qualified immunity doctrine.

ARGUMENT

I. *Why the Principle that "No Person is Above the Law" is the Bedrock of U.S. National Security*

To protect against enemies, both foreign and domestic, the Framers of the U.S. Constitution imbued the office of the presidency with extraordinary powers. Important among these is the President's role as Commander-in-Chief of the armed forces and state militias when called into federal service. U.S. Const. Art. II, § 2, cl.1. As this Court has recognized, it is the rare case in which it would be appropriate for the judiciary to interfere with exercises of Commander-in-Chief authority. This Court has rightly adopted a broad attitude of deference towards executive branch action in matters of war powers. However, when that authority is turned "inward" and exercised toward domestic ends, federal courts have been more than willing to reject the legality of presidential action. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644-45 (1952) (Jackson, J., concurring).

The U.S. Constitution establishes two primary safeguards to protect against the risk of a runaway presidency. First, a president cannot continue in office without being reelected. Second, the Constitution provides that a president may be removed from office by a vote to impeach in the House and a two-thirds vote to convict in the Senate.

Yet these two safeguards are not sufficient to protect the country from the risk of dictatorship, since a truly corrupt president might attempt to commit crimes to manipulate the vote as well as to deprive the impeachment process of effect. *See* Claire O. Finkelstein & Richard W. Painter, *Presidential Accountability and the Rule of Law: Can the President Claim Immunity if He Shoots Someone on Fifth Avenue?*, 24 U. PA. J. CONST. L. 93, 105 (2022). This suggests that the basic principle that the President must comply with the law, on pain of criminal sanctions following conviction for an alleged offense, is an even more fundamental check on the presidency than either the vote or impeachment, since it serves as the protection for those two constitutional safeguards. Put otherwise, the principle that *no person is above the law* serves as the ultimate protector of U.S. democracy, since it underpins the constitutional safeguards against destruction of the Republic by authoritarian forces within. The concept of immunity is antithetical to that critical principle. And while the Constitution bestows a limited immunity from criminal prosecution on members of Congress in the Speech and Debate

Clause, U.S. Const., Art. I, § 6, it nowhere restricts the power of Congress to enact federal criminal statutes binding on the executive branch, including the President.

On at least four occasions justices of this Court have articulated the critical principle that *no person, including the President, is above the law*. The first time was in 1807 in the case of *United States v. Burr*, 25 F. Cas. 30, 34 (C.C. Va. 1807) (No. 14,692d) (Marshall, C.J.), in which Chief Justice Marshall held that President Jefferson was amenable to criminal subpoena issued in the treason trial of his former Vice President, Aaron Burr. The second time was in 1974, at the height of the Watergate crisis, where this Court said that President Nixon must comply with a prosecutor's subpoena of White House tape recordings. *United States v. Nixon*, 418 U.S. 683, 713 (1974). The third time was in 1997, where this Court held that the President is amenable to civil suit for personal conduct involving sexual harassment while the President previously held a state office. *Clinton v. Jones*, 520 U.S. 681, 705-706 (1997). The fourth time was in *Trump v. Vance*, 140 S. Ct. 2412, 2431(2020), in which this Court held that a New York State grand jury was entitled to subpoena a third party accounting firm regarding the President's personal financial records as part of a criminal investigation into possible crimes.

The current case, however, presents an issue never previously before this Court because, as Petitioner points out, no president before Petitioner

has ever been criminally prosecuted for official acts allegedly committed in office. Brief of Petitioner, at 3. The question is whether this Court will decide the matter of criminal indictment of a former president for official capacity crimes in the same way it has decided the foregoing four immunity cases, or whether it will analogize a criminal indictment to civil suits against a former president for actions within the "outer perimeter" of a president's official duties. *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982) (holding that a former president has absolute immunity from civil suits for official acts).

A footnote in *Nixon v. Fitzgerald* emphasizes the distinction between civil actions seeking to impose liability for official capacity acts and the question confronted here, namely presidential amenability to criminal liability for official capacity acts. The footnote points out that there is a greater public interest in prosecuting crimes than in allowing an individual plaintiff to sue for damages: "The Court has recognized before that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions." 457 U.S. 731, 754 n37, citing *United States v. Gillock*, 445 U.S. 360, 371-373 (1980) and *United States v. Nixon*, 418 U.S. at 711-712, 712 n.19.

The distinction between criminal and civil enforcement is also highly relevant for defending U.S. national security interests. Rarely if ever would a national security interest be protected by a private lawsuit for money damages. But national security

interests demand that federal officials remain equally accountable to public assertions of prohibitory norms. Making a former president immune from criminal prosecution could make the presidency itself a profound threat to national security, as it would permit a president to use the great power of the office to further personal interests, such as securing reelection or attempting to avoid accountability for criminal abuse of power. As national security professionals, we emphatically reject the sweeping proposition that all U.S. presidents enjoy legal immunity from criminal prosecution to the "outer perimeter" of their official duties. It is no exaggeration to say that this proposition is potentially the most dangerous that has ever been advanced in a court of law by any U.S. official. Indeed, it is a proposition that would convert the presidency from the greatest protector of the nation to its single greatest threat. It is also a profoundly unethical proposal. To establish the President as singularly unfettered by the same generally applicable criminal laws that apply to every other member of society erects an example of lawlessness among the nation's highest officials. Such lawlessness erodes rule of law values where such values are most needed.

That the President of the United States is subject to the law is clear from the Constitution itself. The Supremacy Clause of the U.S. Constitution, Art. VI, cl. 2 provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land," thus making clear that it is the law, not the President, that

is supreme. The Take Care Clause of Article II of the Constitution also imposes upon the President the obligation to ensure that the laws of the United States are enforced. U.S. Const. Art. II, § 3, cl. 5 (the President "shall take Care that the Laws be faithfully executed").

The constitutional supremacy of the law, not the President or any other person, is consistent with the intent of the Framers. As James Iredell explained in his speech to the North Carolina convention ratifying the Constitution, it was not necessary for the United States to have a privy council imposing constraints on the exercise of presidential power, as it was to constrain the King in Great Britain. Unlike the King, the President is not above the law:

> Under our Constitution we are much happier . . .. No man has an authority to injure another with impunity. No man is better than his fellow-citizens, nor can pretend to any superiority over the meanest man in the country. If the President does a single act by which the people are prejudiced, he is punishable himself, and no other man merely to screen him. If he commits any misdemeanor in office, he is impeachable, removable from office, and incapacitated to hold any office of honor, trust, or profit. *If he commits any crime, he is punishable by the laws of his country, and in capital cases may be deprived of his life*. This being the case, there is not the same

> reason here for having a council which exists in England.

Speech by James Iredell at the North Carolina Ratifying Convention 28 July 1788, *in* The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, 4:108–10 (Elliot, Jonathan ed. 1888)

Petitioner presents this Court with a very different vision, according to which the President is immune from all criminal laws enacted by Congress, and therefore no court can constrain the President or impose accountability on him for acts or omissions that violate federal criminal law. *See* Petitioner's Brief, at 20.

Petitioner's bid for presidential immunity is not only an unprecedented assertion of presidential authority, but also a declaration of the impotence of federal courts with respect to matters touching executive authority, even matters placed explicitly within the jurisdiction of Article III courts by Congress. Petitioner does not attempt to disguise his disdain for Article III courts, frankly declaring that the President's official acts "can never be examinable by the courts." Petitioner's Brief, at 3 *quoting* Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. 137 at 166 (1803). The view of the role of Article III courts Petitioner is proposing would revolutionize their core function, taking them back to the days before Chief Justice Marshall established the power of judicial review in *Marbury v. Madison*. It is clearly within the

power of Article III courts to say what the law is, *Id.* at 177, and to enjoin actions of the executive that violate the law, *Youngstown v. Sawyer*, 343 U.S. at 588-589. Petitioner's conception of immunity would also leave individuals without a remedy even for patently illegal violations of their constitutional and statutory rights. Federal courts routinely hear cases prosecuting executive branch officials for violating federal criminal law, and unsurprisingly not a single case cited by Petitioner even contains dicta that a former president is immune from prosecution if he commits federal crimes while in office.

While Petitioner insists that Article III courts "lack authority to sit in judgment over a President's official acts," Brief of Petitioner, at 11, he allows that federal courts may review the validity of the acts of subordinate executive officials. *Id.* at 16, 20. There is no basis for restricting this Court's authority to actions against presidential subordinates, and doing so would contradict basic criminal law principles of accomplice liability. This Court has willingly told both presidents, and their subordinates, what they may and may not do under the Constitution and the various laws of the United States. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 588-589; *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 (2006) (holding that the Guantanamo military commissions violate the guarantee owed to each detainee under international law to be heard by a "regularly constituted court."); *Boumediene et. al. v. Bush*, 553 U.S. 723, 792 (2008) (holding that prisoners held at Guantanamo Bay have a right to the writ of habeas

corpus). The authority of this Court and other courts to enforce federal criminal law is no different.

The President's duty to conform his conduct to the law is also reflected in the oath he must take before assuming office – itself a requirement of Article II, Section 1 of the U.S. Constitution – to "preserve, protect and defend the Constitution of the United States." U.S. Const. Art. II, § 1. What could be a clearer demonstration that the President must be subject to, and not superior to, the law of the land than this provision requiring the President to swear allegiance to that self-same Constitution? Members of the armed services likewise are required to take an oath to defend the Constitution against all enemies, foreign and domestic, and to obey the orders of the President. 10 U.S.C. § 502. But only enlisted members swear an oath to obey the orders of the President. *Id.* By contrast, commissioned officers swear an oath that does not mention the President, according to which they promise to "support and defend the Constitution of the United States against all enemies, foreign and domestic. . . ." 5 U.S.C. § 3331.

The doctrine of substantive presidential immunity for which Petitioner argues would exactly reverse this constitutionally binding structure. By Petitioner's lights, if he, presently a candidate for the presidency, wins the election and takes the oath of office in January of 2025, he is licensed to do precisely what the oath suggests he must abhor, namely to govern the country without fidelity to the law and to ignore the Constitution.

Any political arrangement that grants broad command authority to a single individual, as Hamilton says in Federalist 69, "would be unsustainable and would risk certain dictatorship if the same breadth of powers were extended without the assurance of accountability under the law." Hamilton further says in that same Federalist Paper: "The [President of the United States] would be amenable to personal punishment and disgrace; the person of the [king of Great Britain] is sacred and inviolable." Alexander Hamilton, Federalist No. 69 (1788) The very extent of the President's power as Commander-in-Chief thus necessitates that he be held to the same standards as any other citizen with regard to clear violations of generally applicable criminal laws, absent an explicit congressional exemption. Presidential accountability under the law is not only compatible with broad deference to the President in matters of war and peace; it is required to sustain such deference.

II. Presidential Immunity For Criminal Acts Would Encourage Use of the U.S. Military to Commit Crimes

One of the most serious risks of presidential immunity for official capacity acts arises from the potential that the President may abuse his Commander-in-Chief authority, thereby placing the integrity of the armed forces at risk. Imagine a president determined to use the U.S. military to commit crimes against political opponents; to constrain and control domestic civilian populations in

violation of federal criminal law; to coerce foreign nations into supporting his bid for reelection by engaging in criminally proscribed corrupt practices; to falsify domestic election results in an effort to criminally defraud the United States; and to coerce the legislative and judicial branches of government into supporting his friends and punishing his enemies. While the Posse Comitatus Act, 18 U.S.C. § 1385 forbids use of the armed forces for civilian law-enforcement purposes unless authorized by the Constitution or laws of the United States, the President could issue an illegal order for this purpose without ramification if the Petitioner's sought-for immunity for official acts were to be granted, and that order might very well be considered by military subordinates as falling within the "authorized by the Constitution" exception to the Act.

Or consider the shocking example of the President ordering a Navy Seal Team Six assassination of a political rival, which Judge Pan discussed with Petitioner's counsel in oral argument of this case in the Court of Appeals for the District of Columbia. Oral Argument at 07:35, United States. v. Trump, No. 23-3228 (D.C. Cir. Jan. 9, 2024), https://www.youtube.com/watch?v=KFppEuJRTO4 [https://perma.cc/KB94-V634]. Such an offense could also be committed against members of Congress who possess the authority and the duty to serve as a check on executive power. What would become of impeachment as a check and balance if a president could order Seal Team Six to intimidate members of Congress and then enjoy immunity unless he was impeached by a majority of the House and convicted

by two-thirds of the Senate? Who in Congress would even dare to try to impeach the President under such circumstances? Likewise, the judiciary could be cowed into submission and the independence of this very Court threatened by fear of violence inflicted on its members. The rule of law will be threatened unless federal courts have protection against intimidation by a criminal president in command of Seal Team Six or any other unit of the U.S. Armed Forces.

Even the three senior military officers and executive branch officials who have filed an amicus brief in this case in support of Petitioner take no stand on the presidential immunity argument made by Petitioner, choosing to focus entirely on the illegality of a presidential order to assassinate a political rival:

> [T]he President has no authority to order the military to assassinate someone because he is a political rival. Nor would the military carry out such an unlawful order. Under the Uniform Code of Military Justice (UCMJ), any military officer who carried out or issued such an order would commit the crime of murder. One such limitation is that the President has no authority to order the military to assassinate someone because he is a political rival. Nor would the military carry out such an unlawful order. Under the Uniform Code of Military Justice (UCMJ), any military officer who carried out or issued such an order would commit the crime of murder. In addition, Executive Order 12333 prohibits any person employed by the U.S. government from

> engaging in, or conspiring to engage in, assassination.

Brief of Three Former Senior Military Officers and Executive Branch Officials, as *Amici Curiae* Supporting Petitioner, *United States v. Trump*, No. 23-939 (U.S. filed Mar. 19, 2024), 3. They conclude: "Whether or not a President has the immunity claimed by Petitioner in this case—a question *amici* do not address in this brief—a President cannot order the military to assassinate a political rival and have that order carried out." *Id.* at 1.

This conclusion is misleading for two reasons. First, the President could certainly issue an order to assassinate a political rival, and when vested with the immunity sought by Petitioner, the risk he would do so is necessarily increased. Second, there is simply no guarantee a subordinate would refuse to obey such an order once the President who issued it could claim immunity from any legal consequence. And there is no guarantee that the principle of presidential immunity might then be mistakenly claimed as authority by subordinates carrying out the President's claimed immunity.

Thus, even former military officers and executive branch officials who purport to support Petitioner in this case make clear that use of the military to commit a crime such as murder would be illegal and any military officer who carried out such an order could be held legally accountable. Note that these amici decline to address the question whether the President would also be guilty of murder. They acknowledge the illegality of such an order yet avoid

the obvious corollary that if the President is emboldened by immunity to issue an illegal order, the military command structure will be infected with distrust and disarray.

The main body of this case, of which the current matter is but an interlocutory appeal, concerns criminal prosecution for an alleged conspiracy to defraud the United States. The case therefore highlights the very real risk of a sitting president accused of committing crimes to remain in office. The risk of a president who commits crimes to avoid the transition of power is one of the gravest our democracy may face. Here we wish to highlight the risk that such crimes could be committed by making use of the U.S. Armed Forces. The President might deploy troops to control polls, for example, in violation of 18 U.S.C. § 592 and 18 U.S.C. § 593 (interference by armed forces), as the present Petitioner himself once discussed in a December 18, 2020 meeting in the Oval Office according to the Report of the U.S. House January 6 Committee. *See Hearing Before the Select Committee to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. 2d. sess. 4-5 (July 12, 2022), https://www.congress.gov/117/chrg/CHRG-117hhrg49355/CHRG-117hhrg49355.pdf [https://perma.cc/86SN-TK3J]. A criminal president could ignore these and other laws and use military force to coerce voters, to coerce state officials counting ballots, or to obstruct the official proceedings in which state legislatures and Congress certify results of elections. 18 U.S.C. § 1512(c) (criminal obstruction of an official proceeding).

Moreover, a president who has committed crimes while in office has incentive to remain in office to deter or entirely thwart the moment at which he is brought to justice. The risk to democracy, and hence to U.S. national security, is gravest from a sitting president who seeks to undermine the transfer of power, and even greater from a president already under scrutiny for criminal acts. By removing liability for the criminal misuse of official capacity acts, this Court could be eliminating the last protection from dictatorship cognized by our constitutional system.

The blanket presidential immunity Petitioner seeks is rendered wholly unnecessary by the fact that a sitting president is already insulated from prosecution in numerous ways. The Justice Department policy forbidding indictment of a sitting president renders justice against a president who has committed crimes in office exceedingly challenging and cumbersome. For example, see Robert G. Dixon, Jr., Asst. Atty. Gen. Office of Legal Counsel, *Memorandum on Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office*, Op. O.L.C. 1, 32 (Sept. 24, 1973) (unpublished memo) ("1973 OLC Memo"); Randolph D. Moss, Asst. Atty. Gen. Office of Legal Counsel, *Memorandum, A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 223 (Oct. 16, 2000) ("2000 OLC Memo"). In addition, a president can pardon his associates accused of wrongdoing and might pardon himself, even if self-pardon is of dubious legality. *See* Albert W. Alschuler, *Limiting the Pardon Power*, 63 ARIZ. L. REV. 545, 553-560 (2021) (discussing self-

pardons). Finally, the President as head of the executive branch appoints, and can remove, senior officials in the Department of Justice, although his firing a prosecutor with the intent to obstruct a criminal investigation of himself or his associates could itself constitute a crime such as obstruction of justice. *See* Claire O. Finkelstein & Richard W. Painter, *"You're Fired": Criminal Use of Presidential Removal Power*, 25 NYU J. LEG. & PUB. POL'Y 307, 347 (2023).

III. Presidential Immunity For Criminal Acts Would Damage the Chain of Command

Presidential immunity for official capacity crimes would create an untenable dilemma for every member of the military chain of command ordered to execute an order, particularly if officers disagree as to its legality under criminal law. Because *any* order issued by a president carries with it a presumption of legality and exerts a powerful gravitational force on its recipients, the risk of such disparate interpretations of the duty to obey, even if the order appears on its face to violate federal criminal law, would be exacerbated if the President were unrestrained in the orders he could issue and could therefore violate the law with impunity.

Failure to obey a lawful order for any individual in the military chain of command whose duty it is to obey such order is a serious offense, subject to prosecution by general courts martial. 10 U.S.C. § 890, Art. 90 10 U.S.C. § 892, Art. 92 (in the

case of a willful violation). In times of war, willful failure to follow certain orders can result in a sentence of death. § 890, Art. 90; § 892, Art. 92. Yet the absolute duty to follow orders is predicated upon the lawfulness of such orders. Any soldier receiving illegal orders has a duty to refuse to carry out those orders, and no one committing atrocities against a civilian population, for example, can hope to achieve an acquittal at court-martial on the basis of following orders.

At the same time, the illegality of a military order is an affirmative defense to a refusal to obey. It is presumed that orders are lawful, and a defendant charged with disobeying orders bears the burden of establishing illegality. *See Manual for Courts–Martial, United States* (2024 Edition), pt. IV, para. 16.c.(2)(a)(iv, https://jsc.defense.gov/Portals/99/2024%20MCM%20files/MCM%20(2024%20ed)%20(2024_01_02)%20(adjusted%20bookmarks).pdf [https://perma.cc/DQ3V-MDYR]; *see also*, John Ford, *When Can a Soldier Disobey an Order?*, War on the Rocks (July 24, 2017), https://warontherocks.com/2017/07/when-can-a-soldier-disobey-an-order/ [https://perma.cc/984Y-V68V]. Any subordinate inclined to disobey an order issued by the President assumes a grave risk of prosecution with a heavy burden to establish the order was in fact illegal.

Furthermore, obedience to an order that is in fact unlawful is a complete defense in military law unless the illegality is known to the subordinate or so patently clear that the subordinate must have known

it was illegal. In the case of an illegal order, the mere fact that it was issued by a president would guarantee uncertainty as to its legality, with the result that obedience could provide a complete defense to any criminal prosecution arising therefrom. This sharply reduces the likelihood that a subordinate officer will refuse to obey a president's orders, even though immunity from prosecution increases the incentive of the President to issue illegal orders. Military personnel who instinctively rely on the validity of an order that is passed through the chain of command can nonetheless be prosecuted for obeying the order if it turns out to be illegal.

The foregoing taken together suggests that the presidential immunity from criminal prosecution asserted by Petitioner would create multiple problems for the command function and good order and discipline of the armed services. First, if subordinates in the chain of command are aware that the Commander-in-Chief is immune from prosecution, some may assume this renders any order legal for purposes of their duty to obey. Others may reach a different conclusion, especially as senior officers in the chain of command will tend to rely on legal advisors to determine legality. This could easily result in chaos, with different commanders in the same chain reaching disparate conclusions as to their duty to obey or disobey. Second, the mere knowledge that the President enjoys immunity may lead subordinates to question their duty to obey presidential orders, something that almost never normally occurs. In short, the expectation that the President's duty to the Constitution necessitates that

all orders comply with the law and the accountability the President would face for legal violations provides the basis for the near absolute trust subordinates place in the legality of presidential orders.

Third, because Petitioner emphasizes that the immunity he asserts would in no way protect subordinates who commit crimes in obedience to presidential orders, they may fear liability for executing illegal orders, thus causing hesitation to execute other lawful commands of the President and civilian officers. Often there is little time to assess whether an order is legal; a subordinate must be able to rely on the legality of all presidential orders, yet this reliance would be unavailable were Petitioner's theory to hold sway. Worry within the command chain about unconstrained presidential crime could thus have devastating consequences for discipline within the ranks.

Finally, there are always those who will follow presidential orders even if they believe doing so will violate federal criminal law, an inevitable consequence of the extremely powerful presumption of obedience to the Commander-in-Chief. Illegality from the top does not come with a label marking it as such. Knowledge that the President is immune from criminal prosecution for official acts, even after he leaves office, would add weight to this presumptive obligation of obedience. Obedience could be justified as consistent with the oath to support and defend the Constitution as the order emanated from a constitutionally designated president who was permitted to issue the order even if inconsistent with

other laws. Military and civilian officers might see presidential immunity as a constitutional blank check to issue *any* order, even orders requiring subordinates to commit crimes, including crimes that endanger national security.

Absolute or qualified immunity of a president could also be mixed with improper use of the pardon power to enable a corrupt president to use the military to accomplish otherwise unlawful objectives. For example, in the Seal Team Six assassination scenario, the team members would not need to fear the consequences of committing murder if the order to commit the murder were coupled with the promise of a pardon. Many other scenarios, including torture of prisoners and detainees, could be realized in which the pardon power is used by a legally unbound, immunized president to subvert the military's allegiance to the Constitution, the rule of law, and military discipline.

IV. Petitioner's Argument for Qualified Immunity Is as Problematic as Blanket Immunity

Petitioner proposes, as a second-choice alternative to absolute immunity, a burdensome and unnecessary standard of qualified immunity that once again seeks to place the President above ordinary citizens with regard to "generally applicable" criminal law. Brief of Petitioner, at 37-40. This argument attempts to import into the criminal arena

the holding of cases immunizing the President from civil suit for actions extending to the "outer perimeter" of official capacity. *Nixon v. Fitzgerald*, 457 U.S. at 756. Petitioner further argues, as a second-best alternative, for a "functional" view of immunity, according to which officials with a broad range of duties should have broader immunity from criminal prosecution than officials with less responsibility and less discretion. Brief of Petitioner, at 46, *citing Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). The primary case he cites for this, namely *Scheuer*, is only tangentially relevant to the current case, given that it is a civil damages case against a governor. Amici are not aware of any legal precedent applying the doctrine of qualified immunity to public officials in criminal cases.

Second, Petitioner claims that as President he is entitled to a "qualified immunity" in the sense that to hold a president criminally liable, there must be a clarity in the law above and beyond the exacting standard of clarity that courts already impose in criminal cases. Brief of Petitioner, at 46-47. Petitioner offers little support for this proposition, however, citing only civil cases brought against public officials, not criminal cases. Petitioner also does not advance a coherent argument as to why the President, or any other public official, is entitled to insist on greater clarity in the criminal law than that required in the criminal trial of any other citizen. Ambiguous criminal statutes already are void for vagueness under the Due Process Clause of the Fourteenth Amendment. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Papachristou v. City of*

Jacksonville, 405 U.S. 156 (1972); *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

Another possible form of "qualified immunity" would be to allow for such immunity generally but then deny it only in those cases in which the President's motive was to remain in office. Petitioner argues that inquiring into a president's motive for an official act is impermissible, Brief of Petitioner, at 42, 45, and then claims that the D.C. Circuit Court held that he was not immune from prosecution because he was "determined to remain in power." *Id.* at 48-49. But the D.C. Circuit Court opinion does not once refer to a president's motive as a factor in ruling on whether he is immune from criminal prosecution after leaving office. Rather, the Court concludes that Petitioner's theory of absolute immunity from prosecution for official acts "is unsupported by precedent, history or the text and structure of the Constitution." *United States v. Trump*, 91 F.4th 1173, 1208 (D.C. Cir. 2024) (No. 23-3228), *cert. granted*, No. 23-939, 2024 WL 833184 (U.S. Feb. 28, 2024). Contrary to Petitioner's contention, the Court of Appeals did not consider the fact that Petitioner's motive for his actions was to remain in power beyond the expiration of his term, however dangerous for democracy such a motive for a president's crimes might be.

Just as with the absolute immunity approach for which Petitioner argues, qualified immunity from prosecution based on the President's office is a dangerous doctrine to adopt, even if more selective than absolute immunity. Perhaps more importantly, the interests Petitioner claims would be advanced by

qualified immunity are already addressed by traditional limitations on criminal liability. Thus, there is no credible justification to support Petitioner's argument that a different and higher level of clarity as to a federal criminal statute must be required when the law is applied to the President than when the same law is enforced by the Department of Justice against an ordinary citizen.

The proposed standard, which would require Congress to speak with specificity as to whether a criminal statute applied to the President in *every* case, would import chaos into both the legislative drafting process for federal crimes and would effectively nullify dozens of existing crimes where Congress had no advanced knowledge of the need to expressly say the statute applies to the President. It is inconceivable that there would be one standard of constitutional due process in cases brought against the President and his subordinates and a different and lower standard for cases brought against everyone else. This could raise complex issues of equal protection and due process for any other citizen prosecuted for violating the same statutory provision.

V. Lack of Immunity for Official Acts Would Not Cripple the President in War

Petitioner suggests that in the absence of immunity for official acts, any number of presidents throughout history might have been prosecuted for war crimes, based on political accusations that they were committing "crimes." Brief of Petitioner, at 22 &

ff. However, being "prosecuted" is not the same as being convicted. Even setting aside the exaggerated nature of Petitioner's argument, a *conviction* for war crimes requires both the judgment of a grand jury that a crime was committed, denial of a motion to dismiss by an Article III judge, and a unanimous finding of guilt beyond a reasonable doubt by trial jury. But if these prosecutorial burdens are satisfied, there is no plausible reason a president should be immune from the criminal consequences of ordering a war crime, a conclusion reinforced by the fact that the federal War Crimes Act makes no exemption for the President or any other high-ranking federal official.

Examples cited by Petitioner are inherently misleading, as none involve orders that were so clearly unlawful as to support criminal prosecution. Pointing to President Roosevelt's relocation and detention of Japanese Americans during World War II; President Clinton's launching of military strikes in the Middle East on the eve of critical developments in the scandal involving his affair with a White House intern; the Bush Administration providing what was subsequently understood to be false information to Congress about weapons of mass destruction in Iraq; and President Obama's targeted killing of U.S. citizens abroad based on a determination they were enemy belligerent operatives, among others. Brief of Petitioner, at 23. Petitioner points out that "In all of these instances, the President's political opponents routinely accuse him, and currently accuse President Biden, of 'criminal' behavior in his official acts. In each such case, those opponents later came to power with ample incentive to charge him. But no former

President was ever prosecuted for official acts—until 2023." Brief of Petitioner, at 23-24. For this reason, Petitioner is convinced that criminal prosecution of a president of any sort "presents a mortal threat to the Presidency's independence." *Id.* at 25.

Yet in trotting out this parade of horribles, Petitioner completely ignores the fact that there is a difference between acts that are actually criminal and acts that are merely said to be criminal by political adversaries. None of these decisions resulted in criminal indictment or prosecution for the obvious reason that there was a substantial gap between political hyperbole and evidence indicating violation of federal criminal law. Moreover, it is not necessary for the President to have blanket immunity to be protected from criminal prosecution for acts ordered, solicited, or committed in times of war. Nor would such blanket immunity be desirable. The My Lai massacre in which U.S. troops killed as many as 500 unarmed villagers in Vietnam in 1968 is a reminder that U.S. troops have committed atrocities in warfare and that criminal liability is a critical part of holding anyone accountable who would engage in such acts. Any president who ordered or encouraged a massacre of civilians would rightly be subject to prosecution for his role in such a heinous act. Furthermore, any subordinate who acted on such orders should not be able to claim a "following orders" defense—a defense that has been consistently rejected, including famously at the Nuremberg trials. *See* 10 U.S.C. § 892, Art. 92.

Indeed, the War Crimes Act of 1996, 18 U.S.C. § 2441, imposes liability on U.S. military personnel for grave breaches of the Geneva Conventions, or Common Article III of that Convention, for acts committed outside the territorial jurisdiction of the United States. This provision addresses cases in which crimes come to light only after the individual separates from the armed forces and is no longer subject to military criminal jurisdiction. Liability under such circumstances is consistent with national security interests, and absolute or qualified immunity for the President would contradict this important principle. Such an asymmetry of criminal accountability is not justified and is not supported by the tradition of command authority as restricted to lawful actions. While a president should be tried in a federal court, rather than a court martial, for his crimes, the principle remains that no person is above the law.

Presidential powers under Article II, moreover, can be accommodated in the drafting and interpretation of criminal statutes. Blanket immunity is not necessary. A president, for example, has the power to share classified information with a foreign power in furtherance of U.S. national security interests. A president who shares classified information with a foreign power in return for a bribe, however, may violate both the Espionage Act and bribery statutes. The fact that some criminal statutes must be construed to be consistent with lawful use of Article II power does not mean that the President has absolute immunity from prosecution for crimes committed in office.

Furthermore, Congress can exempt the President from criminal statutes if it believes a criminal statute imposes an undue infringement on Article II power. For example, the President and Vice President are exempt from the criminal financial conflict of interest statute, 18 U.S.C. § 208, which makes it a crime for executive branch officials to participate in a government matter in which they or their spouse have a financial interest. If this Court believes that a specific criminal statute unconstitutionally intrudes upon exclusive Article II powers of the President, the Court can hold that the statute in all or in part does not apply to the President. The absolute immunity theory proposed by Petitioner is wholly unnecessary.

As Petitioner notes, not once has a criminal indictment against a former president been submitted to a grand jury or even contemplated for crimes committed in wartime. Brief of Petitioner at 6-7. The current prosecutions of Petitioner are similarly unrelated to the Commander-in-Chief function of the President, as none of the acts for which the former President has been indicted were performed in his capacity as Commander-in-Chief.

The Department of Justice has several times examined the risk of meritless criminal charges being filed against a president, and never even hinted that lifetime immunity from prosecution was necessary. Instead, the Department reached the conclusion that a sitting president cannot be indicted while in office. The Office of Legal Counsel memoranda opining that a current president cannot be indicted specifically

point out that *a president can be prosecuted after leaving office*. *See* 1973 OLC Memo, at 32; 2000 OLC Memo, at 255-256, 259. Prohibiting indictment and trial during the term of office sufficiently protects the President's interest in ensuring the focus of his or her duties will not be unduly burdened by having to mount a defense to a criminal accusation while in office, while protecting society's interest in a fair and impartial adjudication of alleged criminal misconduct at a point in time when it will have no such adverse impact on the nation.

The appropriate response to politicized prosecutions is judicial oversight. Courts oversee criminal cases to prevent prosecutorial abuses, including selective or discriminatory prosecution, indictments that are not based on probable cause or fail to properly allege an offense, insufficient evidence of guilt, and unethical prosecutorial conduct. Members of Congress, cabinet members, and federal judges all could be exposed to baseless criminal charges, yet none is entitled to absolute immunity for their official acts. Indeed, this argument for making the President exempt from criminal process has already been presented before this Court by this very same Petitioner, Donald Trump, and it was rejected. *Trump v. Vance*, 140 S. Ct. at 2427-2429.

VI. Conclusion

Amici urge this Court to strengthen, not weaken, the legal and moral authority of the President, particularly as Commander-in-Chief of the

armed forces, by holding the President like every other American accountable under the criminal laws of the United States. Amici recognize that construction and application of federal criminal laws should take into account the powers and responsibilities of the President under Article II of the Constitution, but that is a case specific determination. Amici urge this Court to reject Petitioner's absolute and qualified immunity theories which would be exceedingly dangerous for both our constitutional framework and for U.S. national security.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX
List of Amici Curiae

Claire O. Finkelstein, Algernon Biddle Professor of Law and Professor of Philosophy; Faculty Director of the Center for Ethics and the Rule of Law, University of Pennsylvania

John D. Altenburg, Former Deputy Judge Advocate General of the Army, Major General, (ret.)

James E. Cartwright, U.S. Marine Corps; Former Vice Chair, Joint Chiefs of Staff, General (ret.)

Gary Corn, Staff Judge Advocate (General Counsel) to U.S. Cyber Command, Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff, Colonel (ret.), Director, Technology, Law & Security Program and Adj. Professor of Cyber and National Security Law, American University College of Law

Geoffrey S. Corn, George R. Killam Jr. Chair of Criminal Law and Director of the Center for Military Law and Policy, Texas Tech University School of Law, Lt. Colonel (ret)

Donald J. Guter, former Judge Advocate General of the Navy, Rear Admiral, JAGC, USN (Ret.), President and Dean Emeritus, South Texas College of Law

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John Hutson, former Judge Advocate General of the Navy, Rear Admiral (ret.), former dean and president of the University of New Hampshire School of Law

Alberto Mora, Former General Counsel, Department of the Navy

Richard W. Painter, Counsel of Record for Amici; S. Walter Richey Professor of Corporate Law, University of Minnesota Law School; Former Associate Counsel to the President and chief White House ethics lawyer for President George W. Bush.

Harvey Rishikof, Former Director of Military Commissions and Convening Authority and the Department of Defense, General (ret.)

Manuel Supervielle, SJA (General Counsel) US Southern Command, Special Counsel to the General Counsel U.S. Army, SJA (General Counsel) US Forces in Afghanistan, Colonel (ret.)

Ambassador Alexander Vershbow, Distinguished Fellow, Atlantic Council, Former Assistant Secretary of Defense, former Ambassador to NATO and Russia, former NATO Deputy Secretary General.

Joseph Votel, General (ret.) U.S. Army, Former Commanding General of US Central Command and US Special Operations Command; Member of the Executive Board of the Center for Ethics and Rule of Law, University of Pennsylvania.

Stephen Xenakis, M.D.. U.S. Army, Brigadier General (ret.)