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ARTICLE

# Above the Law: From Medieval England to Trump v. the United States

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## Abstract

There is nothing unprecedented about prosecuting Donald Trump. While it's certainly true that no president has (yet) to be indicted, if we look at to the long stretch of English political-legal history, we find many precedents. Because what happened in England fueled the American Revolution and the Framers' view of the chief executive. As Richard II and Charles I discovered to their cost, acting as if they were above the law could lead to their deposition and eventual death, and the framers agreed. Thomas Jefferson asserted in *A Summary View of the Rights of British America* (1774), retained "the powers of punishment or removal" of their rulers. Holding the chief executive, whether a king, a prime minister, or a president is irrelevant, to account for alleged crimes is, as the phrase goes, baked into American constitutional law. But the Supreme Court has ruled otherwise. The president now enjoys the immunity Charles I claimed. We are now at the cusp of something without precedent: an absolutist presidency.

The Supreme Court has ruled 6-3 that the Constitution grants presidents (or at least, one particular ex-president) "*presumptive* immunity from criminal prosecution" for "acts within the outer perimeter of his official responsibility" (emphasis in the original); there is no immunity for "unofficial acts."[1] When both the majority and the dissenting justices allude to history (which, granted, is not often), both argue that history is on their side.

Chief Justice Roberts relies on the "enduring principles" of the Framers' desire for a "'vigorous' and 'energetic' Executive" resulting in the separation of powers.[2] Justice Sotomayor, on the other hand, in her dissent, asserts that "historical evidence reinforces that, from the very beginning, the presumption in this Nation has always been that no man is free to flout the criminal law."[3] The majority, Justice Sotomayor concludes, has done something unprecedented: "The President is now a king above the law."[4]

[1] Roberts 2024, 1, 2.
[2] Roberts, 40, 10.
[3] Sotomayor 2024, 8.
[4] Sotomayor, 8, 30.

Both sides, however, err in their understanding of history. But to explain how Roberts wrongly concludes that the Framers granted the president immunity for official acts (although Roberts does not attempt to distinguish between "official" and "unofficial" acts, leaving that matter for lower courts to decide[5]), and how Sotomayor overestimates the extent of the monarchy's power, I have to reach back to medieval and early modern English history, because what happened in England shaped the American Revolution and the Framers' view of the chief executive.

History matters and both sides would have done well to look more deeply into the origins of America's legal and constitutional traditions. The majority would have seen that America's political order is based on the notion that nobody, including the president, is above the law, and the minority could have demonstrated concretely the hypocrisy of relying on history "only when it is convenient" (e.g., Justice Alito's extensive reliance on medieval history, early modern, and eighteenth-century history in Dobbs v. Jackson).[6]

## The Ancient Constitution

When Justice Sotomayor asserts that a king is above the law, she's not entirely right. Some kings and queens are indeed above the law, accountable only to God, and they are called "absolute monarchs." But not England's.

England has a "limited" monarch who cannot do whatever he or she likes. Instead, the English monarch takes an oath in which they promise to uphold the law, and the monarch cannot impose their will without any agreement from Parliament.

This tradition formally began in 1215 when a group of barons forced King John to accept the document known as "Magna Carta," which put into writing the limits on monarchic power.[7] It is the law, not the monarch, that has the power to deprive subjects of their liberty and property, and no one has the right to sell or delay justice.

Magna Carta did not create these rights but *reconfirmed* them, and Magna Carta was included at the start of nearly every statute book published in England afterward. The pamphleteers in the Colonies also frequently cited Magna Carta in their arguments against the monarchy's tyranny.

In the fifteenth century, England's Chief Justice, Sir John Fortescue, penned *In Praise of the Laws of England.* Fortescue distinguished between absolute and limited monarchs. In England, the monarch cannot "change the laws without the assent of his subjects."[8] Nor can the monarch impose taxes without Parliament's explicit approval. In the seventeenth century, these principles came to be known as "the Ancient Constitution," and they are affirmed over and over again by "the great common-law authorities – Bracton, Coke, Hale, and Blackstone," that Justice Samuel Alito relied on in Dobbs v. Jackson, the case that overturned Roe v. Wade.[9]

[5] Roberts, 17.
[6] Sotomayor, 8.
[7] Magna Carta 1215.
[8] Fortescue 1997, 27.
[9] Alito 2021, 3.

Who are these people?

Henry Bracton (d. 1268) was a jurist whose book, *On the Laws and Customs of England*, was deeply influential, and he argued that monarchs had to follow the law. Sir Edward Coke (d. 1634) was often considered the greatest jurist of the early modern period. Matthew Hale (d. 1676) served as a judge for both the crown and the government that overthrew Charles I, eventually becoming Chief Justice of the King's Bench. William Blackstone's four-volume *Commentaries on the Laws of England* (1765–1769) was a cornerstone for American legal education well into the nineteenth century.

All said that monarchs are subject to the law.

In the fourth part of his *Reports*, Sir Edward Coke (quoting Bracton) explicitly rejected King James' belief that the monarch was accountable only to God: "The king is under no man, but only God and the law, for the law makes the king."[10] Similarly, Hale (his toxic view about women notwithstanding[11]) holds that the "great solemnity" of the coronation oath binds the monarch to keep England's "laws and liberties," and nothing undermines a monarch's authority more than arguing that "the prince is bound to keep none of the laws" previously passed.[12]

Blackstone also argues that the glory of English law is that it limits royal prerogative: "one of the principal bulwarks of civil liberty," Blackstone writes, "was the limitation of the king's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them, without the consent of the people."[13] He too quotes Bracton's dictum that the king is subject to the law.

For the most part, English monarchs observed these limits, and the few who didn't learned the error of their ways.

By 1399, England's parliament and the aristocracy had had enough of Richard II pretending he was an absolute monarch, above the law, and accountable only to God. So parliament deposed him. Not by a coup. Armed men didn't burst into the castle and murder the king in his bed. Instead, they impeached him.

The Duke of Lancaster, Henry Bolingbroke, presented to parliament a 35-article indictment charging Richard with subverting the law, imposing illicit taxes, and having the "fantastical opinion" that "the laws of the realm were in his head" (a view that closely anticipates Donald Trump's belief that the Constitution gave him "the right to do whatever I want, and that the president has 'total authority' over when states emerge from coronavirus shutdowns"[14]).

The articles detail the many ways that Richard subverted the law, and so, he was "worthy to be deposed."[15]

[10] Coke 2003, 102.
[11] See Armstrong 2022.
[12] Quoted in Holdsworth and Pollock 1921, 301.
[13] Blackstone 1765–1769.
[14] Brice-Sadler 2019; White 2020.
[15] *Holinshed's Chronicle* 1587, vol. 6, 502.

Which is exactly what happened.

A few hundred years later, Charles I also tried to rule as an absolute monarch and that was one of the prime causes of the English Revolution, which started in 1640. He lost. But rather than summarily executing Charles, the revolutionaries put him on trial for treason and "other high crimes against him in the name of the people of England."

I do not mean to suggest that this was an entirely orderly, calm process. Charles's attempt to rule without parliament resulted in a war that killed roughly 200,000 people. Oliver Cromwell also changed the treason law so that he could put Charles on trial. On January 1, 1648, Parliament declared: "By the fundamental Laws of this Kingdom, it is Treason in the King of England, for the Time being, to levy War against the Parliament and Kingdom of England."[16] In other words, treason applied to the state, not the person of the monarch, who is now as capable of treason as any other man or woman. But some in Parliament still wanted to negotiate with the king, and so, on December 6, 1648, Cromwell kicked out of Parliament everyone who disagreed with him in the event known as "Pride's Purge." Then as today, demanding that the head of state is subject to the law is no simple matter.

At his sentencing, the defeated king refused to accept the court's authority to try him, but the judges would have none of it. John Bradshaw, the Lord President, or Chief Justice, of the court, reminded Charles that "the barons of old, when the kings played the tyrants, called them to account."[17] When Charles insisted that putting a king on trial had never before happened, Bradshaw responded, "It was no new thing to cite precedents where the people ... have made bold to call their kings to account ... King Edward the Second and Richard the Second were so dealt with by the Parliament."[18]

When asked, "What law is there to take up arms against the prince in case he breaks his covenant," the polymath and legal scholar, John Selden (d. 1654) answered, "Though there be no written law for it yet there is custom ... for in England they have always done it."[19]

## The American Revolution

What happened in England did not stay in England. According to the great historian of the American Revolution, Bernard Bailyn, English common law together with the precedents of holding monarchs to account shaped "the mind of the American Revolutionary generation."[20] Over and over again, the pamphlets written by the colonists cite Magna Carta, English common law, and the Ancient Constitution in their arguments against the British government's taxing the colonists without their permission. To give one example, in *A Letter from a Freeman* (1774), William Henry Drayton reminded his readers that English subjects "*shall enjoy* the benefit of *Magna Charta* and *the Common Law*, under *a Crown*, which *is itself limited and controuled* [sic] by *Magna Charta* and *the Common Law.*"[21]

[16] *Journal of the House of Commons 1802*, 107.

[17] *A Continuation of the Narrative Being the Last and Final Dayes of the Proceedings of the High Court of Justice ... Concerning the Tryall of the King 1648*, sig. B2r.

[18] *Continuation* sig. B3v-r.

[19] Selden 1927, 137.

[20] Bailyn 1967, 35.

[21] Drayton 2015, 156.

Usually unstated, but always implied, is what might happen in the event that the King decided, as *A Letter from a Virginian* (1774) puts it, to "dispense with the Laws."[22]

Jonathan Mayhew, however, dispensed with reticence. In 1749, Mayhew delivered a thundering sermon on the hundredth anniversary of Charles I's execution entitled "A Discourse concerning Unlimited Submission," in which he argued that submission is never "unlimited." Charles, Mayhew told his Boston flock, governed "in a perfectly wild and arbitrary manner, paying no regard to the constitution and the laws of the kingdom."[23] He ignored the coronation oath, imposed taxes without parliament's permission, and revived the Star Chamber courts "in which the most unheard-of barbarities were committed."[24] In short, Charles became a tyrant, and a tyrant can be resisted and then executed for betraying the nation's laws.

The colonists, Thomas Jefferson asserted in *A Summary View of the Rights of British America* (1774), retained "the powers of punishment or removal" of their rulers. Thomas Paine, in *Common Sense* (1776) fully agreed, his only reservation was that subsequent monarchs learned the wrong lesson: "The fate of Charles the first hath only made kings more subtle – not more just."[25] In *Federalist Paper n. 69* (1788), Alexander Hamilton wrote that unlike the British monarch, the president is subject to impeachment and is "liable to prosecution and punishment in the ordinary course of law" should monarch commit any high crimes or misdemeanors; the English king may be "sacred and inviolable" (he isn't); the president is not.[26]

If Justice Sotomayor misses that English monarchs are not, and never have been, above the law, Chief Justice Roberts errs when he claims that the Founders wanted a chief executive who enjoyed wide immunity from prosecution for "official" acts that are nonetheless illegal. Given how the Founders created a republic explicitly designed to prevent monarchic overreach, it is inconceivable that they would have granted the president "absolute immunity" for any acts, "official" or otherwise.

Or to borrow the phrase that Justice Alito uses in Dobbs v. Jackson, is granting the President immunity "deeply rooted in the Nation's history and tradition"?[27] The answer is clearly not.

In fact, nothing could be more American, more Jeffersonian, more in line with original meaning of the Constitution – and the Ancient Constitution before it – , more "deeply rooted in the Nation's history and tradition," than exercising the right, even obligation, to put an ex-president accused of felonies on trial.

But the Supreme Court has ruled otherwise. The president now enjoys the immunity Charles I claimed.[28] We are now at the cusp of something without precedent: an absolutist presidency.

[22] Boucher? 2015, 224.
[23] Mayhew 1750, 42.
[24] Mayhew 42.
[25] Paine 1776.
[26] Hamilton 1788.
[27] Alito, 2.
[28] President Biden has proposed a constitutional amendment that "would make clear that there is no immunity for crimes a former president committed while in office" (*Washington Post*, July 29, 2024). As of this writing (July 2024), it is unclear if such an amendment will pass.

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