No. 23-939

# In The Supreme Court of the United States

DONALD J. TRUMP,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF OF ATTORNEY KENT GUBRUD AS AMICUS CURIAE IN SUPPORT OF RESPONDENT UNITED STATES OF AMERICA

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[1] *US v. Lee*, 106 U.S. 196; 1 S. Ct. 240; 27 L. Ed. 171; 1882.

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## INTEREST OF AMICUS CURIAE

In 1987, Amicus[1] graduated law school, passed his first bar exam and immediately started working for a public defender's office in Portland Oregon.[2] Amicus moved to New York City in 2002 and has continued to practice criminal law as well as other kinds of law for more than 36 years.

After Robert Mueller was appointed in May 17, 2017 to investigate and prosecute federal crimes committed by President Trump's campaign in coordinating with the Russian government,[3] Amicus was concerned by legal claims made by certain legal commentators,[4] regarding the President's supposed discretionary right to act even with a corrupt purpose. Many supporters of the President claimed special counsel Mueller lacked any right to criminally prosecute the incumbent President for his crimes, who could simply fire Mueller from his appointed position.

Amicus believed such legal claims contradict the law as declared by this Supreme Court in *United States v. Nixon,* 418 U.S. 683 (1974) and many other cases. Amicus then embarked on a personal journey of legal research. As months passed, besides working alone in his office and home, this journey would also cause him to travel to Washington D.C., Philadelphia, Harvard law school and the University of Oregon, to track down critical legal documents. Over the next six years, with interruptions resulting from Mueller's untimely and unwarranted conclusion of his investigation and Covid, this journey has consumed thousands of hours of legal research and writing on various related constitutional topics and issues, including the President's supposed right to fire the special prosecutor, the supposed right to pardon himself, and whether a President who conspires with a foreign power, like Russia, does commit the crime of treason.

By examining and comparing the arguments of every person who commented on the right to prosecute the President, studying books and past judicial decisions during Watergate, writings by dozens of legal scholars, authors and commentators dating back to the constitutional Convention, numerous OLC Opinions, as well as Mueller's final report, his congressional testimony, along with books written by one of his lead prosecutors, Andrew Weissmann,[5] and Trump's *former* Attorney General

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[1] No party or counsel for any party authored any part of this brief or made any monetary contribution to the writing of this brief.
[2] Amicus worked for Multnomah Defenders in Portland Oregon between 1987 and 2000.
[3] See DOJ's Order #3915-2017 dated May 17, 2017 ("Appointment of Special Counsel"), which appointed Robert Mueller to investigate and prosecute all federal crimes relating to the "*coordination between the Russian government and individuals associated with the campaign of President Donald Trump*."
[4]See statements made by former law professor Alan Dershowitz within various articles.
[5] See Where Law Ends, by Andrew Weissmann (Random House 2020)

Bill Barr,[6] Amicus became far more informed and intrigued with the important legal questions raised by DOJ's criminal investigations and prosecutions of then President Trump, now Defendant and *former* President. Amicus felt and feels his duty as an American lawyer was to understand and explain the correct and incorrect arguments relating to this right to prosecute. By investigating Mueller's investigation, this author discovered many important new facts which pertain directly to Jack Smith's current investigations and prosecutions of Defendant Trump. Amicus's interest here is thus merely as a private American criminal defense lawyer and citizen who believes in the importance of preserving and equitably enforcing the rule of law against all persons, including the President and *former* President, and preserving the great strength of our legal system and media in punishing those who violate the rule law while exonerating those who are unjustly accused.

## SUMMARY OF ARGUMENT

The most important conclusion here is simply that "*no man, no matter how high is above the law,*" as first stated by the Supreme Court's 1882 decision in *United States v. Lee*. Notably, the founders drafted the Constitution to implement this fundamental constitutional principle, which does lead directly to the conclusion that all persons can be prosecuted for their crimes, including even the incumbent (sitting) President. Indeed, this fact and conclusion is established by crucial decisions, including *United States v. Nixon, Nixon v. Fitzgerald*, *Clinton v. Jones* and *Trump v. Vance,* as the Department of Justice does actually admit and then deny contradictorily when claiming presidential, criminal immunity. All of these decisions create a body of law that compels the conclusion that the judicial branch has the exclusive, binding constitutional right to decide and declare what the law says and means, which is binding upon all three co-equal branches of government, including the legislature (Congress), executive (headed by the President) and judicial, meaning all other government tribunals, agencies and legislative bodies. By ordering the President to comply with the criminal laws and subpoenas in both *Vance* and *Nixon*, the Supreme Court did twice implicitly confirm the judicial branch's right to adjudicate whether the President has violated the criminal laws, including within a criminal prosecution as Justice Alito did expressly admit and explain within his dissent in *Vance* that such cases must be understood to hold and declare that "*the Constitution [does not impose] restrictions on a state's deployment of its criminal law enforcement powers against a sitting President,"* including contempt of court as expressly allowed by *Fed.R.Crim.P.* Rule 17(g) and Fed.R.Crim.P. Rule 62 along with 28 U.S.C. § 636(e).

[6] See One Damn Thing After Another by William Barr (William Morrow 2022)

In fact, two decades earlier, in 1999, before holding President Clinton in contempt of court, the federal district court decision in *Jones v. Clinton* made clear that the Supreme Court's aforementioned trilogy of decisions did allow the judicial branch to adjudicate contempt accusations against President Clinton, using either criminal or civil contempt procedures. However, the *Jones* district court elected to use civil contempt proceedings for various logical reasons. But the *Jones* district court's decision did nonetheless make and prove this critical lack of presidential criminal immunity at issue within this case.

The 2020 *Vance* Supreme Court decision does indeed confirm the lack of merit and substance in DOJ's distinct presidential criminal immunity arguments made by Randolph Moss's OLC Opinion which DOJ does adopt here: i.e. concluding that the President supposedly deserves criminal immunity, which he only loses upon leaving office.

In fact, immediately after the 1999 *Jones* district court confirmed the right to criminally prosecute the President, Clinton's AG directed his own OLC to construct this secret OLC Opinion that adopted Robert Dixon's earlier (1973) OLC Opinion that President Nixon had directed him to draft so as to justify Nixon's supposed right to criminal immunity.[7] Thus, Moss's OLC Opinion implicitly but falsely rejects the conclusion reached by the 1999 *Jones v. Clinton* district court based upon the prior trilogy of Supreme Court decisions and *US v. Burr*.[8] In short, Moss's OLC Opinion constructs a false and indefensible criminal immunity argument that distorts and misrepresents the relevant Supreme Court rulings as recently confirmed in 2020 by the Supreme Court in *Trump v. Vance*. *Vance* confirmed that these three Supreme Court cases actually support the opposite conclusion: that is, they deny presidential criminal immunity.

This brief does focus primarily upon the trilogy of Supreme Court decisions and *Jones* district court decision that Moss's OLC Opinion did falsely claim to interpret, which the *Vance* Supreme Court did recently reject. Just as this Supreme Court's decision in *Nixon* required the President and his AG to obey the same criminal laws as others, the *Fitzgerald* Court did demand the same thing, despite granting him civil immunity, adopting its earlier decisions that granted civil, but not criminal, immunity to judges and prosecutors. And *Clinton v. Jones* held that the trial court lacked any right to delay Paula Jones' civil prosecution against the incumbent President due simply to his important position. Thus, similarly, DOJ's prosecutors, including special counsel Jack Smith and Robert Mueller lack any right or obligation to delay criminal prosecutions against the President. Instead, DOJ

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[7] See *"Bag Man, Interview with J.T. Smith*," by Rachel Maddow, February 19, 2019, which can be downloaded here: https://www.youtube.com/watch?v=Oku6xbbbJ. See also Inner Circles: How America Changed the World: A Memoir, page 364 (footnote *) by Alexander Haig, (Grand Central Pub 1992).

[8] See id.

prosecutors are obligated to prosecute the President for his crimes like anyone else. Consequently, unlike the two lower court decisions, this Court should expressly decide and declare that no person or President is above the law and then affirm the DC circuit court of appeals decision that denied Defendant's motion to dismiss.

Like this earlier trilogy of Supreme Court decisions, the *Vance* Court does demonstrate the complete lack of merit and substance with Defendant Trump's claim of criminal immunity under *Fitzgerald* as well as DOJ's distinct, unproven claim that the incumbent President supposedly deserves criminal immunity. Nonetheless, Defendant Trump – and DOJ -- nonetheless repeat their specious argument here without ever analyzing or reconciling the *Vance* Court's prior rejection under this prior trilogy of decisions. The crucial fact remains that – like the President himself – the *former* President does not deserve any right to criminal immunity and can indisputably be prosecuted like anyone else.

## ARGUMENT

### I. Supreme Court and other judicial decisions prove DOJ can prosecute incumbent President for his crimes like any other person.

In 1807, Chief Justice John Marshall explained that the Constitution "*does not discriminate between the president and a private citizen.*" *See US v. Burr*, 25 F. Cas. 30, 35 (1807). The Supreme Court did effectively confirm this ruling in *United States v. Lee*, 106 U.S. 196, 220 (1882), when declaring succinctly that: "*[n]o man in this country is so high that he is above the law,*" which it would frequently repeat.[9] The Department of Justice (or "DOJ") admits that this principle that no person is above the law *"extends to "[a]ll the officers of the government, from the highest to the lowest"* and *"applies, of course, to a President"* in contrast with the blanket immunity enjoyed by the British monarch.[10] DOJ further admits that the founders drafted the Constitution to create "*a "President of the United States" who could be removed through impeachment and would be "liable to prosecution and punishment in the ordinary course of law.*"[11] In fact, in *Trump v. Vance,* the Supreme Court did

[9] See United States v. United Mine Workers of America, 330 U.S. 258, 343 (1947); Marone v. Bowdoin, 369 U.S. 643,651 (1962) (Douglas, J., dissenting); Marone v. Bowdoin, 369 U.S. 643, 651, (1962) (Douglas, J., dissenting); Johnson v. Powell, 89 S.Ct. 250, 251, (1968) (Memorandum Opinion of Douglas, J., regarding application for a stay); Branzburg v. Hayes, 408 U.S. 665, 699 (1972); Gravel v. United States., 408 U.S. 606, 615, (1972); United States v. Nixon, 418 U.S. 683, 715 (1974); Butz v. Economou, 438 U.S. 478, 506, (1978); Davis v. Passman, 442 U.S. 228, 246, (1979); Nixon v. Fitzgerald, 457 U.S. 731, 758 & n. 41, (1982); Briscoe v. LaHue, 460 U.S. 325, 358 (1983); United States v. *Stanley,* 483 U.S. 669, 706(1987)Brennan, J., joined by Marshall, J., concurring in part & dissenting in part); *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 108 n. 2, (1996)(Sout.er, J., joined by Ginsburg & Breyer, JJ.); *Clinton u. Jones,* 117 S.Ct. 1636, 1645 (1997). *See Trump v. Vance*, 140 S. Ct. 2412, 2432 (Kavanaugh, J., concurring).

[10] See page 8 of DOJ Opposition to Trump's motion to dismiss, filed October 19, 2023, in *US v. Trump*.

[11] See id.

carefully analyze and apply this principle within its trilogy of decisions in *Nixon, Fitzgerald, Clinton* which demonstrate the President's lack of any special rights with regards to the criminal laws, meaning the President must obey them and if not, can be criminally prosecuted like anyone else.

However, because DOJ has failed or refused to ever charge the President with a crime, the judicial branch has never expressly decided this critical question regarding the President's ability to be criminally prosecuted. Under *Marbury v. Madison*, 5 U.S. 137 (1803) the decisions of the Supreme Court regarding federal constitutional and statutory law are supreme and binding over all conflicting theories from lower tribunals, agencies and officers, including those of DOJ. Within this *Trump* criminal case, the DOJ has launched a criminal case against the former President that directly implicates this constitutional question regarding the incumbent President, which the Supreme Court must or should decide.

Yet, even within this *Trump* case, DOJ attempts to evade and prevent such constitutional determination once again, when – incredibly -- special counsel states within its first footnote that: "*[t]his brief addresses only a* ***former*** *President's immunity from federal criminal prosecution."*[12] In other words, DOJ did not, could not and would not attempt to prove or defend its own constitutional claim that the President cannot (supposedly) be criminally prosecuted as claimed by Moss's OLC Opinion.[13] While both lower courts did abide by DOJ's self-imposed limitation, this Court should disregard DOJ's unjustified refusal to prove its own specious claim that a President cannot be criminally prosecuted, which does also contradict its own separate admission that the Constitution does allow the criminal prosecution of even the "*highest officer in the land*," meaning "the President." By deciding this question, this Court must necessarily reject the former President's separate claim of criminal immunity.

Long before the Supreme Court decided this initial trilogy, many constitutional law scholars, including Raoul Berger,[14] John Hart Ely[15] and William Rawle,[16] had already concluded that the sitting President was subject to criminal prosecution. And after the Court decided *Nixon, Fitzgerald* and *Clinton*, many additional legal commentators did reach this same conclusion. For example, in 1998, Professor

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[12]See footnote one on page 4 of DOJ's opposition to Trump's motion to dismiss in *US v. Trump* filed October 19, 2023.

[13] See footnote 1 on page four of DOJ's opposition (filed 10/19/23) to Trump's motion to dismiss in *US v. Trump*.

[14] See pages 315-16, Impeachment: The Constitutional Problems, Enlarged Edition 2nd Edition, by Berger, Raoul (Harvard University Press 1974).

[15]See pages 24-25 of Rotunda's 1998 memo which described the views of "Professor John Hart Ely — a distinguished constitutional scholar."

[16] See A View of the Constitution of the United States, 2nd ed. by William Rawle, (Nicklin Law Bookseller 1829).

Ronald Rotunda did research and draft a detailed 56-page memorandum for the private eyes of special prosecutor Ken Starr that documented how this trilogy of Supreme Court decisions, as well as other judicial precedent, all supported the right to criminally prosecute the President, which DOJ first released in 2017, which focused primarily upon this Court's 1997 *Clinton* decision, despite that it was a civil case, regarding his unofficial conduct, as follows:[17]

> **If there is no recourse against the President, if he cannot be prosecuted for violating the criminal laws, he will be above the law. *Clinton v. Jones* rejected such an immunity; instead, it emphatically agreed with the Eight Circuit that: "the President, like other officials, is subject to the same laws that apply to all citizens."[11] The "rationale for official immunity 'is inapposite where only personal, private conduct by a President is at issue.'"[12] The President has no immunity in such a case. If the Constitution prevents the President from being indicted for violations of one or more federal criminal statutes, even if those statutory violations are not impeachable offences, then the Constitution authorizes the President to be above the law. But the Constitution creates an Executive Branch with the President under a sworn obligation to faithfully execute the law. The Constitution does not create an absolute Monarch above the law.**

Similarly, in 1998, many others agreed,[18] including lawyers like Attorney General John Ashcroft,[19] Republican lawyer Ted Olson[20] and even NYC's mayor and former federal prosecutor, Rudy Giuliani.[21] What follows in chronological order is a summary of the most relevant Supreme Court and other judicial decisions that declare and establish this indisputable, binding constitutional right to criminally prosecute an incumbent (sitting) President like anyone else, including, of course, a mere *former* President, which is not a government officer or position of *any* kind.

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[17] See page 5 of Professor Rotunda's 1998 Starr memo which was downloaded here: https://www.nytimes.com/interactive/2021/12/03/us/savage-nyt-foia-starr-memo-presidential.html.
[18]None of these legal commentators had access to Rotunda's extensive research, apparently, since, according to Professor Rotunda, DOJ first released his 1998 memo publicly to the New York Times in 2017. See Rotunda's Washington Post article here: https://www.nytimes.com/interactive/2021/12/03/us/savage-nyt-foia-starr-memo-presidential.html.
[19]See "*Top Republicans Warn Clinton About Resisting Subpoena*" (CNN July 26, 1998, downloaded from http://www.cnn.com/ALLPOLITICS/1998/07/26/clinton.subpoena.02/).)
[20] See 1998 congressional testimony of Ted Olson's law partner, Douglas Cox at https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/paneltext090998.htm.
[21] See "*Watch 1998 Rudy Giuliani Completely Torpedo 2018 Rudy Giuliani's Trump Arguments*" by Ken Mazzi, Huffington Post, 05/10/2018: https://www.huffpost.com/entry/rudy-giuliani-president-has-to-testify_n_5af3b511e4b0859d11d03279.

A. ***Marbury v. Madison*** **(Supreme Court 1803)[22]: The judicial branch – headed by the Supreme Court – has the exclusive, binding authority to say what federal law means, which invalidates all other interpretations, including the Department of Justice.**

Chief Justice Marshall explained in *Marbury v. Madison* that any law that contradicts the Constitution is invalid, void and ineffectual: [23]

> It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.
>
> Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.
>
> **If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.**
>
> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and **consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.**
>
> This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.
>
> **If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is.** Those who apply the rule to particular cases, must of

[22] *See Marbury v. Madison*, 5 U.S. 137; 2 L. Ed. 60; 1803; 1 Cranch 137.
[23] *See Marbury, supra*, 5 U.S. at 178-79.

> necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.
>
> Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.
>
> **This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.**

Crucially, the *Marbury* Supreme Court also explained that the judicial branch, which is headed by the supreme court, is charged with the exclusive, binding authority to make this decision of constitutional powers as follows:[24]

> The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

[24] *See Marbury, supra*, 5 U.S. at 174-75.

### B. *United States v. Burr* (Dist.Ct. 1807)[25]: Constitution "*does not discriminate between the president and a private citizen.*"

In 1807, Chief Justice John Marshall decided *US v. Burr* while on circuit acting as a district court judge, within this high-profile criminal case that concerned President Thomas Jefferson accusing his own vice president with the crime of treason. The United States' prosecutor did oppose the accused's motion to obtain a subpoena to demand a critical letter referenced and possessed by the President, claiming that the district court[26] could not force him to produce such letter given his high government position. Justice Marshall overruled the prosecutor's objection, explaining that – unlike the British monarch -- the law empowered by the American Constitution "*does not discriminate between the president and a private citizen*":[27]

> **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.**

Justice Marshall thus ordered the President to produce this letter given this lack of any legal distinction between private citizens and even the highest government official in the land, which forms a central, democratic premise and principle of the American Constitution and system of criminal justice as the Supreme Court has invoked and affirmed repeatedly, including within its 2020 decision in *Trump v. Vance*, as discussed below.

### C. *United States v. Lee* (Sup.Ct. 1882)[28]: "*No man is above the law.*"

In *US v. Lee*, the Supreme Court cited six Supreme Court decisions of Chief Justice John Marshall's, though this case (*Lee*) did not directly concern the President as a party as was true in *US v. Burr*.[29] The *Lee* Court did nonetheless

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[25] *See US v. Burr*, 25 F. Cas. 30 (1807).
[26] Chief Justice John Marshall, while the head of the Supreme Court, was following the practice known as riding the circuit when sitting as judge in this district court case.
[27] *See, Burr*, supra, 25 F. Cas. at 35.
[28] *US v. Lee*, 106 U.S. 196; 1 S. Ct. 240; 27 L. Ed. 171; 1882.
[29] Though the *Lee* Supreme Court adopted Marshall's principle and conclusion in *US v. Burr*, the *Lee* Court did not expressly reference this district court decision. Nonetheless, the *Lee* Court did favorably cite other Supreme Court decisions of Marshall, including the following six: *(1) Cohens v. Virginia*, 6 Wheat. 264, 411, (2) *The Exchange*, 7 Cranch, 116 and (3) *United States v. Clarke*, 8 Pet.

repeat and adopt Marshall's aforementioned principle expressed within *Burr*, when recognizing that American constitutional law – unlike the British monarchy – did not bestow special legal rights upon even the "highest" government official, stating famously:[30]

> **No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.**

The *Lee* Court similarly recognized this uniquely American principle denied legal immunity to all citizens including government officials, regardless of stature or position, explaining:[31]

> **As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests**.

This *Lee* decision did also require the naming of the government official being challenged within litigation whenever possible as such government officers are not equivalent to the government itself, as in the British form of monarchy, quoting its earlier decisions to require such while explaining:[32]

> "Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done, is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. In deciding who are parties to the suit, the court will not look beyond the record. **Making a State officer a party does not make the State a party,** although her law may have prompted his action, and the State may stand behind him as a real party in interest.

436 (4) *United States v. Peters,* 5 Cranch, 115; (5) *Osborn v. Bank of United States*, 9 Wheat. 738; and (6) *The Governor of Georgia v. Madrazo*, 1 Pet. 110.

[30] *See Lee, supra*, 106 U.S. at 221.

[31] *See Lee*, *supra*, 106 U.S. at 207.

[32] See Lee, *supra*, 106 U.S. at 216.

**D. *United States v. Nixon* (Sup.Ct. 1974)[33]: The judicial branch has the exclusive, supreme right to decide what law means and President must obey the same criminal law as others.**

Before deciding that President Nixon had the obligation to comply with the same criminal laws as others, the *Nixon* Court had to first confront and decide the President's *separation of powers* argument: i.e., whether the President deserved an executive privilege that allowed him complete legal discretion to withhold any presidential communications from the judicial branch. The President claimed he had such absolute discretion. However, the *Nixon* Court disagreed and reaffirmed the "*ancient proposition of law, albeit in the context of a grand jury inquiry rather than a trial," that… 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege*."[34] In other words, the government (prosecution) and accused were both entitled to obtain all relevant evidence relating to the criminal charges at issue within the upcoming criminal trial. While the *Nixon* Court recognized that the President was entitled to raise an executive privilege regarding his official communications, absent sufficient justification of some actual threat or danger in releasing these communications, this general privilege had to give way to the criminal parties' evidentiary needs within the criminal case. The *Nixon* Court held that – while all three branches do share and enjoy distinct powers -- the Supreme Court has the distinct, *exclusive and conclusive right to say what the law is*, which is binding upon all three branches, lower judicial and administrative tribunals, agencies and legislature (Congress), which makes any conflicting interpretation invalid:[35]

> **[23] [24] [25] Our system of government "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." *Powell* v. *McCormack, supra*, at 549. And in *Baker* v. *Carr*, 369 U.S., at 211, the Court stated:**
>
> **"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."**
>
> **Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto**

[33] *See US v. Nixon*, 418 U.S. 683 (1974).
[34] See *Nixon*, supra, 418 U.S. at 710.
[35] *See Nixon, supra*, 418 U.S. at 704-06.

> power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p. 313 (S. Mittell ed. 1938). [*705] We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case. *Marbury* v. *Madison, supra*, at 177.

Thus, adopting Chief Justice Marshall's *Marbury* decision as well as his subsequent 1807 decision in *Burr*, the *Nixon* Court held that the executive branch – headed by the President -- has no constitutional right or discretion to violate the judicial branch's exclusive, constitutional right and authority "*to say what the law is.*" Thus, the President and executive branch cannot adopt their own, separate, conflicting constitutional interpretation. *Id.* Instead, the President was obligated to respond to the special prosecutor's criminal subpoena like any other person pursuant to *Fed.R.Crim.P.* Rule 17(c).[36] Similarly, the *Nixon* Court also held that (Acting) Attorney General Robert Bork had no lawful right to fire Archibald Cox in violation with DOJ's existing regulation, 38 Fed. Reg. 30739 (as amended by 38 Fed. Reg. 32805), and thus acted unlawfully when he failed to obtain the consent from certain members of Congress, declaring:[37]

> **So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it.**

Thus, the *Nixon* Court ruled that – just like private citizens and all others -- the President, Attorney General and DOJ all had the obligation to follow the law as ultimately decided and declared by the judicial branch, headed by the Supreme Court, which is the exclusive and supreme constitutional authority. Lower tribunals, government officers or agencies, including DOJ and its Office of Legal Counsel, have no constitutional right to make or enforce their own conflicting legal opinions.

Consequently, applying the same Rule 17 that the *Nixon* Court did enforce, [38] should anyone, including the President, fail or refuse to comply lawfully with a criminal subpoena, the special prosecutor could bring criminal contempt charges against him under section (g) (of Rule 17) like anyone else. Also, if convicted, the court could sanction him like anyone else under this rule, including imposing a sentence of incarceration.

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[36] *See Nixon, supra*, 418 U.S. at 702

[37] *See Nixon, supra*, 418 U.S. at 697.

[38] *See Nixon, supra*, 418 US at page 702.

Thus, understandably, less than two weeks after the Supreme Court released its decision, President Nixon turned over his subpoenaed tape recordings, which did incriminate President Nixon in the felonies committed by his co-conspirators. Using the President's recordings at this criminal trial in *US v. Mitchell*, the government did establish the guilt of the President's coconspirators, who were sentenced to lengthy prison terms. Former President Nixon escaped prosecution however by accepting a full pardon from President Ford.

The Supreme Court has invoked and affirmed this *Nixon* decision repeatedly, including within its recent, 2020 decision in *Trump v. Vance*, as discussed below.

### E. *Nixon v. Fitzgerald* decision (Sup.Ct. 1982)[39]: like judges and prosecutors, President deserves civil immunity for official conduct, but not immunity from criminal prosecution.

About eight years after deciding *Nixon*, the Supreme Court decided *Nixon v. Fitzgerald* in 1982, which granted civil immunity to the *former* President for his official acts while President. However, such Court still distinguished and denied the former President's claims of presidential *criminal* immunity and based this distinction upon the "*broad public interests*" involved within criminal prosecutions that require the courts to "*vindicate the public interest in an ongoing criminal prosecution,*" explaining:[40]

> When judicial action is needed to serve broad public interests -- as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, cf. *Youngstown Sheet & Tube Co.* v. *Sawyer, supra*, or to vindicate the public interest in an ongoing criminal prosecution, see *United States v. Nixon, supra* -- the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.37 [37.]

Notably, the *Fitzgerald* Court adopted the same type of *civil* immunity for the President as it had previously granted to judges and prosecutors. Id. By doing this, such Court was once again denying the President any right to claim immunity from *criminal* prosecution regardless of whether such conduct was deemed part of his "official" or "unofficial" conduct. Indeed, the *Trump* DC court of appeals acknowledged this ruling and caselaw recently stating: "*[J]udges are not immune from criminal liability for their official acts.*"[41]

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[39] *See Nixon v. Fitzgerald*, 457 U. S. 731, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982).
[40] *See Fitzgerald, supra*, 457 U. S. at 794-95.
[41] *See US v. Trump*, 91 F.4th 1173, 1193 (DC Cir 2024).

The *Fitzgerald* Court had explained that -- because of the "*lesser*" public interest civil cases deserve in comparison to criminal ones – the Court could justify granting *civil* immunity under the same *separation of powers* doctrine while simultaneously denying immunity within *criminal* prosecutions:[42]

> [37] The Court has recognized before that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. See *United States v. Gillock, 445 U.S. 360, 371-373 (1980)*; cf. *United States v. Nixon, 418 U.S., at 711-712*, and n. 19 (basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision).

While Chief Justice Burger was also part of the majority in *Fitzgerald*, he also wrote a concurring opinion that explained that two cases, *Nixon* and *Burr,* did effectively adopt and require distinct and *stronger* enforcement of the law in *criminal* cases as compared to *civil* cases under this same *separation of powers* doctrine as follows:[43]

> First, it is important to remember that the context of that language is a criminal prosecution. Second, the "judicial process" referred to was, as in United States v. Burr, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807) (Marshall, C. J., sitting at trial as Circuit Justice), a subpoena to the President to produce relevant evidence in a criminal prosecution. No issue of damages immunity was involved either in Burr or United States v. Nixon. In short, the quoted language has no bearing whatever on a civil action for damages.

Citing the impeachment judgment clause, even the four dissenting Justices in *Fitzgerald* that had disputed the majority's decision to grant civil immunity to the (former) President recognized and agreed that the majority's ruling did not grant him *criminal* immunity, explaining:[44]

> The Constitution itself provides that impeachment shall not bar "Indictment, Trial, Judgment and Punishment, according to Law." Art. I, § 3, cl. 7. Similarly, our cases indicate that immunity from damages actions carries no protection from criminal prosecution. *Supra, at 765-766*.

In fact, the Supreme Court has repeatedly invoked and affirmed this interpretation of *Fitzgerald*, including within its most recent (2020) decision in *Trump v. Vance*, as discussed below.

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[42] *See Fitzgerald, supra*, 457 U.S. at 795, fn. 37.
[43] *See Fitzgerald, supra* 457 U.S. at 782.
[44] *See Fitzgerald, supra*, 457 U.S. at 780.

1. **Defendant Trump misrepresents *Fitzgerald* decision that contradicts his presidential immunity argument.**

Defendant Trump cited the *Fitzgerald* decision dozens of times within his court submissions in *US v. Trump* as being completely supportive of his presidential immunity claims, supposedly. This claim is baseless, however, as he obviously knows since the *Fitzgerald* decision does in fact *contradict* his presidential criminal immunity argument. Buried within a footnote of his initial motion to dismiss, Defendant Trump did cryptically recognize this fact when he disputed the *Fitzgerald* Court's refusal to grant *criminal* immunity to the former President when recognizing its distinction with civil immunity; Trump argued that the *Fitzgerald* decision was "*abrogating the separation of powers"* doctrine, as follows:[45]

> [2]***To be sure, Fitzgerald*** *did not decide whether Presidential immunity extends to criminal prosecution, and it* ***acknowledged that "there is a lesser public interest in actions for civil damages than … in criminal prosecutions." 457 U.S. at 754 n.37.*** ***But the fact that the doctrine of Presidential immunity is rooted in the separation of powers dictates that immunity must extend to criminal prosecution as well as civil liability. While the "public interest … in criminal prosecutions" may be important, id., it is not important enough to justify abrogating the separation of powers, the most fundamental structural feature of our constitutional system. Further, exposure to criminal prosecution poses a far greater threat than the prospect of civil lawsuits to the President's "maximum ability to deal fearlessly and impartially with the duties of his office," and thus it raises even greater "risks to the effective functioning of government." Fitzgerald, 457 U.S. at 753 (citation and quotation marks omitted) Fitzgerald's reasoning, therefore, entails that Presidential immunity include immunity from both civil suit and criminal prosecution.***

Within the above-quoted footnote,[46] other than referencing the *Fitzgerald* decision itself that he was disputing, Trump's lawyers failed to cite even a single precedent to support Trump's objection and claims.[47] Yet, he still ended this footnote by claiming to have somehow resolved this fatal conflict with this case he cited extensively and exclusively, regarding the "*lesser public interest*" in civil cases as distinguished from criminal ones, claiming, illogically: "*Fitzgerald's reasoning, therefore, entails that Presidential immunity include immunity from both civil suit and criminal prosecution."*[48] In fact, Trump's footnote and brief never does reconcile

[45] See fn. 2 on page ten of Trump's motion to dismiss filed October 5, 2023, in *US v. Trump* (DC district court Case No. 23-cr-257.
[46] Id.
[47] Id.
[48] Id.

this fatal defect that his criminal immunity argument demonstrates under the *Fitzgerald* Court's conflicting analysis and conclusion. Yet, without qualification or explanation, Defendant repeats his footnote's false conclusion dozens of times throughout the main body of his brief.

Similarly, nowhere within his opening brief to this Supreme Court does Defendant even disclose, much, less resolve, this massive, fatal contradiction.

Thus, while Trump claims repeatedly that *Fitzgerald* supports his argument to expand the *civil* immunity recognized to include *criminal* immunity, as seen above, this *Fitzgerald* Court decision does not do this itself when it rejects this very argument, an important fact that Defendant Trump's submissions cryptically recognized but fail to reveal or reconcile. This problematic fact was recently confirmed again by the Supreme Court within its 2020 decision of *Trump v. Vance*, as discussed below.

### 2. Trump did falsely claim Supreme Court's decisions granted criminal immunity to judges and prosecutors.

Defendant Trump's motion to dismiss did justly admit that the *Fitzgerald* Court had expressly adopted the same type of immunity for the former President that the Supreme Court had previously granted to judges and prosecutors.[49] However, Trump then claimed falsely that such prior Supreme Court cases did grant them – that is, judges and prosecutors -- *criminal immunity,* citing various cases that did not actually support his argument.[50] In fact, prior Supreme Court cases do not allow judges or prosecutors immunity from *criminal* prosecution even when committed as part of their "official duties, as is critical within the civil immunity granted by *Fitzgerald*, as both D.C. lower courts did conclude and confirm. For example, the D.C. court of appeals explained, prior Supreme Court precedent does deny a judge (and prosecutor) "*criminal immunity for the same "official act"*:[51]

> **[J]udges are not immune from criminal liability for their official acts. *O'Shea v. Littleton* confirmed the holding of *Ex parte Virginia* in dismissing a civil rights action for equitable relief brought against a county magistrate and associate judge of a county circuit. 414 U.S. 488, 490–91, 503 (1974). The Supreme Court concluded that the requested injunction was not the only available remedy because both judges remained answerable to the federal criminal laws."**

[49]See page 17 of Trump's motion to dismiss filed October 5, 2023.
[50] See page 17 of Trump's motion to dismiss filed October 5, 2023, citing *Spalding v. Vilas,* 161 U.S. 483, 494 (1896) (quoting *Yates v. Lansing,* 5 Johns. 282, 291 (N.Y. 1810), *Pierson,* 386 U.S. at 554; and *Fitzgerald,* 457 U.S. at 745-46.
[51]See pages 26-27 of DC court of appeals decision in *US v. Trump*, decided February 6, 2024.

The founders were concerned that -- should he lack legal culpability for his own conduct -- the incumbent *President* might abuse his awesome presidential powers that the Constitution did bestow upon him, just as the legally untouchable British monarch did demonstrate. The founders were not similarly concerned with whether some mere *former* President, who actually lacked any presidential powers, might be criminally prosecuted for his past crimes.

The Supreme Court has invoked and affirmed this fact repeatedly, including within its 2020 decision in *Trump v. Vance*, as discussed below.

### F. *Clinton v. Jones* (SupCt.1997)[52]: the trial court lacked any right or discretion to delay the adjudication of Plaintiff's sexual abuse allegations merely because of the President's important governmental position.

In 1997, the Supreme Court decided *Clinton v. Jones,* which had considered but distinguished *Fitzgerald* and the civil immunity it had recognized for former President Nixon regarding his "*official conduct*" as it had previously applied to other public servants regarding "*suits for money damages,*" which does not apply to their "*unofficial conduct*," stating:[53]

> **[8] The principal rationale for affording certain public servants' immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct. In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability.** [18]

But the *Clinton* Court rejected President Clinton's argument that the *separation of powers* doctrine did require or justify granting him any special legal rights regarding his *unofficial* conduct, including any so-called *temporary immunity* while in office simply due to his important, presidential position. Instead, the Court held that "*it was an abuse of discretion for the District Court to defer the trial until after the President leaves office.*" [54]

Notably, when rejecting that the President deserved any special rights including immunity regarding his "*unofficial*" conduct, the Court held that Plaintiff Jones could continue to prosecute her lawsuit against him as she could against anyone else.

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[52] *See Clinton v. Jones*, supra, 520 U.S. 681 (1997).
[53] *See Clinton, supra,* 520 US at 693-95.
[54] *See Clinton, supra*, 520 U.S. at 708-09 (1997).

Further, this *Clinton* decision did not limit its definition of "*unofficial conduct*" to conduct adjudicated by *civil* cases, as DOJ mentions, stating:[55]

> [T]he distinction for purposes of civil immunity analysis between "official" and "unofficial" conduct, see Clinton, 520 U.S. at 694, does not translate into the federal criminal context. Stated concisely, "[c]riminal conduct is not"— and can never be— "part of the necessary functions performed by public officials." Isaacs, 493 F.2d at 1144. To hold otherwise would be to "carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress." Gravel v. United States, 408 U.S. 606, 627 (1972); see O'Shea v. Littleton, 414 U.S. 488, 503 (1974) ("[T]he judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress.'") (quoting Gravel, 408 U.S. at 627). Consistent with that principle, courts of appeals have rejected arguments by federal judges seeking immunity from federal criminal prosecution even where the conduct in question implicated their official responsibilities as judges. See, e.g., Claiborne, 727 F.2d at 845; United States v. Hastings, 681 F.2d 706, 710-11 (11th Cir. 1982); Isaacs, 493 F.2d at 1143-44.

In fact, the 1997 *Clinton* decision expressly cited two *criminal* cases, *US v. Nixon* and *US v. Burr,* as supporting its ruling that allowed Plaintiff to adjudicate her claims against the incumbent President as she could against anyone else.[56] In fact, as discussed above, the *Fitzgerald* decision had already expressly excluded *criminal* prosecutions from falling within the type of cases for which the President, or former President, even deserved civil immunity for in the first place. Given these facts, including the *Clinton* Court's broad language used to describe and define the President's "*unofficial conduct*," which could clearly include his *criminal* conduct, the *Clinton* decision suggests strongly that this Court's decision would, could and should adopt this same rule with regards to the *prosecution* of *criminal* cases.

Consequently, when combining all three of these Supreme Court decisions within the above presidential trilogy -- *Nixon, Fitzgerald* and *Clinton* -- one must conclude that the judicial branch and DOJ prosecutors lack any constitutional right or discretion to delay the criminal prosecution of the incumbent President until he leaves office. In other words, they all strongly suggest the government has the right to prosecute the President for any crimes like anyone else, including while still in office and reject any so-called right to temporary criminal immunity.

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[55] See page 23 of DOJ's opposition brief filed in *US v. Trump* on October 19, 2023.
[56] *See Clinton, supra*, 520 U.S. at 704-05.

## G. *Jones v. Clinton* decision (Dist.Ct. 1999)[57]: existing trilogy of Supreme Court decisions recognizes and confirms right to criminally prosecute the President.

In fact, in 1999, a federal district court in *Jones v. Clinton* – a civil case -- did directly, judicially confront and decide this precise constitutional question expressly for the first time, regarding whether the government could *adjudicate* criminal charges against the incumbent President. The *Jones* district court needed to decide this question after the Plaintiff had filed a petition to hold the sitting President in criminal contempt. As the *Jones* district court would explain and prove, a criminal contempt allegation "*is a crime in the ordinary sense*," just like the crime that DOJ could initiate by filing a criminal complaint or obtaining an indictment.[58]

Further, after examining the above trilogy of Supreme Court decisions, along with *Fed.R.Crim.P.* 42 ("criminal contempt"), the *Jones* district court concluded that the prior trilogy of Supreme Court decisions*, Clinton*, *Fitzgerald* and *Nixon,* did in fact allow the district court to adjudicate a contempt prosecution against the President as it could against anyone else, explaining:[59]

> [T]he Supreme Court explained that "'[it] is settled law that the **separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States,'" *Clinton v. Jones,* 520 U.S. at 705 (quoting *Nixon v. Fitzgerald,* 457 U.S. 731, 753-54, 73 L. Ed. 2d 349, 102 S. Ct. 2690 (1982)), and noted that "if the judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct." *Id.***

Thus, the *Jones* district court concluded that it could use either criminal or civil contempt procedures against the President, although criminal prosecution -- unlike civil contempt procedures -- would require the court's appointment of a prosecutor. The *Jones* court explained that it had "*fully considered addressing all of the President's possible misconduct pursuant to the criminal contempt provisions set forth in Fed.R.Crim.P. 42, after reviewing the judicial precedent."*[60] However, given certain unique circumstances, including a potential double jeopardy problem given the separate, ongoing criminal investigation by the special prosecutor's office, the *Jones* district court elected instead to use the *civil* contempt proceeding, stating: "*this Court will forego proceeding under Fed.R.Crim.P. 42 and address the*

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[57] *Jones v. Clinton,* 36 F. Supp. 2d 1118 (E.D. Ark. 1999).
[58] *See Jones, supra*, 36 F.Supp. 2d at 1134-35, fn 22.
[59] *See, Jones,* 36 F. Supp. 2d at 24-25.
[60] *See, Jones*, *supra*, 36 F. Supp. 2d at 1133.

*President's contempt by focusing on those undisputed matters that are capable of being summarily addressed pursuant to Fed.R.Civ.P. 37(b)(2).*[61]

Nonetheless, the *Jones* court concluded the court had the lawful right to adjudicate the Plaintiff's criminal contempt allegations against the President under the pertinent Supreme Court decisions. The President's lack of any right to criminal immunity is confirmed by the Supreme Court's recent decision in *Trump v. Vance*, as discussed below.

### H. *Trump v. Vance* (Sup.Ct. 2020)[62]: prior trilogy of Supreme Court decisions and *US v. Burr* establish that President deserves no special criminal rights, including immunity from criminal prosecution.

In this 2020 (8-1) Supreme Court decision in *Trump v. Vance,* the Court confirmed the continuing validity of its prior trilogy of decisions, *Nixon, Fitzgerald* and *Clinton*, when it concluded that that President Trump deserved no unique or special criminal rights or immunity. In fact, the *Vance* Court acknowledged expressly that both the *Nixon* and *Clinton* decisions had specifically denied the President any right to absolute immunity:[63]

> **[W]e have twice denied absolute immunity claims by Presidents in cases involving allegations of serious misconduct. See *Clinton*, 520 U. S., at 685; *Nixon*, 418 U. S., at 687**

In addition to acknowledging these two rulings that deny such immunity, the *Vance* Court did also conclude that its third decision, *Nixon v. Fitzgerald* – while granting civil immunity from monetary damages for the President's "official conduct" – did still expressly deny the President (or *former* President) any right to claim *criminal* immunity when holding that "*the prospect that a President may become "preoccupied by pending litigation" did not ordinarily implicate constitutional concerns."*[64]

In *Vance*, President Trump had cited this *separation of powers* case (i.e. *Fitzgerald*) as part of his larger, *supremacy clause* argument that the Court (supposedly) had to overrule and invalidate the conflicting laws of the State and City of New York which allowed the Manhattan DA to subpoena his business records. However, the *Vance* Court rejected President Trump's supremacy clause argument based upon its own, three *separation of power* cases, which deny him any such special criminal rights, meaning *Fitzgerald, Clinton, Nixon,* along with *Burr*.

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[61] See Jones, *supra*, 36 F. Supp. 2d at 1134-35.
[62] *Trump v. Vance*, 140 S. Ct. 2412 (2020).
[63] *See Vance, supra*, 140 S. Ct. at 2427-28.
[64] *See Vance, supra*, 140 S.Ct. at 2418-19.

Further, despite the *Vance* Supreme Court's rejection, Trump repeats this same argument here without ever resolving or mentioning this rejection.

## II. Supreme Court's two so-called "subpoena rulings" in *Vance* and *Nixon* confirm the judicial branch's right to adjudicate and sanction President's violation of criminal laws.

Notably, when the *Vance* and *Nixon* Supreme Courts declared that the judicial branch had the lawful right to compel presidential compliance with the demands made by the prosecutors' criminal subpoenas, all three of these decisions were necessarily, implicitly, deciding and declaring that -- should the President fail or refuse to comply with these *lawful* criminal subpoenas -- that the judicial branch has the lawful right to enforce them against the President as against anyone else. This implicit right and need for the court to be able to enforce its own subpoenas like other court orders, can even be found within the very definition of the term "subpoena." Black's Law Dictionary (8th ed) explains that the Latin translation of this term "subpoena" means "*under penalty*," which accords with the definition of a writ commanding a person to appear before a tribunal which is: "*subject to a penalty for failing to comply*," as follows:[65]

> Subpoena (se-pee-ne), n. [Latin "under penalty"]. A writ commanding a person to appear before a court or other tribunal, *subject to a penalty for failing to comply*.

If such court could not enforce the subpoena with any penalty when a President refused to abide by such any presidential compliance would necessarily be discretionary, not compulsory. No President who failed or refused to comply could be penalized. But because the President does not in fact deserve any special immunity from criminal prosecution, should he fail or refuse to comply with a lawful "*subpoena*" then the court has the same legal right to enforce such process and penalty by adjudicating whether this failure or refusal constituted sanctionable criminal contempt as defined by *Fed.R.Crim.P.* Rule 17(g), Fed.R.Crim.P. Rule 42 along with 28 U.S.C. § 636(e), as expressly allowed and confirmed by the Supreme Court in *Nixon* as then confirmed under New York State law in *Vance*.

Justification for this interpretation is also confirmed by the government's constitutional obligations to produce and disclose the relevant evidence needed at trial to prove its criminal case beyond a reasonable doubt and to provide discovery of such evidence to the accused, including to produce the testimony or documents

[65]See page __ of Black's Law Dictionary (8th ed).

offered by uncooperative witnesses, as Chief Justice Marshall explained in *US v. Burr*, stating:[66]

> **The right of an accused person to the process of the court to compel the attendance of witnesses seems to follow, necessarily, from the right to examine those witnesses; and, wherever the right exists, it would be reasonable that it should be accompanied with the means of rendering it effectual**.

Thus, although not expressly recognized by the majority decisions in *Vance* and *Nixon*– by demanding presidential compliance with criminal subpoenas under the same laws that applied to others – these decisions were necessarily recognizing a much "broader" constitutional question than the *mere* obligation to comply with a criminal subpoena: i.e., that the judicial branch had the constitutional right to adjudicate criminal charges that the government filed against any sitting President who refused to comply with such criminal laws.

In fact, ironically, while ignored by the *Vance* majority, Justice Alito's dissent justly recognized and described the Court's resolution decided the "broader" question of the judicial branch's right to prosecute the President, explaining:[67]

> **The specific question before us—whether the subpoena may be enforced—cannot be answered adequately without considering the broader question that frames it: whether the Constitution imposes restrictions on a state's deployment of its criminal law enforcement powers against a sitting President. If the Constitution sets no such limits, then a local prosecutor may prosecute a sitting President. And if that is allowed, it follows *a fortiori* that the subpoena at issue can be enforced. On the other hand, if the Constitution does not permit a State to prosecute a sitting President, the next logical question is whether the Constitution restrains any other prosecutorial or investigative weapons.**

## III. *Vance* Supreme Court confirms defects of Moss's OLC Opinion.

Within its oppositions and briefs in response to Defendant's briefs in support of his motion to dismiss in *US v. Trump*, DOJ has ignored all of the above judicial decisions that reject its claim that *the incumbent President* – not just the *former* one -- deserves criminal immunity, while disputing the immunity claims of the *former* President. In fact, DOJ inserted a footnote that disclaims that its brief would

[66] *See Burr, supra*, 25 F. Cas. at 35.
[67] *See Vance, supra,* 395 F. Supp. 3d at 2439-40 (J. Alito dissenting)

address or prove its own claim of presidential immunity[68] which DOJ based upon Moss's OLC Opinion.

Moss's OLC Opinion had argued baselessly that this above trilogy of Supreme Court decisions, *Nixon, Fitzgerald* and *Clinton,* was "*largely consistent*" with Dixon's earlier (1973) OLC memo that had claimed presidential criminal immunity and thus "*recognized and embraced the same type of constitutional balancing test"* supposedly justifying the conclusion "*that a sitting President cannot constitutionally be indicted or tried.*"[69]

But in fact, Moss's OLC Opinion did entirely misrepresent all three of these Supreme Court decisions. As the *Vanc*e Court most recently explained, the President does not deserve any special criminal rights, including criminal immunity, and the President is subject to and must obey the same criminal laws as other persons, including Rule 17 of the federal rules of criminal procedure as expressly held in *Nixon*. Rule 17(g) of such rules allows a court to adjudicate a criminal contempt case against the President like anyone else. Thus, like President Nixon, President Trump deserved only the same rights to challenge a criminal subpoena as any other citizen deserved under this law. The *Vance* Court expressly rejected the President's criminal immunity arguments made under both *Fitzgerald* and Moss's OLC Opinion, as well as rejecting Trump's argument that a prosecutor had to prove some "*heightened need*" before ever serving a presidential subpoena, explaining:[70]

> (i) The President contends that complying with state criminal subpoenas would necessarily distract the Chief Executive from his duties. He grounds that concern on *Nixon v. Fitzgerald*, which recognized a President's "absolute immunity from damages liability predicated on his official acts." 457 U. S. 731, 749, 102 S. Ct. 2690, 73 L. Ed. 2d 349. But, contrary to the President's suggestion, that case did not hold that distraction was sufficient to confer absolute immunity. Indeed, the Court expressly rejected immunity based on distraction alone 15 years later in *Clinton* v. *Jones*, when President Clinton sought absolute immunity from civil liability for private acts. As the Court explained, *Fitzgerald*'s "dominant concern" was not mere distraction but the distortion of the Executive's "decisionmaking process." 520 U. S., at 694, n. 19, 117 S. Ct. 1636, 137 L. Ed. 2d 945. The prospect that a President may become "preoccupied by pending litigation" did not ordinarily implicate constitutional concerns. *Id.,* at 705, n. 40, 117 S. Ct. 1636, 137 L. Ed. 2d 945.

[68] See footnote #1 on page 4 of DOJ's opposition to Trump motion to dismiss in *US v. Trump* filed October 19, 2023.
[69] *See* page 236 of Moss's OLC Opinion.
[70] *See Vance, supra*, 140 S. Ct. at 2418-20.

**Two centuries of experience likewise confirm that a properly tailored criminal subpoena will not normally hamper the performance of a President's constitutional duties.**

Not only did the *Vance* Supreme Court decision expressly hold and confirm that none of the three Supreme Court cases cited by Moss's OLC Opinion actually supported Moss's claim of presidential immunity, but did also affirm the second circuit[71] decision in *Vance*, which had affirmed the *Vance* district court's decision that had severely criticized and rejected Moss's OLC Opinion along with the other two "DOJ memos" that President Trump had invoked as supporting his presidential criminal immunity argument. Notably, the *Vance* district court devoted ten pages to critiquing and criticizing the merits – or, more accurately, the lack thereof -- of these three "DOJ memos" that President Trump had invoked to support his baseless claim of criminal immunity, which collectively included Moss's OLC Opinion,[72] Robert Dixon Jr.'s 1973 OLC Opinion[73] and Robert Bork's 1973 Spiro Agnew Opposition memo.[74] The *Vance* district court explained that: "*[t]he heavy reliance the President places on the DOJ Memos is misplaced*" as "*the DOJ Memos do not constitute authoritative judicial interpretation of the Constitution concerning those issues," and "**the case law does not support the President's and the DOJ Memos' absolute immunity argument to its full extremity and ramifications**."*[75] In fact, the *Vance* district court concluded that these *DOJ's memos* made inconsistent claims regarding presidential criminal immunity but moreover violated the trilogy of Supreme Court decisions that Moss did claim to interpret, as well as violating Marshall's 1807 *Burr* decision, explaining:[76]

> A synthesis of *Burr, Nixon, Fitzgerald,* and *Clinton* suggests that the Supreme Court would reject an interpretation and application of presidential powers and functions that would "sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." Nixon, 418 U.S. at 706. ***

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[71] *See Vance, supra,* 140 S. Ct. at 2412.
[72] See "*A Sitting President's Amenability to Indictment and Criminal Prosecution*," (Oct. 16, 2000) (https://www.justice.gov/file/19386/download).
[73] See "*Re: Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office*," by Robert Dixon Jr. (Sept. 24, 1973)] can be downloaded here: https://archive.org/details/1973OLCAmenabilityofthePresidenttoFederalCriminalProsecution.]
[74] See Exhibit J, page 17, "*In re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew, Vice President of the United States,"* No. 73 Civ. 965 (D. Md. 1973) See page 791 of Freedman, *"On Protecting Accountability,"* Hofstra Law Review Vol. 27, Iss. 4 (1999), Art. 3 (Copy of Bork's memo filed in opposition to Spiro Agnew's motion to dismiss).
[75] *See Vance,* 395 F. Supp. 3d at 306.
[76] *See Vance,* 395 F. Supp. 3d at 316; affirmed in part by 941 F. 3d 631 (2nd Cir. 2019), affirmed, 140 S. Ct. 2412 (2020).

On appeal, the *Vance* second circuit court of appeals did affirm SDNY's ruling on the presidential criminal immunity question, explaining:[77]

> [16]**The President appropriately does not argue that we owe any deference to the OLC memoranda, for "[t]he federal Judiciary does not . . . owe deference to the Executive Branch's interpretation of the Constitution."** Pub. Citizen v. Burke, 843 F.2d 1473, 1478, 269 U.S. App. D.C. 145 (D.C. Cir. 1988).

Then, as already noted, the *Vance* Supreme Court did affirm the second circuit's decision and concluded that none of its three prior presidential immunity cases, including *Fitzgerald*, justified granting him criminal immunity, holding that he had to comply with the Manhattan District Attorney's criminal subpoenas like anyone else would. As already noted above, these three Supreme Court decisions do indeed allow the *incumbent* President to be criminally prosecuted like anyone else.

Like DOJ's current briefs in *Trump*, former special counsel Robert Mueller had also invoked Moss's OLC Opinion exclusively within his March 22, 2019 final report to justify his refusal to criminally prosecute the President (the current Defendant).[78] Just like DOJ's opposition to Trump's motion to dismiss here, Mueller's 448-page final report did also fail to prove or defend the merits of Moss's OLC Opinion, such as by citing any judicial precedent, including the exact same Supreme Court decisions that Jack Smith's team had cited to dispute the *former* President's claims of criminal immunity.[79]

This clear rejection by the *Vance* Supreme Court explains why neither special counsel Jack Smith nor Robert Mueller did or could prove or defend the merits of Moss's OLC Opinion's own, specious presidential criminal arguments under the Supreme Court's trilogy of prior decision, which the *Vance* Court invoked to justify and require the opposite conclusion. Indeed, Mueller's own lead prosecutor, Andrew Weissmann, would explain in 2020 that Mueller's team could not find any judicial precedent to support Moss's claim of presidential criminal immunity, concluding that "*temporary immunity may not even exist under the law, after all.*"[80]

Nonetheless, despite this complete lack of legal precedent, Weissmann claimed that Mueller was still legally obligated to enforce this legally indefensible OLC Opinion merely because it was supposedly binding DOJ policy, stating:[81]

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[77] *See id.*
[78] See pages 1-2 of Volume 2 of Mueller's final report.
[79] *See id.* and Volume 2 generally.
[80] See page 342 of Where Law Ends, by Andrew Weissmann (Random House 2020).
[81] See page 313 of Where Law Ends, by Andrew Weissmann (Random House 2020).

> ***But none of [this lack of legal precedent] mattered, since we were bound by the OLC decisions****. Mueller was not an independent counsel, like Ken Starr, operating outside of Justice Department rules and free to chart his own course; he did not have the option of making his own assessment of the OLC opinion and arriving at some other, well-reasoned interpretation.* ***The regulations setting up the Special Counsel's Office made clear that we simply had to follow such Department rules and OLC opinions. We could be fired if we did not****."*

Thus, Weissmann does implicitly claim that Moss's OLC Opinion could and did constitutionally overrule and invalidate conflicting Supreme Court precedent which is in fact supreme and binding authority as declared by many Supreme Court decisions, starting with *Marbury v. Madison,* as explained above as more recently enforced by the *Nixon* Court which explained that *"it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case."* Thus, in fact, Moss's OLC Opinion cannot overrule or invalidate this Supreme Court precedent. In fact, Mueller's final report did itself acknowledge, albeit somewhat cryptically, that Supreme Court decisions are *binding* upon DOJ and its prosecutors and do invalidate and overrule Moss's erroneous and conflicting OLC Opinion,[82] as first declared by the Supreme Court within its 1807 decision in *Marbury v. Madison,* 1 Cranch 137 (1803).

Ironically, DOJ does even dispute Defendant Trump's central argument under *Fitzgerald* that: "*The defendant seeks to transplant Fitzgerald's civil-damages-based immunity, for the first time, into the realm of criminal immunity.*"[83] DOJ then explains that this would "*place a former president above the law.*"[84] Nonetheless, contradictorily, DOJ's opposition does still adopt this exact same OLC Opinion that does similarly claim to justify presidential criminal immunity, making him "above the law."

In fact, the *Vance* Supreme Court's failure or refusal to give any binding or even persuasive effect to Moss's OLC Opinion is consistent with many other judicial decisions that deny such binding treatment to decisions of the AG or his/her DOJ and its OLC. *See e.g., See Smith v. Jackson*, 246 U.S. 388, 390-91 (1918) ("*Auditor had no power to refuse to carry out the law and that any doubt which he might have*

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[82] See page 8 of Volume II of Mueller's final report which states: "***Constitutional defenses****. As for constitutional defenses arising from the President' s status as the head of the Executive Branch, we recognized that* ***the Department of Justice and the courts have not definitively resolved these issues. We therefore examined those issues through the framework established by Supreme Court precedent governing separation-of-powers issues****."*

[83] See page 19 of DOJ's opposition to Trump motion to Dismiss filed October 19, 2023, in *US v. Trump* (DC district court Case No. 23-cr-257 (TSC).

[84] Id.

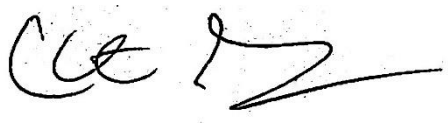
*had should have been subordinated, first, to the ruling of the Attorney General and, second, beyond all possible question to the judgments of the courts below.*"); *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350 (2nd Cir. 2005);*see also Cherichel v. Holder*, 591 F.3d 1002, 1016, n. 17 (8th Cir. 2009) ("*[T]he courts are not bound by [OLC opinions.]*"); *Trump v Thompson*, 455 US App DC 49, 68 [2021] ("*Office of Legal Counsel's interpretation was neither constitutionally required nor compatible with the Preservation Act. 843 F.2d at 1479-1480*"); *District of Columbia v. Trump,* 315 F. Supp. 3d 875, 884 fn.16 (2018) ("*Although not binding on courts, OLC opinions* "*provid[e] binding interpretive guidance for executive agencies."*"); *See Pub. Citizen v Burke*, 655 F Supp 318, 322 [1987]) ("*the DOJ/OLC opinion cannot be controlling. Stated differently, the DOJ/OLC opinion cannot be reconciled with this Circuit's opinion in Nixon v. Freeman.*").

## IV. Conclusion: Court should affirm denial of Defendant's motion to dismiss.

No President is above the law and can be criminally prosecuted like any other person, including the *former* President and Defendant whose motion to dismiss must be denied. This Court should not only affirm the lower court's denial of Defendant's motion to dismiss but also expressly declare that no President is above the law and can be criminally prosecuted like any other person.

April 18, 2024.

Respectfully submitted,



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