In the Supreme Court of the United States

No. 19-635

DONALD J. TRUMP, PETITIONER

v.

CYRUS R. VANCE, JR., IN HIS OFFICIAL CAPACITY AS THE DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, ET. AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF CLAIRE FINKELSTEIN AND THE CENTER FOR ETHICS AND THE RULE OF LAW AT THE UNIVERSITY OF PENNSYLVANIA AS AMICI CURIAE SUPPORTING CYRUS R. VANCE, RESPONDENT

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QUESTION PRESENTED

Whether a Sitting President Can Assert Executive Privilege to Block a State Grand Jury Subpoena for His Personal Financial Records Issued to a Third-party Custodian under Article II and the Supremacy Clause of the U.S. Constitution.

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INTEREST OF THE AMICI[1]

The Amici are members of the *Center for Ethics and the Rule of Law,* a nonpartisan academic center at the University of Pennsylvania dedicated to preserving and promoting the rule of law in national security and democratic governance. Amici are focused on addressing rule of law violations that threaten the security of the United States and undermine democracy.

The Center is led by academics and practitioners who are experts in national security law and ethics and who are not united by party affiliation. The Center has previously identified rule of law violations in both Democratic and Republican administrations.

STATEMENT

Amici offer this brief because of the grave threat to the rule of law posed by increasing use of the concepts of "absolute immunity" and "executive privilege" on the part of U.S. executive branch

[1] No counsel for either party had any role in drafting or contributing money for the drafting of this brief. No person or entity other than the *amicus curiae*, its members and counsel made any monetary contribution to the preparation or submission of this brief. The parties to the case filed blanket consent motions on January 8, 2020 (Petitioner Trump), January 15, 2020 (Respondent Mazars, USA LLP), and January 15, 2020, (Respondent Cyrus R. Vance).

officials.[2] To ensure that the U.S. remains "a government of laws, not men," *Massachusetts State Constitution of 1780*, it is imperative that officials exercise their duties against the background of publicly available mechanisms of accountability that ensure compliance with their mandates. We have already seen a concerning trend since the attacks on 9/11 towards an increasingly expansive conception of executive authority. See Claire O. Finkelstein, "The Imperial Presidency and the Rule of Law," in Claire O. Finkelstein and Michael Skerker, eds., *Sovereignty and the New Executive Authority* (2019) 145. The claims of presidential immunity made by President Trump, his attorneys and the government in this case continue this trend at an accelerated pace. They threaten to eliminate accountability, not just for this president, but for future presidents. Were this Court to adopt the interpretation provided by the Petitioner and in the Amicus Brief filed by the Solicitor General, anyone occupying the office of the president would be beyond the reach of state and federal judicial processes. The risk is particularly great when the claims of absolute presidential immunity are extended, as is proposed here, to private businesses merely because they are in possession of personal financial records belonging to the President.

We believe accordingly that the Court will set a dangerous precedent if it allows the President to

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[2] These claims are primarily presidential in nature but as we have seen, other executive branch officials sometimes assert immunity to subpoena on behalf of the President. *See Comm. on the Judiciary v. McGahn*, 2019 U.S. Dist. LEXIS 203983, __ F. Supp. 3d __, 2019 WL 6312011.

interfere with a state criminal law proceeding directed to a private business, and that such interference would strike a blow to the stability of democratic governance. Of equal importance, the progressive elimination of checks on the executive branch poses increasing risks to the national security of the United States.

SUMMARY OF THE ARGUMENT

The central defect with the position of the Petitioner and the Solicitor General lies in its support of President Trump's assertion of absolute immunity from criminal investigations under Article II of the U.S. Constitution. This view of presidential authority threatens to erode the rule of law. If left unchecked, it will fundamentally alter the basic principles of accountability on which our democracy depends. In the absence of a constitutional basis for the proffered claim of absolute presidential immunity, the rights of states to investigate a sitting president who has longstanding business and residential ties to that state must remain undisturbed by the federal government, as required by the Tenth Amendment. Because the brief of the Solicitor General argues vigorously that Article II provides the basis for an unfettered assertion of absolute presidential immunity, we pay particular attention to that amicus brief in the discussion that follows.

ARGUMENT

1. THE SOLICITOR GENERAL'S BRIEF AMICUS CURIAE IN SUPPORT OF A PRESIDENT ACTING IN HIS PRIVATE CAPACITY DESERVES LITTLE, IF ANY, WEIGHT

The Solicitor General submits amicus briefs to the Court in a small number of the cases each year in which the United States has an interest. While the selective nature of its intervention is to be expected, the Solicitor General has particular impact when he does offer an opinion or enters a case.

It is worth noting that the Solicitor General's decision to intervene in this case does not appear to be supported by the strongest and most legitimate reasons for such intervention, namely that the case involves a matter of critical importance to the national interest. Instead, the gravamen of Petitioner's action lies in the President's desire to conceal personal financial records and hence to evade subpoenas issued in a criminal investigation under the laws of the State of New York.[3] Petitioner

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[3] The Solicitor General cites *United States v. Nixon*, , 418 U.S. 683 (1974) and *Clinton v. Jones*, 520 U.S. 681 (1997) two earlier cases in which the Solicitor General submitted briefs to support a presidential claim of privilege, but those cases are distinguishable as the object of the subpoenas in those cases were held within the White House or directly required the participation of the president. Moreover, the Court rejected the claim of executive privilege in both of those earlier cases. As discussed later in this brief, the claim of executive privilege in this case is weaker than that asserted in either of those cases. The Solicitor General should not, at taxpayer expense, approach

therefore takes the position that he is entitled to assert absolute immunity not just with respect to his own person, but with respect to the operations of private third parties.

Unusual as such an assertion of privilege may be, the President's attorneys argue that "The subpoena must be treated as though it was sent directly to the President." Brief of Petitioner at 17. Had that been the case, the Solicitor General would have had a greater, though not dispositive, basis for making its opinion known. But directed as this subpoena is to outside third parties on a matter that does not relate to the President's duties to the country, this is not a case in which the United States could reasonably be said to have an interest, much less a substantial interest.

A second concern with the Solicitor General's decision to intervene in this matter relates to potential conflicts of interest. The Solicitor General is a subordinate of the President acting in his official capacity. Private lawyers represent Donald Trump in his personal capacity. If, as seems likely, the President demanded that the Solicitor General weigh in for the purpose of advancing the President's personal interests and the interests of Trump business entities, that would be a misuse of office. The President should not enlist executive branch agencies into service to benefit his personal interest in covering up potential misdeeds of his private businesses or to

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this Court with executive privilege arguments that are demonstrably weaker than those this Court has already rejected.

advance his financial interests.[4] Moreover, that same principle would apply if the Solicitor General decided *sua sponte* to assert itself into this case because it thought the President would approve. An executive branch agency should not be in the business of using tax- payer dollars to support the President's personal and financial interests.

For the foregoing reasons, the brief Amicus Curiae of the Solicitor General should be afforded little, if any, weight in this matter.

2. THE PRESIDENT'S ARTICLE II POWERS DO NOT IMMUNIZE HIM FROM CRIMINAL INVESTIGATION

A. *The Solicitor General's Argument that the Framers Supported Absolute Immunity for Sitting Presidents is Historically Incorrect*

The Solicitor General makes a series of unfounded, historically inaccurate and misleading claims about the Framers' intent in Article II. Given that "original intent" is frequently introduced in favor of presidential authority, it is critical to correct the misimpression this brief creates. Against the background of a fuller discussion of the debates of the time, it is clear that the Framers were exceedingly concerned to avoid precisely the view of presidential authority advanced by the Solicitor General's brief,

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[4] Arguably, the Solicitor General has run afoul of the ABA Model Rules of Professional Conduct Rule 1.7 regarding concurrent conflicts of interest, as well as under the Office of Government Ethics regulations; *see also* 5 C.F.R. Section 2635.702, which prohibits "use of public office for private gain."

given that they were afraid of replicating the monarchy they had just fought a war to reject. The Framers were thus careful to rein in the power of the president and to ensure that he was subject to checks and balances of both the Congress and the states.

The Solicitor General argues, for example, that "In Article II, the Framers contemplated that the President would exercise his nationwide powers in the interests of the whole Nation, without any risk of interference by individual States." Solicitor General's Brief at 5. The brief offers no citation for this broad and misleading generality. The brief also argues that "The Founders understood Article II to protect the 'independent functioning' of the President's unique office, 'free from risk of control, interference or intimidation by other branches.' Solicitor General's Brief at 9, citing *Nixon v. Fitzgerald*, 457 U.S. 731, 760–761 (1982). What evidence is there that in the face of their concerns about creating another king the Framers were simultaneously willing to immunize the president against both the oversight of the other branches of the federal government as well as against the states?

In his brief Amicus Curiae, the Solicitor General grounds this claim directly in the text of Article II, yet he is unable to cite any judicial holding supportive of this broad assertion of constitutional authority. Instead, he argues from vaguely suggestive phrases drawn from the writings of some of the Framers, including Thomas Jefferson and the *Journal of William Maclay*. Solicitor General's Brief at 9.

Moreover, the Solicitor General misleadingly introduces Senator Maclay as a source for

monarchical sentiment, implying that he was highly favorable to presidential authority. Yet the text suggests precisely the reverse, and it appears that the brief is drawing on rhetorical passages in which Maclay, a Democrat, is characterizing, and possibly exaggerating, arguments made by some of his political opponents in the Federalist party. The Solicitor General's distortion of original sources would fail to meet the standards of academic scholarship, let alone those for responsible legal advocacy. A moment's examination of Maclay's text will make this clear.

On September 26, 1789, Senator Maclay, a Democrat, had an argument with Federalists Vice President John Adams, Senator Oliver Ellsworth, and Representative Fisher Ames on the relationship of the president to the Judiciary and whether the president was subject to the authority of the courts. Maclay writes that following the departure of Ames from the discussion,

> [Adams and Ellsworth] said the President, personally, was not the subject of any process whatever; could have no action whatever brought against him; was above the power of all judges, justices, etc. For what, said they, would you put it in the power of a common justice to exercise any authority over him and stop the whole machine of government? I said that, although President, he is not above the laws. Both of them declared you could only impeach him, and no other process whatever lay against him.

William Maclay, Journal of William Maclay 166-67 (E. Maclay ed. 1890), *quoted in Impeachment or Indictment: Is a Sitting President Subject to the Compulsory Criminal Process? Hearings Before the Subcomm. On the Constitution, Federalism, and Property Rights of the Senate Comm, on the Judiciary, 105th Cong (1998)*.

The debate recorded in Maclay's journal that day then turns to precisely the topic under discussion here, namely whether a sitting president could be indicted before he had been impeached. Maclay was a firm believer in the view that he could be, and made this clear in a passage reminiscent of debates in this case on oral argument in the Second Circuit Audio of Oral Arguments in Trump v. Vance, 19-3204 (October 23, 2019):

> I put the case: "Suppose the President committed murder in the street. Impeach him? But you can only remove him from office on impeachment. Why, when he is no longer President you can indict him. But in the meantime he runs away. But I will put up another case. Suppose he continues his murders daily, and neither House is willing to impeach him?" Oh, the people would arise and restrain him. "Very well, you will allow the mob to do what legal justice must abstain from." Mr. Adams said I was arguing from cases nearly impossible. There had been some hundreds of crowned heads within these two centuries in Europe,

> and there was no instance of any of them having committed murder. Very true, in the retail way, Charles IX of France excepted. They generally do these things on a great scale. I am, however, certainly within the bounds of possibility, though it may be improbable.

Id. at 167.

The first and rather general question, namely whether the president is "not the subject of any process whatever; could have no action whatever brought against him; was above the power of all judges, justices, etc," has been resolved. The president is not above the law and is subject to the rulings of the judges and justices, one of three coequal branches of our government. This Court has entertained numerous cases in which the president is sued in his official capacity. See e.g. *United States v. Nixon*, 418 U.S. 683 (1974). To the extent that Adams, Ames, and Ellsworth argued anything to the contrary back in the day, history has proven them wrong. But their discussion is sufficient to demonstrate that even then it was far from generally accepted that a sitting president enjoys absolute immunity from legal process.

The second question, namely whether a president can be criminally indicted, has never been decided by an Article III court. Could a president kill someone in the street and avoid prosecution before he is impeached and removed from office? Can he escape justice if one third of the Senate plus one senator refuses to convict him? Our current president has

boasted that he could shoot someone on Fifth Avenue and get away with it, but this Court has never decided this singular question, and thus at present there is no basis for supposing that a president can claim immunity to criminal indictment directly on the basis of Article II of the Constitution.

In addition, the Solicitor General's characterization of Jefferson's position, Brief of the Solicitor General at 9, is an exaggeration, especially as concerns what is at issue in this case, namely the immunity of a sitting president to the exercise of the police powers of the various states. Jefferson and Madison, after all, drafted the famous Kentucky and Virginia Resolutions which asserted that a state could reject a federal law it believed to be unconstitutional. See James Madison, The Virginia Resolution of 1798. Madison and Jefferson were strong proponents of states' rights, and despite Jefferson's later opposition to the power of the Supreme Court over his presidency, he was deeply committed to the view that the states had the right to exercise independent judgment on the constitutionality of actions of the federal government that infringed on the states.

Once president, however, Jefferson was less keen on the idea of subjecting the president to judicial orders. Jefferson's resistance of a subpoena in the treason trial of Aaron Burr was rejected. In *United States v. Burr*, John Marshall discussed the difference between the U.S. president and the king of England, saying that in the case of the king, "it is said to be incompatible with his dignity to appear under the process of the court. . .." Whereas in the case of the U.S. president, he wrote:

> … it is not known ever to have been doubted, but that the chief magistrate of a state might be served with a subpoena ad testificandum. If, in any court of the United States, it has ever been decided that a subpoena cannot issue to the president, that decision is unknown to this court.
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> . . ..
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> If, in being summoned to give his personal attendance to testify, the law does not discriminate between the president and a private citizen, what foundation is there for the opinion that this difference is created by the circumstance that his testimony depends on a paper in his possession, not on facts which have come to his knowledge otherwise than by writing? The court can perceive no foundation for such an opinion. *The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it.* A subpoena duces tecum, then, may issue to any person to whom an ordinary subpoena may issue, directing him to bring any paper of which the party praying it has a right to avail himself as testimony; if, indeed, that be the necessary process for obtaining the view of such a paper.

United States v. Burr, 25 F. Cas. 30 at 10–13 (emphasis added).

As the *Burr* court emphasized, the judgment whether to issue a subpoena pertains to the relevance of the material being subpoenaed, not to the identity of the individual who must be sent such subpoena. One hundred and ninety years later, the *Clinton v. Jones* Court reinforced the same principle, writing that "although the President "is placed [on] high," "not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment." 520 U.S. 681, 696 (1997) (quoting James Wilson's speech at the Pennsylvania Convention in 1787 in support of the Constitution J. Elliot, Debates on the Federal Constitution 480 (2d ed. 1863).

Clearly, the Framers had different views about the president's immunity to legal process, just as views on this question continue to differ today. A brief tour of the early debates about this question, however, demonstrates that the description of presidential immunity in the brief of the Solicitor General is unnuanced and misleading. A more balanced treatment would indicate that there was little doubt among the Framers that the President was subject to subpoena, and that the question whether the President was subject to indictment was as unresolved as the matter remains today.

B. *The Solicitor General Incorrectly Assumes that Article II of the Constitution Immunizes the President from Criminal Indictment*

The Solicitor General assumes, but does not argue, that the President is immune to indictment and that this immunity stems directly from Article II. He then argues that it follows that a sitting president is also immune to investigation. Moreover, Petitioner claims immunity from *all* forms of investigation, including investigation by a state grand jury. The argument is based on the suggestion that a sitting president cannot be indicted combined with the inference that if it is impermissible to indict a sitting president, it is equally impermissible to investigate him. Petitioner's Brief in Trump v. Vance, No. 19-365, 6-9.

It the contention of Amici that the initial premise is incorrect but that even if a sitting president *were* immune to indictment, it would not follow that he would also be immune to investigation. Moreover, Amici assert that any claim of presidential immunity is based on a series of pragmatic considerations, and that there is no argument for such immunity based solely on Article II.

Currently there is only one source of authority for the claim that a sitting president cannot be indicted, namely the Justice Department memo, authorized by the Office of Legal Counsel (OLC) in 1973 at the time of the investigations into President Nixon's role in the Watergate scandal. This advice was revised and repeated in 2000 after the investigation into President Clinton's conduct with

Monica Lewinsky. Office of Legal Counsel Memoranda on the Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office (Sept. 24, 1973) and Office of Legal Counsel Memoranda on A Sitting President's Amenability to Indictment and Criminal Prosecution (Oct. 16, 2000). The reasons given for this conclusion are nearly entirely pragmatic, and as such they are lacking in any constitutional dimension.

The OLC memoranda interpreting the law are advisory only; they do not create binding legal precedent that is owed deference by this Court. They set out the internal policy of the Department of Justice, and thus are binding only insofar as the Justice Department chooses to regard them as such.

Moreover, the Justice Department is headed by an Attorney General who was appointed by and serves at the pleasure of the President. Even in the absence of such an articulated policy, the Justice Department would be unlikely to indict the President to whom that agency is beholden, and thus the policy comes as no surprise. But we find the President and his Amici attempting to parlay an internal Justice Department policy into a binding principle of constitutional stature. The argument the Solicitor General provides for this position is unconvincing at best and dangerously misleading at worst.

The Solicitor General's brief relies heavily on stray remarks in a small number of cases regarding executive privilege, such as *Nixon v. Fitzgerald*, where Chief Justice Burger suggests in a concurrence that the Founders understood Article II "to protect the 'independent functioning' of the President's unique office," Solicitor General's Brief at 9, citing *Nixon v. Fitzgerald*, 457 U.S. at 760-761. Yet *Nixon*

v. Fitzgerald is completely irrelevant to the issue at hand. In that case, the Supreme Court ruled 5-4 that Nixon, by then a former president, "is entitled to absolute immunity from damages liability predicated on his official acts." *Id.* at 745. That has nothing to do with the question of whether a sitting president can be indicted or investigated by a prosecutor for illegal acts he committed *ultra vires* and that pertain solely to his records held by private businesses or potentially his own businesses as well.

Other cases on which the Solicitor General relies include *U.S. v. Nixon* and *Clinton v. Jones,* both of which stand for the precise opposite proposition than that which the Solicitor General is trying to argue here. These cases hold that a sitting president is not immune to judicial process. *United States v. Nixon*, 418 U.S. at 713 ("The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases."), *Clinton v. Jones*, 520 U.S. 681, 696 (1997) ("With respect to acts taken in his 'public character'—that is official acts—the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts."). Indeed, *U.S. v. Nixon* is particularly relevant in that it pertains to a criminal subpoena, as is involved here, and the Court is clear that "a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of 'a workable government'" and gravely impair the role of the courts under Art. III." 418 U.S. at 707.

In *U.S. v. Nixon,* the Court plainly confined the need for presidential confidentiality to circumstances in which the interests of national security demanded it. Chief Justice Burger wrote, "Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide." *U.S. v. Nixon,* 418 U.S. at 707. The Solicitor General cites the *Nixon* case as he does *Clinton v. Jones* as if the case supports his argument when in fact it holds precisely the opposite.

We previously expressed concerns about the characterization of the history and the views of the Framers on this matter. See *supra* Part IIA. The mischaracterization of the case law in the Solicitor General's brief, however, raises the more serious concerns about potential violations of professional conduct rules. See Federal Rules of Civil Procedure, Rule 11, ABA Model Rules of Professional Conduct, Rule 3.3. (Candor to the Tribunal). The Solicitor General characterizes open and hotly debated questions of Constitutional law as settled law and misleadingly suggests that cases that reject his contention are in fact supportive.

Most importantly, the deference by the Department of Justice to the President has nothing whatsoever to do with the powers of the states to prosecute the President. The fact that the Justice Department chooses to adhere to its own OLC memoranda does not mean that the State of New York or its subdivisions cannot investigate the president in

the exercise of its police powers. In the absence of exonerating conditions, shooting someone on Fifth Avenue is a crime under the laws of the State of New York. In a society that is governed according to the rule of law, a person who without justification shoots another person on Fifth Avenue must be investigated and criminally charged for the public welfare. He is no less dangerous because he is president and exempting him from investigation and prosecution would place him above the law.

C. *The Assertion that a Sitting President Cannot Be Indicted Does Not Entail that He Cannot Be Investigated.*

We have argued above that Article II does not confer immunity from indictment on a sitting president. Nevertheless, even if it did, that would not entail a parallel immunity from investigation. The argument linking the two makes little sense, given that it is widely agreed, and the Solicitor General does not contest, that a president can be prosecuted once he leaves office. Solicitor General's Brief at 9. Yet for practical purposes, an immunity to investigation would create a *de facto* immunity to prosecution. The opportunity to engage in timely investigation is essential to gather the evidence needed for prosecution. Furthermore, the President's lawyers argue that sending a subpoena to a private entity is equivalent to subpoenaing the President himself, casting the immunity net far and wide. Brief of Petitioner,17.

Ironically, the Justice Department has already conceded that the President can be investigated while

in office, given that it conducted a 17-month investigation under the direction of Special Counsel Robert Mueller. Despite the President's strenuous objections to that investigation, two Attorneys General continued it and allowed it to come to fruition. Indeed, Special Counsel Mueller obtained evidence from the White House itself as well as from private citizens who were associated with the President's businesses and/or his 2016 presidential campaign. *See* John Dowd Memorandum on Voluntary Document Production by the White House (January 2018).

In sum, the Solicitor General cannot truly mean that the President cannot be investigated while in office. Instead, his argument suggests that a president can only be investigated by the Justice Department, namely an agency run by the Attorney General who is appointed by, and serves at the pleasure of, the President. The President who has publicly described himself as "the chief law enforcement officer" of the United States, is thus effectively in charge of his own investigation. Toluse Olorunnipa and Beth Reinhard, "Trump declares himself 'chief law enforcement officer,'" *Washington Post,* February 19, 2020. The Solicitor General argues not only that the president is immune to federal investigation, but also that no other criminal investigation of the President or his associates could be legal, despite the absence of any federal law or judicial holding establishing a presidential immunity of this magnitude. This Court is being asked by the President not only to read the president's immunity from federal investigation as grounded in Article II, but also that those same powers could impede any

state or county prosecutor from investigating the President.

This broad interpretation of the concept of presidential immunity is supported by no legal precedent and little, if any, textual authority. Legal scholars – even those embracing expanded notions of executive power under the "unitary executive theory" – have largely avoided claiming that Article II bestows presidential immunity from investigation. The one noted law review article on the topic discusses exercise of restraint in investigating the president as a *policy* issue, best addressed in a statute that would define the limits of an investigation of the president. See Brett Kavanaugh, "Separation of Powers During the Forty-Fourth Presidency and Beyond." 93 Minn. L. Rev. 1454 (May 2009).

Justice Kavanaugh's policy preferences on investigating a sitting president evolved between the time he served as staff attorney for Independent Counsel Kenneth Starr in the late 1990s to his views in 2009 after serving nearly three years in the Bush White House. In his 2009 Minnesota Law Review article, Justice Kavanaugh concluded that "the President's job is difficult enough as is. And the country loses when the President's focus is distracted by the burdens of civil litigation or criminal investigation and possible prosecution." Kavanaugh, "Separation of Powers," at 1462. It is important to note that even Justice Kavanaugh does not ground his argument against investigating a sitting president on constitutional principles. Instead he proposes that Congress "enact a statute providing that any personal civil suits against presidents, like certain members of the military, be deferred while the president is in

office." *Id.* at 1460. Justice Kavanaugh's proposal makes most sense against the background of the assumption that Article II could not be the source of any presidential immunity to investigation.

D. *Presidential Claims of Immunity Should Be Limited to Protecting the Ability of the President to Defend National Security*

As the previous Part argued, assertions of absolute immunity on the part of the President are not supported by the cases applying Article II in this context. However, if such a claim of absolute immunity were to be located somewhere in Article II, it would be most appropriate as an interpretation of the President's war-making function. The President's power under Article II has always been understood to be greater when he is acting in his capacity as Commander in Chief. *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) ("Without doubt, our Constitution recognizes that core strategic matters of war-making belong in the hands of those who are best positioned and most politically accountable for making them."). The claim of absolute immunity is likely unconstitutional in any context, but it would have its greatest claim of legitimacy when the country is at war or in cases of grave emergency. Neither the President's brief nor the Solicitor General's Amicus brief makes any mention of a national security interest the immunity is intended to serve. The Solicitor General's brief affirms that the President is bringing this action in his private capacity. Brief of the Solicitor General at 3. A president cannot assert a privilege that derives its logic from his role as

Commander in Chief at the same time that he is acting as a private citizen suing in defense of an assertion of personal rights. Simply put, the President should have no immunity from the criminal process when he is acting in his capacity as a private citizen and is represented by his personal lawyers, as is the case here.

Indeed, in *U.S. v. Burr,* Marshall made clear that the only basis for a president to resist a court order would be national interest, but that could be asserted by way of answer to a lawful subpoena in defense of its execution.

> If, upon any principle, the president could be construed to stand exempt from the general provisions of the constitution, it would be because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting; and, if it should exist at the time when his attendance on a court is required, it would be shown on the return of the subpoena, and would rather constitute a reason for not obeying the process of the court than a reason against its being issued.

25 F. Cas. 30, 34.

Note that the desire on the part of the president to maintain "confidentiality" could never be a reason for non-compliance with a court order, unless the confidentiality was mandated by the national

interest, such as might be the case with highly classified materials or state secrets. The President's tax returns and financial records are not the type of documents whose revelation would threaten the national interest. Moreover, since the proceedings of the grand jury are secret, complying with the New York subpoena would not expose the President's information to the public in any event.

The Solicitor General's brief fails to identify the holding of *U.S. v. Burr* correctly, despite the fact that the President's interest in this case is precisely the "generalized claim" of an entitlement in confidentiality without any assertion of national interest. In short, prior Supreme Court cases make clear that a sitting president may not defeat a subpoena in a criminal case on confidentiality grounds unless there is a compelling national security interest that requires it. Here, as in *Nixon,* there is no such interest.

3. THE TENTH AMENDMENT PROTECTS THE RIGHT OF STATES TO INVESTIGATE AND PROSECUTE CRIMES WITHIN THEIR JURISDICTION

The Tenth Amendment provides that "the powers not delegated to the United States by the Constitution . . . are reserved to the States respectively . . ." Tenth Amendment to the U.S. Constitution. This Court has recognized that "Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power." *Alden v. Maine*, 527 U.S. 706, 713-

714 (1999). The Tenth Amendment has long been understood to protect the rights of states to exercise their "police powers" within their borders.

Moreover, since *Erie v. Tompkins,* it has been understood that the Constitution "recognizes and preserves the autonomy and independence of the States." Erie R.R. v. Tompkins, 304 U.S. 64, 78-79 (1938)) (quoting Justice Stephen Field in *Baltimore & Ohio R. Co. v. Baugh*, 149 U.S. 368, 401). The right to enforce the criminal law lies at the heart of this autonomy. As this Court has found, "Under the federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of [its] delegated powers, has created offenses against the United States. *Screws v. United States*, 325 U.S. 91, 92 (1945).

The Solicitor General makes no reference to these Tenth Amendment rights and instead maintains that "the states have no power" to "retard, impede, burden, or in any manner control" the operations of the federal government" (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426, 436 (1819)), see Solicitor General's brief at 12. The shibboleth of states' rights, previously repeated by political conservatives, has now been summarily swept aside with not even a passing glance in the direction of the main source of checks and balances on the executive branch, namely the principle of federalism. Yet the Solicitor General should have noted that *McCulloch* is inapposite here, since that case involved the supremacy of a Congressional charter to create a national bank. The inability of the states to interfere with the operations of a federal bank created by statute has no bearing on the present case where no statutory authority exists. There is

simply no basis for thinking that the Justice Department guidance not to indict a sitting president is robust against the valid right of the State of New York to exercise its police powers for the security of its citizens.

Furthermore, even when a federal statute obtains, preemption cases still sometimes are decided in favor of the states. This is particularly true when state criminal laws are involved. As recently as March 3, 2020, this Court in *Kansas v. Garcia*, No. 17-834 slip op. (March 3, 2020) ruled that a state's prosecution of an illegal immigrant for identity theft did not interfere with the federal government's enforcement of federal laws. The *Garcia* case has a stronger federal claim relative to the state's ability to exercise its police power than in the present case. Yet a majority of this Court, along with the Trump Administration, sided with the state in *Garcia.* New York's claim to exercise its police powers is at least as strong, if not stronger, than Kansas' in *Garcia.*

Finally, the Solicitor General argues that with over 2300 district attorneys nationwide, allowing states to subpoena the president or his records "would pose a serious risk of both harassment and diversion." Brief of the Solicitor General at 16. He argues, "The risk of harassment is particularly serious when, as here a State uses criminal process for the President himself, not just to obtain evidence for use in the prosecution of another." Id. at 16. He says that "[i]n routine criminal investigations, a prosecutor's legal and ethical obligations provide a sufficient check against the prospect of abuse." *Id.* However, he does not explain why these same high standards of ethics in investigations and prosecutions would not equally

apply to an investigation of the President or his businesses. See e.g. ABA Model Rule 3.8 (Special Responsibilities of a Prosecutor); New York Rules of Professional Conduct, Rule 3.8. See also Criminal Justice Standards for the Prosecution Function (American Bar Association, Fourth Edition 2017). Both federal and state courts rein in prosecutors who pursue defendants solely for purposes of harassment, and a demonstration of any such motive could subject a prosecutor to discipline for violating ethics rules. The Solicitor General has pointed to no evidence whatsoever that the prosecutor in this case was motivated solely by the desire to harass and inconvenience the President. To suggest that state prosecutors could only be motivated by malice were they to subpoena a sitting president is insulting to the many honorable state and local district attorneys and states attorneys general.

The President is asking this Court to curtail the police powers of the State of New York for the purpose of protecting a personal interest on the part of the President. While true conflicts of federalism between a state and the Executive branch may arise, this case does not truly represent such a conflict. Instead, the case is only about the personal interest of the President in preventing himself or his companies from being investigated.

4. It is Inappropriate for the President to Assert Immunity with Regard to State Criminal Law Processes Conducted Against Third Parties

Most of the subpoenaed documents in this case are in the custody of a third-party firm that performs accounting services for the Trump businesses. These documents pertain to the President's personal finances as well as the finances of various Trump corporations, LLCs, and other business entities.

It is widely recognized that corporations, limited liability companies (LLCs) and similar entities are persons under the law. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819). The separate personhood of corporate entities meant that the creditors of Donald Trump had no recourse when hundreds of millions of dollars in loan obligations defaulted, with the result that efforts of plaintiff bondholders to sue Trump and certain affiliates for securities fraud were unsuccessful. *In Re Donald J. Trump Casino Securities Litigation*. 7 F.3d 357 (3d Cir. 1993). Most of these creditors were never paid.

Creditors in the 1990s could not pierce the corporate veil but in 2020 the claim of absolute presidential immunity is said to apply to private entities, even those not owned by Donald Trump. If the present assertion of absolute immunity is allowed to stand, Trump's entire corporate empire will be entitled to the expansive powers and immunities of the President. The President's request to this Court to distort Article II beyond recognition for the purpose of bestowing broad immunity on both himself and his

closely associated business entities should not be supported by the Solicitor General purporting to represent the interests of the United States. Expanding the scope of "presidential" immunity to this degree would contribute substantially to an ever-increasing conception of executive power. Such a revision of the traditional scope of presidential authority would clearly not be in the nation's interest.

5. THE ARGUMENT THAT THIS INVESTIGATION WILL IMPAIR THE PRESIDENT'S PERFORMANCE OF OFFICIAL DUTIES IS NOT CREDIBLE.

If, as he claims, the President is no longer involved in the day-to-day management of these Trump Organization entities, and with most of the responsive documents being in the custody of a third-party, compliance with the Respondents' subpoenas could not possibly have an impact on the performance of the President's official duties, except to the extent that exposing his financial records could lead to direct subpoenas or even the possible prosecution of the President.

The President has to do little or nothing to comply with the subpoenas, given that they are issued to a third party. If at some later point in time the investigation involves a deposition of the President or other discovery that he believes imposes a substantial burden and interferes with his ability to perform his official duties, a court can address the appropriate scope of discovery at that time. Until then, Justice Scalia's remarks in oral argument in *Clinton v. Jones* are still pertinent:

> "Why can't we wait until the President asserts such a conflict? It's never happened in a couple of hundred years. Why can't we wait until the court says, "Mr. President, I want you here for this deposition, and if you don't come, you're going to lose the case." And the President says, "I'm sorry, I have to go to a NATO meeting." Why don't we wait for that, what seems to me, very unlikely situation to arise?
>
> ...
>
> if and when a President has the intestinal fortitude to say, "I am absolutely too busy" –so that he'll never be seen playing golf for the rest of his Administration [laughter] –if and when that happens, we can resolve the problem. But really, the notion that he doesn't have a minute to spare is just not credible."

See Tr. Of Oral Arg. at 20:23-24-21:1-7 in *Clinton v. Jones,* 520 U.S. 681 (Questions from Justice Scalia).

The Solicitor General has not pointed to any specific discovery request by the Manhattan District Attorney that would take any of the President's time, directed, as it is to a third party. Authorizing his accountants to release his financial records in response to the subpoena will take less of the president's personal time than a single round of golf.

CONCLUSION

This case concerns only the interests of private parties and does not have any impact on the United States. The Solicitor General is incorrect in his argument that Article II of the Constitution bestows immunity from criminal investigation by state and local prosecutors upon the President, separate corporate entities, and third parties in possession of their records. Reversing the trend towards ever greater executive powers that became such an abiding feature of the post-9/11 security state has made the United States substantially less secure and is increasingly the greatest source of threat to its democracy.

Respectfully submitted,

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