Washington and Lee Law Review Online

Volume 81 | Issue 5 Article 2

5-13-2024

"No Superior But God": History, Post Presidential Immunity, and the Intent of the Framers

Trace M. Maddox
New York University School of Law

"No Superior But God": History, Post-Presidential Immunity, and the Intent of the Framers

Trace M. Maddox*

Abstract

This essay is directly responsive to one of the most pressing issues currently before the courts of the United States: the question of whether former Presidents enjoy immunity from criminal prosecution for acts they committed in office. Building upon the recent ruling of the United States Court of Appeals for the D.C. Circuit in United States v. Trump*, 91 F.4th 1173 (D.C. Cir. 2024) this essay argues that the clear answer to that question is a resounding "no".*

Former President Trump, who has now appealed the D.C. Circuit's ruling to the Supreme Court, contends that post-presidential criminal immunity is implicit in the Constitution of the United States. Embracing the principle that the Constitution "cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed", Ex Parte Grossman*, 267 U.S. 87, 108–109 (1925), this essay analyzes that claim in the light of the pre-revolutionary common law and the writings of the Framers and their contemporaries. Drawing from these sources, this essay demonstrates that the Constitution reflects a clear intent on the*

* Acting Assistant Professor of Lawyering, NYU School of Law (Incoming June 2024); Term Law Clerk to the Honorable Caroline H. Gentry, United States Magistrate Judge (S.D. Ohio); JD, Cornell Law School; LLM, Université Paris 1. The views expressed in this essay are entirely my own.

part of its Framers to cleanly break with the historic tradition of the sacred and inviolable executive. On these bases, this essay concludes that a doctrine of post-presidential immunity from criminal prosecution is not merely—as the Court of Appeals properly held—unsupported by positive law, but, moreover, both contrary to the Framers' intent and fundamentally incompatible with the Constitution of the United States. It therefore urges the Supreme Court, when deciding the issue for the final time, to consider the thousand-year-old history underlying Mr. Trump's claims to immunity and to reject those claims as incompatible with the republican government established by this country's founders.

Table of Contents

INTRODUCTION

On February 6, 2024, the Court of Appeals for the D.C. Circuit handed down its ruling in *United States v. Trump*.[1] In the unanimous opinion of a three-judge panel, former United States presidents emphatically are *not* immune from criminal prosecution for acts they committed in office.[2]

Although the appeal had been argued less than a month earlier, the court's ruling was much anticipated.[3] To begin with, the question of presidential immunity is likely to have a profound impact on the 2024 presidential election.[4] Appellant former President Donald Trump, currently seeking reelection, is under federal indictment for his alleged involvement in the January 6, 2020 riot at the United States Capitol Building.[5] The appellate court's ruling—that Trump is subject to prosecution and trial for those charge—leaves open the possibility that a second presidential term would have to be conducted from behind bars.[6]

Furthermore, the weeks immediately following the Circuit Court's ruling saw widespread speculation that the buck would end here. Despite—or perhaps because of—the high stakes, the Supreme Court had previously signaled an unwillingness to

---

1. 91 F.4th 1173 (D.C. Cir. 2024).

2. *See id.* at 1200 ("[T]here there is no functional justification for immunizing former Presidents from federal prosecution in general or for immunizing former President Trump from the specific charges in the Indictment.").

3. *See generally* Alan Feuer & Charlie Savage, *After Speedy Start, Appeals Court Slows Down on Trump Immunity Decision*, N.Y. TIMES (Feb. 3, 2024), https://perma.cc/X9PL-A7DT; Melissa Quinn *et al.*, *Appeals Court Probes Limits of Trump's Broad Immunity Claim in 2020 Election Case*, CBS NEWS (Jan. 9, 2024), https://perma.cc/4B96-YXNL.

4. *See, e.g.*, Lawrence Richard, *Trump Not Immune from Prosecution in 2020 Election Case, Federal Appeals Court Rules*, FOX NEWS (Feb. 6, 2024), https://perma.cc/7GTF-ZK5Y (noting the "enormous political ramifications" of the decision).

5. *See* United States v. Trump, No. 23-00257, 2023 U.S. Dist. LEXIS 215162, at *1–8 (D.D.C. Dec. 1, 2023) (stating background facts of the case).

6. *See* Maggie Astor, *What Happens if Donald Trump is Convicted?*, N.Y. TIMES (Mar. 16, 2024), https://perma.cc/7WWP-C235 (describing a scenario where Trump runs his campaign from prison).

weigh in,[7] and more than one commentator predicted a denial of certiorari.[8] And while the Court has now—more than three weeks later—defied these expectations by agreeing to hear Mr. Trump's expedited appeal,[9] the Justices face a tough act to follow.

Beginning immediately after its issuance, the D.C. Circuit's opinion has been lauded as "thorough,"[10] "well done,"[11] "methodical,"[12] and "unimpeachable."[13] It certainly is all of those things. In a relatively pithy fifty-seven pages, the court neatly demonstrated that the question of post-presidential criminal immunity—ostensibly a matter of first impression[14]—is, in fact, easily resolved under existing law.

To reach this conclusion, the Court of Appeals relied primarily upon the plain text of the Constitution,[15] fundamental canons of interpretation,[16] and well-settled analogous case law.[17] However, there is an additional factor which strongly refutes Trump's claims of immunity but which the court

---

7. *See* United States v. Trump, 144 S. Ct. 539 (2023) (mem.) (denying certiorari before judgment).

8. *See e.g.*, Lydia Wheeler & Kimberly Strawbridge Robinson, *DC Circuit Gives Supreme Court Easy Out of Trump Immunity Fight*, BLOOMBERG L. (Feb. 7, 2024), https://perma.cc/282W-4KUV; Khaleda Rahman, *Supreme Court Will Ignore Donald Trump's Immunity Appeal—Attorney*, NEWSWEEK (Feb. 7, 2024), https://perma.cc/9SRN-J645; Editorial Board, Opinion, *The Supreme Court Should Say 'No' To Trump's Immunity Case, Quick*, WASH. POST (Feb. 6, 2024), https://perma.cc/VPN9-AGQW.

9. Trump v. United States, 91 F.4th 1173, 1183 (D.C. Cir. 2024), *cert. granted*, No. 23-939 2024 U.S. LEXIS 1101 (Feb. 28, 2024) (No. 23-939).

10. Rahman, *supra* note 8.

11. *Id.*

12. Wheeler, *supra* note 8.

13. Igor Derysh, *"There Is Nothing Left": Experts Say Ruling "Dismantled" Trump Argument So Bad SCOTUS Won't Touch It*, SALON (Feb. 7, 2024), https://perma.cc/85TZ-7U78.

14. *See Trump*, 2024 U.S. App. LEXIS 2714 at *23 ("The question of whether a former President enjoys absolute immunity from federal criminal liability is one of first impression.").

15. *See id.* at *55–58 (discussing the Impeachment Judgement Clause).

16. *See id.* (denying Trump's negative implication argument by stating that the Framers knew how to explicitly grant criminal immunity).

17. *See id.* at *33–37 (comparing to *Ex Parte Va.*, 100 U.S. 339 (1880), *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951), and *Gravel v. United States*, 408 U.S. 606, 625 (1972)).

considered only secondarily[18]: namely, the pre-revolutionary history of executive immunity and the clear intent of the Framers to cleanly break with that tradition.

This essay expands upon that factor, examining the post-presidential-immunity question from the perspective of the legal historian. It does not in any way suggest that the Court of Appeals erred in its reasoning or its conclusion. To the contrary, this essay strongly concurs that former Presidents of the United States enjoy no special immunity from criminal liability. However, this essay urges the Supreme Court, when deciding the issue for the final time, to also consider the thousand-year-old history underlying Mr. Trump's claims to immunity, and to reject those claims as incompatible with the republican government established by this country's founders.

Specifically, this essay begins by surveying the pre-revolutionary, common-law foundations of executive immunity. It establishes that, in the late eighteenth century, the Anglo-American conception of executive immunity was inextricably bound up with monarchical ideals.[19] This essay then examines the writings of the Framers and their contemporaries on the subject of the presidency. From these, it argues that the Constitution reflects a clear intent to cleanly break with the historic tradition of the sacred and inviolable monarch.[20] On these bases, this essay concludes that a doctrine of post-presidential immunity from criminal prosecution is not merely—as the Court of Appeals properly held—unsupported by positive law, but, moreover, both contrary to the Framers' intent and fundamentally incompatible with the Constitution of the United States.[21]

18. *See id.* at *26–28 (discussing Marbury v. Madison, 5 U.S. 137 (1803) and its progeny); *id.* at *58–60 (discussing the consequences of impeachment in eighteenth-century Britain).

19. *See infra* Part I.

20. See *infra* Part II.

21. See *infra* Conclusion.

I. REX NON POTEST PECCARE[22]: IMMUNITY BEFORE PRESIDENTS

In 1193, Richard the Lionheart, King of England, was captured and brought before the Holy Roman Emperor, Heinrich VI.[23] At a diet assembled in Speyer, Heinrich accused Richard of various crimes, including the subjugation of Cyprus and the assassination of the Marquis de Montferrat.[24] According to tradition, Richard refused to acknowledge the emperor's jurisdiction. Challenging his captors' authority to pass judgment upon him, he declared: "I am born in a rank which recognizes no superior but God, to whom alone I am responsible for my actions."[25]

Though the details of this episode are apocryphal, the principle that Richard supposedly espoused is not. The notion that the English (and later British) king was not answerable in law for his actions dates to the very earliest legal treatises. Glanvill,[26] written in the late 1180s[27] as "the first textbook of the English common law,"[28] notes that "the King can have no equal, much less a superior."[29] Some fifty years later, Bracton[30] would

22. "The king can do no wrong." *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *238.

23. TRACY BORMAN, CROWN & SCEPTRE 54–55 (2021).

24. JONATHAN DUNCAN, THE DUKES OF NORMANDY, FROM THE TIMES OF ROLLO TO THE EXPULSION OF KING JOHN BY PHILIP AUGUSTUS OF FRANCE 290 (1839).

25. *Id.*; ELIZABETH LONGFORD, THE OXFORD BOOK OF ROYAL ANECDOTES 85 (1989). Though the analysis is of course beyond the scope of this essay, this anecdote has striking parallels with Louis XIV's declaration of "I am the State," supposedly made five hundred years later. *See, e.g.*, Craig E. Harline, *"L'État C'est à* [sic] *Moi": Louis XIV and the State*, *in* THE RHYME AND REASON OF POLITICS IN EARLY MODERN FRANCE 185 (Craig E. Harline ed. 1992).

26. Formally *Tractatus de Legibus et Consuetudinibus Regni Anglie* (*Treatise on the Laws and Customs of the Kingdom of England*), but most frequently referred to simply as *Glanvill*, after Ranulf de Glanvill, Justiciar of Henry II, popularly believed to be the author. *See generally* Ralph v. Turner, *Who Was the Author of* Glanvill*? Reflections on the Education of Henry II's Common Lawyers*, 8 LAW & HIST. REV. 97 (1990).

27. *Id*. at 99.

28. *Id*. at 97 (quoting H.G. RICHARDSON & G.O. SAYLES, LAW AND LEGISLATION: FROM AETHELBERT TO MAGNA CARTA 117 (1963)).

29. A TRANSLATION OF GLANVILLE 142 (John Beames ed. & trans. 1900).

30. Formally *De Legibus et Consuetudinibus Angliæ* (*On the Laws and Customs of England*), but most frequently referred to simply as *Bracton*, after

expand upon this principle to conclude that the king could not logically be answerable to his own courts of law, to which he had merely delegated his authority to pass judgment.[31] As Bracton explained:

> [T]he king has ordinary jurisdiction in his kingdom in temporal matters. [He has] neither equals nor superiors. Under [him] there are those who have jurisdiction in many matters, but not as fully as the . . . king. Those who are [his] inferiors can [not] be [his] equals in jurisdiction . . . . [for] equal will not have jurisdiction . . . over equal, much less over a superior.[32]

Thus, for Bracton, "[n]o one may presume to question [the king's] acts," and if the king commits a wrong, "it is punishment enough for him that he await God's vengeance."[33]

This principle of absolute royal immunity was not merely academic. As Jeffrey Goldworthy has demonstrated, both kings and courts repeatedly relied upon the doctrine.[34] In a fourteenth-century case in the Court of Common Pleas, for instance, the Chief Justice rejected a legal argument, admonishing the litigant that "against the King, who is above

---

Henry de Bracton, the thirteenth-century jurist to whom the work is sometimes credited. *See generally, e.g.*, J.L. Barton, *The Mystery of Bracton*, 14 J. LEGAL HIST. 1 (1993); J.L. Barton, *The Authorship of* Bracton: Again, 30 J. LEGAL HIST. 117 (2009); Paul Brand, *The Date and Authorship of* Bracton*: A Response*, 31 J. LEGAL HIST. 217 (2010).

31. *See* 2 BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 306 (George E. Woodbine, ed., Samuel E. Thorne, trans. 1968).

32. 4 BRACTON, *supra* note 30, at 201. Throughout this essay, in all direct quotations to pre-1900 writings, spelling, capitalization, and particularly punctuation have been lightly modernized.

33. 2 BRACTON, *supra* note 30, at 33. On the precise scope of the king's authority, Bracton is confused and potentially contradictory. *See id.* at 305; *see also* Cary J. Nederman, *Bracton on Kingship Revisited*, 5 HIST. POL. THOUGHT 61 (1984); MICHAEL BLECKER, THE KING'S PARTNERS IN BRACTON (1984); Brian Tierney, *Bracton on Government*, 38 SPECULUM 295 (1963); Fritz Schultz, *Bracton on Kingship*, 60 ENG. HIST. REV. 136 (1945). Bracton's suggestion that the king is answerable to the *lex regia* and to his barons, who must hold him to the law, has been read both as a description of political reality (i.e., the king in council with his barons had greater authority than the king acting alone) and a call for the use of extrajudicial checks on royal power (i.e., rebellion). *See* Charles M. Radding, *The Origins of Bracton's* Addicio de Cartis, 44 SPECULUM 239, 240 (1969); JEFFREY GOLDWORTHY, THE SOVEREIGNTY OF PARLIAMENT 24–25 (1999).

34. *See* GOLDWORTHY, *supra* note 32, at 30.

the law, you cannot rely on legal principles."[35] Likewise, during the Wars of Roses in 1460, a court refused to rule between the rival claimants to the throne, demurring that "the matter was so high and touched the King's high estate and regality, which is above the law."[36] And when implicated in a case in 1234, Henry III refused to become involved, declaring that "the lord king can neither be summoned nor submit to the command of anyone, since he has no superior in the kingdom."[37]

This conception of royal peerlessness did not die with the Middle Ages, but survived the Enlightenment and persisted into the modern era. Writing in the seventeenth century, Matthew Hale noted that the king was neither "subject to the penalty of law" nor "liable to any personal loss or damage."[38] And whatever potentially conflicting views he might elsewhere express,[39] Edward Coke was clear in his *Institutes of the Laws of England* that the courts exercised their jurisdiction only on delegation from the king.[40] Likewise, at his trial before the parliamentary High Court of Justice in 1649, Charles I relied upon his royal status to challenge the tribunal's authority, arguing that "a [k]ing cannot be tried by any superior jurisdiction on earth."[41]

---

35. *Id*.

36. *Id*. at 27.

37. *Id*. at 24.

38. Julian Davis Mortensen, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1202 n.112 (2019) (quoting MATTHEW HALE, THE PREROGATIVES OF THE KING 177 (D.E.C. Yale ed. 1976)). *The Prerogatives of the King*, which was apparently unpublished until the twentieth century, has also apparently been out of print for nearly fifty years. *See id*. at 1202 n.110. Lacking access to a copy myself, I trust entirely in Professor Mortensen's citations.

39. *Thomas Bonham v. Coll. Of Physicians* (Dr. Bonham's Case), 77 Eng. Rep. 638 (C.P. 1610) (Coke, C.J.) (famously arguing in dicta that "when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void").

40. *See e.g.*, 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, bk. 2, ch. 11, § 199 (1633) ("the king judgeth by his judges"); 4 EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, bk. 3, ch. 7, at 71 (1648) ("The king hath committed all his power judicial, some in one court and some in another . . . And the king doth judge by his judges . . . . ").

41. *E.g.*, PETER COLE ET. AL., KING CHARLES[:] HIS TRYAL AT THE HIGH COURT OF JUSTICE SITTING IN WESTMINSTER HALL 27 (1650), digitized at https://perma.cc/P36A-BSCE; J. PLAYFORD, ENGLAND'S BLACK TRIBUNALL SET

And while this jurisdictional challenge was unsuccessful as a practical matter, upon the restoration of his son as Charles II in 1660, the men who had presided over the trial were denounced and executed as mere "pretended" judges who had assumed power only "by usurpation."[42]

At the time of the American Revolution, the king's position was thus clear. Blackstone, famously the most influential jurist of the pre-revolutionary period,[43] spilled considerable ink on the subject. As a matter of political theory, the king was "the fountain of justice" and "[a]ll jurisdictions of courts [were] either mediately or immediately derived from the crown."[44] He was both the judge in every case[45] and the prosecutor of every crime.[46] To try the king in his own courts would thus be a theoretical impossibility. In civil cases, "the king [could]not by his writ command himself,"[47] and in criminal cases, he could hardly sit simultaneously as prosecutor, defendant, and judge.[48]

As a matter of positive law, the situation was even more straightforward. Blackstone explained: "[T]he law ascribes to the king the attribute of sovereignty, or preeminence."[49]

FORTH IN THE TRIALL OF K. CHARLES I AT A HIGH COURT OF JUSTICE AT WESTMINSTER-HALL 19 (4th ed. 1660), digitized at https://perma.cc/A2XJ-EAHM.

42. T. VERE & W. GILBERTSON, THE ARRAIGNMENT, TRYAL AND CONDEMNATION OF THOMAS HARRISON, LATE MAJOR GENERAL (1660) (digitized at https://perma.cc/YB3C-WGND).

43. *See, e.g.*, Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 2 (1996) (arguing that Blackstone "should be regarded as the baseline, or shared starting-point, of American legal thought").

44. 1 WILLIAM BLACKSTONE, COMMENTARIES *257; *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *23–24 ("[A]ll courts of justice, which are the medium by which [the king] administers the laws, are derived from the power of the crown.").

45. 1 WILLIAM BLACKSTONE, COMMENTARIES *259 ("His majesty, in the eye of the law, is always present in all his courts . . . His judges are the mirror by which the king's image is reflected.").

46. *Id*. at *258.

47. Calvert's Lessee v. Eden, 1789 Md LEXIS 5, 27 (Md. Ct. App. 1789).

48. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *258 ("In criminal proceedings . . . it would still be a higher absurdity, if the king personally sate in judgment; because in regard to these he appears in another capacity, that of *prosecutor*. All offences are either against the king's peace, or his crown and dignity . . . ").

49. *Id.* at *235.

Therefore, "by law, the person of the king [was] sacred."[50] Succinctly, "no [civil] action [could] be brought against the king," and "no jurisdiction upon earth ha[d] power to try him in a criminal way, much less to condemn him to punishment."[51]

Despite the eight centuries that have passed since Bracton first committed it to writing, this rule persists today. Though the favored term is now "inviolable" rather than "sacred," under British law, the king cannot be criminally prosecuted—or even arrested.[52] In many ways, this makes sense. The British constitution, which has largely been marked by continuity rather than change,[53] continues to recognize the sovereignty of the monarch—albeit in the circumscribed form of Crown-in-Parliament.[54] The king is still the plaintiff in all criminal cases,[55] and the courts still issue judgment in his name.[56]

---

50. *Id.*

51. *Id.*

52. *See* Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned From King Henry III*, 49 ST. LOUIS L.J. 393, 458–59 (2005) ("The monarch's person is regarded as inviolable and is, in principle, immune from all suits and actions at law. . . . The monarch is also not bound by custom and is only bound by legislation by express mention or clear implication.") (internal quotations and emphasis omitted).

53. *See* ANTHONY KING, THE BRITISH CONSTITUTION 1–3 (2007).

54. *See* R (Miller) v. Sec'y of State for Exiting the Eur. Union [2016] EWHC (QB) 2768 (Admin) [20] ("[T]he most fundamental rule of UK constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme."), *overruled on other grounds by* R (Miller) v. Sec'y of State for Exiting the Eur. Union [2017] UKSC 5; Edward M. Morgan, *Act of Blindness, State of Insight*, 13 B.U. INT'L L.J. 1, n.33 (1995) ("In the British constitutional tradition, sovereignty resides in the Crown . . . .").

55. *See, e.g.*, Joseph Olson & David B. Kopel, *All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America,* 22 HAMLINE L. REV. 399, 453 n. 265 (1999) (comparing British and American constitutional traditions, where "criminal cases in the United States are prosecuted in the name of the people, while British cases are prosecuted in the name of the monarch"); Press Release, The University of Law, Time to Welcome the New King's Counsels (Sept. 23, 2022), https://perma.cc/R3ZK-GEMQ ("The change in legal formalities [upon the death of Elizabeth II] also means that prosecutions will now be called in the name of His Majesty King Charles III.").

56. *See, e.g.*, COURTS & TRIBUNALS JUDICIARY, TRADITIONS OF THE COURTS, https://perma.cc/3GP9-KYBQ ("The Royal Arms appear in every courtroom in England and Wales . . . demonstrating that justice comes from the monarch,

In short, the United Kingdom is still a kingdom. Justice still flows from the king, who cannot hail himself into his own courts. Any prosecution against him would be a conceptual absurdity that would see him not only on both sides of the *v.* but presiding from the bench as well. He is absolutely immune from liability—criminal or civil—not because he is the head of state, or due to separation of powers, or out of deference to his office, but rather because he, *personally*, is sovereign.[57]

In the United States, this same logic has been applied to a different conception of sovereignty. The United States as an entity, rather than any individual person or office, is sovereign.[58] Justice thus flows not from the head of state, but from the state itself, which has inherited the Crown's roles as both public prosecutor and judge.[59] Accordingly, the conceptual absurdity of self-prosecution arises, in this country, only if the United States as an entity attempts to charge itself in its own courts with a violation of its own laws.[60]

This same absurdity would thus seem to prevent criminal prosecution of a former president only if he, personally, were synonymous with the nation itself. But in rejecting former President Trump's appeal, the D.C. Circuit also rejected this

---

and a law court is part of the Royal Court. . . . [Its officers] officially represent[] the Crown. . . . And they bow to the bench when they enter . . . to show respect for the King's justice.").

57. *See* Alden v. Maine, 527 U.S. 706, 734–35 (1999) (collecting authorities to the effect that, under English law, sovereign immunity "was predicated" on the theory that "[n]o feudal lord could be sued in his own court" (internal citations omitted)).

58. *See e.g.*, *Kirtz*, 601 U.S. at 47 (referencing the "Court's precedents holding that, as sovereign, the federal government enjoys immunity from suits for money damages"); United States v. Paiz, 905 F.2d 1014, 1023, 1023 n.12 (7th Cir. 1990) ("The United States is sovereign, as is each of the United States.").

59. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 694 (1974) (explaining that a federal criminal case "is a judicial proceeding in a federal court alleging violation of federal laws and is brought in the name of the United States as sovereign" (citing Berger v. United States, 295 U.S. 78, 88 (1935))); *McFaddon*, 11 U.S. at 136 ("The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.").

60. *See, e.g.*, *Kirtz*, 26 F.4th at 171–72 (3d Cir. 2022) ("It would be absurd . . . to subject the federal government to criminal prosecution . . . .") (citing, *inter alia*, *Singleton*, 165 F.3d at 1300).

understanding of the presidential office.[61] The following portion of this essay demonstrates that the Court reached the correct result in this regard, and that, contrary to the arguments advanced by Mr. Trump, post-presidential immunity is not "rooted in the constitutional tradition" and certainly not "supported by our history."[62]

II. "A GOVERNMENT OF LAWS, NOT OF MEN:"[63] THE CONSTITUTION AND THE CLEAN BREAK FROM THE PAST

As an initial matter, it is clear that the plain text of the Constitution does not explicitly provide for presidential immunity of any kind. As the D.C. Circuit noted, "[t]he Framers knew how to explicitly grant criminal immunity. . . . Yet they chose not to [do so for] the President."[64] Accordingly, if—as former President Trump apparently argues[65]—the Constitution itself[66] actually provides for post-presidency criminal immunity, it does so only by implication.[67]

Because "'the intent of the Framers' is often an elusive quarry,"[68] the Supreme Court has recognized that constitutional implications of this kind should be identified and defined by reference to the pre-revolutionary common law.[69] After all, the

---

61. *See Trump*, 91 F.4th at 1180 (D.C. Cir. 2024), *judgment entered*, No. 23-3228, 2024 WL 448829 (D.C. Cir. Feb. 6, 2024), *cert. granted*, No. 23-939, 2024 WL 833184 (U.S. Feb. 28, 2024) ("For the purpose of this criminal case, former President Trump has become citizen Trump . . . .").

62. Brief for Defendant-Appellant, *supra* note 54, at 9–10 (quoting Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982)).

63. *Marbury*, 5 U.S. at 163 (1803).

64. *Trump*, 91 F.4th at 1201.

65. *See* Brief for Defendant-Appellant, *supra* note 54, at 1 (referring to "the text of the Constitution").

66. The alternative, of course, would be the judicial creation of presidential immunity entirely from whole cloth. *Compare Fitzgerald*, 457 U.S. at 749 (discussing the possibility of civil immunity being "implicit in the Constitution"), *and id.* at 770–71 (White, J., dissenting) (same), *with* Pearson v. Callahan, 555 U.S. 223, 233 (2009) (recognizing qualified immunity as a "judge-made rule").

67. *See Trump*, 91 F.4th at 1201–02.

68. Williams v. Florida, 399 U.S. 78, 92 (1970).

69. *See, e.g.*, *Fitzgerald*, 457 U.S. at 747 ("[A]t least in the absence of explicit constitutional or congressional guidance, our immunity decisions have been informed by the common law") (citing Butz v. Economou, 438 U.S. 478,

authors of the Constitution were, by and large, lawyers trained in English law,[70] and the post-revolutionary institutions of the new republic explicitly understood themselves to be successors to their British counterparts.[71] Thus, "the Court has persistently assumed . . . the common law's presence in the minds of the early Framers,"[72] who "inhale[d] it at every breath, [and] imbibe[d] it at every pore."[73] With respect to the intent of the Framers, the question of implied executive immunity from criminal prosecution therefore presents "the constitutional alternatives of abrogation and recognition of the immunity enjoyed at common law."[74]

The D.C. Circuit, as evidence of abrogation, relied primarily upon Alexander Hamilton's essays as Publius in the Federalist Papers,[75] which constitute "the most extensive and important elaboration of the presidency in the ratification period."[76] Writing in response to the "almost universal opposition to an

---

508 (1978)), Imbler v. Pachtman, 424 U.S. 409, 421 (1976))); Steagald v. United States, 451 U.S. 204, 217 (1981) ("The common law may . . . be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable."). *See generally Williams*, 399 U.S. 78 (considering the extent to which the Framers intended to and understood themselves to be "constitutionalizing" the common-law attributes of the petit jury); Payton v. New York, 445 U.S. 573 (1980) (engaging in same analysis with respect to searches).

70. *See* Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 270 (2009) (noting that more than half of the delegates to the Constitutional Convention were trained in English law (citing CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA 63 (1986))).

71. *See, e.g.*, Hayburn's Case, 2 U.S. 409 (1792) (adopting "the practices of the courts of King's Bench and Chancery" as "outlines for the practice of [the Supreme C]ourt"); Respublica v. Clarkson, 1 Yeates 46 (Pa. 1791) ("This [C]ourt . . . will . . . exercise the same powers as the court of King's Bench in England.").

72. Seminole Tribe v. Florida, 517 U.S. 44, 131 (1996) (Souter, J., dissenting), *superseded by statute*, USERAA, 38 U.S.C. §§ 4301–4335, *as explained by* Huff v. Office of the Sheriff, No. 7:13-CV-000257, 2013 U.S. Dist. LEXIS 161954, *7–8 (W.D. Va. Nov. 3, 2013).

73. *Seminole Tribe*, 517 U.S. at 131 (Souter, J., dissenting) (quoting P. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF JURISDICTION OF COURTS OF THE UNITED STATES 91 (1824)).

74. *Seminole Tribe*, 517 U.S. at 106 (Souter, J., dissenting).

75. *See* United States v. Trump, 91 F.4th 1173,1202–05 (D.C. Cir. 2024) (analyzing Federalist Papers No. 65 and 69 on the immunity of the President).

76. Reinstein, *supra* note 70, at 265.

executive who would possess the powers of [the king],"[77] Hamilton took pains to highlight the "total dissimilitude between [the President] and a king of Great Britain."[78] In particular, he declared that, "in a republic . . . every magistrate ought to be personally responsible for his behavior in office" and expressly contrasted the *office* of the presidency with the sacred—and "perpetual"—*person* of the king.[79]

Notably, in a passage relied upon by both Mr. Trump and the D.C. Circuit, Hamilton emphasized that "[t]he President of the United States would be liable to be impeached, tried, and, upon conviction . . . removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law."[80] And while a strained reading of this passage allows for the inference that "impeach[ment] . . . and remov[al] from office" is a *prerequisite* to "prosecution and punishment in the ordinary course of law,"[81] that conclusion is—as the Court of Appeals observed[82]—rendered untenable in context. Not only does Hamilton immediately and explicitly contrast the "personal responsibility" of the President with the "sacred and inviolable" person of the British king,[83] but later in the same essay, he notes, without reference to impeachment, that the President "would be amenable to personal punishment and disgrace."[84]

---

77. *Id.*; *see also* THE FEDERALIST NO. 67 at 408 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting "the aversion of the people to monarchy").

78. THE FEDERALIST NO. 69 at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

79. THE FEDERALIST NO. 70 at 429 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Although Hamilton is, in context, referring to *political* responsibility, in the British tradition, the politically infallibility of the king was inextricably bound up with his personal sovereignty. *See* 1 BLACKSTONE, *238–39.

80. *Id.*

81. *Id.*

82. *See Trump*, 91 F.4th at 1202–03 ("It strains credulity that Hamilton would have endorsed a reading of the Impeachment Judgment Clause that shields Presidents from all criminal accountability unless they are first impeached and convicted by the Congress.").

83. THE FEDERALIST NO. 69 at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

84. *Id.* at 422. *See also* THE FEDERALIST NO. 77 at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the President would be "*at all times* liable to . . . the forfeiture of life and estate by subsequent prosecution in the common course of law" (emphasis added)).

Moreover, while the Federalist Papers provide the natural "starting point for examining the scope of executive power,"[85] they are far from the only indication that the Framers and their contemporaries understood no post-presidential immunity to be implicit in the presidential office. For instance, Luther Martin, in his report to the Maryland legislature regarding the proceedings at the Constitutional Convention, indicated that the delegates "were eternally troubled with arguments and precedents from the British government,"[86] yet he gave no indication that the Convention had even considered the possibility that sacred inviolability would, in the British model, attach to the individual person who held the executive office. He did, however, report a belief that "no treason was so likely to take place as that in which the President himself might be engaged," and a fear that the President would "attempt to assume to himself powers not given by the Constitution and establish himself in regal authority."[87]

This fear of presidential treason was not shared by James Iredell, later Justice of the Supreme Court, who in 1788 opined that "[t]he probability of the President of the United States committing an act of treason against his country is very slight."[88] Yet even Iredell conceded that "[s]uch a thing is . . . possible" and observed that, in such an unlikely scenario, the President "is not exempt from a trial, if he should be guilty, or supposed guilty, of that or any other offence."[89] And writing a year earlier, Tench Coxe, a delegate to the Constitutional Convention from Pennsylvania, had emphasized the same point, observing that "[the President's] person is not so much protected as that of a member of the House of Representatives, for he may be proceeded against like any other man in the ordinary course of law."[90]

---

85. Reinstein, *supra* note 70, at 265.

86. Luther Martin, *Genuine Information* [Part IX], MD. GAZETTE ¶47 (Jan. 29, 1788), https://perma.cc/6HUS-GNFS.

87. *Id.* at ¶79.

88. James Iredell, *Marcus* [Part III], NORFOLK & PORTSMOUTH J. (Mar. 5, 1788), https://perma.cc/L3QN-PVYA (PDF).

89. *Id.*

90. Tench Coxe, *On the Federal Government* [Part I], INDEPENDENT GAZETTEER, (Sept. 26, 1787), https://perma.cc/4UCT-RJ3S. Coxe took care to highlight the radical differences between president and king, observing that,

Indeed, even among the most virulent antifederalists, there seems to have been little fear of a personally inviolable executive in the model of the British king. Although "[v]irtually every feature of the proposed presidency generated criticism from at least one Antifederalist writer,"[91] the possibility of post-presidential criminal immunity appears to have gone largely unconsidered. For instance, the pseudonymous "An Old Whig," writing in 1787, foresaw the presidency of a man who lacked "the virtue, the moderation and love of liberty which possessed [George Washington]" and predicted that such a President would "make the attempt to perpetuate his own power."[92] However, he assumed that that attempt would take the form of a military coup, not an assertion of immunity. And Cato, who railed against "the vast and important powers of the president" made no mention of criminal immunity when enumerating the proposed President's "powers and prerogatives."[93]

That the possibility of post-presidential immunity was apparently of minimal concern to the Framers may be unsurprising, given that, as we have seen, the English legal tradition in which they were trained derived the executive's *legal* inviolability from his *personal* sovereignty. Certainly, this was the understanding of the early American courts. Thirty years after the Constitution's ratification, Justice Joseph Story explained the established view: "[T]wo reasons are given why the king cannot be summoned or arrested in any civil or criminal suit. The first is, his supereminency, and the second [is] that justice is administered by him and in his name."[94]

But early dicta demonstrate a clear understanding that this logic was inapplicable in the United States, where the

---

"[i]n Britain[,] their king is for life. In America our President will always be one of the people at the end of four years." *Id.*

91. Raymond B. Wrabley, Jr., *Anti-Federalism and the Presidency*, 21 PRES. STUDS. Q. 459, 464 (1991).

92. *An Old Whig* [Part V], INDEPENDENT GAZETTEER (Nov. 1, 1787), https://perma.cc/89YV-LZH2 (PDF).

93. *Cato* [Part IV], N.Y.J. (Nov. 8, 1787), https://perma.cc/HHK4-VTZR (PDF).

94. The Santissima Trinidad, 20 U.S. 283 (1822) (explaining that the sovereign immunity which shielded the King of Spain under international law was conceptually distinct from that which applied in the domestic courts of Spain).

sovereignty of the nation was distinct from the executive power and was not vested in any individual person. Writing for the Virginia Supreme Court in 1804, for instance, Judge Spencer Roane observed that:

> [t]he character of . . . allegiance [to the King], by the English law, is, that it is due to the person of the sovereign and not to his political character. [But w]e have, happily, no king, to whose sacred person this allegiance may be said to be due. It is . . . to [the] government only, which is perpetually changing as to the persons who administer it . . . [that] the allegiance of the citizen is due.[95]

And that same year, in a case regarding State reception of English law, the United States Supreme Court acknowledged that the traditional doctrine was incompatible with the new constitutional order, noting that "[t]he adoption of the common law . . . was not meant to adopt those parts which were inconvenient, or inconsistent with our situation—such as that the king can do no wrong."[96]

This is not to say that the early courts understood the Constitution to have abrogated *every* immunity enjoyed prior to the revolution. For instance, in an 1810 case against the State Chancellor,[97] the Supreme Court of New York extensively examined the case law regarding judicial immunity in England and found that the logic underlying that doctrine applied with full force to the post-revolutionary courts.[98] And in an 1823 ejectment action, the Court of Appeals of Kentucky held that the inerrancy previously ascribed to the sovereign king had been inherited by the states as sovereign entities.[99]

---

95. Read v. Read, 9 Va. 160, 200–01 (Va. 1804) (opinion of Roane, J.).

96. M'Ilvaine v. Coxe's Lessee, 6 U.S. 280, 289 (1805).

97. I.e., the highest officer in the courts of chancery.

98. Yates v. Lansing, 5 Johns. 282, 290–93 (N.Y. 1810)

> The doctrine which holds a judge exempt from a civil suit or indictment . . . has a deep root in the common law . . . . A short view of the cases will teach us to admire the wisdom of our forefathers, and to revere a principle on which rest[s] the independence of the administration of justice . . . .

99. Elmondorff v. Carmichael, 13 Ky. 472, 489–90 (Ky. Ct. App. 1823) ("The king can do no wrong; the commonwealth can do no wrong. The commonwealth cannot be charged with fraud. If wrong be done by act of the government through its agents, the wrong is charged to the officers and agents of the government.").

But where common-law immunities such as these *were* endorsed by the early courts, it was because they were founded upon rationale that remained applicable and compelling under the new constitution. As Justice Iredell explained in his dissenting opinion affirming State sovereign immunity in *Chisholm v. Georgia*, "when any part of an ancient law is to be applied to a new case, the circumstances of the new case must agree in all essential points with the circumstances of the old cases to which that ancient law was formerly appropriated."[100]

This clearly was not the case with respect to the personal inviolability enjoyed by the British king. Indeed, the *Chisholm* Court explicitly and resoundingly rejected any suggestion that the logic which dictated personal inviolability in Britain compelled the same result with respect to an American executive.[101] Chief Justice Jay explained:

> [The British] system considers the Prince as the Sovereign and the people as his Subjects; it regards his person as the object of allegiance and excludes the idea of his being on an equal footing with a subject, either in a Court of Justice or elsewhere. That system contemplates him as being the fountain of honor and authority; and from his grace and grant derive[] all franchises, immunities and privileges; it is easy to perceive that such a sovereign could not be amenable to a Court of Justice or subjected to judicial control and actual constraint. It was of necessity, therefore, that suability became incompatible with such sovereignty . . . . *No such ideas obtain here*[.][102]

And while the *Chisholm* ruling was issued in the context of State rather than federal sovereignty, the opinions of the justices make clear that, as a general principle, jurists of the period did not consider the common-law doctrine of personal inviolability to remain applicable – or even conceptually sound – with respect to the executive offices of the new republic.[103]

---

100. Chisholm v. Georgia, 2 U.S. 419, 447 (1793) (opinion of Iredell, J.), *superseded on other grounds by constitutional amendment*, U.S. CONST. amend. XI.

101. *Id.*

102. *Id.* at 471 (opinion of Jay, C.J.) (emphasis added).

103. *See id.* at 472 ("[European] Princes have personal powers, dignities, and pre-eminences, our rulers have none but official; nor do they partake in

In sum, the Framers and their contemporaries were no strangers to the concept of immunity, whether civil or criminal. The legal system in which they had been trained viewed such immunities as necessary consequences of the political theory on which the system rested. And while the adoption of the Constitution instituted a new system, that new system was, in many fundamental respects, made in the image of the old.

Thus, under the new system instituted by the Constitution, as under the old, it remained necessary "to enable and encourage a representative of the public to discharge his public trust with firmness and success."[104] Accordingly, the Framers adopted virtually unchanged the parliamentary privilege enshrined in the English Bill of Rights.[105] Similarly, the new system, like the old, demanded that "judges, in administering justice, [be] uninfluenced by considerations personal to themselves."[106] The Framers and their contemporaries therefore

---

the sovereignty otherwise, or in any other capacity, than as private citizens."); *see also id*. at 446 (opinion of Iredell, J.)

> [A] contract with the Governor of a State . . . is entirely different from such a contract made with the crown in England. The crown there has very high prerogatives, in many instances is a kind of trustee for the public interest . . . A Governor of a State is a mere Executive officer; his general authority very narrowly limited by the Constitution of the State; with no undefined or disputable prerogatives; . . . having no colour to represent the sovereignty of the State . . .

id. ("[A] Petition being only presentable to [the king] as he is the sovereign of the Kingdom, so far as analogy is to take place, such Petition in a State could only be presented to the sovereign power, *which surely the Governor is not*." (emphasis added)); *id*. at 473 (opinion of Jay, C.J.)

> Grant that the Governor of Delaware holds an office of superior rank to the Mayor of Philadelphia, they are both nevertheless the officers of the people; and however more exalted the one may be than the other, yet in the opinion of those who dislike aristocracy, that circumstance cannot be a good reason for impeding the course of justice.

But see 2 U.S. 399, 400 (1790) ("[A]ll process of this [C]ourt shall be in the name of 'the President of the United States.'").

104. Michael L. Shenkman, *Talking About Speech or Debate: Revisiting Legislative Immunity*, 32 YALE L. & POL'Y REV. 351, 360 (2014) (quoting 2 WORKS OF JAMES WILSON 38 (Andrews ed. 1896)).

105. *Compare* Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.), *with* U.S. CONST. art. I, § 6, cl. 1; *see also* Shenkman, *supra* note 104, at 358–59.

106. Randall v. Brigham, 74 U.S. 523, 536 (1868).

understood common-law judicial immunity to have been implicitly preserved in the American courts.[107]

But the new system was not, of course, identical to the old. Of the many ways in which the Constitution signaled a rupture from the British tradition, the most fundamental was the rejection of "feudal principles" in favor of republicanism.[108] The new American courts exercised the judicial power of the nation itself, not the delegated judgment of a monarch.[109] The States and the federal government, as sovereign entities, took the place of the king's sovereign person.[110] The new executive power was vested in an office of limited term, not embodied in an eternal person. As Justice Iredell explained in 1795:

> [t]he great distinction between Monarchies and Republics (at least our Republics) in general is that, in the former, the monarch is considered as the sovereign and each individual of his nation as subject to him . . . But in a Republic, all the citizens, as such, are equal . . . In such governments,

---

107. *See id*. (citing Yates v. Lansing, 5 Johns. 282, 290–93 (N.Y. 1810)).

108. *See Chisholm*, 2 U.S. at 472 (opinion of Jay, C.J.) ("From the differences existing between feudal sovereignties and Governments founded on compacts, it necessarily follows that their respective prerogatives must differ.").

109. *See, e.g.*, Gilchrist v. Collector of Charleston, 10 F. Cas. 355, 361 (C.C.D.S.C. 1808)

> The jurisdiction of the court . . . must depend upon the constitution and laws of the United States. We disclaim all pretensions to any other origin of our jurisdiction, especially the unpopular grounds of prerogative and analogy to the king's bench. That judicial power, which the constitution vests in the United States, and the United States in its courts, is all that its courts pretend to exercise.

110. *See, e.g.*, Irwin v. Comm'r of Northumberland Cnty., 1 Serg. & Rawle 505, 507 (Pa. 1815) (Tilghman, C.J.) ("Criminal actions were formerly prosecuted in the name of the king, who paid no costs. Upon our revolution the commonwealth stood in the place of the king . . . ."); Martin v. State, 1 H. & J. 721 (Md. Ct. App. 1805)

> The king is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offence . . . . In all criminal proceedings or prosecutions for offences, the king is prosecutor. All affronts to the power and breaches of the rights of the community, are immediately offences against him. Hence it follows, that all crimes and offences are considered as immediately against the state; and that the same are punished by actions at the suit of the state: That in proceedings for their punishment, the state is prosecutor, and one of the parties.

> therefore, the sovereignty resides in the great body of the people . . . .[111]

Thus, where the Framers and the early courts recognized immunity from suit, they invariably understood those immunities to attach not to the *person*, but to the *office*. Members of Congress were immune from arrest and prosecution not when acting as private citizens, but only "during their attendance at the session of their respective houses, and in going to and returning from the same[,] and for any speech or debate in either house."[112] Likewise, judges were "exempt from . . . indictment" not personally, but only for acts "done, or admitted to be done by them . . . [while] sitting as judge."[113] And, following the same reasoning to its inexorable conclusion, "[i]f, upon any principle, the president could be construed to stand exempt from the general provisions of the constitution," it would be not because "the law . . . discriminate[s] between the president and a private citizen," but only "because [of] his duties as chief magistrate."[114]

There is thus no indication that the Framers intended the *office* of President of the United States to confer a perpetual and *personal* inviolability of the kind enjoyed by the British king. They certainly did not understand such a "personal dignity"[115] to be implicit in the executive power that they had so carefully curtailed. To the contrary, they were confident that "[h]ow essentially th[e] difference of circumstances must vary the policy of the laws of the two countries, [with] reference to the personal dignity of the executive chief, will be perceived by every person."[116] Against this ideological backdrop, they would have

---

111. Penhallow v. Doane's Adm'rs, 3 U.S. 54, 93 (1795) (opinion of Iredell, J.).

112. U.S. CONST. art. I, § 6, cl. 1.

113. Yates v. Lansing, 5 Johns. 282, 291 (N.Y. 1810) (cited with approval in Randall v. Brigham, 74 U.S. 523, 536 (1869)).

114. United States v. Burr, 25 F. Cas. 30, 34 (Va. Cir. 1807).

115. *See id.*

> [P]ersonal dignity conferred on them by the constitutions of their respective nations, the court will only select and mention two. It is a principle of the English constitution that the king can do no wrong, that no blame can be imputed to him, that he cannot be named in debate.

116. *Id.*

been horrified—although not, perhaps, surprised[117]—to hear a former President of the United States echo the old royal claim that "[n]o one may presume to question his acts."[118]

CONCLUSION

Former President Trump's claim to immunity rests on argument by implication. That, alone, does not render his arguments unsound. After all, "[t]hat which is implied is as much a part of the Constitution as that which is expressed."[119] But because the Constitution was not framed in a vacuum, no part of it—express or implied—"can[] be interpreted safely except by reference to the common law and to British institutions as they were when the [Constitution] was framed and adopted."[120] Indeed, this has become a fundamental and imperative rule of Constitutional construction: "[the Constitution] *must* be interpreted in the light of the common law, the principles and history of which were familiarly known to the [F]ramers."[121]

At the time of the American Revolution—and for many hundreds of years before—one of the most fundamental principles of the British common law was the unity of the executive power and the sovereignty of the nation in the single sacred and inviolable person of the king. That person was not merely a functionary or officeholder. He was imbued with a "special pre-eminence . . . over and above all other persons and out[side] of the ordinary course of the common law, in right of his regal dignity."[122] He was "all-perfect and immortal,"[123] and "the law ascribe[d] to him . . . attributes of a great and

117. *See supra* notes 85 and 90 and accompanying text.

118. 2 BRACTON, *supra* note 28, at 33.

119. South Carolina v. United States, 199 U.S. 437, 451 (1905).

120. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 39 (2022) (internal emphasis removed) (quoting Ex Parte Grossman, 267 U.S. 87, 108–09 (1925)).

121. Schick v. United States, 195 U.S. 65, 69 (1904) (internal citations omitted and emphasis added) (collecting cases).

122. 1 BLACKSTONE, *232.

123. *Id*. at *242.

transcendent nature, by which the people [were] led to consider him in the light of a superior being."[124]

By the time of the framing of the Constitution, these bedrock principles of the British constitution had held for centuries. Since nearly the time of the Norman Conquest, they had been relied upon by courts and kings and expounded upon by the most preeminent legal writers.[125] Certainly, they were intimately familiar to the Framers, who "were trained in the English law and traditions,"[126] and who could not have been ignorant of the "unbroken line of common-law precedent stretching from Bracton to Blackstone."[127]

But familiarity does not imply approbation. "It cannot be seriously claimed that [the Framers] intended to adopt the common law wholesale."[128] Rather, "[t]hey accepted those portions of it which were adapted to this country and conformed to the ideals of its citizens and rejected the remainder."[129] Thus, "[n]ot many common-law rules have been elevated to the status of constitutional[ity]."[130] Rather, "[t]he provisions of our Constitution . . . reflect an incorporation of certain few common-law rules and a rejection of others."[131]

With respect to the criminal immunity of the executive, there could be no clearer case for rejection. Undoubtedly, the Framers knew how to bestow the perpetual and sacred inviolability enjoyed by the king at common law. They knew how to instill personal majesty and embody the sovereignty of a nation in one person. In short, had they wanted to, they knew how to make a king. After all, they had a thousand-year blueprint before them.

But they chose not to.

---

124. *Id*. at *234–35.

125. *See supra* notes 24–48 and accompanying text.

126. United States v. Mandujano, 425 U.S. 564, 571 (1976).

127. *Bruen*, 597 U.S. at 35 (referring to right to bear arms); *see, e.g.*, *Schick*, 195 U.S. at 70 (concluding that, "[u]ndoubtedly, the Framers of the Constitution were familiar with [Blackstone]").

128. Green v. United States, 356 U.S. 165, 212 (1958) (Black, J., dissenting).

129. *Id*; *cf.* M'Ilvaine v. Coxe's Lessee, 6 U.S. 280, 289 (1805).

130. Gannett Co. v. DePasquale, 443 U.S. 368, 384 (1979).

131. *Id*. at 384–85.

Instead, the Framers vested the carefully circumscribed executive power in a chief magistrate responsible both to the people and to the law. They created an office so radically distinct from the monarchy, that they felt it "[i]mpossible not to bestow the imputation of deliberate imposture and deception upon the gross pretense of a similitude between a king of Great Britain and . . . the President of the United States."[132]

Now, more than two-hundred year later, a former president attempts – as the Framers feared – to overturn the egalitarian and republican principles on which the Constitution rests and to "establish himself in regal authority."[133] The matter is before the highest court in the land, which will ultimately have the final word on the meaning of the Constitution and the intent of those who framed it. If that Court finds merit in Mr. Trump's arguments and reverses the decision of the D.C. Court of Appeals, it will issue its ruling in the face of the Framers' every attempt to distinguish the limited office of the president from the sacred person of king. Such a finding of implicit post-presidential immunity would contradict one of the single most fundamental principles enshrined in our Constitution: that, while "[i]n England, the King is a perpetual magistrate,"[134] in the United States, "the president is elected from the mass of the people and, on the expiration of the time for which he is elected, returns to the mass of the people again."[135]

In other words, any holding that "neither a federal . . . prosecutor, nor a . . . federal court[] may sit in judgment over a President's official acts"[136] would elevate the President's "unique position in the constitutional scheme"[137] to that of a monarch. As this essay has shown, every aspect of our constitutional history clearly demonstrates that such a result

---

132. THE FEDERALIST NO. 67 at 408 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

133. Martin, *supra* note 87.

134. THE FEDERALIST NO. 70 at 429 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

135. United States v. Burr, 25 F. Cas. 30 (Va. Cir. 1807) (Marshall, C.J.) (discussing the differences between "the personal dignity conferred on [the British king and the President of the United States] by the constitutions of their respective nations")

136. Brief for Defendant-Appellant, *supra* note 54, at 10; *cf. supra* notes 19–47 and accompanying text.

137. Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

was neither the intent of the Framers nor even compatible with the republican system they established.