United States Senate
COMMITTEE ON THE JUDICIARY

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Donald J. Trump v. *United States*

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“ ‘When the President Does It, That Means It’s Not Illegal’:
The Supreme Court’s Dangerous Immunity Decision.”

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Statement of

PHILIP ALLEN LACOVARA

(former Deputy Solicitor General of the United States
Counsel to the Watergate Special prosecutor
President of The District of Columbia Bar)

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It is an honor to appear before the Committee to express my views on the recent decision by the Supreme Court of the United States creating a unique immunity from prosecution for crimes that a president commits in the alleged performance of his “official” functions.

As I wrote shortly after the Court announced that startling decision, never in my life has the Court rendered a decision that is so lacking in constitutional foundation or that is so dangerous to our most fundamental and cherished constitutional values. (*The Bulwark*, July 8, 2024).

Before explaining each of those assessments, allow me to provide a brief survey of my qualifications to express these opinions.

My Credentials

I have been a “student” of the Supreme Court for more than half a century. After clerking on the United States Court of Appeals for the District of Columbia Circuit, I joined the Solicitor General’s Office as special assistant to then-Solicitor General Thurgood Marshall. Among my tasks was to assist him in preparing for his hearings before this Committee in connection with his nomination to serve as an Associate Justice. After his confirmation, he added further distinction to his already history-making career, and I had the privilege to appear before him several times across the bench. I am proud to say that we continued our relationship for the rest of his life.

As you know, the Office of the Solicitor General is responsible for conducting all of the United States Government's matters before the Supreme Court. After Justice Marshall was confirmed for his seat on the Supreme Court, I remained in the SG's Office under the new Solicitor General, former Harvard Law School Dean Erwin N. Griswold. During the ensuing two years, I worked on hundreds of federal cases before the Court, and I presented my first three oral arguments before the Court then headed by Chief Justice Earl Warren.

Following that tour in the SG's Office, I joined a New York law firm. While there, Solicitor General Griswold retained me (technically, as "Special Assistant to the Attorney General") to prepare the *amicus curiae* brief for the United States in the first Supreme Court cases dealing with the constitutionality of capital punishment. My assignment was to develop a recommendation about the position that the Unites States Government should take. The Solicitor General accepted my recommendation and approved the draft brief that I tendered. The Supreme Court then agreed with that constitutional position. (*McGautha* v. *California*, 402 US 183 (1971)).

While I subsequently was serving as Special Counsel to the New York City Police Commissioner, Solicitor General Griswold invited me to return to Washington as the Deputy Solicitor General responsible for supervising all the federal government's criminal and national security cases before the Supreme Court. In that capacity I supervised the handling of hundreds of such cases and resumed my career as a Supreme Court advocate, regularly arguing more cases before the Court.

During that period, I assisted in preparing Professor Robert H. Bork to assume his duties as the new Solicitor General appointed by President Nixon to succeed Erwin Griswold.

In May of 1973, Archibald Cox, who had been Solicitor General in the Kennedy Administration and had just been appointed as the Watergate Special Prosecutor, invited me to join his office as his Counsel. In that role, which I continued to perform under his successor, Leon Jaworski, I was responsible for developing and briefing all of the Office's legal positions, including on constitutional questions such as the indictability of an incumbent president and the existence and scope of any "Executive Privilege."

In July 1974, along with Mr. Jaworski, I presented the oral argument for the United States in the "Nixon Tapes" case (*United States* v. *Nixon*, 418 U. S. 683 (1974)), relying on the brief that I was responsible for developing. The Supreme Court ruled unanimously in favor of the proposition that we advanced – that, like anyone else, even a president is subject to the law and must produce evidence necessary to enable federal prosecutors and the federal courts to enforce federal criminal law.

The Court recognized that, while the President has constitutional responsibilities as head of he Executive Branch of the Government, it is the "constitutional duty of the Judicial Branch to do justice in criminal prosecutions." The president may not invoke his own prerogatives to frustrate the constitutional function of the federal courts to adjudicate culpability for committing federal crimes.

President Nixon was forced to resign two weeks later.

During subsequent years, I continued to focus on issues of constitutional law and the proper functioning of the national government. In addition to continuing to appear before the Supreme Court on a regular basis on behalf of my own clients, I served as a member of the American Bar Association Special Committee on Amicus Curiae Briefs formulating positions to be taken on behalf of the legal profession in cases before the Supreme Court. That committee was chaired by Rex Lee, who had been the Solicitor General in the Reagan Administration.

I testified as an expert before this Committee and other congressional committees in helping to develop various statutes, including the Foreign Intelligence Surveillance Act and the Classified Information Procedures Act. I was retained to serve as a consulting counsel in connection with the Senate's "ABSCAM" investigation and as Special Counsel in charge of the House of Representatives Ethics Committee's "Koreagate" investigation.

In addition to my congressional testimony, I have published many articles on questions of presidential power and the rule of law. Among my teaching experiences at Columbia Law School, Georgetown Law Center, John Jay College and Hunter College of the City University of New York, I developed and taught a university level political-science course entitled "Presidential Power in Peace and War."

I have served for many years as a Trustee of the Supreme Court Historical Society, which was created at the instance of Chief Justice Warren Burger.

I was elected as President of The District of Columbia Bar.

President Ronald Reagan twice appointed me as the President's representative on the District of Columbia Judicial Nomination Commission, which is responsible for recommending candidates for consideration by the President and the Senate to serve on the courts in the Nation's Capital.

The Supreme Court's "Trump Immunity" Decision

On July 1, 2024, the Supreme Court in a bitterly splintered 6-3 decision ruled that a president is immune from criminal prosecution – ever – for criminal acts that he commits "within the outer perimeter of his official responsibility." (*Trump* v. *United States*, 603 U.S.__, No. 23-939).

To reach this astonishing conclusion –

- The Court cited no constitutional text creating such an immunity, because there is none.
- The Court cited no precedent recognizing such a privilege, because there is none.
- The Court cited no historical practice acknowledging such a privilege, because there is none.

Instead, in inventing this privilege, the Court relied exclusively on a staggering misunderstanding of the Framers' intent and on the justices' own equally result-oriented preferences about the supposed needs of an imperial presidency.

1. __The Decision is Patently Wrong__

The sole predicates for the *Trump Immunity* decision are summarized in two propositions set forth in the opinion by Chief Justice John Roberts:

- That the Framers designed the Presidency to provide for a "vigorous" and "energetic" Executive.
- That any "hesitation to execute the duties of his office fearlessly and fairly that might result when a President is making decisions" under "a pall of potential prosecution" raises "unique risks to the effective functioning of government."

Neither rationale can withstand honest analysis in light of our constitutional history. Nor does either rationale have any basis in the text of the Constitution, which the Framers carefully structured to hold miscreant presidents accountable for their misdeeds.

Quoting a couple of snippets from comments by some of the Framers that they wanted to have a "vigorous" and "robust" presidency is transparently result-oriented. Of course, the Framers wanted a strong presidency. Indeed, historians agree that they had General George Washington in mind as their model; not surprisingly, he became the first president.

But a strong president is not necessarily a *criminal* president. Not a word in the debates surrounding the drafting of the Constitution or in text that they framed suggests that any of the Framers expected that a president could be "vigorous" enough and "energetic" enough only if licensed to commit federal crimes.

__The Decision Defies Constitutional History__

The Framers had just participated in a Revolution premised on a Declaration of Independence that catalogued a lengthy list of abuses that the King of Great Britain had inflicted on the citizens of the Colonies. Only willful blindness to the origins of the framing of the Constitution, including the creation of a presidency to be the head of the Executive Branch, could justify a leap from "vigor" to criminality.

Just as they did not want the President to be a King – or like a king – they did not want a Caesar. Or, for that matter, a Don Corleone or a Bugsy Siegal. Any of those figures could claim to be "vigorous" and "energetic." But the Framers surely did not intend to mean that dictators or gangsters should be running the country, simply because they are bold and forceful.

To the contrary, the Framers, including George Washington, were classically trained. They had a vision for a Republic. Their model was not the King or Caesar; it was the hero of the early Roman Republic, Cincinnatus, who voluntarily relinquished his enormous power. That is the model that, historians agree, set the precedent for Washington to step aside after two terms as

president, even though he could have clung to power indefinitely, if he had lacked the civic virtue that the Framers contemplated.

It is bitterly ironic, therefore, for the Roberts Court to pretend that the Framers would have countenanced the acts of an incumbent president using criminal means to cling to office after having been voted out – precisely the allegations that triggered the Court's creation of criminal immunity for Donald Trump.

Equally impossible to credit is the Court's speculation that a president would be rendered impotent, if he had to fear being prosecuted after leaving office.

This is arrant nonsense. As the great Justice Oliver Wendell Holmes wrote a hundred years ago, "A page of history of worth more than a volume of logic." (*New York Trust Co*. v. *Eisner*, 256 US 345 (1921)). The Roberts majority simply ignored the vivid and eloquent lesson of history. Our country had survived for 235 years and through 44 prior presidents before Donald Trump, including many "vigorous" and "energetic" presidents. But no one until July of this year ever suspected that a president had to be able to commit federal crimes with impunity in order to do his job effectively.

Rather, the Roberts Court got it backwards. We finally wound up with a President who, according to several grand juries and sworn officers of the Department of Justice, decided to commit crimes while in office. It makes no sense to argue from this unique example of presidential criminality that all past presidents and all future presidents need to be able to commit crimes in order to function effectively.

Indeed, in a bitterly ironic coda, the Roberts opinion tried to invoke George Washington as somehow justifying its conclusion.

> "Our first President had such a perspective. In his Farewell Address, George Washington reminded the Nation that 'a Government of as much vigor as is consistent with the perfect security of Liberty is indispensable.'"

The majority twisted the point that Washington was making. He actually was warning *against* assertions of governmental power that were not "consistent with the perfect security of Liberty"! He expressly warned against creating any institutions that "are inauspicious to liberty, and which are to be regarded as particularly hostile to republican liberty." He warned against creating any mechanisms "by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government . . . ."

The whole point of his warning was to beware of precisely the kind of abusive power that the *Trump Immunity* decision confers on a president – to impinge upon the Liberty of his fellow citizens by committing "official crimes" against them. Washington urged his countrymen to beware of acceding to mechanisms that could establish "a frightful despotism":

> "The disorders and miseries which result gradually incline the minds of men to seek security and repose in the absolute power of an individual; and sooner or later the

> chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation on the ruins of public liberty."

In cautioning against exactly the kind of concentration of unchecked power that the *Trump Immunity* decision confers, Washington explained why we must be zealous in avoiding unchecked governmental power:

> "A just estimate of that love of power and proneness to abuse it which predominates in the human heart is sufficient to satisfy us of the truth of this position."

Thus, despite the *Trump* opinion's Orwellian inversion of Washington's actual point, what the first president was warning about echoed Benjamin Franklin's famous answer to a question posed several years earlier at the end of the Constitutional Convention, whether the Framers had constructed a monarchy or a republic: "A republic, if you can keep it."

The *Trump Immunity* decision does not help us keep our Republic. In a Republic, no one is privileged to commit crimes as part of his job, including the president.

The Decision Defies Constitutional Text

The text of the Constitution, which the Roberts Court disregarded, points in exactly the opposite direction.

The majority had to concede that, "unlike the Speech and Debate Clause immunity," which the Framers carefully crafted in Article I, Section 6, to provide members of Congress with some *limited* immunity for engaging in *some* legislative acts, it is "true" that "there is no 'Presidential immunity clause' in the Constitution."

But it is misleading to imply that the Framers simply overlooked this issue or forgot about the possibility that there might be a criminal president one day. Instead, they actually addressed that issue, and the text of the Constitution demonstrates that the Roberts Court simply defied the Framers' fundamental judgment that a president who uses his office to commit crimes is fully answerable in a criminal prosecution.

The Constitution declares that the "President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." (Art. II, Sec. 4). Like treason and bribery, these other "high crimes and misdemeanors" may be statutory crimes as well as abuses of office.

The Impeachment Clause expressly states that, even after impeachment by the House and conviction by the Senate, *any* person, including the president, "**shall nevertheless be liable and subject to *Indictment, Trial, Judgement and Punishment*, according to Law**." (Art. I, Sec. 3) (emphasis added).

This "nevertheless" clause was intended to preclude an argument that the Double Jeopardy Clause would bar criminal prosecution after a Senate conviction.

Thus, the Framers could hardly have been clearer that a former president *is* actually liable to "indictment, trial, judgment, and punishment" for crimes that may have led to impeachment and legislative conviction by the Senate.

Yet, bizarrely, the Roberts Court – by the expedient of disregarding the constitutional text – created criminal immunity for precisely the same official acts that the Framers carefully preserved as a basis for criminal prosecution, even after impeachment, conviction, and removal from office.

The Court was aware of this constitutional text. Trump relied on it to argue that a president is not liable to prosecution *unless* first impeached by the House and convicted by the Senate. The Court properly rejected that argument as facially insupportable:

> "The Federalist Papers on which Trump relies *** concerned the checks available against a sitting President. Hamilton noted that unlike 'the King of Great-Britain,' the President 'would be liable to be impeached' and 'removed from office,' and 'would afterwards be liable to prosecution and punishment.' The Federalist No. 69, at 463; see also *id*., No. 77, at 520 (explaining that the President is 'at all times liable to impeachment, trial, dismission from office . . . and to the forfeiture of life and estate by subsequent prosecution')."

The opinion then explained why Trump's precondition argument made no sense:

> "Impeachment is a political process by which Congress can remove a President who has committed 'Treason, Bribery, or other high Crimes and Misdemeanors.' Art. II, §4. Transforming that political process into a necessary step in the enforcement of criminal law finds little support in the text of the Constitution or the structure of our Government."

Then, after admitting that the principal Framers of the constitutional text expressly declared that "the president" is "at all times liable to prosecution and punishment" and "to the forfeiture of life and estate by subsequent prosecution," whether or not impeached and convicted in a Senate trial, Chief Justice Roberts went on to craft perhaps the most astounding non-sequitur in all of our constitutional history:

> *A president must be immune from prosecution in any event, despite all this!*

But the text of the Clause as expressly explained by the pertinent Framers could not be clearer that they expected that "the *President*" *is* "liable" to "prosecution and punishment" and "to the forfeiture of life and estate" following "prosecution."

The Chief Justice was forced to conceded that the text of the Constitution "clearly contemplates that a former President may be subject to criminal prosecution." But then, by the expedient of pulling a constitutional rabbit out of a hat, the opinion invents an ambiguity where there is none. He asserted that that the "Clause does not indicate whether a former President may,

consistent with the separation of powers, be prosecuted for his *official* conduct in particular." (Emphasis in original).

This was a desperate effort to create a loophole where there is none. Under the English practice that the Framers borrowed, impeachment was a legislative remedy for abuses committed *while in office* in the abusive exercise *of official power*. Many of those abuses could also involve crimes under general legal principles, including bribery and treason, which the Impeachment Clause expressly preserves for potential prosecution of a former president.

Thus, any fair reading of the text of the Constitution, as the Framers themselves explained it, compels the conclusion that the Framers foreclosed the question that the Roberts court sought to fabricate: a president who uses his "office" to commit crimes in the abuse of his *official powers is* "liable" to prosecution and punishment in criminal courts. The Framers simply did not see the conflict that the Roberts majority contrived in order to exonerate Donald Trump.

Moreover, in Article II, Section 3, the Constitution also explicitly imposes on the President the solemn duty to "take Care that the Laws be faithfully executed." Those laws include federal criminal statutes. The text creates no exceptions. It does not say that the president is above these laws. It surely does not say that the president is exempt from faithfully executing the criminal laws of the United States whenever the president thinks that it is expedient for him to violate them.

The Roberts opinion never tries to come to grips with this dilemma posed by the text of the Constitution: How can a president be performing his explicit constitutional duty to "faithfully execute the Laws" by deliberately *violating* those laws?

The Majority Evident Court's Goal – Legitimize An Imperial Presidency

Only the most flagrant intention to achieve a desired outcome could enable six justices to concoct a theory of immunity in defiance of the constitutional text and the clearly expressed expectation of the Framers.

To understand how the Roberts Court could have reached such a wrong-headed conclusion, it is important to understand the new political philosophy that the six justices in the majority share. The underpinning for their view of the supervening "needs" of the presidency rests on a novel political view of what can fairly be termed the "imperial presidency," a theory divorced from the anti-monarchial design of the Framers. The new notion is technically called the "Unitary Executive" theory. It was developed by several law school professors in the late 1970s, and it became fashionable with some professors in some law schools thereafter.

The theory was actively promoted on law school campuses by the Federalist Society during the years when several of the *Trump*-majority justices were in school. Almost all of them were members of the Federalist Society, which actively screened and promoted their candidacies for the federal bench and ultimately for promotion to the Supreme Court.

The *Trump Immunity* decision rests on this recently formulated theory of political philosophy, which calls for an especially powerful Executive Branch embodied solely in the

president personally. Indeed, Chief Justice Roberts expressly asserts in the *Trump* decision that the president personally *is* the entire Executive Branch of the national government.

Despite the majority efforts to read this theory back into the minds of the Framers more than two centuries ago, that exercise is simply a sham. The political philosophy motivating the majority in the *Trump* case is closer to the monarchial concept of King Louis XIV – "*l'état, c'est moi" – "I am the State"* – than it is to the republican ideal that the Framers chose.

Immunity for a president to commit crimes would have struck the Founders of our country as sheer madness. The Framers of the Constitution were practical men. They understood human nature – better, I think than John Roberts and his confreres in the *Trump* case. The Framers crafted an ingenious document designed to protect against the kind of abuse that the *Trump Immunity* decision allows.

Any middle-school student who took a course in social studies knows that the Framers were so fearful of unchecked government power that they created a carefully balanced system of "checks and balances." They chose liberty above efficiency. In *Federalist No. 51*, James Madison, the principal architect of the Constitution, explained the wisdom underlying the elaborate system of "checks and balances" that they built into the structure of the national government:

> "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place *oblige it to control itself*." (Emphasis added).

But the Roberts Court has sabotaged this goal as the Framers sought to achieve it. As I have explained, the Framers expressly provided in the text of the Constitution that all government officers, including the President, are to be subject to direct control through impeachment and *also* through exposure to indictment, trial, conviction, and punishment. But the Roberts Court has stripped away that crucial form of control through the constraints of criminal law.

I am confident that, before the members of the current Court took their seats, not a single justice who ever served on the Supreme Court would have seriously entertained the notion that a president must be licensed to commit federal crimes in order to carry out his official duties. From my experience with the *Nixon Tapes* case, I am convinced that all of the justices on that unanimous Court – Republicans and Democrats, conservatives and liberals – understood and appreciated that no one, including the president, is above the law.

In candor, I acknowledge that Donald Trump, who is no great student of history or law, has claimed such extraordinary power. For example, at least as early as 2019, he declared:

> "Then, I have an Article II [sic], where I have to the right to do whatever I want as president." (*Washington Post*, July 23, 2019).

Even Professor Jonathan Turley, who is the rare academic willing to defend some of Trump's most aggressive claims, had to concede about this claim:

"*That position* happens to be wrong, by the way." (*Id*.; emphasis added).

It is notable that, even while President Nixon and his lawyers were claiming expansive constitutional prerogatives for the presidency during the Watergate investigation, they never were so brazen as to suggest that the president enjoys constitutional immunity from prosecution for crimes committed while in office. The only serious issue that was debated was whether a president may be indicted *while* still in office. (We in the Watergate Special Prosecutor's Office concluded that there is no such constitutional bar, a conclusion that I still consider sound.)

Nixon understood that he certainly was subject to prosecution *after* he resigned and could be held to account in a criminal court for criminally abusing his official powers to orchestrate the Watergate cover-up. So did President Gerald Ford. That is why, as a matter of executive clemency, Ford offered Nixon a pardon protecting him from prosecution, and Nixon accepted it. Nixon never imagined that he simply could have rejected the tendered pardon and asserted some fanciful, free-floating "immunity" from prosecution.

Nor did anyone else imagine such a fantastic notion. Until July 2024, only the most tendentious outlier would have denied that, in "a system of laws and not of men," a man (or woman) who serves as president is subject to the same criminal laws as are all his fellow citizens.

Yet that fundamental bedrock principle of American constitutional government is precisely what the Roberts Court repudiated, when it created a unique privilege for the president as the only person, in or out of government, who may deliberately commit a federal crime as part of his job – and get away with it.

2. <u>The Decision is Profoundly Dangerous</u>

In addition to being profoundly wrong the *Trump Immunity* decision is profoundly dangerous.

Of course, there is the immediate risk that former President Trump will escape otherwise just punishment for crimes allegedly committed in 2020-2021. There is the further, near-term risk that, if he is reelected, he will take advantage of this newly created immunity and exercise this "license to kill" vigorously and energetically.

But more is at stake. This ruling – until repudiated at some point in the future – will be available to future presidents. It would be nice to think that there will never again be a president who is tempted to use criminal immunity to pursue what he considers "official" actions.

But I know from my experience during the Watergate affair that it would be folly to assume that every president will voluntarily refrain from abusing power available to him, even when it involves committing federal crimes. As I mentioned, the Framers understood that persons who

occupy high office in government, including the presidency, are not any more likely to be "angels" than any other mortals.

Richard Nixon abused his powers to punish his political enemies by setting the Internal Revenue Service on them. He used his control over executive agencies, including the CIA, to interfere with the investigation into responsibility for the Watergate break-in. He misused his senior White House aides to orchestrate a campaign of bribery and subornation of perjury to obstruct the Watergate coverup investigation. Except for Ford's pardon, he faced prosecution for those crimes.

Under the *Trump Immunity* ruling, however, a future Richard Nixon could replicate those crimes with impunity.

As a lawyer and former officer of the Department of Justice, I am most concerned that the *Trump* decision is a virtual invitation to future presidents to abuse the Justice Department to bring politically motivated charges against their enemies.

The majority opinion declares that the president's instructions to the Department of Justice about whom to investigate and prosecute fall within his "exclusive authority and absolute discretion." As a result, he is entitled to "absolute immunity" for whatever he does in weaponizing the Justice Department to harass and abuse his perceived political enemies.

Even before the ruling in his favor in the 2020-election-interference case, Donald Trump had threatened to do precisely this, if reelected – to order "his" Justice Department to punish persons whom he considers "enemies," including any former aides and high ranking military officers whom he views as disloyal because they revealed his seamy side.

Within the past few weeks, Trump threatened to order "election fraud" prosecutions against election clerks, campaign donors and others who stand in the way of his resumption of power. As he posted on his in-house social media site, Truth Social, and repeated on X/Twitter:

> "WHEN I WIN, those people that CHEATED will be prosecuted to the fullest extent of the Law, which will include long term prison sentences. Please beware that this legal exposure extends to Lawyers, Political Operatives, Donors, Illegal Voters, & Corrupt Election Officials." (September 7, 2024; all emphasis in original).

Now, thanks to the Roberts Court, he could direct the Justice Department to pursue his adversaries with trumped up investigations and prosecutions, which is odious enough. But the *Trump Immunity* decision even allows him to falsify evidence and contrive perjured testimony as part of his scheme, the same criminal conduct for which Nixon escaped prosecution only because of a presidential pardon.

The *Trump Immunity* decision also added a sweeping ban on even using evidence of presidential communications that purportedly were part of the president's official actions. That ban could effectively insulate his co-conspirators from any exposure to prosecution. This feature

of the opinion makes it easier for a president – a re-elected Trump or someone else – to orchestrate federal crimes with impunity.

Even Justice Amy Coney Barrett found this evidentiary hurdle a "bridge too far," dissociating herself from the rest of colleagues in the majority on this point. But it is part of the Court's holding. This additional boon awarded to former President Trump means that, as a practical matter, pliant prosecutors installed by a felonious president would effectively share this new-found immunity. Honest prosecutors would be barred from offering evidence of such a dire scheme contrived by a Nixonian (or Trumpian) president.

It is hard to imagine a more corrosive doctrine threatening the rule of law than the *Trump Immunity* decision. It is unlikely that prayers alone will assure that only "angels" will occupy the White House in the aftermath of *Trump*.

3. <u>Conclusion</u>

The *Trump Immunity* decision is startling, lawless, and reckless.

In my view, history will eventually render its verdict on this decision – and on the justices who collaborated in it. That verdict will place it and them in the discredited category akin to the *Dred Scott* decision (*Scott* v. *Sanford*, 60 U.S. 393 (1856)), which declared Black persons little more than property, and the equally shameful decision in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), authorizing racial segregation so long as "separate" facilities were purportedly "equal."

Eventually, *Trump* v. *United States* will slink off into the judicial dustbin just as did another of the Court's efforts to unleash unbridled presidential power, albeit in the extreme circumstances of a world war. That was the Court's wartime decision to approve the president's power to intern American citizens and others solely on the basis of their (Japanese) ancestry. *Korematsu* v. *United States*, 323 U.S. 214 (1944).

Ironically, Chief Justice John Roberts himself, the author of the *Trump Immunity* decision, was forced to concede that *Korematsu* "was gravely wrong the day it was decided, has been overruled in the court of history," and "has no place in law under the Constitution" – even while he was upholding another dubious assertion of presidential prerogative. *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018).

Some day – soon, I hope – a similar assessment will mark the formal interment that a more sensible and constitutionally responsible Court will pronounce over the grave of *Trump* v. *United States*. Until then, the country is at the mercy of corrupt presidents who are empowered and unleashed by this benighted decision.

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