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Introduction

1. Accountability of those holding executive power is vital to ensure good government, respect of legal and constitutional principles, and public faith in the political culture of the state.[1] The mechanisms developed to achieve accountability must also be fair, effective, and have legitimacy. As Elbridge Gerry said during the debate at the Philadelphia Convention in 1787, he wished that a 'maxim would never be adopted here that the chief magistrate can do no wrong'.[2] That was the rationale for the inclusion of impeachment within the US Constitution. This article will argue that the Supreme Court's decision in *Trump v United States*[3] is misguided and offers a broad immunity to a former President of the United States, an immunity that will erode accountability, and reduce the deterrent of the ordinary courts once the President has left office.

2. It will also argue that the decision is relevant to the UK for three reasons. The first is that a former President could have immunity in the US for actions taken during their presidency, but if they were to visit the UK then this might result in what might be called a 'Pinochet scenario'.[4] The second is that, given the so-called special relationship, if a future President was to be emboldened by the logical consequences of the Supreme Court's decision, then the UK may have as its chief ally a country where the Head of State actively engages in overt illegally as a matter of course. The third is that the decision offers an opportunity to reflect on the position in the UK whereby the Prime Minister enjoys no immunity, but the monarch does. Why these

[1]This was encapsulated by Tony Benn's five questions that he set out during a debate in the House of Commons in 2001: 'What power have you got? Where did you get it from? In whose interests do you exercise it? To whom are you accountable? And how can we get rid of you?' (HC Deb 22 March 2001, vol 691, col 510).

[2]The record is available here: <https://archives.gov/publications/prologue/2006/spring/gerry.html#:~:text=%22A%20good%20magistrate%2C%22%20he,Convention%20adopted%20an%20impeachment%20provision> accessed 24 October 2024.

[3]603 US (2024).

[4]*R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Ugarte (Amnesty International intervening) (No 3)* [1999] 2 All ER 97. For the legal significance of the *Pinochet* case see Andrea Bianchi, 'Immunity Versus Human Rights: The *Pinochet* Case' (1999) 10(2) EJIL 237; Hazel Fox, Colin Warbrick and Dominic McGoldrick, 'The Pinochet Case No. 3' (1999) 48(3) ICLQ 687. See Dame Rosalyn Higgins QC's (the then President of the International Court of Justice) discussion of 'The "out of office" scenario' in 'After Pinochet: developments on head of state and ministerial immunities', ICLR Annual Lecture 2006, pp 16–18 <https://bailii.org/uk/other/speeches/2006/ICLR2006.pdf> accessed 24 October 2024.

three reasons may appear at first to be peripheral to the significancy consequences of *Trump v United States*, it does reflect the fact that no one country exists in a silo, and there are consequences beyond the immediate outcome of the decision.

How do you get rid of a bad President?

3. What makes a President a bad President? To regard someone as being 'bad' involves subjectivity and this is often infused with implicit or explicit political biases. To date three Presidents have been impeached: Andrew Johnson in 1868, William (Bill) Jefferson Clinton in 1998, and finally Donald J Trump who was impeached twice. In 2019 and 2021 the House of Representatives thought that Trump was guilty of an impeachable offence and on both occasions the Senate did not convict. Trump's conduct was in the view of the House of Representatives that of a bad President. Clinton's impeachment is still within the living memory and engrained into popular culture.

4. Was Clinton a bad President deserving of impeachment? *The Washington Post* asked readers at the time of the impeachment for their views, which were mixed and often drew a distinction between the personal failings of Clinton and his ability to be a good President. The responses offer a contemporary snapshot of public feeling. One reader from Virginia thought that, '[t]he lies and deceptions of President Clinton are deplorable. However, they are not high crimes against the country'. Whilst another from Atlanta wrote, 'Clinton has corrupted everyone and everything associated with Him and made the presidency a mockery'.[5]

5. Opinion was divided amongst those connected with the Clinton administration and Kenneth Starr, the Independent Counsel. Karen A Popp, a former Associate White House Counsel during the Clinton administration, was of the view that 'the impeachment process failed and, in the process, did a great deal of damage along the way' and 'President Clinton should not have been impeached'.[6]

6. The debate over the appropriateness of impeaching Clinton continues. Writing in 2019, Paul Rosenzweig, the former Senior Counsel to Kenneth Starr during the Whitewater investigation, was of the view that Clinton deserved to be impeached. He was clear that, 'Lewinsky's contact with Clinton was consensual, however morally reprehensible on the president's part. It was Clinton's decision to obstruct justice by lying about his conduct under oath that led to his impeachment charge'.[7] However, Rosenzweig considered Trump even more of deserving: 'Trump's acts in soliciting Ukrainian

[5]'Readers' Views on the Impeachment Hearings' *The Washington Post* (1998) <https://washingtonpost.com/wp-srv/politics/special/clinton/postings/hearings1.htm> accessed 24 October 2024.
[6]Karen A Popp, 'The Impeachment of President Clinton: An Ugly Mix of Three Powerful Forces' (2000) 63(1) and (2) Law and Contemporary Problems 223, 243.
[7]Paul Rosenzweig, 'Opinion: I Worked on the Bill Clinton Probe. He Deserved Impeaching. Trump's Actions are Even Worse' *Los Angeles Times* (4 November 2019) <https://latimes.com/opinion/story/2019-11-04/trump-impeachment-crime-cover-up-ukraine-clinton-nixon> accessed 24 October 2024.

interference in the political affairs of America are very different. His actions implicate him in the personal abuse of presidential authority'. There are clearly degrees of badness – Clinton's conduct was morally questionable, but the bad (for legal purposes) came in as a result of an attempt to cover up his affair with Monica Lewinsky.

7. As to the use of impeachment, Kenneth Starr, the former Independent Counsel, warned the Senate in 2020 that, 'the Senate is being called to sit as the high court of impeachment all too frequently. Indeed, we are living in what I think can aptly be described as the age of impeachment'.[8] Even the man who was most closely associated with bringing about the Clinton impeachment, Starr was hesitant about the recourse to impeachment: 'Like war, impeachment is hell. Or, at least, presidential impeachment is hell … It's filled with acrimony and it divides the country like nothing else.'[9] Herein lies the problem with accountability through the use of impeachment – it is divisive, but when a sitting President is 'bad' and is immune from prosecution whilst in office, then how do you hold them to account?

8. Returning to Trump in 2019 there were two articles of impeachment for abuse of power and the obstruction of justice. Trump was accused of '[u]sing the powers of his high office [to solicit] … the interference of a foreign government, Ukraine, in the 2020 United States Presidential election'. In 2021, the sole article related to incitement of insurrection. It made for stark reading:

> President Trump's conduct on January 6, 2021, followed his prior efforts to subvert and obstruct the certification of the results of the 2020 Presidential election … . In all this, President Trump gravely endangered the security of the United States and its institutions of Government. He threatened the integrity of the democratic system, interfered with the peaceful transition of power, and imperiled a coequal branch of Government.

9. The Framers of the US Constitution were worried about a bad President. On 20 July 1787 during the Philadelphia Convention, James Madison argued that impeachment was 'indispensable … for defending the Community [against] the incapacity, negligence or perfidy of the chief Magistrate'. His fellow delegate Elbridge Gerry was clear that '[a] good magistrate … will not fear them … a bad one ought to be kept in fear of them'.[10] Alexander Hamilton in *The Federalist* papers was clear that a President should be capable of being impeached, and his position should not mirror that of King George who had absolute immunity:

> The person of the King of Great Britain is sacred and inviolable: there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected, without involving the crisis of a national revolution. In this delicate and important circumstance of personal responsibility, the president of confederated America would stand upon no better ground

[8]See <https://theguardian.com/us-news/2020/jan/27/kenneth-starr-trump-impeachment-trial> accessed 24 October 2024.
[9]See ibid.
[10]The record is available here: <https://archives.gov/publications/prologue/2006/spring/gerry.html#:~:text=%22A%20good%20magistrate%2C%22%20he,Convention%20adopted%20an%20impeachment%20provision> accessed 24 October 2024.

> than a governor of New York, and upon worse ground than the governors of Virginia and Delaware.[11]

10. The US Constitution provides for the removal of a President using impeachment. Article II, Section 4, of the Constitution states that '[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors'. There is no requirement that the conduct is recognised as a criminal offence. This gives the House of Representatives a wide discretion to determine what is an impeachable offence.

11. The impeachment mechanism was borrowed from Great Britain. Thus Congress had the sole power of removing the President, and the division of responsibility between the House of Representatives and the Senate adds in a safety valve to prevent inappropriate use of impeachment. As is the case of the House of Commons, the House of Representatives has 'the sole Power of Impeachment',[12] and needs only a majority of those attending to 'constitute a quorum' to impeach.[13] This makes it relatively easy to impeach a bad President. The vital ingredients are that the other party has a majority and that there is broad agreement about bringing an impeachment. The difficulty however is that the Senate requires a two-third majority of those present to convict.[14]

12. Article I, Section 3, of the Constitution states that:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

13. In the context of our notional bad President the object of impeachment would be to remove them from office. Upon conviction the Senate might also state that the President was disqualified from holding further office. The significance of the second Trump impeachment was that had Trump been convicted then he might have faced disqualification which would prevent him from running again for President. Interestingly, there is precedent for someone who has been convicted by the Senate holding public office again, the individual being Alcee Hastings who was removed as a federal judge in 1989 (but not disqualified from holding public office in the future) and later served from 1992 in the House of Representatives. Two more things must be addressed. First, in the case of an impeachment the bad President will not face a custodial sentence or a fine. This is unlike the historic use of impeachment in Great Britain. However, if our bad President is removed from

[11]Alexander Hamilton, 'No. 68' in Alexander Hamilton, John Jay and James Madison, *The Federalist* (Liberty Fund 2001) 356.
[12]Article 1, Section 2.
[13]Article 1, Section 5.
[14]Article 1, Section 3.

office, then they will be subject to the ordinary law. This means that they could be prosecuted for any criminal conduct committed during their tenure as President. A bad President might be mindful here to follow the example of Richard Nixon and resign before being impeached, and receive a pardon from their successor.[15] This pardon does not extend to impeachment, so it would be preferable to resign before being convicted by the Senate.[16]

14. Our bad President, even if accused of inciting an insurrection or trying to overturn an election, may well escape conviction due to the Senate's two-thirds majority requirement. Impeachment does serve (to some extent) as a deterrent and a bad President may moderate their conduct to avoid the indignity of impeachment or ensure that they still have the support of the Senators from their own party. Failure to maintain such support may force a President to resign, as in the case of Nixon, in order to avoid being convicted. The fact that a President has left office does not prevent an impeachment, as Trump was no longer President when he was tried in the Senate in 2021.[17] If impeachment is unlikely to result in a conviction, then where does this leave our bad President? The President is immune from criminal prosecution but not from civil lawsuits during their presidency.[18] After leaving the White House the President can be prosecuted in the ordinary courts for acts that occurred during their Presidency. The President could pardon associates to avoid future criminal prosecution, but it is unclear whether a President could pardon themselves before the end of their term.[19] This would not stop the next President from pardoning their predecessor, but this is hardly guaranteed.

15. Bringing the scenario back to the present reality, Trump was acquitted twice by the Senate, and having left office he faced criminal prosecution for his role in the 6 January 2021 attack on the US Capitol Building notwithstanding being acquitted by the Senate. Thus the 'bad' President was out of office and could be prosecuted by recourse to the ordinary courts.

[15]Nixon was pardoned by his successor, President Gerald Ford.
[16]Article II, Section 2.
[17]Precedents relied upon included William Belknap, the former Secretary of State for War who was impeached in 1876. Belknap had sought unsuccessfully to avoid being impeached by resigning shortly before the House of Representatives voted. Another precedent was that of Warren Hastings, the former Governor-General of Bengal, who was impeached in 1787. The House Managers in the second Trump trial were clear: 'Warren Hastings, a former official, faced impeachment charges in England even as the Framers gathered in Philadelphia to draft our Constitution – and the Framers cited his case as one in which impeachment was appropriate'. See <https://democrats-judiciary.house.gov/uploadedfiles/house_impeachment_trial_reply_2.9.21.pdf> accessed 24 October 2024.
[18]*Clinton v Jones* 520 US 681 (1997).
[19]For example, Frank O Bowman III argues that self-pardons are 'constitutionally impermissible' (450) and not supported by the intent of the Framers of the constitution: 'these provisions together strongly suggest that the Framers meant for a president to remain amenable to prosecution in addition to impeachment, and that they would therefore have rejected a self-pardon as defeating that end': Frank O Bowman III, 'Presidential Pardons and the Problem of Immunity' (2021) 23 Journal of Legislation and Public Policy 425, 450 and 461–462 respectively. For a contrary view see Jonathan Turley, 'Yes, Donald Trump Can Pardon Himself, But it Would Be a Disastrous Idea' *USA Today* (4 June 2018) <https://law.gwu.edu/yes-donald-trump-can-pardon-himself-it-would-be-disastrous-idea> accessed 24 October 2024.

16. What is the connection here between impeachment and the Supreme Court within the context of a 'bad' President? One of the only means to remove a 'bad' President (the other being the 25th Amendment) is a conviction by the Senate during an impeachment trial. Presidential immunity means that a President cannot be prosecuted through the courts for acts that are considered to be illegal. Therefore, whilst a President is in office, impeachment serves as a way to sanction (through a successful impeachment vote in the House of Representatives which has occurred four times) and remove (which has never occurred) the President. Out of office the President *should* enjoy no such immunity, unless as in the case of Nixon they are pardoned by their successor. We can see that in terms of controlling Presidential conduct, the threat of impeachment and subsequent criminal liability in the ordinary courts are two forms of accountability (even if the latter is retrospective).

Enter the Supreme Court

17. Faced with an indictment by a Grand Jury, Donald Trump sought to dismiss the indictment based on Presidential immunity. The majority decision by the Supreme Court on the whole gave Trump broad immunity from prosecution. This is worrying, as by giving a former President immunity for the sake of expediency whilst they are in office, the Court has removed an important facet of accountability: equality before the law. Unlike the Prime Minister in the UK, the President enjoys immunity from prosecution whilst in office and can only be removed by way of impeachment. The Framers clearly intended such immunity whilst *in* office, but it is extremely doubtful whether they intended this immunity to extend *out* of office. To be clear the immunity in question only relates to the actions of the President during their time in office and not relating to the period afterwards.

18. Delivering the opinion of the Court, Chief Justice Roberts emphasised the significance of the case: '[t]his case is the first criminal prosecution in our Nation's history of a former President for actions taken during his Presidency'.[20] Associate Justice Thomas delivered a concurring opinion, whilst Associate Justice Barrett concurred in part. However, Barrett in part supported the dissenting opinion of Associate Justice Sotomayor, rejecting Roberts' opinion that the Constitution could limit the admission of protected conduct as evidence in a criminal prosecution.[21]

19. The question before the Supreme Court was '[w]hether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office'.[22] What was not at issue was whether a former President had immunity for unofficial acts. It was clear that there existed no such immunity.[23] Where there was disagreement was

[20]The opinion of the Court, delivered by Chief Justice Roberts, 5.
[21]The opinion of Associate Justice Barrett, 5–6.
[22]The opinion of the Court, delivered by Chief Justice Roberts, 5.
[23]ibid 15.

concerning official acts, with Trump lawyers arguing that the civil immunity 'for acts within the outer perimeter of his official responsibilities' (as was held in *Nixon v Fitzgerald*[24]) extended to also cover criminal immunity.[25] This would protect Trump from being prosecuted both for official acts and those at the outer perimeter. The government argued that 'regardless of how they are characterized' there could be no immunity.[26] The majority of the Supreme Court accepted that a former President 'with respect to the President's exercise of his core constitutional powers' had absolute immunity.[27] The other official actions which were categorised as 'core constitutional powers' carried immunity, but importantly Roberts stressed that the Court would not say whether the immunity was absolute, or whether there was a 'presumptive immunity'.[28] It was clear that Roberts' rationale was the separation of powers within the US Constitution.

20. Roberts was clear that the Courts would distinguish between a President who acted within their authority and a President who acted outside their authority. Only in the latter situation would the Court intervene.[29] It is apparent though that the Court has considerable discretion to decide when a President is acting within or outside their authority.[30] Citing *Fitzgerald*, Roberts noted that '[t]he President "occupies a unique position in the constitutional scheme"', and was 'the only person who alone composes a branch of government'.[31] Drawing upon the intent of the Framers, Roberts concluded that the Framers wanted a President who was both vigorous and energetic.[32] The rationale for immunity was to permit the President to act decisively for the benefit of the Republic. As was held in *Fitzgerald* if the President was liable to prosecution, then he might be 'unduly cautious in the discharge of his official duties'.[33] The Supreme Court held in *Clinton v Jones* that 'our dominant concern' was to avoid 'diversion of the President's attention during the decision making process caused by needless worry as to the possibility of damages actions stemming from any particular official decision'.[34]

21. Roberts stressed that '[t]he President, charged with enforcing federal criminal laws, is not above them'.[35] However, the 'separation of powers principles explicated in our precedent necessitate at least a *presumptive* immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility' (emphasis original). But why was this required? As Roberts put it: '[s]uch an immunity is

[24]457 US 731 (1982).
[25]The opinion of the Court, delivered by Chief Justice Roberts, 5.
[26]ibid 5–6.
[27]ibid 6.
[28]ibid 6.
[29]ibid 7.
[30]ibid 7.
[31]*Trump v Mazars USA, LLP* 591 US 848 (2020).
[32]The opinion of the Court, delivered by Chief Justice Roberts, 10.
[33]ibid 10.
[34]ibid 11.
[35]ibid 13–14.

required to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution'.[36] The rationale is clear. It is not expedient to have a cautious and hesitant President who is fearful of being prosecuted for simply exercising their official powers. This is an attractive reason, but it perhaps betrays a focus on the idealistic as opposed to the reality. Is it more expedient to require the president to be cautious or to have instead a President that pushes the boundaries and relies on having 'at least a *presumptive* immunity from criminal prosecution'?[37] Roberts declared that 'the current stage of the proceedings in this case does not require us to decide whether this immunity is presumptive or absolute'.[38]

22. Roberts was clear that '[d]istinguishing the President's official actions from his unofficial ones can be difficult'.[39] The starting point was to look at whether the President had the authority to do the act. The official actions are very wide and include the 'President's "discretionary responsibilities" under the Constitution and laws of the United States' and 'some Presidential conduct – for example, speaking to and on behalf of the American people … certainly can qualify as official even when not obviously connected to a particular constitutional or statutory provision'.[40] Importantly, when tasked with distinguishing between official and unofficial acts, Roberts held that the 'courts may not inquire into the President's motives'.[41] There was no scope to address whether the President was using their powers for either a proper or improper purpose. Roberts was clear that even if the act violated law, this did not mean that the act ceased to be an official act.[42]

23. Next, Roberts addressed the specific indictment. The first charge was that Trump 'conspired to obstruct the January 6 congressional proceeding at which electoral votes are counted and certified … '.[43] This involved inter alia using the Justice Department to 'convince certain States to replace their legitimate electors with Trump's fraudulent slates of electors' which the acting Attorney General resisted and was threatened with dismissal. This was accepted by both parties to be an official act of the President. The government argued that the power was used for improper purposes and therefore Trump should have no immunity. Roberts rejected the government's argument.[44] The second charge was that Trump sought to persuade Mike Pence, his Vice-President, to use his 'ceremonial role at the January 6 certification proceeding to fraudulently alter the election results'.[45] Roberts held that this discussion

[36]ibid 14.
[37]ibid 14.
[38]ibid 14.
[39]ibid 17.
[40]ibid 17.
[41]ibid 18.
[42]ibid 18.
[43]ibid 19.
[44]ibid 21.
[45]ibid 21.

between Trump and Pence was official conduct given the Vice-President's special role within the executive branch.[46] However, the Vice-President's role in the Senate was as part of the legislative branch. In terms of rebutting the presumption of immunity, the burden was on the government to convince the District Court that Trump did not enjoy immunity and thus is still to be decided at first instance.[47]

24. The third charge involved Trump's discussions with private citizens and state officials to return fraudulent electors.[48] Roberts observed that '[o]n Trump's view, the alleged conduct qualifies as official because it was undertaken to ensure the integrity and proper administration of the federal election'.[49] The government argued that these discussions were 'nothing more than Trump's "private scheme with private actors"'.[50] Roberts stated that this charge was problematic as it 'cannot be neatly categorized as falling within a particular Presidential function'.[51] This again was remanded to the District Court to determine whether Trump's conduct was official or unofficial.[52] The fourth charge related to Trump's use of Twitter 'encouraging his supporters to travel to Washington, D.C.' on 6 January 2021.[53] Trump then subsequently addressed the crowd and called for the Vice-President to refuse to accept the ballots sent from the states.[54] The problem was this was followed by the crowd storming the Capitol Building. Roberts held that the President had a role in speaking to American citizens and using the power of persuasion: '[i]ndeed, a long-recognized aspect of Presidential power is using the office's "bully pulpit" to persuade Americans, including by speaking forcefully or critically, in ways that the President believes would advance the public interest'. Going back to Roberts' refusal to look into the President's motive, this does not require Trump to show that the public interest was not really what was in the President's own interest. Roberts held that 'most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities. There may, however, be contexts in which the President, notwithstanding the prominence of his position, speaks in an unofficial capacity – perhaps as a candidate for office or party leader'.[55] The determination of whether Trump's communication was to be regarded as official or unofficial conduct was once again remanded to the District Court.[56]

25. Roberts did reject Trump's attempt to further broaden his immunity.[57] This essentially meant that Trump had argued that because he had been impeached and acquitted

[46]ibid 22–23.
[47]ibid 24.
[48]ibid 25–26.
[49]ibid 26.
[50]ibid 27.
[51]ibid 28.
[52]ibid 28.
[53]ibid 28.
[54]ibid 28–29.
[55]ibid 29.
[56]ibid 30.
[57]ibid 32.

by the Senate for conduct for which he was now being indicted, the Constitution's Impeachment Clause prevented a former President from being prosecuted as he had been acquitted by the Senate. The clause was clear that a President who had been removed from office as a result of impeachment could still face prosecution in the courts. Trump's argument was that this meant conversely a President who had been acquitted would not. Roberts argued that '[h]istorical evidence likewise lends little support to Trump's position'.[58] This rejection of Trump's argument is crucial and is to the Court's credit. Roberts illustrates the rationale for his position:

> The implication of Trump's theory is that a President who evades impeachment for one reason or another during his term in office can never be held accountable for his criminal acts in the ordinary course of law. So if a President manages to conceal certain crimes throughout his Presidency, or if Congress is unable to muster the political will to impeach the President for his crimes, then they must forever remain impervious to prosecution.[59]

26. The majority and the dissent were perhaps unsurprisingly divided between those justices appointed by Republican Presidents and those appointed by Democratic Presidents. Former President Clinton and Secretary Clinton encapsulated the concerns that many had as a result of the decision when they issued a statement on X stating that: '[Trump] has promised to be a dictator on day one, and the recent ruling by his servile Supreme Court will only embolden him to further shred the Constitution'.[60] Roberts sought to downplay the criticism in the dissenting opinions: '[a]s for the dissents, they strike a tone of chilling doom that is wholly disproportionate to what the Court actually does today'.[61] Roberts regarded the dissent as using 'cherry-picked sources' some of which 'do not even discuss the President in particular'.[62] In response Associate Justice Sotomayor pointed out the absence of authority to support the majority's decision as to presidential immunity:

> Aware of its lack of textual support, the majority points out that this Court has 'recognized Presidential immunities and privileges rooted in the constitutional tradition of the separation of powers and supported by our history' … Nothing in our history, however, supports the majority's entirely novel immunity from criminal prosecution for official acts. The historical evidence that exists on Presidential immunity from criminal prosecution cuts decisively against it.[63]

27. Sotomayor emphasised that there was no authority for such immunity and the consequences were alarming: 'the majority today endorses an expansive vision of Presidential immunity that was never recognized by the Founders … Settled

[58]ibid 33.
[59]ibid 33–34.
[60]Statement from President Clinton and Secretary Clinton, 21 July 2024 <https://x.com/BillClinton/status/1815102085198958657/photo/1>.
[61]The opinion of the Court, delivered by Chief Justice Roberts, 37.
[62]ibid 38.
[63]Dissenting opinion of Associate Justice Sotomayor, 6.

understandings of the Constitution are of little use to the majority in this case, and so it ignores them'.[64] Sotomayor was scathing of the impact that this would have on the rule of law, 'the majority pays lip service to the idea that' the President 'is not above [the law]'.[65] The expediency rationale relied upon by the majority was rejected by Sotomayor: '[i]ts analysis rests on a questionable conception of the President as incapable of navigating the difficult decisions his job requires while staying within the bounds of the law'.[66] The majority's obsession with 'the President's need for boldness and dispatch' was not a view shared by the Framers.[67] There needed to be a balance between the President's need to act whilst in office and the need for accountability and a respect for the rule of law. It is hard to disagree with this view, especially based on the historical evidence and the Constitution. Sotomayor ended her dissent, '[m]oving forward … all former Presidents will be cloaked in such immunity … With fear for our democracy, I dissent'.[68]

28. Associate Justice Jackson in her dissent set out the consequences of the decision: 'even a hypothetical President who admits to having ordered the assassinations of his political rivals or critics … or one who indisputably instigates an unsuccessful coup … has a fair shot at getting immunity under the majority's new Presidential accountability model'.[69] Jackson saw the decision as at odds with the rule of law and offering the opportunity for abuse from a President who would be happy to break the law:

> … I simply cannot abide the majority's senseless discarding of a model of accountability for criminal acts that treats every citizen of this country as being equally subject to the law – as the Rule of Law requires. That core principle has long prevented our Nation from devolving into despotism. Yet the Court now opts to let down the guardrails of the law for one extremely powerful category of citizen: any future President who has the will to flout Congress's established boundaries.[70]

29. Roberts rejected the characterisation of the decision by the dissenting justices: '[c]oming up short on reasoning, the dissents repeatedly level variations of the accusation that the Court has rendered the President "above the law"'.[71] To Roberts the dissenters were 'fear mongering on the basis of extreme hypotheticals about a future where the President feels empowered to violate federal criminal law'.[72] Roberts was clear that unlike the public and politics the Court could not just focus of the present, but 'be more farsighted'.[73] The decision is questionable based on precedent and history, and the Supreme Court, despite Roberts' defence of the opinion,

[64]ibid 10.
[65]ibid 12.
[66]ibid 14.
[67]ibid 30.
[68]ibid 30.
[69]Dissenting opinion of Associate Justice Jackson, 8.
[70]ibid 21.
[71]The opinion of the Court, delivered by Chief Justice Roberts, 39.
[72]ibid 40.
[73]ibid 41–42.

has done significant damage to the rule of law, and reduced the accountability of a former President on the justification of expediency and the President's special role. It is submitted that the immunity for this special role is already set out, with the President enjoying immunity whilst in office, and there was no basis for extending this immunity.

Relevance to the UK

30. Imagine a scenario where a President inter alia orders the arrest and detention of their political opponents and several die whilst being interrogated by the President's officials. The President is impeached but is acquitted and eventually leaves office. Following *Trump v United States*, they have immunity or presumptive immunity depending on how these official acts are classified. In a situation comparable to *Pinochet*, imagine that the former President visits the UK or another country and there is an arrest warrant. Furthermore, imagine the consequences for British diplomacy of having to maintain the so-called special relationship whilst such a President was in office. The decision in *Trump v United States* offers an opportunity to reflect on the situation in the UK given the constitutional turmoil of the past decade. In the UK, the Prime Minister has no immunity from prosecution whilst in office. The only person to have such immunity is the monarch.[74] Our approach to equality before the law means that Prime Ministers have been and can continue to be prosecuted whilst in office.[75] In terms of the constitution (if not the law) it is often perceived as problematic that it is possible for a Prime Minister to ignore constitutional norms and evade accountability.[76] The key check is the need for the Prime Minister to maintain the confidence of the Commons, their own ministers and MPs, and voters. For example, Boris Johnson was felled by his own ministers and MPs. The US and the UK constitutions are very different, but the decision in *Trump v United States* offers a stark contrast to our own system. This contrast is encapsulated by Lord Denning MR's words in *Gouriet v Union of Post Office Workers*[77] ('To every subject of this land, however powerful, I would use Thomas Fuller's words over three hundred years ago, "Be ye never so high, the law is above you"') and AV Dicey's articulation of the rule of law ('every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen … all men are in England subject to the law of the realm').[78]

[74]This immunity does not extend to other members of the royal family. See for example the prosecution and conviction of the Princess Royal in 2002. The conviction related to the Princess Royal's dog biting two children.
[75]Boris Johnson was fined in 2022 for breaking the law in relation to the Covid-19 pandemic.
[76]See e.g. Michael Gordon, 'Ministerial Irresponsibility in the UK Government: Constitutional Accountability after Theresa May and Boris Johnson' (2024) PL 414; Alison Young, *Unchecked Power? How Recent Constitutional Reforms are Threatening UK Democracy* (Bristol University Press 2023) 256.
[77][1977] QB 729.
[78]AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 114–115.