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## On Protecting Accountability

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## ON PROTECTING ACCOUNTABILITY

*Eric M. Freedman\**

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This article is a slightly edited version of testimony submitted by the author to the Subcommittee on The Constitution, Federalism, and Property Rights of the Senate Committee on the Judiciary on September 9, 1998. *See Impeachment or Indictment: Is a Sitting President Subject to the Compulsory Criminal Process? Hearings on S. 105-969 Before the Subcomm. on the Constitution, Federalism, and Property Rights, 105th Cong. 23 (1998), available at 1998 WL 781663 (statement of Eric M. Freedman).*

The principal changes made for present purposes consist of updating and slightly expanding several footnotes. In the interests of authenticity, and at the author's request, the editors of the Law Review have largely refrained from rigorously conforming the original citation style to the dictates of the Bluebook.

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#### INTRODUCTION

Chairman Ashcroft, Ranking Member Feingold, and members of the Subcommittee:

My name is Eric M. Freedman, and I am a Professor of Law at Hofstra University School of Law in Hempstead, New York.

Following my graduation from the Phillips Exeter Academy, Yale College and Yale Law School, I practiced law for seven years with the New York and Washington offices of a major New York City law firm, and clerked for Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit. I am currently completing my term as Chair of the Committee on Civil Rights of the Association of the Bar of the City of New York.

Since joining the Hofstra faculty in the fall of 1988, I have been awarded the University's Stessin Prize for Outstanding Scholarship for my article *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 TENN. L. REV. 783 (1993), and been named the University Distinguished Faculty Lecturer to deliver a lecture on the question that brings me here today.

As this summary may suggest, I have two primary academic specialties. One embraces constitutional law, particularly with respect to civil liberties issues, and constitutional history, with an emphasis on the Revolutionary and early national periods. The other is litigation-centered, and includes civil and criminal procedure and strategy.

Today's subject, whether a sitting President may be indicted, is one that I have addressed in print over many years, dating back to the Nixon Administration. In particular, I am the author of *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*<sup>1</sup> which I believe remains the most complete and thoroughly-documented scholarly study of the issue. Since it contains a good deal of additional legal and historical data backing up the principal points I will be making, I hope you will read it in full (or at least refer to its voluminous footnotes in the event that you seek more support for any of my statements).

But as the basis for our discussion here today, I would like to begin, in Part I, by presenting a condensed and updated overview of my position, taking the opportunity to respond to a few objections to it that have been made since the Hastings article was published. Then I will turn, in Part II, to the ways in which I believe Congress might constructively play a role in this area. Finally, I have annexed to my testimony as Appendices several primary source documents that are not widely

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1. Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L.Q. 7 (1992).

available and that I hope will assist others who may need to grapple with these issues in the future.

## SUMMARY

### PART I

I reject the idea that the Constitution gives the President blanket immunity from criminal prosecution as inconsistent with the history, structure, and underlying philosophy of our government, at odds with precedent, and unjustified by practical considerations.

Section 1 presents the history of the issue at the time of the adoption of the Constitution. It demonstrates that there was explicit disagreement on our question among members of the founding generation—highlighted by disputes on and off the floor of the first Senate—and concludes that we must base our judgment on other considerations.

Section 2 examines national historical practice since the ratification of the Constitution, and finds that high federal officeholders in all three branches, through and including the Vice-President, have uniformly been considered subject to criminal prosecution while in office; that the federal government routinely prosecutes state and federal officials; that states regularly prosecute their officials, including their Governors; and that, despite significant opportunities for abuses in all these areas, no significant problems have materialized.

Section 3 considers the overall theoretical and legal framework within which this issue of constitutional law and history should be addressed. Beginning with the framers' views on the dangers of official abuse, this Section examines the two-fold nature of the impeachment clause—separating issues of political suitability to hold office from those of criminal liability for wrongdoing—and then turns to the regime of civil but not criminal immunity that has been developed in the case of other officeholders. It reaches three conclusions.

First, the interaction between the impeachment and the criminal sanction is such that the effectiveness of each, and the flexibility of the governmental system as a whole, is enhanced by having them available simultaneously rather than sequentially. Second, holding Presidents amenable to criminal prosecution while in office would be consistent with the letter and spirit of the legal regime developed by the case law regarding official immunity. Third, that result would be justified by both the traditional understanding of the purpose of “the rule of law”, *i.e.* to curb the bad officeholder, and by a newer one that I propose as an

outgrowth of recent trends in constitutional scholarship, *i.e.*, to demonstrate the virtue of a good officeholder.

Finally, Section 4 considers and rejects, on factual and legal grounds, a series of practical objections:

(A) the argument that indicting the President would effectively constitute a removal from office in derogation of the constitutional exclusivity of the impeachment remedy. I observe here, among other things, that the argument is not only incorrect legally, but rests on a series of implausible hypotheticals. Realistically, criminal prosecution is less likely to be a removal from office than an alternative to it, and the issue of how to imprison an unwilling President is a bogeyman;

(B) the threat that the President might be subject to frivolous prosecutions. This argument runs headlong against the teaching of almost two centuries of national experience with the rule requiring Presidents to give testimony when called upon. But to the extent that additional protection may be needed in particular contexts, statutory remedies can do the job;

(C) the danger that the fear of criminal liability might chill the President from the vigorous discharge of duty, particularly in national security areas. This argument confuses the threshold question of amenability to prosecution with the substantive contours of Presidential criminal liability. The mere fact that the President has no blanket immunity does not necessarily mean that there may not be specific privileges (analogous to executive privilege in the evidentiary context) applicable to particular prosecutions.

## PART II

It is, of course, the Supreme Court, rather than Congress, that will eventually provide the answer to the question of whether the Constitution grants the President immunity from criminal prosecution. But Congress could take some modest legislative steps to deal with inconveniences that experience has suggested may arise.

If the President is subject to indictment, there are several statutory ways that the dangers of abusive prosecutions might be minimized. Further, when the independent counsel statute comes up for renewal, Congress needs to consider an important problem left unresolved after the Iran-Contra affair: the potential ability of the executive branch in certain instances to emasculate independent counsel prosecutions (whether of the President or other high-level executive branch officials) through spurious claims of national security. Congress might also wish to consider whether the President's vulnerability to criminal prosecution

may provide an additional consideration supporting a legislative response to recent court rulings that narrowly define the scope of the privilege between government attorneys and their clients.

If, on the other hand, the President does have immunity, it would certainly be wise to provide by explicit legislation for the tolling of the otherwise applicable statutes of limitations.

## CONCLUSION

Reading the Constitution to insulate an incumbent President from criminal liability would not only feed the imperial delusions to which too many high officials in this century have succumbed, but would undermine the fundamental concept of the President as an ordinary citizen temporarily exercising power delegated by We the People.

### I. PART I: THE PRESIDENT HAS NO CONSTITUTIONAL IMMUNITY FROM CRIMINAL PROSECUTION

#### *Section 1. The Founders Disagree*

There is little illumination on our question to be found among the recorded discussions on impeachment at the Philadelphia Convention, where the major disagreement centered on the issue of the forum in which the President's impeachment would be tried after the House had exhibited its articles.<sup>2</sup>

The most relevant scrap of data that can be collected from the sources presently known is that on September 4, 1787, during a debate on the privileges of Congress, James Madison "suggested also the necessity of considering what privileges ought to be allowed to the Executive," but this was never done.<sup>3</sup> According to another delegate, Charles Pinckney, this silence reflected a deliberate determination by the delegates that the President, in contrast to legislators, should not

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2. In that context, Governor Morris objected to trial by the Supreme Court, since it "was to try the President after the trial of the impeachment." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 500 (Max Farrand ed., 1937) (reprinting James Madison's notes of Sept. 4, 1787). But since the objection would be equally cogent whether criminal proceedings came first or second, this statement seems peripheral to the immunity question.

3. *Id.* at 503. It is perfectly possible that Madison never actually intended to have the Convention address this subject in any detail. He made his suggestion because he opposed the proposal on the floor that each House should be the judge of its own privileges, and was seeking reasons why the matter should not be addressed then, instead of being postponed (as in fact it was). *See id.*

have any special immunity.<sup>4</sup> Although no one taking notes on the Convention floor recorded such a decision, it is perfectly possible that Pinckney's report is correct, since we have no evidence of anyone expressing a contrary view during the discussion that eventually took place concerning legislative privileges. Moreover, James Wilson, who had been a member of the Convention, specifically urged in the Pennsylvania ratifying convention that the failure to give the President any specific immunities meant that he had none.<sup>5</sup> On the other hand, as the rest of this Section demonstrates, the issue was a controverted one during the ratification debates, which would tend to make it somewhat less likely that, if the Convention indeed discussed the point, it reached agreement.

For, whatever may have happened in Philadelphia, there plainly was disagreement among contemporaries outside the Convention. During the ratification debates various pamphleteers, reviewing the provisions of the proposed Constitution, reached conflicting conclusions on our question. Some read Article I, § 3, cl. 7<sup>6</sup> as Alexander Hamilton did,<sup>7</sup> to mean that a party must be impeached and removed from office before being subject to indictment.<sup>8</sup> Others thought the text meant the

4. See 10 ANNALS OF CONG. 74 (1800). During a debate on the privileges of the House of Representatives, Pinckney stated that, mindful of the abuses that had taken place in Great Britain, the framers had intended to exclude all executive or legislative privileges except those expressly granted. See *id.* at 69, 72. If this is true, it is strong evidence against the argument in favor of Presidential immunity recently advanced by Professor Bybee of Louisiana State University, which is built in part on the theory that there should be "a certain parity or proportionality . . . between the protection afforded members of Congress and that afforded the President." Jay S. Bybee, *Who Executes the Executioner?*, 2 NEXUS 53, 64 (1997). In any event, the argument is shaky at best, since, as discussed in more detail in Section 2 below, members of Congress are subject to criminal prosecutions in all circumstances but those directly and specifically interfering with the proper discharge of their duties—which, as detailed in Section 4.C. *infra*, is essentially what the rule should be for the President.

5. See Speech of James Wilson to the Pennsylvania Ratifying Convention (Dec. 11, 1787), reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 579 (Merrill Jensen ed., 1976) [hereinafter DOCUMENTARY HISTORY] ("Does even the first magistrate of the United States draw to himself a single privilege or security that does not extend to every person throughout the United States? . . . Far, far other is the genius of this system.").

6. "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." U.S. CONST. art. I, § 3, cl. 7.

7. See THE FEDERALIST NO. 65, at 398-99 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

8. See, e.g., Letter from Americanus I to the Virginia Independent Chronicle (Dec. 5, 1787), reprinted in 8 DOCUMENTARY HISTORY, *supra* note 5, at 203 ("Should he . . . attempt to pass the bounds prescribed to his power, he is liable to be impeached . . . and afterwards he is subject to indictment, trial, judgment, and punishment according to law."); NOAH WEBSTER, AN



precise opposite.<sup>9</sup> Similarly, many delegates to the state ratifying conventions believed that the President could be indicted while in office,<sup>10</sup> while numerous others held the contrary view.<sup>11</sup>

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EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 37 (Philadelphia 1787), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 52 (Paul Leicester Ford ed., Da Capo Press 1968) (1888) (“[A]fter a judgement upon an impeachment, the offender is liable to a prosecution, before a common jury, in a regular course of law.”).

9. See, e.g., Tench Coxe, *An American Citizen, On the Federal Government I*, in INDEPENDENT GAZETTEER (Sept. 26, 1787), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 5, at 141 (arguing the President’s “person is not so much protected as that of a member of the House of Representatives; for he may be proceeded against like any other man in the ordinary course of law.”) (emphasis omitted); ALEXANDER CONTEE HANSON, REMARKS ON THE PROPOSED PLAN OF A FEDERAL GOVERNMENT, ADDRESSED TO THE CITIZENS OF THE UNITED STATES OF AMERICA, AND PARTICULARLY TO THE PEOPLE OF MARYLAND (1788), reprinted in 15 DOCUMENTARY HISTORY, *supra* note 5, at 525, 530 (“Like any other individual, [the President] is liable to punishment . . . . Not even his person is particularly protected. . . .”); James Iredell, *Answers to Mr. Mason’s Objections to the New Constitution, Recommended by the Late Convention at Philadelphia, NORFOLK AND PORTSMOUTH JOURNAL*, (Mar. 5, 1788), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 5, at 322 (stating that the President “is not exempt from a trial, if he should be guilty, or supposed guilty, of that [treason] or any other offence”); see also Speech of James Iredell to North Carolina Ratifying Convention (July 28, 1788), reprinted in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 109 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1891) [hereinafter ELLIOT’S DEBATES] (“If he [the President] commits any misdemeanor in office, he is impeachable, removable from office, and incapacitated to hold any office of honor, trust, or profit. If he commits any crime, he is punishable by the laws of his country. . . .”).

10. Speeches explicitly or implicitly concluding that the President could be indicted while in office include the following: Speech of Patrick Henry to Virginia Ratifying Convention (June 5, 1788), reprinted in 3 ELLIOT’S DEBATES, *supra* note 9, at 59 (arguing that criminal processes will be insufficient to control the President; he will prefer to conduct a coup backed by his army rather than “being ignominiously tried and punished”); Speeches of James Iredell to North Carolina Ratifying Convention (July 24 & 28, 1788), reprinted in 4 ELLIOT’S DEBATES, *supra* note 9, at 37, 109. Iredell stated that federal officers:

may be tried by a court of common-law . . . for common law offenses, whether impeached or not . . . [n]o man is better than his fellow-citizens, nor can pretend to any superiority over the meanest man in the country. If the President does a single act by which the people are prejudiced, he is punishable himself . . . . If he commits any crime, he is punishable by the law of his country, and in capital cases may be deprived of his life.

*Id.*

11. See, e.g., Speech of George Mason to the Virginia Ratifying Convention (June 14, 1788), reprinted in 3 ELLIOT’S DEBATES, *supra* note 9, at 402-03 (“[T]he commission of indictable offences, or injuries to individuals [by members of the government] . . . could be tried neither in the state nor federal courts.”). Speech of George Nicholas to the Virginia Ratifying Convention (June 10, 1788), reprinted in 3 ELLIOT’S DEBATE, *supra* note 9, at 240 (“If he [the President] deviates from his duty . . . [h]e will be absolutely disqualified to hold any place of profit, honor, or trust, and liable to further punishment if he has committed such high crimes as are punishable at common law.”); Speech of Robert Barnwell to the South Carolina House of Representatives (Jan. 17, 1788), reprinted in 4 ELLIOT’S DEBATES, *supra* note 9, at 293 (stating that the framers have appropriately “postponed the period at which he [the President] could be tried” so that the “fervor

Given the elliptical nature of some of the historical evidence, and the fact that many of the debaters knew far less about the Constitution than we do today, if this were the only evidence of the original understanding, it might be possible to gloss over these disagreements as arising from either an imperfect comprehension of the issue by our predecessors or from our own weak grasp of the historical record. But a review of the proceedings of the first Congress makes this position untenable, and shows that well-informed contemporaries simply disagreed over whether or not the President should be immune from criminal prosecution while in office.

The diary of William Maclay, a Pennsylvania member of the first Senate, contains the following entry under the date of September 26, 1789:

When I first went into the Senate chamber this morning, the Vice-President [Adams], Elsworth, and Ames stood together, railing against the vote of adherence in the House of Representatives on throwing out the words "the President" in the beginning of the Federal writs.<sup>12</sup> I really thought them wrong, but, as they seemed very opinionated, I did not contradict them. This is only a part of their old system of giving the President as far as possible every appendage of royalty<sup>13</sup> . . . .

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of party" has a chance to die down "and cool reflection can determine his fate"); Speech of Samuel Johnston to North Carolina Ratifying Convention (July 24, 1788), *reprinted in* 4 ELLIOT'S DEBATES, *supra* note 9, at 37 ("Men who were in very high offices could not be come at by the ordinary course of justice," but could be impeached and "stripped of their dignity, and reduced to the rank of their fellow-citizens, and then the courts of common law might proceed against them.").

12. The House of Representatives had taken that position earlier the same day by a 28-22 vote, with Madison among the majority. See 1 ANNALS OF CONG. 951 (Joseph Gales ed., 1789). Representative Michael Jenifer Stone of Maryland, favored the measure:

He thought substituting the name of the President, instead of the name of the United States, was a declaration that the sovereign authority was vested in the Executive. He did not believe this to be the case. The United States were sovereign; they acted by an agency, but could remove such agency without impairing their own capacity to act. He did not fear the loss of liberty by this single mark of power; but he apprehended that an aggregate, formed of one inconsiderable power, and another inconsiderable authority, might, in time, lay a foundation for pretensions it would be troublesome to dispute, and difficult to get rid of. A little prior caution was better than much future remedy.

*Id.*; cf. Alexander M. Bickel, *The Constitutional Tangle*, NEW REPUBLIC, Oct. 6, 1973, at 14, 15 (favoring Presidential criminal immunity because in "the Presidency is embodied the continuity and indestructibility of the state"). In light of this history, not to mention the arguments I made against this view in Freedman, *supra* note 1, at 14-15, it is rather surprising to find this magazine phrase of Professor Bickel's still being quoted uncritically by such ordinarily scholarly authors as Akhil Reed Amar & Brian C. Kalt. See Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11, 12 (1997). I discuss this point further in Section 4.B.3. See *infra* notes 150-53 and accompanying text.

13. Apparently because both sides believed that a matter of high principle was at stake, the

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

I put the case: "Suppose the President committed murder in the street. Impeach him? But you can only remove him from office on impeachment. Why, when he is no longer President you can indict him. But in the mean time he runs away. But I will put up another case. Suppose he continues his murders daily, and neither House is sitting to impeach him. Oh, the people would rise and restrain him. Very well, you will allow the mob to do what legal justice must abstain from." Mr. Adams said I was arguing from cases nearly impossible. There had been some hundreds of crowned heads within these two centuries in Europe, and there was no instance of any of them having committed murder. Very true, in the retail way, Charles IX of France excepted. They generally do these things on a great scale. I am, however, certainly within the bounds of possibility, though it may be improbable. General Schuyler joined us. "What think you, General?" said I . . . . "I am not a good civilian, but I think the President a kind of sacred person." Bravo, my "*jure divino*" man! Not a word of the above is worth minuting, but it shows clearly how amazingly fond of the old leaven many people are.<sup>14</sup>

Nor was this the first time the Senators had disagreed on exactly this same point. They had done so just a few months earlier, during a rancorous argument over whether the President enjoyed the sole power of removing officers that he had appointed and the Senate had confirmed. Beginning from opposing premises as to the locus of national

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issue proved very contentious between the two houses. See 1 ANNALS OF CONG. 962 (Joseph Gales ed., 1789). It was eventually resolved by the passage of a series of temporary statutes requiring the federal courts to follow state forms of practice. See 1 Stat. 92-93 (1789); 1 Stat. 123 (1790); 1 Stat. 191 (1791); 1 Stat. 275-76 (1792). The effect of this resolution was to hand a practical, although theoretically reversible, victory to the House of Representatives.

14. WILLIAM MACLAY, JOURNAL OF WILLIAM MACLAY 163-64 (American Classics 1965) (1890); see also CHARLENE BANGS BICKFORD & KENNETH R. BOWLING, BIRTH OF THE NATION: THE FIRST FEDERAL CONGRESS 1789-1791, at 18 (1989) (describing Maclay's diary as of "tremendous importance" for its insights into the first Senate). The Maclay diary has been republished in a more scholarly but somewhat less readable edition in THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES (Kenneth R. Bowling & Helen E. Veit eds., 1988). This edition makes no substantive changes in the passage quoted in the text. See *id.* at 168.

sovereignty, some placing it in the President and others in the People, the Senators had debated the existence, nature, and extent of implied executive powers under the Constitution<sup>15</sup>—and specifically clashed over whether the President was immune from criminal and civil proceedings while in office.<sup>16</sup>

Thus, the known evidence is not particularly obscure. It is just unhelpful if one is looking for some single “original intent.” The members of the founding generation simply disagreed on this issue, and knew full well that they did. Hence, it seems fair to conclude that if one had asked any of the antagonists how future generations should resolve it, he would have answered that they would have to reach their own conclusions on the basis of practice, precedent, the nature and underlying philosophy of our government, and concerns of policy and practicality.<sup>17</sup> I accordingly turn to those considerations.

15. See generally Leonard R. Sorenson, *The Federalist Papers on The Constitutionality of Executive Prerogative*, 19 PRESIDENTIAL STUD. Q. 267 (1989) (tracing efforts of historians and political scientists to understand the views of the founding generation on this issue).

16. See 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 218-19 (L. H. Butterfield ed., 1962) (Adams’ notes of the debate). These notes are also reproduced in THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES, *supra* note 14, at 445-49, together with the notes of several other of the participants. See *id.* at 465-67 (Senator William Samuel Johnson of Connecticut); *id.* at 483-89 (Senator William Paterson of New Jersey); *id.* at 499 (Senator Wingate Paine of New Hampshire). When the issue came to a vote, on July 16, 1789, the Senate split 10-10, and the matter was resolved in favor of exclusive Presidential removal power by the tie-breaking vote of Vice-President Adams. See *id.* at 115; *Myers v. United States*, 272 U.S. 52, 115 (1926).

17. See Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *reprinted in* 12 THE WORKS OF THOMAS JEFFERSON 11-12 (Paul L. Ford ed., 1905) (“Some men look at constitutions with a sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it . . . It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to arise from the dead . . . [L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed . . . and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.”); Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 563 (Framers themselves disputed many issues, but “understood they were creating—‘constituting’—a dynamic organism” and expected pragmatic resolutions); L. Kinvin Wroth, *The Constitution and the Common Law: The Original Intent About the Original Intent*, 22 SUFFOLK U. L. REV. 553, 567-68 (1988) (Framers intended their successors to use methods of common law); William A. Aniskovich, Note, *In Defense of the Framers’ Intent: Civic Virtue, The Bill of Rights, and the Framers’ Science of Politics*, 75 VA. L. REV. 1311, 1336, 1341 (1989) (Framers anticipated that the unanticipated would occur, and expected later generations to resolve issues by practical consideration of whether choices would tend “to promote or to destroy republican institutions formed to protect individual liberty”); Eric M. Freedman, Note, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 YALE L.J. 142, 165 (1978) (In theory and practice, common law lawyers who created both the

## Section 2. Practice

To the extent that the history of our own unbroken practice from the founding generation through the present furnishes a reliable guide to what the law should be, it strongly supports the proposition that Presidential amenability to indictment is perfectly consistent with the unfettered discharge of the legitimate functions of the office. While none of these experiences are precisely on point—that is, after all, why we are dealing with an open question—they do offer a number of important lessons.

### A. The Federal Executive Branch

On July 11, 1804, Aaron Burr, who was then Vice-President, fatally shot Alexander Hamilton in a duel.<sup>18</sup> As a result, Burr was indicted for murder both in New York<sup>19</sup> and in New Jersey.<sup>20</sup> Amid the considerable public tumult that followed, there was never any suggestion that he had any immunity from prosecution on these charges. On the contrary, Burr himself initially proposed to surrender in New York,<sup>21</sup> although he

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Articles and the Constitution “sanctioned flexible interpretation” to meet future practical problems); *see also* Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *reprinted in* 15 THE PAPERS OF THOMAS JEFFERSON 395-96 (Julian P. Boyd ed., 1958) (“[N]o society can make a perpetual constitution . . . . The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct.”); Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1517 (1988) (Jefferson view represents the republican tradition, since a constitution “cannot retain its claim to republican validity without changing in response to historical change in the people’s composition and values”); *see generally* Estelle v. Gamble, 429 U.S. 97, 102-03 (1976) (explaining that the original intent of the Eighth Amendment was that its meaning would develop over time); Eric M. Freedman, Book Review, 48 BROOK. L. R. 391, 396-99 (1982) (reviewing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980)); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 30 (1980) (Privileges and Immunities Clause of the Fourteenth Amendment should be taken “as a delegation to future constitutional decision-makers to protect rights that are not listed either in the Fourteenth Amendment or elsewhere in the document.”); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 15 (1955) (Framers of Fourteenth Amendment intended to enact an evolving idea of equality).

18. *See* MILTON LOMASK, AARON BURR: THE YEARS FROM PRINCETON TO VICE PRESIDENT 1756-1805, at 354-55 (1979); 2 MEMOIRS OF AARON BURR 309-10 (Matthew L. Davis ed., 1838) (agreed statement of the seconds to the duelists); Letter from Doctor David Hosack to William Coleman (Aug. 17, 1804), *reprinted in id.*, at 314-318 (account of physician who attended Hamilton); *See generally* ARNOLD A. ROGOW, A FATAL FRIENDSHIP: ALEXANDER HAMILTON AND AARON BURR (1998).

19. *See* 2 MEMOIRS OF AARON BURR, *supra* note 18, at 327-28.

20. *See id.* at 349.

21. *See* Letter from Aaron Burr to Joseph Alston (Aug. 11, 1804), *reprinted in id.*, at 332-33 (“Warrants have been issued in New-York . . . I am negotiating to get an assurance from authority that I shall be bailed, on receipt of which I shall surrender.”).

later changed his mind.<sup>22</sup> More significantly, the charges in New Jersey provoked a letter from eleven United States Senators to the Governor, requesting him in polite terms to attempt to terminate the prosecution.<sup>23</sup> The basis for this request was “to facilitate the public business by relieving the President of the Senate from the peculiar embarrassments of his present situation, and the Senate from the distressing imputation thrown on it, by holding up its President to the world as a common murderer,” not any suggestion that the Vice-President had immunity.<sup>24</sup>

To be sure, an argument based upon this silence can be pushed only so far. Perhaps, for example, the Senators thought that it would be more politically effective to appeal to the Governor’s discretion rather than to assert an aggressive legal posture. In addition, while an acknowledgment that Burr was amenable to prosecution on the state murder charges would be inconsistent with the strong form of immunity urged by Vice-President Agnew,<sup>25</sup> one could take the view that, while impeachment is the exclusive remedy for “[crimes] that only the President [or Vice-President] could commit,”<sup>26</sup> office-holders are subject to the general criminal process with respect to other charges. Under that view, the recognition that Burr had no immunity from the state murder charges would simply constitute an acknowledgment that killing one’s

22. See Letter from Aaron Burr to Theodosia Alston (Dec. 4, 1804), *reprinted in id.*, at 351-52.

You have doubtless heard that there has subsisted for some time a contention of a very singular nature between the states of New-York and New-Jersey . . . The subject in dispute is which shall have the honour of hanging the vice-president. I have not now the leisure to state the various pretensions of the parties, . . . nor is it yet known that the vice-president has made his election, though a paper received this morning asserts, but without authority, that he had determined in favour of the New-York tribunals.

*Id.* In fact, once his term of office had expired, Burr found it wise to travel west and avoid both states. See Letter from Aaron Burr to Theodosia Alston (Mar. 10, 1804), *reprinted in id.*, at 359. It was during this trip that he conducted the activities which eventually led to his treason trial, which is described in Section 4.B.1 *infra*.

23. The text of the letter, dated Nov. 24, 1804, can be found in CHARLES BIDDLE, AUTOBIOGRAPHY OF CHARLES BIDDLE 306-08 (1883).

24. *Id.* at 308. Biddle, a close friend of Burr’s, see 2 MEMOIRS OF AARON BURR, *supra* note 18, at 325, recounts that the “letter was sent open to me to be forwarded to Governor Bloomfield.” BIDDLE, *supra* note 23, at 306. For a discussion of the political background to the letter and an account of the events that followed it see 2 POLITICAL CORRESPONDENCE AND PUBLIC PAPERS OF AARON BURR 898-902 (Mary-Jo Kline & Joanne Wood Ryan eds., 1983).

25. See Memorandum in Support of Motion, at 2-3, 18 n.\*, In re Proceedings of the Grand Jury Impaneled Dec. 5, 1972 (D. Md. 1972) (setting out Vice-President Agnew’s position that there could be no prosecution on any charges during an incumbent’s tenure in office), *reprinted in App. B, infra*.

26. Edward M. Mezvinsky & Doris S. Freedman, *Federal Income Tax Evasion as an Impeachable Offense*, 63 GEO. L.J. 1071, 1080 (1975).

rivals in duels is no part of the Vice-President's official duties. Finally, the Vice-President is not as important to the governance of the country as the President,<sup>27</sup> so that the absence of an immunity for the former would not conclusively foreclose it in the case of the latter.

Nonetheless, the Burr episode is highly instructive for two reasons. First, many of the most important founders were still alive and active, and had strong incentives to assert the existence of an immunity; but they did not.<sup>28</sup> Second, the entire very contentious affair did no damage to the ability of the executive branch to conduct public business.<sup>29</sup> Particularly in light of today's conditions,<sup>30</sup> this fact should lend some weight to the view that it would be perfectly possible for the President to be indicted, and conduct a defense or be replaced for a greater or lesser period with the Vice-President, without danger to the functioning of the government.

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27. See Amar & Kalt, *supra* note 12, at 15-16. The authors make this point as their complete answer to the force of the Burr precedent. This ignores not only my own explicit statement to the same effect, see Freedman, *supra* note 1, at 12 n.13 ("At least as the office is now constituted, it seems difficult to argue that the country would suffer any irremediable loss if it had to muddle through without a Vice President for some period of time. . . . It has successfully done so in the past . . ."), but, more significantly, the arguments made in the text, and the indisputable fact, further discussed in Section 4.B *infra*, that the President has received unique deference from the courts and has unique legal resources for self-defense. See Alexis Simendinger, *Above, or Below, the Law?*, 32 NAT'L J. 1870, 1870 (Aug. 8, 1998) (describing President's unique legal resources).

28. When Burr returned to Washington following the duel, he was greeted with solicitude by two of his political adversaries, President Thomas Jefferson and Secretary of State James Madison. See PHILIP VAIL, *THE TURBULENT LIFE OF AARON BURR: THE GREAT AMERICAN RASCAL* 106-07 (1973); see also William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 NW. U. L. REV. 903, 906 (1991). Apparently, this courtship was due to the desire of the Jefferson Administration to secure Burr's cooperation during the forthcoming Senate impeachment trial of Supreme Court Justice Samuel Chase. See RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 92 (1971); LOMASK, *supra* note 18, at 364-65. Thus, it seems reasonable to speculate that if either of them had thought that Burr had some basis for a claim of official immunity, they would have made the suggestion. Instead, the Administration seems to have supported the plan of writing the letter described in the text. See LOMASK, *supra* note 18, at 364.

29. In the months following the indictments, Burr engaged in his normal political and official activities, drawing bipartisan praise for the manner in which he presided over the Chase impeachment trial, see *supra* note 28, and for his farewell address to the Senate upon the expiration of his term of office. There is a summary account in the historical novel GORE VIDAL, *BURR* 401-06 (1973). The Justice Department relied on this history in arguing that Vice-President Agnew was subject to indictment. See Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, In re Proceedings of the Grand Jury Impaneled December 5, 1972, at 13 (D. Md. 1973) ("[A]s the case of Aaron Burr illustrates, mere indictment standing alone apparently does not seriously hinder full exercise of the Vice-Presidency."), reprinted in App. C, *infra*.

30. See *infra* Section 4 (discussing the impact of 20th century technological and legal developments).

## B. The Federal Judicial and Legislative Branches

While the Aaron Burr case provides the closest historical parallel to the situation we are discussing,<sup>31</sup> there is also much to be learned from looking at the history of indictments of federal judges and legislators. As a legal matter, in each case we have judicial determinations directly on point. More importantly, as a structural matter, it can be powerfully argued that the ability of judicial and legislative officeholders to do their constitutionally-mandated jobs is impaired if a hostile executive branch can indict them—an argument that is far weaker in the case of a President. The Presidency is unmatched in its ability to defend its institutional prerogatives against assaults, whether launched horizontally (by federal criminal proceedings) or vertically (by state ones). Thus, the long history of authority rejecting judicial and legislative claims of immunity in the criminal context, even while upholding them in the civil context,<sup>32</sup> significantly strengthens the case that the same rule should apply to the President.

### 1. The Federal Judicial Branch

Judicial independence is important, and could easily be threatened if the executive branch used its indictment power in a partisan way. Nonetheless, there is an unbroken consensus that the value of punishing crimes weighs more heavily in the balance. The country's experience to date supports that judgment; there has been no indication that the potential for executive branch abuse has been realized, and there is every reason to believe that a judge who had been improperly indicted would have ample legal and political tools with which to fight back.<sup>33</sup>

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31. The only other federal Cabinet-level official to be charged criminally while still in office was Secretary of Labor Raymond J. Donovan. He was indicted by a New York State grand jury in September, 1984 on charges, centering on fraud in public works contracts, unconnected to his official position. He resigned in March of 1985, and eventually won a complete acquittal, see Selwyn Raab, *Donovan Cleared of Fraud Charges by Jury in Bronx: 7 Others Acquitted*, N.Y. TIMES, May 26, 1987, at A1. It apparently did not even occur to him to claim immunity. He did, however, seek unsuccessfully to remove the charges to federal court pursuant to 28 U.S.C. § 1442(a)(1). See Application of Donovan, 601 F. Supp. 574, 580 (S.D.N.Y. 1985) (noting adverse effect of indictment on the functioning of federal government, but rejecting removal because charges unrelated to defendant's official conduct); see also text accompanying note 167, *infra*.

32. This existing legal regime is discussed in Section 3 below.

33. Thus, for example, after the indictments of Judges Hastings and Collins described below, senior members of the House of Representatives announced their intention to hold hearings into whether the Justice Department was inappropriately targeting black public officials for prosecution. See Steve France, *Selective Prosecution: Critics See Racism Behind Indictment of Federal Judge*, A.B.A. J., May 1991, at 22; see also Sharon Donovan, *Friends Race to the Side of a Jurist*, NAT'L L.J., July 8, 1991, at 8 (noting that Judge Collins was defended by two pro bono law firms,



The indictment of sitting judges was accepted as proper both before the adoption of the Constitution<sup>34</sup> and in the decades following its ratification.<sup>35</sup> The best-known example dates from 1796, when a group of inhabitants of the Northwest Territory petitioned the House of Representatives to take some action against George Turner, a judge of the territorial Supreme Court said to be abusing the power of his office. The House referred the matter to the Attorney General, Charles Lee, who replied four days later with a short letter. Apparently considering it an established fact, he stated without argument: "A judge may be prosecuted . . . for official misdemeanors or crimes . . . before an ordinary court, or by impeachment before the Senate of the United States."<sup>36</sup> Because of the logistical difficulties of trying an impeachment 1,500 miles away from the territory in question, he continued, "the Attorney General is of opinion that it will be more advisable . . . that the prosecution should not be carried on by impeachment, but . . . before the supreme court of that Territory, which is competent to the trial."<sup>37</sup> After receiving this report, the House committee considering the matter reported to the full House its "opinion that the mode of prosecution recommended by the Attorney General will afford Judge Turner a fair opportunity of defending himself against said charges, . . . and, for the reasons given in

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and that an offshoot of the National Bar Association raised funds for the defense). As also described below, Judge Aguilar, who remained on the bench while litigation proceeded, successfully pursued legal remedies after his conviction. See *infra* note 51 and accompanying text.

34. See, e.g., CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA xxii (Peter Charles Hoffer & William B. Scott eds., 1984) ("At the February 1723 sessions, Justice John Tarpley stepped down from the bench to bond himself for his good behavior after the grand jury had presented him for swearing. Other justices paid fines for failures to repair bridges and roads and for disturbing the peace."); PETER CHARLES HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635-1805, at 81-83 (1984) (Francis Hopkinson, chief judge of the Pennsylvania Admiralty Court, impeached in 1780 but upper house ruled that the charges could be pursued by civil and criminal court proceedings; Virginia Assembly declined to impeach John Price Posey, justice of the peace, in 1783, whereupon he was criminally prosecuted and convicted); see also 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW, ch. 22, at 873-77 (London 1816) (describing the mode of criminal proceedings at King's Bench against magistrates for misconduct in office).

35. This seems to have been accepted as a matter of course, requiring no elaborate justification. For example, the first Congress, in Section 21 of the Act of April 30, 1790, 1 Stat. 112, at 117 (1790), provided penalties for judges who took bribes. See *Judicial Reform Act: Hearings on S. 1506 Before the Subcomm. on Improvements in Judicial Machinery*, 91st Cong., 2d Sess. 85, 87 (1970) (statement of William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Department of Justice). Another example of the general assumption that sitting judges were liable to criminal indictment and punishment is to be found in the argument of Luther Martin at the impeachment trial of Judge Samuel Chase. See 14 ANNALS OF CONG. 431-32 (1805). Martin had been a member of the Philadelphia Convention, as had at least two of the Senators. See *id.* at 430.

36. 20 AMERICAN STATE PAPERS 151 (Washington 1834) (H.R. Misc. Doc. No. 87) (report dated May 9, 1796, communicated to the House on May 10, 1796).

37. *Id.*

the Attorney General's report, is preferable to a prosecution by way of impeachment."<sup>38</sup> Accordingly, the House took no further action; another judge was appointed two years later.<sup>39</sup>

Although President Nixon's defenders during Watergate suggested that the fact that Judge Turner was an Article I judge rather than an Article III judge robs this case of precedential value,<sup>40</sup> that view seems untenable since, under the terms of the Northwest Ordinance (itself a constitutive document), his tenure in office was the same as that of an Article III judge: during good behavior.<sup>41</sup>

In any event, as defendants in modern times began to challenge the proposition that the criminal indictment of sitting judges is permissible under the Constitution,<sup>42</sup> courts unanimously endorsed it. Over the past twenty-five years, Otto Kerner of the United States Court of Appeals Seventh Circuit,<sup>43</sup> Alcee L. Hastings of the United States District Court for the Southern District of Florida,<sup>44</sup> and Eugene Henry Claiborne of

38. *Id.* at 157 (H.R. MISC. DOC. No. 95) (report communicated to the House on Feb. 27, 1797).

39. See JOSEPH BORKIN, *THE CORRUPT JUDGE: AN INQUIRY INTO BRIBERY AND OTHER HIGH CRIMES AND MISDEMEANORS IN THE FEDERAL COURTS* 251-52 (1962); see generally Andrew R. L. Cayton, *Land, Power, and Reputation: The Cultural Dimension of Politics in the Ohio Country*, 37 WM. & MARY Q. 266 (3d ser. 1990) (describing political conflicts, centering on the judicial system, in Northwest Territory in period 1788-1803).

40. See Arthur John Keefe, *Explorations in the Wonderland of Impeachment*, 59 A.B.A. J. 885, 887 (1973).

41. See An Ordinance for the government of the territory of the United States northwest of the river Ohio § 4 (July 13, 1787), reprinted in 1 U.S.C. at XLV (1982); U.S. CONST. art. III, § 1; see also *McAllister v. United States*, 141 U.S. 174, 186-88 (1891) (distinguishing judges appointed during good behavior under the Northwest Ordinance and similar statutes from other territorial judges); cf. 1 ANNALS OF CONG. 394 (Joseph Gales ed., 1789) (statement of James Madison that an executive officer with tenure during good behavior could be convicted of crime while in office).

42. Until the 1970's, indicted federal judges had not questioned this principle. See *United States v. Hastings*, 681 F.2d 706, 709 n.7 (11th Cir. 1982), cert denied, 459 U.S. 1203 (1983) ("Judge Francis Winslow of the southern district of New York was indicted in 1929 and resigned before trial commenced. Judge John Warren Davis of the third circuit court of appeals was indicted and stood trial twice before resigning in 1941. Neither of these men claimed that they were immune from criminal prosecution prior to impeachment.").

43. See *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974). The charges on which Judge Kerner was convicted principally involved his acceptance of bribes while Governor of Illinois, but also included making false statements to the grand jury and Internal Revenue Service investigators after becoming a judge. See *id.* at 1131.

44. See *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982). The charge was that Judge Hastings accepted a bribe to show leniency to a criminal defendant. See *id.* at 707. He was acquitted, but successful impeachment proceedings were later brought on the theory that he had procured his exoneration wrongfully. See David Johnston, *Hastings Ousted As U.S. Judge by Senate Vote*, N.Y. TIMES, Oct. 21, 1989, at A1.

Following his removal from office, Judge Hastings returned to practice as a criminal

the United States District Court for the District of Nevada<sup>45</sup> were each indicted and then claimed immunity from prosecution. In all three instances the Circuit Court rejected the claim,<sup>46</sup> and the Supreme Court denied certiorari.<sup>47</sup> Indeed, more recently, Judge Walter Nixon of the United States District Court for the District of Mississippi did not even find it worthwhile to make the assertion,<sup>48</sup> nor did Judge Robert F. Collins of the United States District Court for the Eastern District of Louisiana,<sup>49</sup> nor did Judge Robert P. Aguilar of the United States District

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defense lawyer, *see Impeached Judge Feels Vindicated*, N.Y. TIMES, Sept. 19, 1992, at A8, and ran successfully for the House of Representatives. *See State by State Results*, N.Y. TIMES, Nov. 5, 1992, at B11. Since the Senate in removing Judge Hastings from the bench did not vote to disqualify him from further officeholding pursuant to U.S. Cont. Art. I, § 3, cl. 7, the prior impeachment proceedings were no barrier to his occupying the seat, *see Marcia Coyle, A Win Could be Hastings' Loss*, NAT'L L.J., Nov. 2, 1992, at 3; *see also Suit to Block ex-judge From U.S. House Fails*, CHI. TRIB., Jan 5, 1993, at 8 (United States District Court for the Southern District of Florida dismisses on standing grounds a suit seeking to prevent Hastings from serving; he is sworn in the next day, *see The Swearing in of Judge Hastings to the House of Representatives*, WASH. POST, Jan. 6, 1993, at A10), which he currently does.

45. *See United States v. Claiborne*, 727 F.2d 842 (9th Cir. 1984), *stay denied*, 465 U.S. 1305 (Rehnquist, Circuit Justice), *cert. denied*, 469 U.S. 829 (1984), *on later appeal*, 765 F.2d 784 (9th Cir. 1985), *reh'g denied*, 781 F.2d 1325, 1327, 1334 (1985, 1986), *cert. denied*, 475 U.S. 1120 (1986), *stay denied in postconviction proceedings*, 790 F.2d 1355 (9th Cir. 1986) (permitting defendant to be imprisoned prior to impeachment and removal from bench), *postconviction relief denied*, 870 F.2d 1463 (9th Cir. 1989). Judge Claiborne was convicted of evading taxes after becoming a judge.

46. *See Claiborne*, 727 F.2d at 845-49; *Hastings*, 681 F.2d at 709-11; *Isaacs*, 493 F.2d at 1141-44.

47. *See Claiborne*, 727 F.2d at 842, *cert. denied*, 469 U.S. 829 (1992); *Hastings*, 681 F.2d at 706, *cert. denied*, 459 U.S. 1203 (1983); *Isaacs*, 493 F.2d at 1124, *cert. denied*, 417 U.S. 976 (1974).

48. *See United States v. Nixon*, 816 F.2d 1022 (5th Cir. 1987), *reh'g denied*, 827 F.2d 1019 (1987), *cert. denied*, 484 U.S. 1026 (1988), *postconviction relief denied*, 881 F.2d 1305 (5th Cir. 1989). Judge Nixon was convicted of perjury for denying that he had used his judicial influence to assist someone who had given him a lucrative business opportunity while he was on the bench. Like Judge Claiborne, *see supra* note 45, Judge Nixon was not removed from office by impeachment until well after he had begun to serve his prison term. *See Former U.S. Judge is Paroled*, N.Y. TIMES, Nov. 22, 1989, at A18; *see Senate Convicts U.S. Judge, Removing Him From Bench*, N.Y. TIMES, Nov. 4, 1989, at A7; *Impeachment Voted; A Federal Judge Faces a Trial in the Senate*, N.Y. TIMES, May 11, 1989, at A20. Following his release, Judge Nixon was rearrested on a charge of violating his parole by carrying a firearm. *See Impeached Judge is Charged With Violation of His Parole*, N.Y. TIMES, Aug. 7, 1990, at A12; *see also infra* note 76.

49. Judge Collins was convicted of accepting bribes to influence his sentencing of a marijuana smuggler. *See Henry J. Reske, Collins Guilty of Bribery*, A.B.A. J. Sept. 1991, at 32; Francis Frank Marcus, *U.S. Judge is Convicted in New Orleans Bribe Case*, N.Y. TIMES, June 30, 1991, at A13. This resulted in a prison sentence of nearly seven years. *See U.S. Judge is Given Prison Sentence*, N.Y. TIMES, Sept. 7, 1991, at A12. Although he did not raise an immunity defense, he did argue unsuccessfully on appeal that heightened probable cause requirements should apply to the executive branch's commencement of investigations into sitting federal judges. *See United States v. Collins*, 972 F.2d 1385, 1389, 1395-96 (5th Cir. 1992) (affirming conviction and sen-

Court for the Northern District of California<sup>50</sup>—a particularly telling instance since the Supreme Court reviewed the conviction at length on the merits, and none of the several opinions even considered the point worth an allusion.<sup>51</sup>

The courts' unanimous rejection of claims of judicial immunity from criminal prosecution is soundly based.<sup>52</sup> The cases have made many of the points that I will be making below: that the impeachment and indictment remedies were designed to be separate; that the considerations are similar to those involved in the indictment of sitting federal legislators, a long-sanctioned practice; and that "whatever immunities . . . the Constitution confers for the purpose of assuring the independence of the co-equal branches of government . . . [p]unishment for [criminal] conduct will not interfere with the legitimate operations of a branch of government."<sup>53</sup>

## 2. The Federal Legislative Branch

As I am sure I need hardly tell you, the amenability of sitting Senators and Representatives to indictment is a similarly well-accepted part of our legal order. The practice is consistent with what we know of original intent,<sup>54</sup> and has long been approved by the Supreme Court.<sup>55</sup>

tence), *cert. denied*, 507 U.S. 1017 (1993).

50. Judge Aguilar was convicted on charges that he abused his judicial knowledge of a pending wiretap for the benefit of a potential criminal defendant. *See* Katherine Bishop, *Federal Judge Is Given Reduced Prison Sentence in Corruption Case*, N.Y. TIMES, Nov. 2, 1990, at A14.

51. After Judge Aguilar had secured a dismissal of all charges from the Ninth Circuit, *see* *United States v. Aguilar*, 21 F.3d 1475 (9th Cir. 1994) (en banc), the Supreme Court reversed with respect to one of the counts and remanded to the Court of Appeals for consideration of other issues relating to that count. *See* *United States v. Aguilar*, 515 U.S. 593 (1995). On remand, the Ninth Circuit held that the relevant jury instructions had been erroneous, vacated the conviction, and remanded for a new trial. *See* *United States v. Aguilar*, 80 F.3d 329 (9th Cir. 1996). On June 24, 1996, Judge Aguilar resigned pursuant to an arrangement under which the Justice Department dropped the case, and he, without admitting criminal wrongdoing, issued a statement acknowledging that he had disclosed the wiretap information. *See* Joseph Wharton, *Under Settlement, Judge Resigns*, A.B.A. J., Sept. 1996, at 36.

52. It is notable that those commentators who disagree with this conclusion and would overrule the Circuit Court rulings adverse to Judges Kerner, Claiborne, and Hastings, do not dispute the analogy to the situation of the President. *See* Bybee, *supra* note 4, at 59 ("Whatever may be said of the prosecutability of federal judges applies with equal force to the President and vice versa."); *see also* Steven W. Gold, Note, *Temporary Criminal Immunity for Federal Judges: A Constitutional Requirement*, 53 BROOK. L. REV. 699 (1987) (arguing that since indictment constitutes *de facto* removal from office, impeachment must come first).

53. *United States v. Isaacs*, 493 F.2d 1124, 1144 (7th Cir. 1974).

54. *See* Speech of James Iredell to the North Carolina Ratifying Convention (July 28, 1788), *reprinted in* 4 ELLIOT'S DEBATES, *supra* note 9, at 125-26 (Senators "are punishable by law for crimes and misdemeanors in their personal capacity. For instance, the members of Assembly are

Even defendants appear to believe any claim of absolute congressional immunity from prosecution would be untenable.<sup>56</sup> Indictments of sitting federal legislators have become almost common,<sup>57</sup> but the principle that they are permissible under the Constitution has not drawn scholarly, judicial, or political attack.<sup>58</sup>

### C. Federal Prosecution of State and Local Officials

State and local officials—including governors,<sup>59</sup> legislators,<sup>60</sup> judges,<sup>61</sup> and others<sup>62</sup>—are routinely indicted by federal prosecutors.<sup>63</sup>

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not liable to impeachment, but, like other people, are amenable to the law for crimes and misdemeanors committed as individuals.”); Speech of James Wilson to the Pennsylvania Ratifying Convention (Dec. 4, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 5, at 492 (Even if political considerations present a successful impeachment, Senators may be tried criminally); *see also* *Blondes v. State*, 294 A.2d 661, 668-70 (Md. Ct. Spec. App. 1972) (relying on the history of the ratification period to reach the same construction of parallel state constitutional provisions).

55. *See* *United States v. Helstoski*, 442 U.S. 477, 488-90 (1979) (Representative could be prosecuted for taking bribes to introduce private bills to assist aliens, but Speech or Debate Clause would preclude evidence that he had actually introduced them); *United States v. Brewster*, 408 U.S. 501, 502, 528-29 (1972) (upholding bribery prosecution of former Senator against Speech or Debate Clause challenge); *United States v. Johnson*, 383 U.S. 169, 171-72, 180 (1966) (Representative liable to prosecution for defrauding the United States by selling his services, but inquiry into preparation of floor speech precluded by the Speech or Debate Clause), *on remand*, 419 F.2d 56 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970) (affirming convictions on remaining counts); *Williamson v. United States*, 207 U.S. 425, 446 (1908) (Representative convicted of conspiracy to suborn perjury could be imprisoned during his term; the constitutional privilege from arrest does not extend to criminal offenses); *Burton v. United States*, 202 U.S. 344, 365-70 (1906) (affirming the conviction of a Senator on conflict-of-interest charges; however, conviction could not operate to vacate his seat).

56. *See* *Brewster*, 408 U.S. at 522 n.16. Congressional defendants generally argue only that particular prosecutions (or portions thereof) run afoul of the specific textual privileges in Article I of the United States Constitution. *See* U.S. CONST., art. I, § 6, cl. 1 (“Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses . . . and for any Speech or Debate in either House, they shall not be questioned in any other Place.”). All of the Supreme Court cases cited *supra* in note 55 are examples of this pattern.

57. Freedman, *supra* note 1, at 30 n.80, contains a long list of examples, which could today be made all the longer.

58. Politicians do sometimes express concern about particular prosecutions. Thus, for example, during the investigation of Senator Harrison Williams of New Jersey as part of the Abscam operation, a number of lawmakers suggested that the investigative techniques of the F.B.I. had bordered on entrapment, *see* Steven V. Roberts, *Senators Keep F.B.I. Conduct in Mind*, N.Y. TIMES, Mar. 5, 1982, at B2, and their promise to investigate that issue further was one of the key inducements for the Senator’s agreement to resign. *See* Bennett L. Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment*, 91 Yale L.J. 1565, 1565 n.3 (1982). But there seems to be no one in public life who takes the position that federal legislators should have immunity from criminal charges.

59. *See, e.g.,* *United States v. Tucker*, 137 F.3d 1016 (8th Cir. 1998) (remanding for further hearings Whitewater-related case of Jim Guy Tucker, who resigned as Governor of Arkansas when convicted of mail fraud in these proceedings, *see* Stephen Labaton, *Clinton Partners in Arkansas*

*Deal Convicted by Jury*, N.Y. TIMES, May 29, 1996, at A1, and eventually pleaded guilty to additional tax and bankruptcy charges as part of a plea arrangement, see Linda Friedlieb & Joe Stumpe, *Tucker Pleads Guilty; Avoids Prison*, ARK. DEMOCRAT-GAZETTE, Feb. 21, 1998, at A1; *United States v. Edwards*, 823 F.2d 111, *reh'g denied*, 823 F.2d 772 (5th Cir. 1987), *cert. denied*, 484 U.S. 934 (1998) (upholding sealing orders entered in bribery trial of Governor Edwin Edwards of Louisiana, tried twice while in office, resulting in a mistrial and an acquittal); *United States v. Mandel*, 415 F. Supp. 1025 (D. Md. 1976) *aff'd* 602 F.2d 653 (4th Cir.), *reh'g en banc denied*, 609 F.2d 1076 (4th Cir. 1979) (rejecting claim of Governor Marvin Mandel of Maryland that he should have immunity from federal charges of influence peddling); *coram nobis granted*, *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989) (vacating convictions in light of *McNally v. United States*, 483 U.S. 350 (1987)); *United States v. Leche*, 34 F. Supp. 982 (W.D.La. 1940), *aff'd*, 118 F.2d 246 (5th Cir. 1941), *cert. denied*, 314 U.S. 617, *reh'g denied*, 314 U.S. 712 (1941) (Richard W. Leche, former Governor of Louisiana, convicted of taking kickbacks on state contracts); *Blanton Sentencing Culminates Five Years of Controversy*, U.P.I., TENN. WIRE, Aug. 14, 1981 (former governor Ray Blanton of Tennessee sentenced to three years imprisonment on federal charges of accepting payoffs for liquor licenses; other officials were jailed for selling parole and highway bid-rigging); see also *United States v. Moore*, 931 F.2d 245, 247-48 (4th Cir. 1991), *cert. denied*, 116 L. Ed. 2d 134 (1991) (rejecting a challenge to guilty plea entered by Arch A. Moore to charges that he committed bribery and extortion while Governor of West Virginia); *Former West Virginia Governor Is Sentenced to 5 Years for Graft*, N.Y. TIMES, July 11, 1990, at A10, col. 4 (describing case, noting that Moore had been tried and acquitted on extortion charges while serving previous term as Governor).

60. See, e.g., *McCormick v. United States*, 500 U.S. 257, 260, 271-74 (1991) (reversing, on statutory grounds, Hobbs Act conviction of West Virginia legislator Robert L. McCormick for taking unreported campaign contributions); *United States v. Gillock*, 445 U.S. 360, 362, 366-74 (1980) (holding that in federal bribery prosecution, state legislator does not have evidentiary privilege against prosecutorial use of official acts); *United States v. Davis*, 967 F.2d 516 (11th Cir. 1992) (affirming conviction of Alabama legislator Patricia Davis for accepting bribes); *United States v. Jenkins*, 943 F.2d 167, 169 (2d Cir. 1991) (affirming the conviction of former New York State Senator Andrew Jenkins on charges arising from a money-laundering scheme); *United States v. Ruiz*, 894 F.2d 501, 502 (2d Cir. 1990) (affirming conviction of New York State Senator Israel Ruiz for loan fraud; later developments described *infra* note 65); *United States v. Aimone*, 715 F.2d 822, 824-25 (3d Cir. 1983) (affirming RICO convictions of New Jersey State Senator William V. Musto and numerous local officials); *Carolina Inquiry Indicts 18th Lawmaker*, N.Y. TIMES, Aug. 22, 1991, at A24, (South Carolina State Senator Bud Long becomes 18th current or former legislator charged with bribery and related offenses as a result of a 2-year investigation into a vote-buying scheme); Elizabeth Kolbert, *Indictments: Just A Part of the Albany Routine*, N.Y. TIMES, Dec. 23, 1990, at E12 (ten sitting New York legislators indicted in last five years); *3d West Virginian In Corruption Inquiry Is Punished by Court*, N.Y. TIMES, Feb. 16, 1989, at A14, (following federal probe of corruption in West Virginia Legislature, former president of state Senate, Dan Tonkovich, sentenced for extortion; during same week, former state Senate president Larry Tucker sentenced for taking illegal payments from gambling interests, and former state Senate majority leader Si Boettner sentenced for income tax evasion).

61. In one recent example that drew a fair amount of attention, David Lanier, a Chancery Court Judge in Tennessee, was convicted in federal court of criminal civil rights violations growing out of his sexual assaults on women who came to his chambers on business. See *United States v. Lanier*, 520 U.S. 259 (1997). He fled following this adverse ruling, resulting in the dismissal of his subsequent appeals, see *United States v. Lanier*, 123 F.3d. 945 (6th Cir. 1997), *cert. denied*, 118 S.Ct. 1200 (1998), but was eventually recaptured and incarcerated. See *Lanier's Conspiracy Theory Doesn't Hold Up in Court*, THE TENNESSEAN, Mar. 8, 1998, at 4B.

Another notable example was Operation Greylord, which resulted in the conviction of 15 judges and 66 lawyers and police officers in Cook County Illinois for various forms of judicial

This is a fact of some significance, since the unequal resources of the federal and state governments, and the frequent political tensions between their officeholders, would seem to raise the danger of unjustified prosecutions. If realized, this threat could significantly weaken federalism. Yet real, or even perceived, abuses of federal prosecutorial power in this field are rare,<sup>64</sup> and are dealt with through the normal mechanisms of politics,<sup>65</sup> rather than through the creation of an immunity.

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corruption. *See e.g.*, *United States v. Glecier*, 923 F.2d 496 (7th Cir. 1991), *cert. denied*, 502 U.S. 810 (1991) (affirming conviction of former judge Daniel P. Glecier of Cook County Circuit Court); *United States v. Oakey*, 853 F.2d 551 (7th Cir. 1988), *cert. denied*, 488 U.S. 1033 (1989) (affirming conviction of James Oakey, former Cook County traffic court judge); *United States v. Murphy*, 768 F.2d 1518, 1524, 1528-29 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986) (affirming conviction of John M. Murphy, former Cook County Circuit Court associate judge, and defending operation against claim that it was unwarranted federal intrusion into the state system); *see also* *Bracy v. Gramley*, 520 U.S. 899 (1997) (ruling favorably on habeas corpus petition of prisoner who had received death sentence from Judge Thomas J. Maloney, convicted of bribe-taking during Operation Graylord).

But, while they often receive less national publicity, such instances are far from rare, *see, e.g.*, *United States v. Shields*, No. 94-1388, 1994 U.S. App. LEXIS 16229 (7th Cir. 1994) (affirming the denial of post-conviction relief to David J. Shields, former presiding judge of the Chancery Division of Circuit Court of Cook County, Illinois, convicted under Hobbs Act for taking bribe to fix case); *Brennan v. United States*, 867 F.2d 111, 112 (2d Cir. 1989) (affirming sentence reduction for William C. Brennan, former justice of the New York Supreme Court, convicted of 26 felonies related to bribe-taking), and can claim a long pedigree. *See Ex parte Virginia*, 100 U.S. 339, 340, 342 (1879) (upholding indictment of a state judge under Civil Rights Act of 1875).

62. *See, e.g.*, *United States v. Barry*, 961 F.2d 260, 261, 269 (D.C. Cir. 1992) (affirming sentence on federal drug charges imposed on Mayor Marion S. Barry of Washington, D.C.); *United States v. Caldwell*, 544 F.2d 691, 693 & n.1 (4th Cir. 1976) (John H. Kelly, State Treasurer of West Virginia, and Joseph F. Rykoskey, Assistant State Treasurer, pled guilty to a mail fraud charge arising out of a bribery scheme).

63. *See* *United States v. Gillock*, 445 U.S. 360, 373 n.11 (1980) ("Federal prosecutions of state and local officials, including state legislators, using evidence of their official acts are not infrequent."). Again, the presentation here is a condensed one. Numerous other examples of such prosecutions are cited in Freedman, *supra* note 1, at 33-36 nn.82-85.

64. Opponents of my position respond that, in a nuclear age, any distraction of the President from official duties is much more important than any distraction of a state Governor. *See Amar & Kalt, supra* note 12, at 12-13. Quite apart from its dismissive attitude towards our federal structure, this argument misses the point of my analogy, which is that the fact that the system has been able to proceed smoothly on the state level, despite the absence of immunity, suggests that there is no need to read one into the Constitution on the national level, and that my position—which will leave the President in the same legal position as a Governor—is sound. *See infra* Section 2.D.

As to the distinction suggested by Amar & Kalt that "Governors are elected separately from other state executive officials—attorney generals, treasurers, and secretaries of state—and thus do not embody the full executive power of their states," to the extent that this is true, it would seem to support my viewpoint, since presumably prosecutorial authority is more subject to political abuse when held by a separately-elected official than when it remains in the ultimate control of the chief executive, as in the federal system. *See Amar & Kalt, supra* note 12, at 12. Moreover, nothing in my position negates the continued existence of prosecutorial discretion. *See Freedman, supra* note 1, at 10 n.7.

65. *See, e.g.*, Ronald Smothers, *Charge Against Mayor Strikes Chord in Birmingham*, N.Y.

#### D. State-Level Practice

Most states' constitutional provisions for impeachment closely track the ones on the federal level.<sup>66</sup> Laying particular stress on the different functions served by the impeachment and criminal processes, the state courts have uniformly ruled that officers who are subject to impeachment are also subject to indictment while still in office,<sup>67</sup> and the states in fact regularly bring criminal proceedings against their office-holders.<sup>68</sup>

In light of this overwhelming and salutary history, any justification for granting the President an immunity from criminal prosecution must rest on theoretical or practical considerations unique to that office. The next two Sections accordingly explore those issues.

### *Section 3. The Constitutional, Legal, and Historical Structure Supporting The Rule of Law*

The argument advanced here is consistent with the ideas of human nature that underlie the structure of our government, and with the implications that have been drawn from those ideas in more recent years.

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TIMES, Jan. 20, 1992, at A12, (following a contempt citation, *see infra* note 90, Mayor Richard Arrington of Birmingham invites numerous local and national organizations to hearings on "the selective prosecution and harassment of black leadership"; he later surrenders to United States marshals after participating in a protest march with more than 700 of his supporters, *see With 700 Supporters Rallying Round, Birmingham Mayor Goes to Prison*, N.Y. TIMES, Jan. 24, 1992, at A12, ); N.Y. TIMES, Nov. 6, 1991, at B4 (New York State senator Israel Ruiz wins re-election despite ouster from seat in 1989 after a federal conviction, *see supra* note 60, for falsifying a loan application); Sam Howe Verhovek, *Facing Jail, Ruiz May be Vote Winner*, N.Y. TIMES, Aug. 8, 1989, at B1 (describing the re-election campaign).

66. *See* Mecham v. Gordon, 751 P.2d 957, 961 (Ariz. 1988); *Kinsella v. Jaekle*, 475 A.2d 243, 252 (Conn. 1984).

67. *See* Freedman, *supra* note 1, at 37 n.89 (collecting cases). Thus, to take a fairly recent example, Governor Evan Mecham of Arizona was indicted in January of 1988 by a state grand jury for perjury and related campaign offenses, and subsequently impeached by the Arizona House of Representatives. *See* Paul F. Eckstein, *The Impeachment of Evan Mecham*, LITIG., Spring 1990, at 41 (describing proceedings). Perhaps mindful of the array of precedent against him, he did not plead an immunity to the criminal charges; rather, he sought to enjoin the impeachment proceedings. *See* Mecham v. Gordon, 751 P.2d at 958. That effort failed, *see id.* at 958, 962, 963 (distinguishing purpose of impeachment and criminal proceedings), as did his subsequent effort to obtain judicial review of alleged procedural errors in the impeachment trial which resulted in his removal from office. *See* Mecham v. Arizona House of Representatives, 782 P.2d 1160, 1160-61 (1989). *See generally* Ingram v. Shumway, 794 P.2d 147, 152 (Ariz. 1990) (acting under a clause textually close to that of the federal Constitution, when the Arizona Senate removed Mecham from office, it had discretion with respect to disqualifying him from future offices; since it chose not to do so, Mecham was entitled to run in the September, 1990 Republican gubernatorial primary).

68. The numerous examples collected in Freedman, note 1 at 38 n.90, include state criminal prosecutions of leaders of legislative houses, attorneys general, and Governors, as well as judges and mayors.



As historians have long highlighted, the founding generation shared a deep suspicion of human nature and a strong sense that any power entrusted to a government officeholder was likely to be abused. This outlook underlies two broad insights supporting the proposition that there should be no criminal immunity for a sitting President.

#### A. The Dual Nature of the Impeachment Clause

The primary reason the impeachment clause of the Constitution<sup>69</sup> has the structure it does is to separate the question of possible criminal misbehavior from the issue of fitness to hold office. “One thing that the writers of the American Constitution made clear was that no matter how close to English precedent they wished to come, the American impeachment process was basically a political process for removal and not an alternative to, or substitute for, criminal proceedings.”<sup>70</sup>

Parliamentary impeachment in England, from its beginnings in the mid-fourteenth century through its period of most intense use in the seventeenth century and until its gradual withering away late in the eighteenth century, normally involved the simultaneous removal from office and imposition of criminal punishment.<sup>71</sup> Specifically rejecting the idea of a legislature playing this latter role, the framers created a system under which the two remedies—the judicial remedy for ordinary crimes, and the impeachment remedy for political misdeeds (which could, of course, include crimes)—would play distinct roles in controlling the behavior of government officials.<sup>72</sup> “The Framers deliberately

69. As indicated, *see supra* note 6, the impeachment clause provides:

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.

U.S. CONST. art. I, § 3, cl. 7.

70. PHILIP B. KURLAND, *WATERGATE AND THE CONSTITUTION* 108 (1978). There is a recent full discussion of the subject in the comprehensive article, Julie R. O’Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2180, 2196-227 (1998), which endorses my views regarding Presidential criminal immunity. *See id.* at 2262; *see also* Speech of Samuel Johnston to North Carolina Ratifying Convention (July 25, 1788), *reprinted in* 4 ELLIOT’S DEBATES, *supra* note 9, at 48 (contrasting impeachment and criminal sanctions; opponents of Constitution need not “be afraid that officers who commit oppressions will pass with impunity,” since they are subject to both).

71. *See, e.g.,* HOFFER & HULL, *supra* note 34, at 3 (“A criminal penalty was almost always attached to conviction. Prison, fines, along with forfeiture of lands and goods, and loss of office, were meted out to defendants. Capital punishment was rarely ordered.”). A number of the better-known English precedents are summarized in E. Mabry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion That Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025, 1036-42 (1975).

72. *See* 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*

separated the two forums to avoid raising the specter of bias and to ensure independent judgments . . . .”<sup>73</sup>

Impeachment was designed to curb behavior undermining the President’s fitness to continue governing. As Hamilton wrote in *The Federalist*, its purpose is to reach those offenses “of a nature which may with peculiar propriety be denominated political,” that is, those “which proceed from the . . . abuse or violation of some public trust,” rendering the offender unworthy of continued public confidence.<sup>74</sup>

Thus, although the Constitution speaks in terms of “high Crimes and Misdemeanors,”<sup>75</sup> it has long been settled that impeachable abuses of power are not limited to crimes.<sup>76</sup> For example, Congress could properly have considered Richard Nixon’s secret bombing of Cambodia an impeachable offense, even if not a crime, and removed him from office on the basis of it. The rationale would have been that a leader who committed sustained acts of war against a neutral country without subjecting his actions to scrutiny by the people’s representatives in Congress was an unworthy steward of public power.

§ 784, at 253 (Boston 1833) (“There is wisdom, and sound policy, and intrinsic justice in this separation of the offence, . . . bringing the political part under the power of the political department of the government, and retaining the [judicial] part for presentment and trial in the ordinary forum.”). See generally Memorandum for the United States Concerning the Vice President’s Claim of Constitutional Immunity, In re Proceedings the Grand Jury Impaneled December 5, 1972, at 8-9 (D. Md. 1973) reprinted in App. C, *infra* (argument on behalf of the Justice Department that the Vice-President is not immune from indictment because different considerations govern propriety of application of impeachment and criminal sanctions). Congressman Bob Barr has recently restated the point somewhat more tendentiously. See Bob Barr, *High Crimes and Misdemeanors: The Clinton-Gore Scandals and the Question of Impeachment*, 2 TEX. REV. L. & POL. 1, 5 (1997).

73. *Nixon v. United States*, 506 U.S. 224, 234 (1993) (case further discussed in note 76, *infra*).

74. THE FEDERALIST PAPERS NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted).

75. U.S. CONST. art. II, § 4.

76. See *Nixon v. United States*, 506 U.S. 224, 231 (1993) (ruling, in the case of Judge Walter L. Nixon, described at *supra* note 48, that “[t]he Senate alone shall have [the] authority to determine whether an individual should be acquitted or convicted,” *id.* at 231, rejecting the argument of three concurring Justices that the Court should reserve power to review cases in which the Senate, without any process at all, removed an officeholder for being “a bad guy,” *id.* at 239, 253-54); *Mecham v. Arizona House of Representatives*, 782 P.2d 1160, 1161 (Ariz. 1989); *Ferguson v. Maddox*, 263 S.W. 888, 892 (Tex. 1924); STAFF OF THE IMPEACHMENT INQUIRY, HOUSE COMM. ON THE JUDICIARY, 93d CONG., 2d SESS., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 26-27 (Comm. Print 1974); 116 CONG. REC. H11913-14 (daily ed. April 15, 1970) (remarks of Rep. Gerald R. Ford on the proposed impeachment of Justice William O. Douglas); Speech of James Iredell to North Carolina Ratifying Convention (July 28, 1788), reprinted in 4 ELLIOT’S DEBATES, *supra* note 9, at 113-14; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 4-17, at 291 (2d ed. 1988); Committee on Federal Legislation, Association of the Bar of the City of New York, *The Law of Presidential Impeachment*, 29 REC. ASS’N B. CITY N.Y. 155, 155-62 (1974).

Criminal sanctions serve a different social purpose. The criminal code, defined in statutes and applied by a neutral judiciary, embodies a minimum standard of behavior that society requires of all citizens. If, for instance, Lyndon Johnson drove drunk, he should have been convicted of drunken driving, not impeached. In this way, society would have expressed its disapprobation of his conduct, while retaining a leader who had done nothing to undermine his political legitimacy.

In light of their unflattering view of human nature, one of the framers' key purposes in designing constitutional institutions was to control the predictable misconduct of those who would hold high office. But if the President were immune from criminal prosecution while in office, practicalities ranging from the running of statutes of limitations<sup>77</sup> to the possibility that the Congress might be dominated by members of the President's political party<sup>78</sup> might often frustrate this purpose. Hence, the soundest way to view the relationship between the impeachment and the criminal sanction is that these dual controls are available simultaneously, rather than only sequentially.

## B. The Rule of Law

### 1. Civil Immunity

The concept that "[t]he government of the United States [is] . . . a government of laws, and not of men,"<sup>79</sup> also follows from the framers' pessimistic view of human nature. The courts have been called upon to

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77. For example, the general statute of limitations in the federal criminal system is five years. *See* 18 U.S.C. § 3282 (1994). If as few as 34 Senators shared the view that criminal tax evasion is not an impeachable offense, *see* Mezvinsky & Freedman, *supra* note 26, at 1079-80 (despite strong evidence that Richard Nixon criminally evaded taxes, the majority of the House impeachment committee refused to vote for the Article charging this, on the theory that impeachable offenses were confined to ones "that only the President could commit"), then, if a sitting President has immunity, a two-term President could commit that offense during his or her first three years in office with total impunity (unless the courts were willing to invent a new tolling doctrine to cover this situation, or, as I suggest in Part II, *infra*, Congress were to act). Such an immunity seems far broader than is defensible on any theory.

The Justice Department urged precisely this point in the Agnew prosecution, arguing that, since a statute of limitations was due to expire in a few weeks, the Vice-President would have permanent immunity from criminal prosecution if he could not be indicted while still in office. *See* Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, In re Proceedings of the Grand Jury Impaneled December 5, 1972, at 22 (D. Md. 1973), *reprinted in* App. C, *infra*.

78. *Cf.* Speech of Patrick Henry to Virginia Ratifying Convention (June 13, 1788), *reprinted in* 3 ELLIOT'S DEBATES, *supra* note 9, at 355 (arguing that impeachment will be an ineffectual check if sufficient number of Senators corrupted).

79. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

give concrete meaning to this idea in the course of crafting rules of civil immunity for federal and state officeholders that seek to encourage them to discharge their duties vigorously, but to discourage abuses. These cases have both substantive and methodological application to the problem of Presidential criminal immunity.

Substantively, as already discussed, civil immunity for officeholders has never been coupled with criminal immunity. Indeed, the existing legal structure for control of virtually all federal and state policy-making officers combines broad civil immunity with no criminal immunity.<sup>80</sup>

Methodologically, the lesson of the civil immunity cases is their highly pragmatic approach to the issue, which attempts on a case-by-case basis to determine the effect of immunity on the actual functioning of the office in light of the policy objectives of the underlying enactment.<sup>81</sup> This is the "functional" method of determining the existence and contours of official immunity from civil lawsuits.<sup>82</sup>

80. See *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) ("This Court has never suggested that the policy considerations which compel civil immunity for certain government officials also place them beyond the reach of the criminal law."), *quoted with approval in Mesa v. California*, 489 U.S. 121, 133 (1989); *see also United States v. Gillock*, 445 U.S. 360, 372 (1980) ("[T]he cases in this Court which have recognized an immunity from civil suit for state officials have presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials."), *cited with approval in Nixon v. Fitzgerald*, 457 U.S. 731, 754 & n.37 (1982) (asserting that the President is impliedly immune from civil damages actions, which implicate "a lesser public interest . . . than, for example, . . . criminal prosecutions").

81. A few of the most prominent results of cases taking this approach have been:

State judges enjoy immunity from paying damages for the issuance or non-issuance (as distinguished from the enforcement) of rules, *see Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 734, 738 (1980), and for judicial rulings, *see Mireles v. Waco*, 502 U.S. 9, 9-12 (1991) (*per curiam*), unless made in the "clear absence of all jurisdiction," *Stump v. Sparkman*, 435 U.S. 349, 357 (1978) (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 352 (1872)). However, except to the extent exempted by section 309 of the Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, they are subject to injunctive relief and the payment of attorneys fees in those cases, *see Pulliam v. Allen*, 466 U.S. 522, 541-44 (1984), and do not have absolute immunity from actions arising out of personnel decisions, *see Forrester v. White*, 484 U.S. 219, 230 (1988).

State prosecutors are absolutely immune for initiating prosecutions, *see Imbler v. Pachtman*, 424 U.S. 409, 431 (1976), and for participating in probable cause hearings, *see Burns v. Reed*, 500 U.S. 478, 487-92 (1991), but have only qualified immunity for advice given to the police. *See id.* at 496.

State governors enjoy a qualified immunity that depends on an examination of the totality of the circumstances. *See Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974) ("[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.").

State legislators have virtually complete immunity from civil damages actions when

To apply this method, the Court has explained,

we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of "qualified" immunity that avoids unnecessarily extending the scope of the traditional concept of absolute immunity.<sup>83</sup>

While there has been a good deal of scholarly unhappiness (which I share) over the assessments the Court has made with respect to particular classes of officials, the functional approach enjoys strong judicial support, and is likely to dominate the law for the foreseeable future.

If, therefore, subjecting the President to indictment did not interfere with the proper functioning of the office (the subject of Section 4), doing so would be fully consistent with the entire structure of existing case law. Perhaps more critically, such an outcome would be justified by the same insights into "the rule of law" which supported those results, as well as some newer ones.

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"acting in a field where legislators traditionally have power to act," *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951), and the same is true on the municipal level, *see Bogan v. Scott-Harris*, 118 S. Ct. 966, 970 (1998).

Federal executive branch officials "performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), unless the "special functions" of the officer "require a full exemption from liability," *Butz v. Economou*, 438 U.S. 478, 508, 514, 516-17 (1978) (granting absolute immunity to judges and prosecutors in federal administrative proceedings).

Finally, the President has no immunity from civil suits unrelated to his or her official duties, *see Clinton v. Jones*, 520 U.S. 681, 705 (1997), but absolute immunity from judicially implied civil causes of action based upon conduct within the "outer perimeter" of those duties. *See Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982) (quoting *Barr v. Matteo*, 360 U.S. 564, 575 (1959)). In deciding this case, the Court applied a functional approach to determine that the President should have absolute immunity, *see id.* at 749-57, but specifically noted that Congress had not spoken to the issue. *See id.* at 748 n.27. In light of the Court's traditional deference to Congress in this field, it seems fairly clear that the Court's discussion of the constitutional importance of the President's office, *see id.* at 749, was a supportive argument for the rule it created, rather than a ruling that the Constitution prohibited the Congressional imposition of liability.

82. *See Richardson v. McKnight*, 117 S. Ct. 2100, 2105-08 (1997) (denying immunity to private prison guards on grounds that policy goals that had led the Court to imply immunity in other contexts would not be vindicated by doing so in this one).

83. *Forrester v. White*, 484 U.S. 219, 224 (1988).

## 2. The Law as Fence and Crown

“The rule of law,” a shorthand expression for the thought that officeholders should be subject to the same demands they place on others, has two aspects. Both support the position advanced here.

The older rationale for “the rule of law”—the negative one, which dominates the immunity cases—is that officeholders would predictably abuse their powers and should be inhibited from misrule by the threat of legal sanctions.<sup>84</sup> In other words, the law was a fence designed to keep the willful officeholder within safe bounds. On this view of “the rule of law,” the President should be subject to indictment so as to deter the incumbent from improper conduct.

In more modern times, scholars have also called attention to that strand of the framers’ philosophy that hoped to find in the polity a devotion to the public good which would move a citizen to take up public office as an act of sacrifice for the benefit of the community. Analogously, legal rules may reflect not only their authors’ fears of the failures to which future mortals will succumb, but also the lawmakers’ dreams for the successes that later generations will achieve.

From this perspective, subjecting the President to “the rule of law” is not negative, but positive. Rather than degrading the office, as some have argued,<sup>85</sup> the incumbent’s amenability to prosecution enhances the reputation of the Presidency and reflects the nation’s hopes: a good citizen will undertake the position as a public service, rather than as an opportunity for self-aggrandizement, and will therefore glory in the known constraint of acting lawfully. On this positive view of “the rule of law”—one which sees it as a republican crown signifying the officeholder’s virtue—the President should be subject to indictment so as to legitimate his or her good character as a republican leader, that is, an ordinary citizen differing from his or her peers only in being temporarily delegated to perform certain functions.

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84. See Thomas A. Smith, Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561, 567-68 (1984) (summarizing framers’ views to this effect).

85. Cf. *United States v. Poindexter*, 732 F. Supp. 142, 156 (D.D.C. 1990) (discussed *infra* notes 140-44 and accompanying text). The court there responded to the objection made in President Reagan’s brief to “the spectacle of a former President being subjected to peremptory judicial process” as follows:

In view of recent developments toward the establishment of democratic forms of government in many parts of the world, and the concomitant halt to the isolation and organized adulation of all-powerful leaders, foreign nations might regard the amenability of a President of the United States to the processes of justice and to courts of law with understanding, and perhaps admiration, rather than with scorn.

*Id.*

Thus, even if no prosecution ever actually took place, a recognition that the President has no immunity would further the twin purposes underlying the "rule of law."

#### *Section 4. Practicalities*

Even many commentators who are willing to concede that my position is legally sound nevertheless reject it as simply unworkable.<sup>86</sup> They urge three general propositions, which will be considered in turn:

A. The Removal Objection: The indictment of the President is the functional equivalent of a removal from office, which, under the Constitution, may only be accomplished by impeachment;

B. The Harassment Objection: If the President were subject to criminal prosecution, numerous frivolous indictments would follow; and

C. The Intrusiveness Objection: The President would be chilled from the vigorous discharge of duty by the fear of potential criminal prosecution.

#### A. The Removal Objection

"Obviously," wrote Alexander M. Bickel in arguing for Presidential criminal immunity, "the presidency cannot be conducted from jail, nor can it be effectively carried on while an incumbent is defending himself in a criminal trial."<sup>87</sup> Therefore, the argument continues, to indict or punish the President is tantamount to a removal from office. Since this can assertedly only be accomplished by impeachment, the proposed conclusion is that the President may not be indicted while in office. This syllogism is vulnerable at four points.

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86. Most of these concerns were canvassed some time ago in a thoughtful and scholarly memorandum by Robert G. Dixon, Jr., a constitutional law expert who served as the Assistant Attorney General in charge of the Justice Department's Office of Legal Counsel, *see Robert G. Dixon Jr., Law Professor, Dies*, N.Y. TIMES, May 8, 1980, at D4, that has only recently surfaced publicly. Written as Watergate crises loomed, the memorandum concludes on the basis of a series of practical considerations that the President (in contrast to the Vice President) is immune from prosecution while in office. *See Memorandum re Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution While in Office* (Sept. 24, 1973) (on file with the *Hofstra Law Review*).

87. Bickel, *supra* note 12, at 15.

First, it hypothesizes a remote sequence of events, albeit one that I have argued we should provide for: the President is facing criminal proceedings, but not impeachment proceedings. If so, the criminal charges are likely to be relatively minor ones—drunk driving, say<sup>88</sup>—and the objection that one is effectively removing the President from office is pro tanto of less force. If not, then in measuring whether the Presidency can “be effectively carried on while an incumbent is defending himself,” the true comparison is not between the disruptiveness of criminal proceedings and no proceedings, but rather between the disruptiveness of criminal proceedings and impeachment proceedings—which would appear to be approximately equal.<sup>89</sup>

The removal objection also implausibly assumes that— notwithstanding the creativity in sentencing that judges exercise daily,<sup>90</sup>

88. To take another example, it is not inconceivable that a President might do as many public figures in our society have done: admit an addiction to alcohol or cocaine, plead guilty to negotiated criminal charges, vanish for a month or so of rehabilitation in an institution, and re-emerge to resume his or her prior role. As discussed below, Section 3 of the Twenty-fifth Amendment would make such a plan easy to implement.

The basic point is that rejecting the idea of criminal immunity for the President “provide[s] a means of regulating high-level executive misconduct that may go unregulated by the Executive Branch, yet may never rise to the level where an impeachment proceeding would gain sufficient congressional support.” Geoffrey M. McNutt, Note, *Formal and Functional Approaches to Separation of Powers: The Political Cost of Checks and Balances in Nixon v. United States and Morrison v. Olson*, 2 GEO. MASON L. REV. 281, 300 (1995).

89. Such scanty national experience as we have on this subject supports this equivalence. Andrew Johnson did not attend his impeachment trial, but was acquitted nonetheless. Richard Nixon never appeared in a courtroom throughout the Watergate affair, and, even when considering fining him for contempt, the trial judge was prepared to excuse him from personal appearance. See JOHN J. SIRICA, TO SET THE RECORD STRAIGHT: THE BREAK-IN, THE TAPES, THE CONSPIRATORS, THE PARDON 179 (1979).

The order I had drawn up required the president to appear the next morning in my court to explain why a contempt citation should not be issued and fines not imposed.

And should he elect simply to send his lawyers, I required that he personally sign a waiver of his right to appear.

*Id.*; cf. *infra* note 96 (discussing disruptive effects of Clinton impeachment).

90. The overwhelming majority of convicted criminals in this country are not sentenced to prison, and, as cell space grows increasingly scarce relative to demand, the use of alternative sentences is increasing. See Michael deCourcy Hinds, *Feeling Prisons' Costs, Governors Weigh Alternatives*, N.Y. TIMES, Aug. 7, 1992, at A17; Andrew H. Malcolm, *New Strategies to Fight Crime Go Far Beyond Stiffer Terms and More Cells*, N.Y. TIMES, Oct. 10, 1990, at A16.

Thus, no great judicial creativity would be required to impose a non-jail (or perhaps weekend jail) sentence on a convicted President, and the tools for doing so would lie close at hand. See, e.g., Alicia M. Grace, Note, *Home Incarceration Under Electronic Monitoring: A Statutory Review*, 7 N.Y.L. SCH. J. HUM. RTS. 285 (1990); Elizabeth Anderson, *States Using Electronic Device to Monitor Prisoners at Home*, N.Y. TIMES, N.J. Weekly, May 13, 1990, at 1 (“Nationally, experts estimate, 10,000 criminals in more than 40 states are electronically monitored” by a bracelet device that creates “an unstructured structured environment” which can be adapted to convicts’ scheduling needs); Ronald Smothers, *Birmingham Mayor Cited for Contempt*, N.Y.



and the extreme deference with which the person of the President has always been treated by the courts in the testimonial context—a court would impose a jail term upon conviction.<sup>91</sup>

Second, even assuming all of that (but also assuming, as we must for the objection to have any force, that the crime is not so serious as to result in removal from office by impeachment—which suggests that the sentence will be relatively short), it may indeed be possible to conduct the Presidency from a jail cell. Woodrow Wilson after his stroke in 1919 and Ronald Reagan following his prostate surgery in early 1987 were both so incapacitated as to be well-nigh absent.<sup>92</sup> But, through surrogates, the Presidency was conducted nonetheless. Additionally, developments in communications technology continue to enhance the ability of white collar workers like the President to conduct their business from virtually anywhere.<sup>93</sup>

Far-fetched as this may sound, experience shows that we are much more likely to underestimate than overestimate the robustness of the Presidency. When subpoenaed for the Burr trial, Jefferson complained that such a precedent would make it impossible for him to discharge his duties,<sup>94</sup> yet the President managed to conduct a vigorous defense at the same time as he was overseeing the military and diplomatic preparations for what seemed to be imminent wars with both Britain and the Indian tribes of the Midwest.<sup>95</sup> Similarly, the crises of Watergate came

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TIMES, Jan. 18, 1992, at A6 (Federal contempt citation issued against Mayor Richard Arrington, Jr., “drawn to consider the ‘right of the people of Birmingham to have their Mayor on duty,’” calls for him to serve jail terms lasting from Thursday evenings to Monday mornings of each week he fails to comply with document subpoena in corruption investigation).

91. Cf. Speech of James Madison to Virginia Ratifying Convention (June 14, 1788), reprinted in 3 ELLIOT’S DEBATES, *supra* note 9, at 408 (“We must keep within the compass of human probability. If a possibility be the cause of objection, we must object to every government in America.”).

92. See KENDRICK A. CLEMENTS, *WOODROW WILSON: WORLD STATESMAN* 216 (1987); DONALD T. REGAN, *FOR THE RECORD: FROM WALL STREET TO WASHINGTON* 71 (1988); EDWIN A. WEINSTEIN, *WOODROW WILSON: A MEDICAL AND PSYCHOLOGICAL BIOGRAPHY* 357-69 (1981).

93. Cf. Maureen Dowd, *Aides Worry About How Bush’s Vacation Looks in a Crisis*, N.Y. TIMES, Aug. 11, 1990, at A8 (explaining that not wishing “to appear to be held hostage in the White House to events,” President Bush went on vacation to Maine three days after sending troops to the Persian Gulf, assuring the public that “highly complex and highly efficient communications” enabled him to conduct necessary business from there). See generally Spencer Reiss, *The Strongman in Stir*, NEWSWEEK, Nov. 5, 1990, at 24 (describing special arrangements for General Manuel Noriega of Panama in a Miami federal prison).

94. See *infra* note 127-28 and accompanying text.

95. See Letter from Thomas Jefferson to James Madison (Sept. 1, 1807), reprinted in 11 THE WRITINGS OF THOMAS JEFFERSON 350-51 (Andrew A. Lipscomb ed., 1904); Letter from Thomas Jefferson to Henry Dearborn (Sept. 6, 1807), reprinted in *id.* at 361; Letter from Thomas Jefferson

simultaneously with both the Agnew resignation and a Middle Eastern war,<sup>96</sup> with no visible adverse effect on the President's performance.

Third, even assuming that the President could not perform his or duties effectively while defending against criminal charges or serving a criminal sentence, the removal objection is flawed because its legal premise—that impeachment is the exclusive means of removing a President from office—is constitutionally inaccurate. The Twenty-Fifth Amendment provides two mechanisms for having the President leave office temporarily.

The simplest possibility would be for the President, invoking Section 3 of the Amendment,<sup>97</sup> to step aside voluntarily for the duration of the criminal proceedings. The language of Section 3 was deliberately left broad, both to cover unexpected contingencies and to encourage the President to relinquish his or her duties when circumstances warranted.<sup>98</sup> For this reason, its use by a President prior to entering jail would be as appropriate as its use prior to undergoing surgery. For instance, a popular President, arrested for relatively minor wrongdoing, might apologize

to Thomas Paine (Sept. 6, 1807), *reprinted in id.* at 362.

96. See 2 RICHARD NIXON, RN, *THE MEMOIRS OF RICHARD NIXON* 475-503 (1978).

The experience of President Clinton certainly supports the suggestion, *see supra* note 89 and accompanying text, that impeachment proceedings do at least as much damage to the President's ability to conduct foreign affairs as criminal proceedings would. On the day the House was scheduled to vote to impeach him, President Clinton launched air strikes against Iraq, thereby setting off an intense political controversy as to whether the action had been taken in good faith or to disrupt the impeachment process. See Francis X. Clines & Steven Lee Myers, *Impeachment Vote in House Delayed As Clinton Launches Iraq Air Strike, Citing Military Need to Move Swiftly*, N.Y. TIMES, Dec. 17, 1998, at A1; *see also* James Bennet & John M. Broder, *A Long Day of Planning and Fatigue, on 2 Fronts*, *id.* at A29 (describing President's intertwined consideration of the two matters). Subsequently, it was suggested that the President's decisionmaking process leading to his determination that NATO should conduct a bombing campaign in response to Yugoslavia's actions in Kosovo had been undermined by distractions caused by his impeachment and Senate trial. See Elaine Sciolino & Ethan Bronner, *How a President, Distracted by Scandal, Entered Balkan War*, N.Y. TIMES, Apr. 18, 1999, at A1.

97. This provides:

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

U.S. CONST. amend. XXV, § 3.

98. See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT* 197 (1976) (Lack of definition of inability "was not the result of an oversight. Rather, it reflected a judgment that a rigid constitutional definition was undesirable . . ."); William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: "The Emperor Has No Clones"*, 75 GEO. L.J. 1389, 1405 (1987) ("Section 3 of the amendment is intended . . . to encourage an incapacitated President to step aside temporarily by assuring that resumption of the office will be possible immediately upon recovery.").

to the nation, serve the sentence, and return to the good graces of the country. In fact, during Watergate, lawyers for both the White House and the Special Prosecutor planned for the possibility of President Nixon making use of Section 3 if he wished to step aside temporarily while fighting legal battles.<sup>99</sup>

Professor Bickel argued against using the Twenty-Fifth Amendment in this way, urging that the Amendment should be applied only to physical disability, because “the amendment would be a dangerous instrument indeed if it were otherwise.”<sup>100</sup> But that position has little force when applied to Section 3, which can only be triggered by the voluntary action of the President.

The argument for a limited definition of inability is more plausible when the discussion turns to the second option under the Twenty-Fifth Amendment, a declaration by the Vice-President and the Cabinet, acting under Section 4,<sup>101</sup> that the President “is unable to discharge the powers and duties of his office” due to the criminal proceedings. Because such a declaration would have the effect of suspending the President from office, if those officers thought that the President’s legal difficulties were incapacitating and the President thought otherwise, a crisis might well ensue. But this precise problem was foreseen by the framers of the Amendment, who did not choose to solve it by Professor Bickel’s method of limiting the definition of “inability” to physical illness.<sup>102</sup>

99. See BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* 325 (1976).

100. Bickel, *supra* note 12, at 15.

101. This provides:

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the [Congress] their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the [Congress] his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days . . . their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue . . . If the Congress . . . determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

U.S. CONST. amend. XXV, § 4.

102. See FEERICK, *supra* note 98, at 198-99 (describing various emergencies considered in floor debates); III PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 68-69 (Kenneth W. Thompson ed., 1996) (Justice Department contemplated that President might be taken hostage); Brown & Cinquegrana, *supra* note 98, at 1407 n.68 (sponsors considered, *e.g.*,

Rather, they deliberately made it more difficult to remove the President through Section 4 (two-thirds vote in both Houses) than by impeachment (majority in the House, two-thirds in the Senate). In the words of the Amendment's author and prime sponsor, "We were concerned about the politics of the palace coup. So in reality, we created a vehicle where it is more difficult to declare a president disabled than it is to impeach him for a breach of his constitutional duties."<sup>103</sup> Hence, any President involuntarily removed under Section 4 would be one who in any event lacked the votes to stave off impeachment.

History has already shown the wisdom of the framers' choice. One serious concern during Watergate was that President Nixon might be impeached and convicted, and yet remain in the White House, perhaps protected by the military, and refuse to leave.<sup>104</sup> This nightmare scenario had been envisioned by the opponents of the original Constitution,<sup>105</sup> but the availability of Section 4, with its unambiguous procedures for demonstrating the overwhelming will of the country, helps reduce the likelihood of the nightmare coming true.

Section 4 could prove equally valuable if an incumbent President were to be indicted. There could, for example, be a form of plea bargain, under which the President, rather than be impeached, agreed not to contest a Section 4 suspension from office during the pendency of criminal proceedings.<sup>106</sup> But even without the President's consent, the

capture of President by enemy).

103. See PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT, *supra* note 102, at 10-11 (remarks of former Senator Birch Bayh); see also Brown & Cinquegrana, *supra* note 98, at 1413-14. Senator Bayh's account of the writing and passage of the amendment is BIRCH BAYH, ONE HEARTBEAT AWAY (1968).

104. See WOODWARD & BERNSTEIN, *supra* note 99, at 214-16 (group headed by Phil Buchen, later White House counsel, that met to plan for the Ford Presidency considered this possibility and the potential need to remove Nixon through Section 4); William Safire, *Command & Control*, N.Y. TIMES, Dec. 7, 1989, at A35 (corroborative account of former Secretary of Defense James Schlesinger).

105. See Letter from Tamony to Virginia Independent Chronicle (Jan. 9, 1788), reprinted in 15 DOCUMENTARY HISTORY, *supra* note 5, at 324 (President will use the army to resist impeachment; no hope for "the bauble of a mace, hazarded in the mouth of a mortar"); LUTHER MARTIN, THE GENUINE INFORMATION DELIVERED TO THE STATE OF MARYLAND 69 (Philadelphia 1788), reprinted in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 219-20 (In light of President's powers, "to him it would be of little consequence whether he was impeached or convicted, since he will be able to set both at defiance"); cf. Speech of Patrick Henry to Virginia Ratifying Convention (June 5, 1788), reprinted in 3 ELLIOT'S DEBATES, *supra* note 9, at 59-60 (President will not be stopped by criminal process any more than by impeachment; he will prefer to conduct a coup backed by army rather than "being ignominiously tried and punished.").

106. Cf. William Safire, *Taking the 25th*, N.Y. TIMES, July 15, 1985, at A19. ("Someday a President will be faced with a debilitating physical or mental ailment, and will find tempting an option that is short of resignation.").

use of Section 4 to accomplish such a suspension would be perfectly appropriate, and might under some circumstances be preferable to impeachment. Suppose, for example, the charges were serious but the evidence of guilt were unclear. Remitting the President to the criminal process, from which he or she could seek to return to office at any time, might well be more desirable, from the viewpoint of governmental efficiency and as a matter of due process, than protracted impeachment proceedings that might effectively recreate the parliamentary practice of criminal trials in a legislative forum.

In short, using either Section 3 or Section 4 of the Twenty-Fifth Amendment to remove the President from office until the resolution of criminal charges would be not only legal, but eminently practical. This conclusion strikes a hard blow at the argument that the President must have immunity from criminal charges while in office because under the Constitution he or she may only be removed from office by impeachment.

Fourth, the question of how to enforce a criminal sentence against the President is no different than the question of how to enforce a subpoena against the President.<sup>107</sup> Yet, while acknowledging the potential problems in implementing their decrees,<sup>108</sup> judges have regularly required Presidents to comply with testimonial demands.<sup>109</sup> The courts have apparently believed, and with some reason, that, should push come to shove: (1) they would be able to formulate an appropriate coercive sanction,<sup>110</sup> or (2) the President would deem the political costs of resis-

107. Thus, for instance, in arguing *Mississippi v. Johnson*, 71 U.S. 475 (1866), on behalf of the President, Attorney General Henry Stanbery vigorously criticized the Burr subpoena case, *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va.) (No. 14,692d) (discussed *infra* notes 117-29 and accompanying text), on the basis that the testimonial duty recognized there could not be enforced without imprisoning the President, which would constitute an improper judicial removal from office. See *Mississippi v. Johnson*, 71 U.S. at 487. The same argument was made by the dissent in *Nixon v. Sirica*, 487 F.2d 700, 757 (D.C. Cir. 1973) (en banc). But, as a result of *United States v. Nixon*, 418 U.S. 683 (1974) (discussed *infra* notes 134-35 and accompanying text), the Burr rule is now firmly established. See *United States v. Nixon*, 418 U.S. at 702.

108. See SIRICA, *supra* note 89, at 179 ("As I said, I had thought a few times about imposing a jail sentence, but that was absurd . . . And what would I have done to enforce the sentence? Send the United States marshals over to confront the Secret Service?").

109. Perhaps the enforcement problem has encouraged the courts in their practice, discussed below, of showing great deference to Presidents, but that would be true in the criminal context as well. The courts would no doubt be mindful of the problem as they drew the contours of the President's substantive privilege.

110. See, e.g., SIRICA, *supra* note 89, at 179-80 (trial judge was prepared to enforce the grand jury subpoena issued to President Nixon by a contempt citation and fines).

In a practical example of the validity of this reasoning, the trial judge in the sexual harassment case brought by Paula Corbin Jones against President Clinton held him in contempt for testifying falsely during his deposition, see *Jones v. Clinton*, 36 F. Supp. 1118 (E.D. Ark. 1999),

tance too high,<sup>111</sup> or (3) the country would consider defiance itself to be an impeachable offense. All of the same considerations apply to the enforcement of criminal sanctions. Certainly, a President who wished to retain office would have strong incentives to appear to be cooperating with, rather than defying, the criminal process.

It is in this context that one should consider the suggestion of then-Solicitor General Bork that the President must have immunity because the power to pardon himself or herself would render any conviction nugatory.<sup>112</sup> The brief response is that, assuming the legal premise is accurate,<sup>113</sup> this possibility is logically unconnected to the issue of whether the officeholder has immunity while in office. If a President deemed the legal and political risks of the pardon route worth taking in order to achieve protection after leaving office, he or she could take it regardless of how the immunity issue were decided.<sup>114</sup>

But there is also a slightly longer answer. In cases where the President's crimes are also impeachable offenses, the amenability of the President to prosecution while in office is of less importance than in other circumstances.<sup>115</sup> The President's lack of immunity from criminal proceedings is most critical in situations where the crime is not impeachable, e.g. drunken driving, and prosecution serves as a mechanism to enable society to express its disapprobation while retaining a leader who continues to enjoy political support. Any President who pardoned himself or herself for a crime of that sort would surely forfeit that political support, and be impeached.

Yet the President would have a strong incentive to remain in the good graces of the country. Since the power to pardon extends only to

and sanctioned him by directing him to reimburse the Court and opposing counsel approximately \$90,000 for the costs he had thereby created. *See Jones v. Clinton*, No. LR-C-94-290, 1999 WL 555622 (E.D. Ark. July 29, 1999). The President immediately responded by issuing a statement saying, "We accept the order of the court and will comply with it." *See Robert Suro, Clinton is Sanctioned in Jones Lawsuit; Payment Ordered to Lawyers, Court*, WASH. POST, July 30, 1999, at A1.

111. This is the conclusion President Nixon reached. *See infra* note 136.

112. *See* Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, In re Proceedings of the Grand Jury Impaneled December 5, 1972, at 20 (D. Md. 1973), reprinted in App. C, *infra*.

113. For a persuasive case to the contrary, *see* Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779 (1996).

114. *See* WOODWARD & BERNSTEIN, *supra* note 99, at 325-26 (During Watergate, President Nixon's staff researched the issue of whether he could pardon himself, and concluded that he could); *see also* Daniel Schorr, *Will Bush Pardon Himself?*, N.Y. TIMES, Dec. 29, 1992, at A15 (describing this episode).

115. *But cf. supra* notes 77-78 and accompanying text (discussing practical benefits of having both sanctions available).

“Offences against the United States,”<sup>116</sup> the officeholder would remain subject to correlative state prosecutions regardless of the self-pardon; and whether or not those could be brought while he or she remained in office, they could be afterwards.

These legal, political, and practical considerations all reinforce the conclusion validated by the actual experience of President Nixon: the self-pardon scenario does not weaken the argument against the removal objection. Realistically, criminal prosecution is less likely to be a removal from office than an alternative to it.

## B. The Harassment Objection

The view that permitting indictment of the President could unleash a potentially debilitating swarm of frivolous prosecutions is practically, historically, and legally unsound. It is, in addition, inconsistent with the experience we have had, and with the legal framework we could have.

### 1. Historical Judicial Protection

The President receives more deference from the courts than any other official in the country, as the cases regarding his or her amenability to give testimony show. The courts have long insisted on, and Presidents have generally accepted, a presidential duty to provide relevant trial testimony. Yet the judiciary has enforced this duty with considerable deference to the demands of the President’s office, thus protecting the incumbent from harassment while making evidence available in appropriate cases. Any court faced with the problem of protecting the President from an abusive criminal prosecution would approach the issue against the backdrop of this rich constitutional history.

In 1807, Aaron Burr stood trial for treason. The charges were in substance that, following his term as Vice President, he had sought to separate some of the country’s newly-acquired western territories from their allegiance to the United States. During the course of the proceedings, he demanded that President Jefferson produce a letter that Jefferson had received from General James Wilkinson. The basis for the request was that Jefferson had informed Congress of the letter in a message that stated that Burr’s “guilt is placed beyond question.”<sup>117</sup> Chief Justice Marshall, who was presiding at the trial, distinguished the President from the King, and ordered issuance of the subpoena. He

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116. U.S. CONST. art. II, § 2, cl. 1.

117. See *United States v. Burr*, 25 F. Cas. 30, 32, 36 (C.C.D. Va. 1807) (No. 14,692d); 16 ANNALS OF CONG. 39 (1807) (message to Congress of Jan. 22, 1807).

stated that once the document had been produced, he would review it in camera to redact any irrelevant material implicating matters of state.<sup>118</sup>

On receiving the subpoena, Jefferson wrote counsel for the government, promising to send the requested letter, and requesting that counsel furnish the defense with the material sections.<sup>119</sup> Counsel accordingly tendered the defense portions of the letter while offering to submit the entire document to the court.<sup>120</sup> Burr objected that this was insufficient,<sup>121</sup> and Marshall delivered another opinion, this one stating that he would not even consider permitting any redactions unless they were personally directed by the President; Marshall added, however, that he would limit circulation of the letter.<sup>122</sup> Counsel for the government thereupon sent a messenger with the letter to Jefferson at Monticello, who returned it with a certificate stating that he was withholding only confidential matters having nothing to do with the pending charges.<sup>123</sup> Since the trial had in the meantime been progressing very favorably for Burr,<sup>124</sup> he apparently accepted the redacted version,<sup>125</sup> and did not pursue the matter further prior to his acquittal on the remaining charges shortly thereafter.<sup>126</sup>

This pragmatic series of rulings established the pattern that future courts have followed—insisting on their power to compel presidential testimony, but exercising that power in a way maximally protective of the officeholder's official functioning.

To be sure, after the trial, Jefferson, who had a long history of conflict with Marshall and believed that the Federalists sitting on the bench had a partisan bias against him, complained that Marshall had been wrong in his decision, particularly in asserting in dictum the right to compel his personal attendance.<sup>127</sup> It would be impractical, Jefferson

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118. See *Burr*, 25 F. Cas. at 30, 37; see also THOMAS JEFFERSON CORRESPONDENCE (W.C. Ford ed. 1916) (photoreproduction of subpoena on unnumbered page between 144 and 145; court clerk's endorsement states: "The transmission to the Clerk of this Court of the original letter . . . will be admitted as sufficient observance of the process without the personal attendance of any . . . of the persons therein named").

119. See *Burr*, 25 F. Cas. at 55, 65.

120. See 2 REPORTS OF THE TRIALS OF COLONEL AARON BURR 514 (David Robertson ed. 1808); 3 THE TRIAL OF COL. AARON BURR, 25, 28 (T. Carpenter ed., 1808).

121. See 2 REPORTS OF THE TRIALS OF COLONEL AARON BURR, *supra* note 120, at 514; 3 THE TRIAL OF COL. AARON BURR, *supra* note 120, at 28-30.

122. See *Burr*, 25 F. Cas. at 187, 190-92.

123. See *id.* at 193; 3 THE TRIAL OF COL. AARON BURR, *supra* note 120, at 46.

124. See *Burr*, 25 F. Cas. at 55, 180-81 (acquitting Burr on the most serious charges).

125. See 3 THE TRIAL OF COL. AARON BURR, *supra* note 120, at 39, 46.

126. See *Burr*, 25 F. Cas. at 187, 201.

127. See William H. Rehnquist, *Thomas Jefferson and his Contemporaries*, 9 J.L. & POL. 595, 604 (1993).



asserted, to expect him and his cabinet officers to be removed from their constitutional duties and "be dragged from Maine to Orleans by every criminal who will swear that their testimony 'may be of use to him.'"<sup>128</sup>

Nonetheless, during the trial itself Jefferson wrote the court:

if the defendant suppose there are any facts within the knowledge of the heads of departments or of myself, which can be useful for his defence, from a desire of doing anything our situation will permit in furtherance of justice, we shall be ready to give him the benefit of it, by way of deposition . . . at this place.<sup>129</sup>

In keeping with this precedent, President Monroe, in 1818, sent interrogatory answers to the court martial of his appointee, Dr. William Barton, after having been served with a subpoena by the defense and advised by the Attorney General that he was required to provide information, although not necessarily to attend the trial, and President Grant provided deposition testimony from the White House to assist the defense of one of his associates accused of corruption.<sup>130</sup>

Since this history was not widely known, by the time of Watergate some commentators considered the President's amenability to process doubtful.<sup>131</sup> However, in October of 1973 the en banc United States Court of Appeals for the District of Columbia Circuit upheld a subpoena from the Watergate grand jury for tape recordings of presidential conversations,<sup>132</sup> and President Nixon chose not to appeal the decision.<sup>133</sup>

Any remaining doubts about the President's obligations to respond to judicial testimonial demands were convincingly dispelled nine months later by the unanimous opinion in *United States v. Nixon*,<sup>134</sup> which relied heavily on *Burr* to uphold a trial subpoena that, subject to a

128. Letter from Thomas Jefferson to George Hay (June 20, 1807), reprinted in 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 95, at 241-42; see also Letter from Thomas Jefferson to George Hay (Sept. 7, 1807), reprinted in 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 95, at 365.

129. *Burr*, 25 F. Cas. at 55, 69.

130. These episodes, along with several similar ones, were rescued from obscurity by an assistant counsel to the Senate committee investigating Watergate. See Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 34 U. ILL. L.F. 1, 3, 5-6 (1975).

131. See Nathan Lewin, *Subpoenaing The President*, NEW REPUB., June 9, 1973, at 19; *On Taking A President Before a Grand Jury*, N.Y. TIMES, June 10, 1973, at E14 (two letters to the editor); "President Nixon Can Be Made to Appear Before the Grand Jury", WASH. POST, June 1, 1973, at A25 (letter to the editor).

132. See *Nixon v. Sirica*, 487 F.2d 700, 722 (D.C. Cir. 1973) (en banc).

133. See 2 NIXON, *supra* note 96, at 937; WOODWARD & BERNSTEIN, *supra* note 99, at 72-73.

134. 418 U.S. 683 (1974).

series of safeguards, compelled the President to surrender tapes and documents for use in the Watergate prosecutions of many of his key aides and political operatives.<sup>135</sup> Despite some pre-judgment hints that he might not comply with an adverse ruling—a course of action that would surely have resulted in his immediate impeachment and conviction<sup>136</sup>—President Nixon produced the materials, and was forced to resign as a result of the disclosures in them.

Applying this ruling the following year, a District Court overruled the government's objections and directed enforcement of a subpoena issued to President Ford by a criminal defendant accused of attempting to assassinate him.<sup>137</sup> But it made sure to minimize any inconvenience; the lawyers traveled to Washington, and the President gave his testimony on videotape in his office.<sup>138</sup>

In the Iran-Contra affair, the courts showed this same pattern of maximum deference, but ultimate compulsion. In the prosecution of Colonel Oliver North, the trial judge ruled that the Presidential materials sought were not necessary to the defense, thus mooting any questions concerning the mode of compliance.<sup>139</sup> In the prosecution of Admiral John M. Poindexter, the trial judge ruled: (1) The materials sought from

135. See *id.* at 702, 723-25; see also WOODWARD & BERNSTEIN, *supra* note 99, at 263-64 (Justices unanimously decided against President day after argument).

136. See 2 NIXON, *supra* note 96, at 630 ("In the event that the Court ruled flatly against me in the tapes case, I could decide to defy the ruling. But that would almost certainly bring about impeachment and therefore could not realistically be considered.")

137. See *United States v. Fromme*, 405 F. Supp. 578 (E.D. Cal. 1975).

138. See Lucinda Franks, *Fromme Jury Hears Ford Tape; Testimony First by a President*, N.Y. TIMES, Nov. 15, 1975, at 1; see also Fromme, 405 F. Supp. at 583. Thereafter, President Carter testified in several less-remembered cases: for the prosecution at the federal gambling conspiracy trial of two Georgia officials, who were acquitted, see Susan Fraker et. al, *A Superstar Witness*, NEWSWEEK, May 1, 1978, at 33; to a grand jury investigating charges that Robert L. Vesco attempted to apply improper influence to the administration to fix his legal problems, see Edward T. Pound, *Jury in Vesco Case Sees Carter on Tape*, N.Y. TIMES, Mar. 2, 1980, at A39, an investigation that ultimately ended with the grand jury declining to bring any indictments, see Laura A. Kiernan & Charles R. Babcock, *18-Month Vesco Probe Ends With No Indictments*, WASH. POST, Apr. 2, 1980, at A3; at a deposition taken by special counsel Paul J. Curran investigating improprieties at his peanut warehouse, see *Justice Clears Carter Warehouse*, 11 NAT'L J. 1783 (1979); and at a Justice Department deposition regarding lobbying by his brother Billy, see Neil A. Lewis, *President's Strategy: Put Burden on Starr*, N.Y. TIMES, Aug. 18, 1998, at A13.

139. See *United States v. North*, No. 88-0080-02, 1989 U.S. Dist. LEXIS 2903, at \*1-6 (D.D.C. Mar. 31, 1989) (refusing to enforce a subpoena issued to ex-President Reagan and noting that court had previously quashed subpoena issued to ex-Vice-President, and sitting President, Bush; court had power in both cases, but defendant had failed to show that subpoenas likely to yield relevant evidence); Christopher Walther, Comment, *Legitimacy: The Sacrificial Lamb at the Altar of Executive Privilege*, 78 KY. L.J. 817, 832-33 (1989-90) (agreeing with *United States v. North* insofar as it affirmed court's power, but criticizing it for imposing excessively heavy threshold burden on defendant seeking evidence).

President George Bush (who had been Vice-President during the relevant period) were irrelevant or cumulative;<sup>140</sup> (2) The court would conduct an in camera inspection of portions of the diary kept by Ronald Reagan while he was President to determine whether they had to be turned over to the defense;<sup>141</sup> (3) The defense was entitled to take the videotaped deposition of former President Reagan concerning his conduct in office, but under the supervision of the trial judge, at a time and place convenient to the witness, and in secret, so that the government would have the opportunity to move for redactions from the testimony before it was made public.<sup>142</sup> Rulings (2) and (3) were both made over vigorous objection,<sup>143</sup> but former President Reagan complied without seeking appellate review.<sup>144</sup>

As of this date, President Clinton has given testimony four times, all by videotape: in support of the defense in a federal criminal trial arising from loan fraud committed in connection with the Whitewater land venture;<sup>145</sup> as a defense witness in the federal criminal trial of two Arkansas bankers charged with misapplication of funds in connection with his 1990 gubernatorial campaign;<sup>146</sup> at his deposition taken as a de-

140. See *United States v. Poindexter*, 725 F. Supp. 13, 30 (D.D.C. 1989).

141. See *United States v. Poindexter*, 727 F. Supp. 1501, 1511 (D.D.C. 1989). After conducting this examination, the court initially determined that some of the entries were relevant, see *United States v. Poindexter*, 732 F. Supp. 135, 141 (D.D.C. 1990); David Johnston, *Reagan is Ordered to Provide Diaries in Poindexter Case*, N.Y. TIMES, Jan. 31, 1990, at A1, but ultimately refused to provide them to the defense in light of the government's assertion of executive privilege, and Admiral Poindexter's opportunity (described in the text) to take the former President's testimony. See *United States v. Poindexter*, No. 88-0080-01, 1990 U.S. Dist. LEXIS 2881, at \*14-15 (D.D.C. Mar. 21, 1990); David Johnston, *Poindexter Loses Fight for Reagan Notes*, N.Y. TIMES, Mar. 22, 1990, at A20.

142. See *United States v. Poindexter*, 732 F. Supp. 165, 167, 170 (D.D.C. 1990); *United States v. Poindexter*, 732 F. Supp. 142, 160 (D.D.C. 1990).

143. See David Johnston, *Reagan Asks Court to Kill Subpoena*, N.Y. TIMES, Dec. 7, 1989, at A27; see also Anthony Lewis, *Not by Divine Right*, N.Y. TIMES, Mar. 16, 1990, at A35 (praising rulings in light of history, and because "the royal view of the Presidency has been rejected by the courts once again").

144. See David Johnston, *Reagan Testifies He Did Not Order Any Illegal Acts*, N.Y. TIMES, Feb. 23, 1990, at A1.

145. See Stephen Labaton, *Clinton Denies Any Links to Whitewater Case Loan*, N.Y. TIMES, May 10, 1996, at A1. The defendants, James and Susan McDougal and incumbent Governor Jim Guy Tucker of Arkansas, were convicted. See Stephen Labaton, *Clinton Partners in Arkansas Deal Convicted by Jury*, N.Y. TIMES, May 29, 1996, at A1; see also *supra* note 59.

146. See Stephen Labaton, *Clinton Denies Trading State Jobs for Gifts*, N.Y. TIMES, July 19, 1996, at A16. The defendants were acquitted of many of the charges, see Stephen Labaton, *2 Acquitted by Whitewater Jury; Mistrial Declared on Other Counts*, N.Y. TIMES, Aug. 2, 1996, at A1, and independent counsel Kenneth Starr decided to drop the remainder. See Jerry Seper, *Starr Closes Book on Arkansas Bankers; He Won't Try Them Again for Fraud*, WASH. TIMES, Sept. 4, 1996, at A6.

fendant in the civil sex harassment case brought by Paula Corbin Jones;<sup>147</sup> and to a grand jury investigating whether he committed perjury or obstruction of justice in connection with that testimony.<sup>148</sup>

This lengthy history provides a solid basis for predicting what would happen if the President became the subject of a criminal prosecution: the courts would extend every possible procedural protection, and their efforts would amply protect the officeholder against vexation. Since there are presumably many more situations in which it might be plausibly claimed that the President has relevant evidence than ones in which it might be plausibly claimed that the President has committed a crime, the case for testimonial immunity is—from the point of view of safeguarding against harassment—stronger than the case for criminal immunity. The fact, therefore, that the courts have been able to reach appropriate accommodations in the testimonial context strongly supports the view that they would be able to do so in the criminal context.

## 2. Self-Protection

The President has ample assets for self-defense, including rich legal resources, a unique ability to mobilize public opinion, and unparalleled control over prosecutorial decisions. As a practical matter, it is far more likely that an ill-inclined President could launch a harassing investigation of a judge who had rendered unfavorable rulings, or of a Senator or Governor perceived as a potential rival, than that one of these officeholders could instigate an unfounded investigation of the Presi-

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147. See *Jones Looks on As Clinton Testifies at Deposition; President Responds to Accusations for Six Hours*, ST. LOUIS POST-DISPATCH, Jan. 18, 1998, at A1. Eventually, the District Court granted summary judgment to the defendants. See *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998); Francis X. Clines, *Paula Jones Case is Dismissed; Judge Says Even if Tale is True, Incident Was Not Harassment*, N.Y. TIMES, Apr. 2, 1998, at A1. While this ruling was on appeal, the case settled. See *Jones v. Clinton*, 36 F. Supp.2d 1118, 1123 (E.D. Ark. 1999).

148. See John M. Broder & Don Van Natta, Jr., *Clinton Agrees to Testify For Lewinsky Grand Jury; Starr Retracts Subpoena*, N.Y. TIMES, July 30, 1998, at A1; Eric M. Freedman, *Clinton and the Irresistible Urge of History*, LEG. TIMES, Aug. 3, 1998, at 2.

Subsequently, as part of an investigation by Attorney General Reno into whether she should call for an independent counsel to investigate alleged violations of campaign finance laws during President Clinton's 1996 re-election effort, President Clinton was questioned by Justice Department lawyers and F.B.I. agents at the White House; there was a similar interview of Vice-President Gore a few days later. See James Bennet, *Justice Dept. Questions President in '96 Campaign Finance Inquiry*, N.Y. TIMES, Nov. 10, 1998, at A1; *Gore Interviewed About Campaign Advertising*, N.Y. TIMES, Nov. 12, 1998, at A4. The Attorney General then decided against seeking the appointment of an independent counsel. See Robert Suro, *Reno Won't Seek Probe by Counsel on '96 Ads; Reno Decides Against Independent Counsel Probe of 1996 Clinton Ads*, WASH. POST, Dec. 8, 1998, at A1.

dent.<sup>149</sup> That existing prosecutorial power has not been abused, and is apparently subject to adequate political checks when seen to be abused, is good empirical evidence of the weakness of the harassment objection as applied to the President.

### 3. Statutory and Judicial Protection

Quite apart from the safeguards already created by the judiciary in the testimonial context, any future President under indictment would benefit from unique legal safeguards against harassment. Some of these exist currently, and, as I discuss in Part II, others could be put in place if Congress wished. But let us for the moment take the worst case from the harassment standpoint. Assume Congress does nothing, the independent counsel statute expires, and a meritless prosecution is commenced by state authorities.<sup>150</sup> The President still (1) would have the benefit of the federal removal statute,<sup>151</sup> and (2) access to the federal courts to enjoin the vexatious proceedings.<sup>152</sup>

149. Further, as discussed below, even if such an event took place, the President would have legal protections that the other officeholders would not. See *infra* notes 150-52 and accompanying text.

150. In this regard, it is worth recalling that, as in the case of Labor Secretary Raymond J. Donovan, see *supra* note 31, demonstrated, there is no existing barrier to states indicting federal officials. See *Whitehead v. Senkowski*, 943 F.2d 230, 236 (2d Cir. 1991) ("Contrary to Whitehead's assertion, the state is not without power to prosecute federal officials from the outset."); 1 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶0.6[5], at 249 (2d ed. 1996) ("Federal officials are not immune from state criminal prosecutions for violating a valid criminal law of the state"). Yet there seems to have been no widespread abuse of the power.

151. 28 U.S.C. § 1442(a)(1) (1994) (any officer of United States may remove to federal court prosecution commenced in state court "for any act under color of such office"). The Supreme Court has long stressed the key role of this statute in assuring the vigorous functioning of the federal government. See, e.g., *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969) (statute should be broadly construed); *Tennessee v. Davis*, 100 U.S. 257 (1880) (statute is constitutional even if the alleged crime is a violation of state law because otherwise the federal government would be unable to defend its existence against the states); see also E.W.M. Mackey, *Removal of Criminal Causes From State Courts to Federal Courts*, 1 CRIM. L. MAG. 141, 142-46 (1880) (arguing this position).

While the Court in *Mesa v. California*, 489 U.S. 121, 138 (1989) (no removal of state traffic prosecutions where defendants pleaded no connection to federal office), might be said to have shown some disposition to halt expansion of the statute, it wrote a very narrow opinion, as the concurrence emphasized, see *id.* at 140 (Brennan & Marshall, JJ., concurring), and the winning attorney recognizes. See Kenneth S. Rosenblatt, *Removal of Criminal Prosecutions of Federal Officials: Returning to the Original Intent of Congress*, 29 SANTA CLARA L. REV. 21, 86-87 (1989). In light of the historic deference of the courts to the convenience of the President, it is highly likely that removal would be upheld virtually anytime that officer sought it.

152. The Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971), while stating a general presumption against federal court injunctive interference with state criminal proceedings, nonetheless reaffirmed the traditional exception for bad-faith, harassing prosecutions, *id.* at 47-49. It further added, "Other unusual situations calling for federal intervention might also arise, but there is

To be sure, the pursuit of these legal remedies might require some portion of the President's attention, but the defense of impeachment proceedings may well require no less—and, in the cases meriting serious concern, that is likely to be the alternative.<sup>153</sup>

### C. The Intrusiveness Objection

This objection differs from the harassment objection in focusing on the claimed disruption to the functioning of the President resulting from potential, as opposed to actual, prosecutions. The concern is that, intimidated by the prospects of criminal liability, the officeholder would be deterred from the appropriately energetic exercise of duty.

Richard Nixon made a very similar argument in support of the position that his tapes should be guarded by an absolute privilege,<sup>154</sup> and the Court's response is equally applicable to the present context. The Nixon Court did not hold that nothing is privileged; it simply held that not everything is privileged. It rejected a claim of absolute privilege "based only on the generalized interest in confidentiality," but specifically left it open to the President to claim particular privileges, notably for our purposes, the "state secrets" privilege<sup>155</sup> as articulated in *United States v. Reynolds*.<sup>156</sup>

The determination of the applicability of that privilege, in turn, rests on a case-by-case balancing of the need for disclosure against the importance of the interest asserted by the demanding party.<sup>157</sup> Some cases are so obviously at the core of executive functioning that further

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no point in our attempting now to specify what they might be." *Id.* at 54. While the success rate of litigants seeking to establish bad faith has been virtually nil in the years since, and there has as yet been no clear Court description of what might be meant by "unusual situations calling for federal intervention," see 17A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE*, § 4255 (2d ed. 1988) (reviewing post-*Younger* cases), an allegedly harassing state criminal prosecution of a President would seem to fall comfortably within both exceptions.

153. It is worth noting in this regard that an impeachment resolution is one of the highest privileges on the floor of the House of Representatives—meaning that, notwithstanding any other pending business, any Representative with the floor may set the machinery in motion at any time. See LEWIS DESCHLER & WILLIAM H. BROWN, *PROCEDURE IN THE U.S. HOUSE OF REPRESENTATIVES*, ch. 14, §§ 2.2, 2.5, at 163-64 (4th ed. 1987); see *id.* ch. 14, § 5.7, at 166. Such a Congressman will surely be found in any plausibly serious case—and if there is no other way to get the President to respond to the charges (*e.g.* of tax evasion), the process may well move forward whether or not impeachment is the appropriate remedy for the conduct at issue.

154. See *United States v. Nixon*, 418 U.S. 683, 705-07 (1974).

155. See *id.* at 713-715 & n.21.

156. 345 U.S. 1, 7 (1953).

157. See *id.* at 11.

inquiry is precluded; one example, said the Reynolds Court, is a breach of contract action by an alleged spy.<sup>158</sup>

There is no reason to doubt that the same ruling would properly be made if we imagine a criminal fraud action launched against the President for failure to pay the spy.<sup>159</sup> On the other hand, if the President killed the spy in the Oval Office as a result of a heated dispute over the season's prospects for the Washington Redskins, a court should reach the opposite conclusion, since only the most ephemeral of public purposes would be served by a holding that the President had immunity in that context.<sup>160</sup>

The argument advanced here is simply that the President is amenable to prosecution, and has no generalized criminal immunity. But after that threshold has been crossed, there might well be a particularized substantive privilege if in a specific case there were some concrete reason to believe that the various objections considered in this Section were actual rather than theoretical; in other words, just as they do in civil actions, the courts would distinguish between officeholders' amenability to suit, and the substantive standards governing liability.<sup>161</sup> The resulting legal regime, in fact, would be analogous to the "totality of the circumstances" civil immunity recognized for state governors in *Scheuer v. Rhodes*.<sup>162</sup>

To be sure, any such formulation leaves a zone of uncertainty, but, as the courts have recognized in similar contexts, there is no empirical support for the intuitively unlikely proposition that this will chill the vigor with which public servants discharge their duties,<sup>163</sup> certainly not

158. *See id.* at 11 & n.26 (citing *Totten v. United States*, 92 U.S. 105 (1875)).

159. There would be ample legal materials available to guide this ruling, since, in a wide variety of contexts, the courts considering questions of civil immunity have weighed how central the challenged action is to the appropriate discharge of the officeholder's function, and then tailored the immunity accordingly. *See supra* note 81 and accompanying text.

160. *Cf.* Howard Schechter, Essay, *Immunity of Presidential Aides from Criminal Prosecution*, 57 GEO. WASH. L. REV. 779, 797-98 (1989) (Except in rare cases, neither the President nor his aides should have absolute criminal immunity, but a judge should "perform a balancing test based on the action taken in light of both the need to have an effective and efficient functioning executive and the societal interest involved.").

161. *See Richardson v. McKnight*, 521 U.S. 399, 407-12 (1997) (discussed *supra* note 82).

162. 416 U.S. 232, 247-48 (1974) (discussed *supra* note 81).

163. *See United States v. Nixon*, 418 U.S. 683, 712 & n. 20 (1974) ("[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.") (citing *Clark v. United States*, 289 U.S. 1, 13, 16 (1933)) (Cardozo, J. for a unanimous Court) (Despite theoretical possibility of chilling candor, privilege against intrusion into jury deliberations subject to case-by-case exceptions to investigate wrongdoing; "[T]he chance that now and then there may be found some timid soul who will take counsel of his fears

to the extent that would outweigh the benefits I have already canvassed at such length.

## II. PART II: POSSIBLE CONGRESSIONAL ACTIONS

The issue of Presidential criminal immunity is one of constitutional law and will eventually be decided by the Supreme Court. But Congress could play a modest but helpful legislative role in this area.

### *Section 1. Harassment Issues*

In my own view, the country would be better off if the Congress were to re-enact the independent counsel statute<sup>164</sup> when it comes up for renewal. One reason of relevance to our discussion today is that the statute has procedures for preliminary review by the Attorney General that are designed to reduce the chances of ill-founded inquisitions.<sup>165</sup> Furthermore, although I see no empirical need for such action, if there is a genuine concern with the prospect of harassment by state prosecutors, Congress could easily amend the law to make this statutory route the exclusive means of investigating any suspected Presidential crimes, state as well as federal.<sup>166</sup>

Similarly, Congress might choose to broaden the federal removal statute to cover officeholders prosecuted for state crimes committed prior to their incumbencies.<sup>167</sup>

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and give way to their repressive power is too remote and shadowy to shape the course of justice.”); *see also* *United States v. Gillock*, 445 U.S. 360, 373 (1980) (While allowing federal prosecutors to use evidence of state legislator’s official acts “may have some minimal impact on the exercise of his legislative function,” Court will not “impair the legitimate interest of the Federal Government in enforcing its criminal statutes [for] only speculative benefit to the state legislative process.”).

164. 28 U.S.C. §§ 591-599 (1994).

165. 28 U.S.C. § 592 (1994).

166. Such a statute, designed to protect the unassailable federal interest in a functioning Presidency, would plainly be constitutional. *See* Freedman, *supra* note 1, at 65-66 nn.201-02.

167. *Cf.* *Application of Donovan*, 601 F. Supp. 574, 580 (S.D.N.Y. 1985) (acknowledging that “the indictment of a cabinet officer interferes with the administration and operation of the executive branch of the federal government,” but holding that the removal statute as presently written does not provide for removal on that ground). The case is discussed *supra* notes 31, 150.



## Section 2. National Security Issues

As I have discussed at greater length elsewhere,<sup>168</sup> the Iran-Contra prosecutions revealed some vexing problems with the statute, problems whose constitutional underpinnings lead me to discuss them here.

Independent counsel Lawrence Walsh was forced to drop key charges—including the entire indictment against CIA agent Joseph Fernandez, the most important accusations against Colonel Oliver North, and a portion of the case against Admiral William Poindexter—because executive branch officials, many of them political intimates of the defendants, were in a position to block the release of classified information.<sup>169</sup> Once the government (i.e. the Justice Department) had deprived the defendants of information relevant to their defenses, the prosecutor (i.e. the independent counsel) could not constitutionally proceed against them.<sup>170</sup>

Since the very purpose of the independent counsel statute is to prevent the executive branch from controlling the prosecution of cases in which it may be laboring under a conflict of interest, the impropriety is manifest.<sup>171</sup> At first glance, the remedy may appear simple: since the independent counsel represents the United States for purposes of the prosecution, the independent counsel should represent the United States for the purposes of determining whether the classified material should be released.

168. See Eric M. Freedman, *Open Legal Questions Remaining After Iran-Contra*, in *PRESIDENT REAGAN AND THE WORLD* 263 (Eric J. Schmertz et al. eds., 1997).

169. See *Two Charges Against Poindexter Dismissed*, N.Y. TIMES, July 26, 1989 at B6; David Johnston, *U.S. Drops Part of its Case Against Iran-Contra Figures*, N.Y. TIMES, June 17, 1989, at A7; Michael Wines, *Key North Counts Dismissed by Court*, N.Y. TIMES, Jan. 14, 1989, at A1; see also *Justice Delays Iran-Contra Justice*, N.Y. TIMES, Oct. 21, 1989, at A24 (criticizing Justice Department's performance).

170. See *United States v. Fernandez*, 913 F.2d 148, 149 (4th Cir. 1990) (affirming dismissal of indictment against Joseph Fernandez); see also John Q. Barrett, *All or Nothing, or Maybe Cooperation: Attorney General Power, Conduct, and Judgment in Relation to the Work of an Independent Counsel*, 49 MERCER L. REV. 519, 537, 541-42 (1998) (describing this sequence of events as "at odds with the fundamental purpose and the general provisions of the independent counsel law itself," and proposing a statutory amendment to grant to independent counsels the authority over classified information hitherto exercised by Attorney General).

171. In the case of the Iran-Contra prosecutions, the situation was not aided in the least by the fact that the "classified" information that Attorney Generals Meese and Thornburgh sought to protect was both innocuous and widely known. See SENATE SELECT COMMITTEE ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, HOUSE SELECT COMMITTEE TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN CONTRA AFFAIR, S. Rep. No. 216, H.R. Rep. No. 433, 100th Cong., 1st Sess., at 144 (1987); Anthony Lewis, *Government of Laws?*, N.Y. TIMES, Nov. 30, 1989, at A31.

That resolution, however, raises a constitutional concern. If “the power to protect national security information were vested in a prosecutor not fully accountable to the President,”<sup>172</sup> then the President’s control over foreign relations would certainly be diminished, and, if one were to misread some of the Supreme Court’s broadest dicta in the area,<sup>173</sup> unconstitutionally so.

However, it is a mistake to consider the power over foreign relations as exclusively Presidential. Even on its most expansive days, the Court has recognized that Congress does have a role in the setting of foreign policy and in determining how much discretion the President is to have in carrying it out.<sup>174</sup> Thus, the President need not be the sole decisionmaker on the issue of whether or not the overall interests of the United States are best served by the disclosure of classified information or by the dismissal of an indictment; the President’s discretion can properly be limited by legislative criteria.

For example, if, as one veteran of the Iran-Contra prosecutor’s office has suggested, the relevant statutes were to be amended so that an independent counsel were given the power to challenge on substantive grounds the decision of an Attorney General to block disclosure of classified information,<sup>175</sup> this procedure would be constitutional. Judicial doctrines that call for a high degree of deference to executive branch secrecy decisions<sup>176</sup> are just that—judicial doctrines. They are subject to modification by Congress, which might, for example, require the Attorney General to demonstrate to the satisfaction of the court “by a preponderance of objective evidence that the disclosure would cause irreparable harm to the United States.”<sup>177</sup>

Without endorsing any particular statutory language, I call this issue to your attention, not just because it happens to be a problem with the statute, but specifically because it is one that is plainly intensified if the President may be indicted,<sup>178</sup> and deserves attention in that context.

172. *United States v. Fernandez*, 887 F.2d 465, 471 (4th Cir. 1989).

173. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

174. *See id.* at 319-20.

175. *See Sandra D. Jordan, Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice After Iran-Contra*, 91 COLUM. L. REV. 1651 (1991). Plainly, the existing statute, 28 U.S.C. § 594(a)(6), has not done the job.

176. *See, e.g., United States v. Reynolds*, 345 U.S. 1, 10-11 (1953).

177. *Jordan, supra* note 175, at 1674.

178. In the Iran-Contra situation, the concern of Attorney General Meese, for whatever reason, was not that President Reagan might be indicted for authorizing the transfer of HAWK missiles to Iran in violation of the National Security Act, but that he might be impeached for doing so. *See David Johnston, Meese Testifies That Impeachment Was a Worry*, N.Y. TIMES, Mar. 29, 1989, at A17.

### Section 3. *Privilege Issues*

Similarly, the recent narrowing of the governmental attorney-client privilege at the Court of Appeals level is not limited to the President,<sup>179</sup> but the application of such rules to the President<sup>180</sup> is plainly more troublesome if that official is facing possible criminal liability, which might be an additional consideration in moving Congress to correct the situation.

### Section 4. *Statute of Limitations*

Some commentators who believe that the President is immune from indictment also appear to assume that the Supreme Court, in ruling to this effect, will further rule that the applicable statute of limitations is tolled while he or she is in office.<sup>181</sup> Perhaps. But it would certainly be prudent for the Congress to insure this result.<sup>182</sup> That could be done without pre-judging the constitutional issue by a statute providing in general terms for tolling with respect to any officer of the government whose official position rendered him or her immune from indictment.

## CONCLUSION

Ultimately, the dispute over whether the President is immune from criminal liability is not a dispute exclusively, or perhaps even primarily, about legal rules. It is, as the members of the first Senate saw,<sup>183</sup> a clash over how we conceive of our President and our country.

If the President is merely one of 'We the People', temporarily delegated to perform certain functions, then the concept of absolute immunity has no more resonance than in the case of any other officeholder, and is easily rejected. If, however, the President, upon taking office, becomes a different order of being, one who embodies "the continuity and indestructibility of the state,"<sup>184</sup> then the issue takes on a different cast. In that case, an errant officeholder should first be removed—by a unique political process, rather than an ordinary legal

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179. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 925-26 (8th Cir. 1997), *cert. denied*, *Office of the President v. Office of Independent Counsel*, 521 U.S. 1105 (1997).

180. See *In re Bruce Lindsey*, 148 F.3d 1100, 1114 (D.C. Cir. 1998).

181. See Amar & Kalt, *supra* note 12, at 16.

182. This suggestion has been previously made by a commentator who disagrees with me on the constitutional issue. See Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2157 (1998).

183. See *supra* notes 12-16 and accompanying text.

184. Bickel, *supra* note 12, at 15.

one—so that the sacred nature of the office will not be profaned by the outside intrusion of secular authority.

But this almost idolatrous view, which is precisely the one Thomas Paine was ridiculing in the passage from *Common Sense*, alluded to in the title of my 1992 article,<sup>185</sup> is politically debilitating—not just because it feeds the imperial delusions of the President,<sup>186</sup> not just because it frees the incumbent from popular control, but more importantly because it relieves We the People from the responsibility that we should bear for the actions of the head of a representative government.

The difference between The Law as King and The President as King is that the President is a person and The Law is not. The Law is an abstraction, but an abstraction with real meaning; in a system of representative democracy, The Law is us. Subjecting our highest officeholder to The Law thus represents our collective determination to be responsible for our own destiny.

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185. See THOMAS PAINE, *COMMON SENSE* 57 (Philadelphia 1776): “[L]et a day be solemnly set apart for proclaiming the Charter; let it be brought forth placed on the Divine Law, the Word of God; let a crown be placed thereon, by which the World may know, that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is Law, so in free Countries the law ought to be king; and there ought to be no other.” See generally Christopher Collier, *The Fundamental Orders of Connecticut and American Constitutionalism*, 21 CONN. L. REV. 863 (1989) (“Events of recent years echoing those of the early 1970s, remind us that our system of government is based on” Paine’s concept); Richard Benveniste, *Sirica’s Legacy*, N.Y. TIMES, Sept. 4, 1992, at A20, (letter to editor from former Watergate prosecutor on death of Watergate trial judge John Sirica; “His legacy is to remind us that in our system no one is above the law.”).

The second allusion in the title is to an action known to history as the “ship money” case. Charles I laid a defense tax, and John Hampden, a leader of the popular party in the House of Commons, refused to pay it on the grounds that Parliament had not authorized it. The Crown sued for the sum in the Court of Exchequer, and, after elaborate argument, the twelve judges, by a split vote early in 1637, ruled in favor of the King. Concurring in this judgment, Sir Robert Berkeley stated: “I never read nor heard, that *Lex was Rex*, but it is common and true, that *Rex is Lex*, for he is a *lex loquens*, a living, a speaking, an acting Law.” THE TRYAL OF JOHN HAMPDEN ESQ. 131 ([T. Salmon ed.] London 1719) reprinted in 3 STATE TRIALS 1098 (T.B. Howell & T.C. Hansard eds. London 1816). This judgment is generally thought to have been the first act in a drama that progressed to the impeachment of the Earl of Strafford, the Civil War, and the execution of Charles I. Long before the drama had reached its denouement, the judgment in the ship money case had been vacated by Parliament, and Justice Berkeley had been impeached, convicted, and fined for his role in it. See 3 STATE TRIALS, *supra*, at 1283-96, 1300-01; 6 H.L. JOUR. 214 (Sept. 12, 1643).

186. See William Safire, *Creeping Royalism*, N.Y. TIMES, June 22, 1989, at A23 (criticizing the Presidency for becoming too much like a Kingship).

WATERGATE SPECIAL PROSECUTION FORCE

DEPARTMENT OF JUSTICE

*Memorandum*

TO : Leon Jaworski

DATE: February 12, 1974

FROM : Carl B. Feldbaum, George T. Frampton,  
Gerald Goldman, Peter F. Rient

SUBJECT: Attached Memorandum

The attached memorandum was prepared on the basis of extensive discussions among ourselves and after consultation with other members of the legal staff. . We submit it to you in the hope that it may assist you in deciding how best to proceed with respect to the evidence now before the Watergate Grand Jury.

Recommendation for Action By  
The Watergate Grand Jury

This office will soon be called upon by the Watergate Grand Jury for recommendations as to what actions it should take in light of the evidence that has been presented to it. Since this evidence implicates the President in a conspiracy to obstruct justice, the Grand Jury will no doubt be anxious to receive our recommendation, and the reasons therefor, concerning appropriate action with respect to the President. The purpose of this memorandum is to aid the process of decision by focusing attention on two possible courses of action -- indictment and presentment -- and articulating the reasons for which we believe that one of these courses should be recommended to the Grand Jury.

I.

The facts described to you in a separate memorandum, in our view constitute clear and compelling prima facie evidence of the President's participation in a conspiracy to obstruct justice. Assuming that the Grand Jury agrees with this assessment, then we are compelled by (1) our mandate to investigate and prosecute allegations involving the President, (2) the Grand Jury's sworn duty to make

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true presentment of all offenses that come to its knowledge, and (3) the paramount importance of reaffirming the integrity of the law, to recommend that the Grand Jury express its judgment by the customary method of indictment or (if we conclude indictment is constitutionally barred or is otherwise inappropriate) by a presentment setting out the evidence and the Grand Jury's conclusion of criminal activity.

The proposition that we and the Grand Jury have a duty to reach a conclusion whether the President has acted criminally and to manifest that conclusion by appropriate action on the part of the Grand Jury follows from several considerations. In the first place, the Special Prosecutor's "duties and responsibilities" include "full authority for investigating and prosecuting . . . allegations involving the President . . ." E.O. No. 551-73, § 0.37 and App. A. The history of the Watergate matter leaves no doubt that the Office of the Special Prosecutor was established and continues to exist because of overwhelming public support for committing the decision of the President's criminal guilt or innocence to the traditional processes of law enforcement. The need for a Special Prosecutor arose from widespread public suspicion concerning the ability of the Executive to identify and pursue any criminal wrongdoing

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by the President and his closest associates -- a suspicion that created a crisis of confidence in the President, the Presidency, and the criminal justice system. The unique arrangements creating and sustaining this office were a direct result of public conviction that there should be an independent, responsible body which could be trusted not only to investigate fully and vigorously all allegations of criminal wrong-doing, and to determine, on the basis of all available evidence, whether crimes had in fact been committed, but also to do so in like fashion as in the case of allegations of criminal activity involving anyone else.

Furthermore, the Grand Jury -- which exists wholly apart from these arrangements and indeed "is a constitutional fixture in its own right," Nixon v. Sirica, 487 F.2d 700 -- is obliged under the oath of office taken by each of its members "diligently, fully and impartially [to] inquire into and true presentment make of all offenses which will come to [its] knowledge" and to "present no one from hatred or malice or leave anyone unrepresented from fear, favor, affection, reward or hope of reward . . ." To recommend to the Grand Jury any action inconsistent with a definitive conclusion about the President's criminal liability based on the extensive evidence that it has received would thus



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be to counsel abdication of its constitutionally sanctioned function to "present" crimes committed by any citizen, regardless of his circumstances or station.

This leads to another consideration -- the necessity for vindicating the integrity of the law. No principles are more firmly rooted in our traditions, or more at stake in the decision facing this office and the Grand Jury, than that there shall be equal justice for all and that "(n)o man in this country is so high that he is above the law." United States v. Lee, 106 U.S. 196, 220 (1882). For us or the grand jury to shirk from an appropriate expression of our honest assessment of the evidence of the President's guilt would not only be a departure from our responsibilities but a dangerous precedent damaging to the rule of law. The inevitable conclusion would be that one man, at least, is so far different from anybody else as to be above the ordinary processes of the criminal law. The implications of such a conclusion would be unfortunate under ordinary circumstances; but we are not faced with ordinary circumstances -- we are dealing with the very man in whom the Constitution reposes not only the most power in our society but also the highest and final obligation to ensure that the law is obeyed and enforced. Thus, failure to deal evenhandedly

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with the President would be an affront to the very principle on which our system is built. And this failure would be all the more severe because of the nature of the crime in question, a conspiracy to obstruct justice, the purpose of which was to place certain individuals beyond the reach of the law. The result would probably be greater public disrespect for the integrity of the legal process than has already been created by public knowledge of attempts by the nation's highest officials to put themselves beyond the law.\*

It follows from this analysis of our responsibilities and those of the grand jury that our duty is to make a recommendation with respect to the President which is directed toward enforcement of the criminal law. The existence of the impeachment mechanism in no way alters this conclusion. Impeachment is an avowedly "political" process by which the people's representatives can remove a sitting President before the end of his term based on a "political" judgment about his fitness to govern. Although

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\* Another possible consequence is an increased likelihood of wrong-doing by a future President who need not fear the strictures of the criminal law as a limitation on the exercise of his immense power.

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the matter is subject to debate, Congress' judgment about impeachment, in our view, is meant to respond to considerations that may or may not include and, in any event, are not limited to whether the President has committed a crime. The Constitution, in other words, does not require that a felony have been committed for conviction upon impeachment, nor does it demand that a felon be ousted from office. In contrast, our criminal justice process exists, and is universally perceived to exist, for a different purpose, entailing a different standard: to prosecute crimes with reference to an apolitical code applied objectively to all citizens. For this very reason our office was created as an office of criminal prosecution, not (as it might have been) as an independent commission to determine all the facts and then to make recommendations about anyone's fitness to continue to serve in public office. Under the Constitution the one task is allocated to Congress and the other to the grand and petit juries.

The constitutional allocation of these separate functions means that to let "political" considerations of the kind now being debated in Congress intrude upon the decision-making of this office and of the Grand Jury would be to confuse the functions of law enforcement

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and of impeachment, and the result would be further to undermine public confidence in the integrity of the legal process. A recent precedent seems instructive. A substantial segment of the public was critical of the plea bargain reached with Vice President Agnew not only because they perceived that on account of his position Agnew was given much more favorable treatment than would have been afforded others guilty of similar crimes, but also because they perceived that a motivating force in this bargain was the desire of those in power to remove him from public office. In accomplishing this, the Executive Branch was regarded as taking upon itself the decision of fitness for public office. This not only usurped a decision constitutionally allocated to another institution -- the Congress could, after all, have decided against Agnew's impeachment -- but was seen in the public eye as a departure from the principle of equal justice for all.

Thus, we believe that it would be impermissible for this office to determine its course of action on the basis of a belief that the President should or should not be removed from public office. By the same token, we cannot responsibly leave the question of the President's criminal guilt or innocence to the "political"

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process and the "political" judgment of impeachment. To do so, we feel, would be an abdication of our duties and those of the Grand Jury, premised only on the view that for the most powerful official in the country, the essence of "justice" is limited to the decision of his fitness to govern and to ouster from office if he is found wanting. The Constitution itself decries such a premise by stating that a person convicted after impeachment "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." If the President were placed so much apart from all other citizens that he could even escape the determination of whether there is probable cause to believe that he has committed a crime, one can only imagine how much greater the public cynicism would be.

This is not to say that no room exists for interplay between the functions of law enforcement and of impeachment. We and the Grand Jury would obviously be remiss if we allowed the impeachment process to go forward without full knowledge of what the President has in fact done.\* And, indeed, there is precedent for a Grand Jury

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\* Disclosure of the facts concerning the President's involvement should not occasion undue pretrial publicity problems for any of our defendants since the facts add little to those which will, in any event, be charged in the indictment.

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presentment to the House of Representatives of specific, criminal charges and the evidence supporting them, for the purpose of impeachment. See 3 Hinds' Precedents of the House of Representatives § 2488, at 985 (1907). But assuring that the House has at its disposal information concerning the President's involvement in Watergate does not fulfill our function or that of the Grand Jury. We and the Grand Jury do not exist merely for the purpose of assuring that debate on impeachment is fully informed.

In short, we do not believe that mere transmission of our evidence to Congress is a satisfactory means of discharging our responsibilities or those of the Grand Jury. Nor do we believe that our decision about how to proceed in the matter of the President should be influenced by the likelihood that some "political" mechanism will determine his "fitness" for office or by any other abstract notion of how "justice" can be served other than by enforcement of the criminal law. We and the Grand Jury are the only ones who can make the decision that we, in large part, were established, and the Grand Jury is sworn, to make -- the decision whether the President has acted criminally. If we and the Grand Jury refuse to make that judgment, the consequences for the criminal justice system and for public confidence in the law will, in our view, be most unfortunate.

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II.

Assuming the validity of the foregoing conclusions, the question to be addressed is whether we should recommend to the Grand Jury an indictment or a presentment of the President.

As we understand it, the conclusions regarding indictment of an incumbent President reached by the Department of Justice, the U.S. Attorney's office, and this office, are all consistent: there is nothing in the language or legislative history of the Constitution that bars indictment of a sitting President, but there are a number of "policy" factors that weigh heavily against it. Chief among these are (1) that indictment would be equivalent to substantially disabling, if not functionally removing, the President from office -- a decision that is Constitutionally allocated to Congress and not to a prosecutor's office and Grand Jury; and (2) that indictment would create a dangerous precedent for abuses in the future, even if justified by the facts in this case.

Before addressing these considerations relating to the President's indictability, we should point out that we recognize that these "policy" factors are relevant not only to the question whether the President can legally be indicted but also to the question whether, as a matter of

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prosecutorial discretion, he should be. We need not be convinced in other words, of the unconstitutionality of indictment to recommend against it. The issue of "prosecutorial discretion," however, does not arise in the traditional sense. The factors that customarily inform an exercise of prosecutorial discretion not to press all the charges warranted by the evidence uniformly militate in favor of indictment in this case. These include the nature of the offense and strength of the evidence, the background and other activities of the potential defendant, his degree of culpability, the extent of his cooperation, and the presence or absence of various mitigating circumstances.\* Rather, the "policy" factors advanced against the appropriateness of indicting the President are more general public policy or quasi-Constitutional considerations concerning the proper relationship between the President, the criminal justice system, and the Congress.

For many of the same reasons set out in the first part of this Memorandum, some of us cannot easily accept

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\* Apparently, the only significant defense available to the President should he be indicted appears to be a legal defense based on constitutional provisions concerning his tenure in office -- provisions that do not absolve him of liability once he leaves office and that in no way mitigate his culpability.



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the proposition that such "policy considerations" -- in essence, political considerations -- should be dispositive of the President's indictability. While not suggesting that such matters are entirely outside our purview in deciding upon whether indictment is the proper course, we believe that too heavy reliance on them threatens abdication of our peculiar responsibility in favor of another process designed to produce a different kind of decision, and risks further public disillusionment with the principle of equal (and unpoliticized) justice.\* In short, there is a good argument that in deciding whether the President can appropriately be indicted, it is not up to us to weigh the politics of the matter at all but to do our job and do it faithfully.

In evaluating the considerations against indictment, we believe that the second one mentioned -- that of creating a dangerous precedent -- has little merit. To begin with,

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\* Congress, as the people's representative, is in a far better position to weigh these factors. It may decide, for example, to remove the President from office but to immunize him from prosecution. Whatever its decision, Congress will have acted openly and the people and history can judge the validity of its decision. We would be formulating public policy in private, and there is nothing in our mandate or backgrounds that gives us expertise or responsibility for such a policy-making role.

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the argument sweeps with too broad a brush, for the possibility of abuse inheres in the exercise of any responsibility. Moreover, the quantum of proof we believe should be required to support a recommendation of indictment (or presentment) -- that the evidence of the President's guilt be direct, clear, and compelling, and that it admit of no misinterpretation -- is a substantial bulwark against future abuse and against charges of improper action on our part. Furthermore, the fact that the President normally exercises the ultimate prosecutorial authority of the Federal Government and can, in the ordinary course, prevent his subordinate officers and employees from prosecuting him conclusively puts to rest any fear that maverick or partisan prosecutors might subject the President to unjustified future harrassment in the Federal courts.\* In the case before us, of course, both the Legislative and Executive branches have recognized the uniqueness of the situation by endorsing creation of a special officer explicitly authorized to "prosecute" allegations concerning

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\* Even if the President can be indicted in the federal courts, we believe there is no question but that considerations of federalism would bar his indictment in a state court and that adequate remedies for preventing such action exist. Thus indictment of the President for federal crimes will not provide a precedent for local prosecutors who might seek to harrass the President by indicting him for local or state crimes.

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the President himself, and insulated to a considerable extent from contrary instructions or dismissal by the President. If at some future time circumstances require appointment of a new "Special Prosecutor," then the precedent set here would not be a dangerous one. Moreover, even if the risks of future abuse were great, which we think they are not, those risks would have to be weighed against the harmful precedent of failing to act appropriately in the case before us. The best way to prevent a situation like the one we have now from occurring again is to assure that the criminal justice process fulfills its historic responsibilities, thus reaffirming the principle that the President, like everyone else, is subject to prosecution for commission of serious crimes.

The other serious argument against indictment is that it would be the "equivalent" of impeachment because if the President were convicted and incarcerated (and even if he had to prepare for and undergo trial) he would no longer be able to discharge the duties of his office; and in any event the country would be brought to a standstill prior to trial by the existence of outstanding and unresolved charges against a President who refused to resign or was not impeached.

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The answer to this argument is that the disruption caused by indictment and trial of the President would be no greater, and possibly less, than that caused by the impeachment process.\* The institution of criminal charges might well reduce considerably the time during which the disruptive effect was felt, considering how quickly Mr. Nixon could be tried on a specific charge based on tapes and a few prosecution witnesses, contrasted with what promises to be a terribly drawn out, divisive, and possibly inconclusive process of impeachment and trial in Congress on a variety of less distinct charges.

Moreover, at least some of our evidence showing the President's complicity in illegal activity is probably going to become public in any event, particularly if we have an obligation to communicate the evidence to the Congress. If our primary concern is the impact of that information on the conduct of our domestic and foreign affairs should the President attempt to remain in office,

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\* Of course, the President clearly could not perform the duties of his office while in jail, but the Twenty-Fifth Amendment provides a mechanism by which the Vice President can govern the country should the President become "unable to discharge the powers and duties of his office."

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then it might be better for it to come out in the traditional legal form of specific, distinct allegations which can then be determined to public satisfaction in a traditional proceeding according to a customary standard applicable to all citizens. The fact that some evidence of criminal activity will probably become public in any event also means the public will eventually realize we had evidence we did not act upon. This would certainly raise serious questions about the performance of this office and the integrity of the criminal justice system.

Finally, the Framers obviously contemplated some disruption in the Executive Branch as a necessary and bearable cost to providing the people -- through the impeachment mechanism -- with a remedy for gross misconduct. Since the Framers did not specifically provide for Presidential immunity from indictment, it could be concluded that they also contemplated that if a President engaged in serious criminal activity destroying public confidence in the Executive, the same cost should be borne in connection with institution of ordinary criminal charges.

In the final analysis, if imposition of criminal charges indeed results in uncertainty and paralysis in the

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conduct of governmental affairs, the remedy is readily available in the hands of Congress -- that is, impeachment, if the President refuses to resign -- and the grounds for impeachment will then unquestionably be on the table. If the people then believe that such an impasse is intolerable, they will compel their representatives to act.

Although, we are of different minds about the final outcome in balancing these considerations relating to the President's indictability, we all agree on the fundamental premise of this memorandum: the real issue before us is not whether to recommend that the Grand Jury manifest its conclusion about the President's guilt or innocence, but how we should recommend that it do so. If we conclude that indictment of the President is constitutionally barred or is inappropriate, then we and the Grand Jury can and must fulfill our responsibilities to the public and to the law by recommending a Grand Jury presentment setting out in detail the most important evidence and the Grand Jury's conclusions that the President has violated certain criminal statutes and would have been indicted were he not President. There appears to be no question of the propriety or legality of such a course, and there is precedent for it as

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pointed out above.\*

Expression of the Grand Jury's conclusion about the President's guilt through a presentment, rather than formal institution of charges by indictment, meets most of the arguments against indictment canvassed above. A presentment would raise no spectre of Presidential preparation for a trial or possible imprisonment. Moreover, although presentment might still affect the ability of the Executive to conduct governmental affairs, it would not functionally disable the President or result ipso facto in his removal from office.

Presentment offers the additional advantage of focusing the issues that must be resolved by Congress without infringing on Congress' constitutional prerogatives. While indictment would set in motion an independent process for determining Presidential guilt or innocence, perhaps adding to the present ambiguity regarding institutional

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\* A separate question would then be raised whether or not to name the President as a co-conspirator in our main indictment. The evidence is clear the the President joined the conspiracy that will be charged in that indictment. Failure to name him as a co-conspirator in our case would serve no purpose since we would have to name him in our Bill of Particulars in any event. In addition, the existence of a presentment would vitiate the strongest argument against naming the President, that of "fairness", as is discussed in the following text.

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responsibilities, presentment would signal to Congress our belief that no further action can or should be taken through the ordinary criminal process against a sitting President. The result would be that responsibility for further action would be placed squarely upon Congress, and that Congress would then have an unambiguous basis for swift action.

On the other hand, presentment arguably raises an additional problem not raised by indictment -- lack of "fairness" to the President. The President, it may be urged, has no way to meet or contest charges articulated in a presentment. Although logically the problem cannot be dismissed, it seems more theoretical than real. It should be remembered, first, that this is a "problem" created by a desire to avoid the even greater "problem" for the President of indicting him. To put the point another way, the alleged unfairness to the President must be weighed against the unfairness to the public and the damage to the rule of law should we and the Grand Jury, contrary to our responsibilities, altogether fail to act on the evidence that we have gathered, thereby depriving the public of our conclusion about what that evidence shows. Moreover, the truth of the matter is that the President has almost unlimited access to the media and the evidence



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in his own possession. He is, therefore, in a position to answer any charges directly to the country.

In reality, it is the people who have not had the opportunity to have a disinterested and independent representative of the public interest examine the evidence and arrive at an informed and professional conclusion about what it shows. That is the reason we are here. That is the reason we have concluded that the only responsible recommendation we can make to the Grand Jury is that if it finds clear and compelling prima facie evidence that the President participated in a conspiracy to obstruct justice, the Grand Jury should manifest that conclusion.

In sum, if the Grand Jury finds probable cause to believe the President acted criminally, then it is essential that this simple, primary truth emerge from the action we and the Grand Jury take: that but for the fact that he is President, Richard Nixon would have been indicted. This fundamental conclusion should not be allowed to be lost in a recitation of facts or sources of evidence that omits the basic judgment involved or leaves it open to public (and Congressional) speculation and debate. Such a critical omission would, in our view, (1) avoid the mandate of the Special Prosecutor to investigate and

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prosecute allegations involving the President, (2) evade the responsibility of the Grand Jury to make true presentment of all offenses which come to its knowledge, (3) confuse the distinct purposes of the criminal justice system and the political system, and, (4) ultimately, dilute the force of law in our social and governmental processes.

Carl B. Feldbaum  
George T. Frampton  
Gerald Goldman  
Peter F. Rient

UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

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In re Proceedings of the Grand Jury :  
Impaneled December 5, 1972: :

C10  
~~Misc~~ No. 73-965

Application of Spiro T. Agnew, :  
Vice President of the United States :

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MEMORANDUM IN SUPPORT OF MOTION

PAUL, WEISS, RIFKIND, WHARTON & GARRISON  
1775 K Street, N. W.  
Washington, D. C. 20006

By:

Jay H. Topkis  
Martin London  
Max Gitter

Of Counsel:

Judah Best  
George Kaufman

## I

THE CONSTITUTION BARS A CRIMINAL PROCEEDING  
AGAINST THE VICE PRESIDENT OF THE UNITED STATES

The Vice President of the United States holds office either by vote of electors elected by the people or -- under the Twenty-fifth Amendment -- through nomination by the President and confirmation by the Houses of Congress.

In either event, his title traces to the vote of representatives of all citizens of the Republic. He is thus second only to the President in personifying the national will and dignity.

The functions of the office are by no means merely symbolic. The Vice President must maintain himself in a state of constant preparation to replace the President. As presiding officer and holder of the tie-breaking vote in the Senate, he is regularly concerned with the deliberations of that body. By virtue of statute, executive order and reorganization plan, he participates in the activities of executive agencies ranging from the National Security Council to the Domestic Council. And finally, under the Twenty-fifth Amendment, he is charged with the most awesome

responsibility: continuously to monitor the ability of the President to discharge the powers and duties of Chief Executive -- and to decide whether action should be begun to remove the President by reason of disability.

A Vice President so elected and charged with such duties may not, we submit, be hindered or prevented from performing his office by the institution of a criminal proceeding against him. While he is Vice President, he must be free to function as Vice President. The Nation must not be deprived of his services while he defends himself against an indictment voted by perhaps 12 of 23 grand jurors, or an information filed at the whim of a prosecutor.

Rather, the Constitutional plan requires that a Vice President may be removed from his office or effectively prevented from performing its duties only through impeachment voted by the House, and judgment of conviction voted by the Senate. Having elected him through their representatives, the people may be deprived of his services only by vote of equal dignity.

This does not mean, of course, that the man holding the office of Vice President is above the law or beyond its reach. It means, rather, that he must hold the office and be free to perform its duties until his removal comes about

in accordance with the Constitutional plan -- by impeachment, resignation, or expiration of his term. Once so removed, the man will be as subject to the processes of the criminal law as anyone else. But the man having been removed, the way is cleared for the choosing of a successor. The Nation will not be forced to do without a Vice President.

Nor will it have had to undergo the national indignity of a criminal proceeding against its second highest officer.

#### THE LANGUAGE OF THE CONSTITUTION

The conclusion here urged is not spelled out with total clarity in the language of the Constitution. But at least three provisions of the Constitution point clearly in this direction.

#### "The Party Convicted"

Art. I, § 3, Cl. 7, provides:

"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."

The Framers' feeling for the nuances of our language was, of course, extraordinary. They did not use words casually. And so it would appear that their use of the past participle was significant: a person "convicted" in an impeachment proceeding is liable to criminal indictment after he has been impeached and convicted -- not before. Until he has been convicted, he may not be indicted, he may not be tried, he may not be judged and he may not be punished.

Other readings are, of course, possible -- e.g., that the language is intended only to indicate that a President or Vice President may be punished in a criminal, as well as an impeachment, proceeding. But such other readings, while conceivable, share a lack of likelihood.

The non-exclusivity of impeachment, for example, could have been spelled out quite readily without using a past participle. The past participle is given full significance only when it is read to indicate a sequence of events.

Moreover, if read as dealing only with non-exclusivity, the language does not accomplish its purpose: it does not indicate that impeachment may follow criminal conviction. The reason, we submit, is that the Framers did not intend to permit criminal proceedings against a President or Vice President prior to impeachment.

Removal by Impeachment

Art. II, § 4, provides:

"The 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."

To give this language its fair meaning, it must be read as being both authorization and prohibition: it sanctions removal by an impeachment proceeding, and not otherwise.

This reading surely makes sense: the President and Vice President having been elected to serve by national vote, their election should not be set at naught by criminal proceeding or other means of effective removal.

The term "civil Officers," we recognize, causes a problem in that it would seem to embrace cabinet officers and others who have always been understood to be subject to removal at the President's wish. And if "civil Officers" may be removed by the President, as well as by impeachment, then perhaps Art. II, § 4, does not specify the exclusive means of removing the President and the Vice President.



The reasonable reconciliation, we suggest, is to recall the contrasting sources of authority. The President and the Vice President are elected pursuant to the Constitution, while "civil Officers" owe their office to the President's nomination. It is wholly reasonable that those whom the President chooses to carry out the executive will should be subject to removal at his wish -- he can scarcely discharge his duties of office with incompatible aides. But the President and the Vice President, who hold office by virtue of an election under the Constitution, may reasonably be removed from office only by a proceeding under the Constitution.\*

#### The Twelfth Amendment

This reading is reinforced by consideration of the Twelfth Amendment.

There seems never to have been any significant doubt that impeachment is the only technique by which the President may be removed: while he holds office he is immune

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\* In the North Carolina debates on ratification, the issue was squarely raised. Some of the delegates to the state's ratification convention expressed concern that impeachment should be the only remedy against federal tax-gatherers who behaved corruptly. Mr. Iredell answered the concern by suggesting that such petty officers could be reached by local criminal process. Governor Johnston, agreeing, pointed out however that "men who were in very high offices could not be come at by the ordinary course of justice;" but could be reached by local authority only after impeachment. <sup>4</sup> Elliott, Debates on the Federal Constitution, 36-37 (1901) [hereafter Elliott].

against any form of criminal proceeding.\* The reasons were eloquently stated a century ago by Attorney General Stanbery, speaking on behalf of President Andrew Johnson:

"It is not upon any peculiar immunity that the individual has who happens to be President; upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President. There is only one court or quasi court that he can be called upon to answer to for any dereliction of duty, for doing anything that is contrary to law or failing to do anything which is according to law, and that is not this tribunal but one that sits in another chamber of this Capitol. There he can be called and tried and punished, but not here while he is President; and after he has been dealt with in that chamber and stripped of the robes of office, and he no longer stands as the representative of the government, then for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people." State of Mississippi v. Johnson, 71 U.S. 475, 484-5 (1866).

If the President may be called to account only by impeachment proceedings, the Twelfth Amendment -- by providing

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\* The position was most recently set forth publicly on behalf of the incumbent President, In re Grand Jury Subpoena, Misc. No. 47-73 (D. D.C.), Brief in Opposition, Aug. 7, 1973. The Watergate Prosecutor has not challenged the President's view.

for the simultaneous and separate election of President and Vice President -- would seem to give the latter the equal immunity appropriate to his equal dignity.

#### THE PERTINENT HISTORY

The reading of the Constitution here urged is borne out by the records of the Constitutional Convention and contemporaneous documents. These make clear the universal view of the time that criminal proceedings might be initiated against a President or Vice President only after his removal from office.

#### The Order of Events

A good starting point is Alexander Hamilton's "Plan" for the Constitution, which contained this language dealing with impeachment:

"[The President] may be impeached for any crime or misdemeanor by the two Houses of the Legislature, two thirds of each House concurring, and if convicted shall be removed from office. He may be afterwards tried and punished in the ordinary course of law--" 3 Farrand, Records of the Federal Convention of 1787, 625 (Rev. Ed. 1966) (hereafter Farrand) (emphasis added).

Thus Hamilton had no uncertainty about the appropriate order of events. His language was not, of course,

that ultimately adopted. But its closeness to the final text is warrant for the belief that he expressed the consensus.

Surely he so believed. Writing in The Federalist, and referring to the language as actually adopted, he wrote:

"the punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of this country, he will still be liable to prosecution and punishment in the ordinary course of law." The Federalist, No. 65 (emphasis added).

\* \* \*

"The president of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law." The Federalist, No. 69 (emphasis added).

Light is shed also by the Framers' debates concerning whether the Supreme Court should try impeachments.

Gouverneur Morris, speaking against the proposal, said:

"A conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President after the trial of the impeachment." 2 Farrand 500 (emphasis added).

Thus Morris, too, understood the order of events to be as we contend.

In the debates in North Carolina on ratification, Governor Johnston said that "men who were in very high offices" must be removed before criminal sanctions could be imposed.

Such men

" . . . could not be come at by the ordinary course of justice; but when called before this high tribunal [the Senate] and convicted, they would be stripped of their dignity, and reduced to the rank of fellow-citizens, and then the courts of common law might proceed against them." <sup>4</sup> Elliott 37 (emphasis added).

Significant, too, is the decision of the Framers not to allow impeachments to be tried by jury. Luther Martin, one of the Framers, later noted that the Convention had refused "to permit the tenure of their offices to depend upon the passions or prejudices of jurors." <sup>3</sup> Farrand 407. Instead, the question of removal would be determined by the Senate. But to read the Constitution as permitting criminal proceedings before impeachment would have the very consequence which, said Martin, the Framers sought to avoid -- letting the tenure of the President and Vice President "depend upon the passions or prejudices of jurors."

Finally, we may note de Tocqueville's understanding that criminal proceedings may only follow impeachment:

"But the great difference which exists between Europe and America is, that in Europe political tribunals are empowered to inflict all the dispositions of the penal code, whilst in America, when they have deprived the offender of his official rank, and have declared him incapable of filling any political office for the future, their jurisdiction terminates and that of the ordinary tribunals begin." I de Tocqueville, Democracy in America 111 (Reeve Trans. 1961).

Thus the historical evidence suggests a universal view that the Nation was not to be effectively deprived of its elected leadership by any criminal process.

One additional teaching emerges from this material: in rejecting both the Supreme Court and juries as triers of impeachments, the Framers made clear their determination that the legislative branch, not the judicial, was to pass on removal from office -- an attitude reaffirmed in the removal procedure of the Twenty-fifth Amendment. To allow commencement of a criminal proceeding in the courts against an incumbent President or Vice President would affront this clearly-expressed intent.

#### The President and the Vice President

The historical material discloses also that the Framers held the Vice Presidency in the highest respect and regarded the proper performance of its duties as critically important. They would scarcely, then, contemplate treating the

President and the Vice President differently on susceptibility to criminal proceedings.

Again we may let Hamilton be our initial guide.

The President and Vice President were to be elected in the same balloting, he said, because the Vice Presidency required "the appointment of an extraordinary person."

In the debates in the First Congress over salaries, Elias Boudinot, of New Jersey, argued that the Vice President should be granted a regular salary because

" . . . he is to be elected in the same manner as the President, in order to obtain the second best character in the Union . . . . [C]onsequently he ought to be respected, and provided for according to the dignity and importance of his principal character." I Annals of Congress, First Cong., 650-651 (1789).

Theodore Sedgwick of Massachusetts said:

"[T]he Vice President . . . must always be ready to take the reins of Government when they shall fall out of the hands of the President; hence . . . he should . . . remain constantly at the seat of government . . . [to] devote his whole time to prepare himself for the great and important charge for which he is a candidate." Id. at 646-47.

The Framers regarded the Vice President's tie-breaking role as critically important. In the early days of the Republic, the Senate's small number made ties far

more likely than today,\* and the states, newly come together, regarded each other with understandable jealousy and suspicion. In these circumstances, the Vice President was required to be a figure of national prominence, possessing confidence as universal as possible. Thus, in the ratification debate in North Carolina, William Richardson Davie, one of the Framers, expressed their thoughts:

"Mr. Chairman, I will state to the committee the reasons upon which this officer was introduced. I had the honor to observe to the committee, before, the causes of the particular formation of the Senate -- that it was owing, with other reasons, to the jealousy of the states, and, particularly, to the extreme jealousy of the lesser states of the power and influence of the larger members of the confederacy. It was in the Senate that the several political interests of the states were to be preserved, and where all their powers were to be perfectly balanced. The commercial jealousy between the Eastern and Southern States had a principal share in this business. It might happen, in important cases, that the voices would be equally divided. Indecision might be dangerous and inconvenient to the public. It would then be necessary to have some person who should determine the question as impartially as possible. Had the Vice-President been taken from the representation of any of the states, the vote of that state would have been under local influence in the second. It is true he must be chosen from some state; but, from

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\* Vice President Adams used his vote at least 29 times, often on issues of critical importance. See Feerick, From Falling Hands, 69 (New York 1965).



the nature of his election and office, he represents no one state in particular, but all the states. It is impossible that any officer could be chosen more impartially. He is, in consequence of his election, the creature of no particular district or state, but the officer and representative of the Union. He must possess the confidence of the states in a very great degree, and consequently be the most proper person to decide in cases of this kind. These, I believe, are the principles upon which the Convention formed this officer [Vice President]." 4 Elliott 42-3 (emphasis in original).

These historical materials indicate, then, that the Framers expected to find for the Vice Presidency a man of the highest ability, and they thought it appropriate to confer upon him the highest dignity. Nothing in the materials suggests that they would have thought him any more susceptible to a criminal proceeding than the President.

On one occasion, of course, an indictment was voted against a Vice President, Aaron Burr. In 1804, following his killing of Hamilton, New Jersey lodged an indictment charging Burr with homicide.\* A group of Senators, and Attorney-General Dallas, separately petitioned the Governor of New Jersey to quash the indictment, and although the Governor appears to have taken no official action, the indictment was

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\* At about the same time, a New York grand jury brought a presentment charging Burr with the misdemeanor of sending a challenge to a duel.

allowed to die. Moreover, the Senate was apparently so persuaded that the indictment was a nullity that a few months later it allowed Burr to preside at the impeachment trial of Justice Chase. See Parmet and Hecht, Aaron Burr : Portrait of an Ambitious Man, 224 (New York, 1967); Schachner, Aaron Burr, 264-66 (New York, 1937); I Wandell, Aaron Burr, 307-316 (New York, 1927).

In sum, history tends to confirm the fair reading of the Constitution's language: the Vice President may not be made a defendant in any criminal proceeding.

#### The Twenty-fifth Amendment

In adopting the Twenty-fifth Amendment, the Congress and the States gave new proof that a functioning Vice President is far too important to the Nation to permit his disablement by criminal prosecution.

Thus the Amendment creates a new and heavy duty for the Vice President: playing the key role in determining when the President's involuntary removal from office should be initiated. And the draftsmen of the Amendment, by providing for filling a vacancy in the Vice Presidency, ". . . intended to virtually assure us that the Nation will always possess a Vice President." Sen. Rep. 1382, 88 Cong., 2d Sess. 13 (1964).

In the hearings that led to the Amendment, the importance of the Vice Presidency was continually stressed. President Nixon, then a private citizen, spoke eloquently of the need for a Vice President. He said:

" . . . the man that I think who generally is best qualified to succeed to the Presidency in the event that something happens to the President is the Vice President of the United State." Hearings, "Presidential Inability and Vacancies in the Office of Vice President," Sen. Comm. on the Judiciary, 88th Cong., 2d Sess. 239 (1964) [hereafter "Inability Hearings"].

And he explained that belief by saying:

"The Vice President, particularly in recent years, is cut in, in effect, on all of the major decisions and, therefore, he is prepared to take over as President as no one else, not the Speaker, not the Secretary of State, no one else in the country, is prepared to take over." Ibid.

And so President Nixon urged that an amendment be adopted to insure that a Vice President, so "cut in . . . on all of the major decisions" would always be "prepared" to take over.

A Vice President busy defending himself against criminal charges can hardly keep himself so constantly in readiness.

President Nixon spoke also of the need to have a Vice President instantly available:

"Today only one man in this world, in the free world, can defend the security of the free world in the event of attack. Only one man's finger is on the trigger.

"The United States and the free world can't afford 17 months or 17 weeks or 17 minutes in which there is any doubt about whether there is a finger on the trigger, . . ." Inability Hearings at 242.

The United States can not then afford to have its Vice President off somewhere defending himself against criminal charges.

The Nation would have been in sore straits, indeed, had Vice President Johnson been in a criminal court on November 22, 1963.

Of course, if a Vice President were facing impeachment charges he would be every bit as burdened as were he on trial in a criminal court. But that is precisely the best reason why the House of Representatives -- rather than a grand jury or a prosecutor -- should decide whether the Vice President shall be diverted from his duties. A grand jury has a duty to level charges whenever it believes that there are charges to be answered -- it is none of the grand jury's concern whether the matter is serious or trifling, whether the Nation should give up its Vice President while the charges are tried. And importantly, the grand jury can act upon the vote of a bare majority of its 23 members, and in practice is the instrument of but one man -- the prosecutor. It is therefore eminently possible that a decision may be made on the narrow basis of his personal views. The House, by contrast, has the welfare of the Nation as its primary concern, and can make the decision whether or not to accuse in the Nation's interest. The House makes that decision as a deliberative body. No single person's ambition or prejudice may control. The decision is made by a fair cross-section of the body politic. The Framers, no different than we today, could hardly have conceived of a different result.

## SUMMARY

The language of the Constitution and the history of its adoption, then, stand in the way of indictment of the Vice President.\* There need be added only considerations deriving from the structure of our government.

Thus, as we have noted, before the Twelfth Amendment the Vice President was likely to be the President's chief political rival -- he was the runner-up to the President in electoral votes. The Framers could scarcely have intended that the President should have the power forthwith to incapacitate his rival effectively by a unilateral judgment of the Attorney General, the President's direct appointee.\*\*

The situation is not different under the Twelfth

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\* We should note that this conclusion does not depend on whether the alleged criminal acts are said to have occurred during the Vice President's tenure in office, nor does it depend on the outcome of the scholarly debate as to whether impeachment will lie for acts committed before assuming office. It is our entire thrust here that the immunity is not of the man but of the office. And so it makes no difference when the acts took place. And if impeachment will not lie, then the accusers must wait while the Republic is served.

\*\* It may be suggested, of course, that a grand jury might not return an indictment requested by a federal prosecutor. There are two answers. First, those experienced at the criminal bar know that, as a practical matter, only the most inept prosecutor will fail to obtain the indictment he requests; he is, after all, alone with the grand jury, and may present to it and withhold such evidence as he wishes. Second, the prosecutor does not need an indictment: he may frame the charge so as to proceed by an information which he alone need sign.

Amendment. If it were intended that the President should control the ability of the Vice President to remain in office, the Vice Presidency would not be for a term certain but would be an appointive office just as any other cabinet post.

This becomes all the clearer in light of the Twenty-fifth Amendment, making the Vice President the sole initiator of any question of the President's ability to serve.

In consequence, the Vice President must be immune to criminal charge.

## II

### THE PROSECUTION-INSPIRED PUBLICITY BARS GRAND JURY ACTION AGAINST THE VICE PRESIDENT

We have urged above that the Vice President, by virtue of his office and during his tenure in office, may not be subjected to prosecution and punishment by ordinary criminal process. As against an incumbent Vice President, impeachment is the only proper course.

The wisdom of the Framers in so deferring customary criminal procedures is demonstrated by the experience of the past two months. Since the first public announcement

that an investigation of the Vice President was under way, there has been a constant stream of publicity -- so great as to preclude any possibility that a grand or petit jury could fairly weigh the matter on the evidence.

In all probability, such publicity is inevitable when a Vice President is the subject of a criminal investigation. And this inevitability reinforces the conclusion that the House and the Senate -- rather than a grand and petit jury -- should determine whether the Vice President shall be charged, and exonerated or convicted. The Congress is accustomed to acting in the glare of publicity. A jury is not so experienced.

This is not a matter alone of the interest of the incumbent Vice President in receiving a fair trial. More importantly, it is a matter of the Nation's interest in having its Vice President properly treated. Vindication of that interest compels the conclusion that a Vice President must be removed from office before he may be subject to routine criminal proceedings.

Here, regrettably, the inevitable publicity has been perverted -- by the deliberate act of prosecutorial officials. In the affidavit supporting this motion we have detailed representative samples of the outrageously prejudicial publicity campaign in which some Government officials

have engaged. It seems clear-beyond question that Government officials have asserted that the Vice President has engaged in plea bargaining. They have said that the evidence against him is "cold." They have publicly expressed their opinion as to his guilt. They have publicized alleged testimony and plea-bargaining negotiations of witnesses. And they have made public the purported results of lie detector tests.

These statements violate the canons,\* Justice Department guidelines\*\* and the local rules of this and other federal courts.\*\*\* But to say that this behavior offends every codified rule of prosecutorial conduct does not even begin to express the outrage of any lawyer familiar with the criminal process.

These statements, moreover, are so clearly damaging to the Vice President as a potential defendant, and they have been so pervasively publicized throughout the Nation,

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\*Code of Professional Responsibility of the American Bar Association, DR 7-107(c).

\*\*28 C.F.R. § 50.2(b)(6)(vi) (1972).

\*\*\*See, e.g., Rule 16, Rules of the United States District Court for the District of Maryland; Rule 8, Criminal Rules of the United States District Court for the Southern District of New York.



that it would be "blinking reality not to recognize the extreme prejudice inherent" in their dissemination, Turner v. Louisiana, 379 U.S. 466, 473 (1965). And, as in Estes v. Texas, 381 U.S. 532, 542-43 (1965), the pervasiveness of the publicity and its so patently damaging character involves "such a probability that prejudice will result that . . . [a prosecution would be] deemed inherently lacking in due process."

The courts have recognized that, where the Government so deliberately makes reasoned grand jury deliberation impossible, a remedy will be afforded. Thus, as Judge Frankel said in United States v. Sweig, 316 F.Supp. 1148, 1153 (S.D.N.Y. 1970), aff'd, 441 F.2d 114 (2d Cir.), cert. denied, 403 U.S. 932 (1971):

"Granted the historic proposition that grand juries may roam fairly widely (and certainly outside the limits of Wigmore's concerns) in collecting their factual beliefs, . . . it can hardly be doubted now that prosecutors must observe some limits of essential fairness in their work with such investigatory bodies. . . . Unless the role of the grand jury as a shield for the citizen as well as a prosecutorial agency is to become an empty slogan, there are kinds of pressure that must obviously be avoided to the extent possible. However free may be the sources of 'fact,' the generation of public animus against a prospective defendant, with the attendant danger that grand jurors may be subjected to subtle or explicit 'demands' for prosecution, . . . is no part of the prosecution's legitimate business." (citations omitted, emphasis added).

Cf., Silverthorne v. United States, 400 F.2d 627, 633-634 (9th Cir. 1968); United States v. Nunan, 236 F.2d 576, 593 (2d Cir. 1956), cert. denied, 353 U.S. 912 (1957); United States v. Kahaner, 204 F.Supp. 921, 922 (S.D.N.Y. 1962), aff'd, 317 F.2d 459 (2d Cir. 1963).

These cases indicate that, where the prosecution has so betrayed its responsibility, the prospective defendant must be protected.

In an ordinary case, with a Vice President not involved, prosecution-inspired publicity of the magnitude here present could be remedied, if at all, only by barring grand jury action until the prejudice had been dissipated -- if ever.

Here, we submit, the proper remedy is to bar grand jury action at least so long as the Vice President holds office -- for only when he becomes a private citizen, if then, can he be treated as fairly, by a grand jury, as any other citizen.

CONCLUSION

The motion should be granted. .

Respectfully submitted, .

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September 28, 1973

UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

In Re Proceedings of The Grand Jury Impaneled December 5, 1972:	:	
Application of Spiro T. Agnew Vice President of the United States	:	Case Number Civil 73-965

MEMORANDUM FOR THE UNITED STATES  
CONCERNING THE VICE PRESIDENT'S  
CLAIM OF CONSTITUTIONAL IMMUNITY

The motion by the Vice President poses a grave and unresolved constitutional issue: whether the Vice President of the United States is subject to federal grand jury investigation and possible indictment and trial while still in office.

Due to the historic independence and vital function of the grand jury, motions to interfere with or restrict its investigations have traditionally met with disfavor. See, e.g., United States v. Dionisio, 410 U.S. 1 (1973); Branzburg v. Hayes, 408 U.S. 665 (1972); United States v. Ryan, 402 U.S. 530 (1971). Thus in ordinary circumstances we would oppose litigious interference with grand jury proceedings without regard to the underlying merits of any asserted claim of immunity. But in the special circumstances of this case, which involves a constitutional issue of utmost importance, we believe it appropriate, in the interest of both the Vice President and the nation, that the Court resolve the issue at this stage of the proceedings.

Counsel for the Vice President have ably advanced arguments that the Constitution prohibits the investigation and indictment of an incumbent Vice President. We acknowledge the weight of their contentions. In order that judicial

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resolution of the issues may be fully informed, however, we wish to submit considerations that suggest a different conclusion: that the Congress and the judiciary possess concurrent jurisdiction over allegations made concerning a Vice President.

This makes it appropriate that the Department of Justice state now its intended procedure should the Court conclude that an incumbent Vice President is amenable to federal jurisdiction prior to removal from office. The United States Attorney will, in that event, complete the presentation of evidence to the grand jury and await that body's determination of whether to return an indictment. Should the grand jury return an indictment, the Department will hold the proceedings in abeyance for a reasonable time, if the Vice President consents to a delay, in order to offer the House of Representatives an opportunity to consider the desirability of impeachment proceedings.\*

The Department believes that this deference to the House of Representatives at the post-indictment stage, though not constitutionally required, is an appropriate accommodation of the respective interests involved. It reflects a proper comity between the different branches of government, especially in view of the significance of this matter for the nation. We also appreciate the fact that the Vice President has expressed a desire to have this matter considered in the forum provided by the Congress. The issuance of an indictment, if any, would in the meantime toll the statute of limitations and preserve the matter for subsequent judicial resolution.

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\*/ We note that the Speaker of the House, Representative Carl Albert, though declining to take action at this stage, has not foreclosed the possibility that he might recommend House action at a subsequent stage.

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We will first state the posture of this matter and then offer to the Court considerations based upon the Constitution's text, history, and rationale which indicate that all civil officers of the United States other than the President are amenable to the federal criminal process either before or after the conclusion of impeachment proceedings.

## STATEMENT

A grand jury in this District, impaneled December 5, 1972, is currently conducting an investigation of possible violations by Spiro T. Agnew, Vice President of the United States, and others of certain provisions of the United States Criminal Code, including 18 U.S.C. 1951, 1952 and 371, and certain criminal provisions of the Internal Revenue Code of 1954. This investigation is now well advanced and the grand jury is in the process of receiving evidence.

The Vice President has moved to enjoin "the Grand Jury from conducting any investigation looking to his possible indictment \* \* \* and from issuing any indictment, presentment or other charge or statement pertaining to [him]" (Motion, p. 1). The Vice President has further moved "to enjoin the Attorney General of the United States, the United States Attorney for the District of Maryland and all officials of the United States Department of Justice from presenting to the Grand Jury any testimony, documents, or other materials looking to possible indictment of [him] and from discussing with or disclosing to any person any such testimony, document or materials" (Motion, pp.1-2).

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The Vice President's motion is based on two contentions: (1) that "[t]he Constitution forbids that the Vice President be indicted or tried in any criminal court," and (2) that "officials of the prosecutorial arm have engaged in a steady campaign of statements to the press which could have no purpose and effect other than to prejudice any grand or petit jury hearing evidence relating to the Vice President \* \* \*" (Motion, p. 2).

On September 28, 1973, this court directed that the Department of Justice submit its brief on the constitutional issue on October 5 and its brief on the remaining issue on October 8, that the Vice President's counsel file a reply brief on October 11, and that oral argument be had on October 12. This Memorandum is submitted on behalf of the United States, the grand jury, and the individual respondents named in the motion, in opposition to the claim that the grand jury should be enjoined because the Vice President cannot "be indicted or tried in any criminal court" (Motion, p. 1).

## I

THE TEXT OF THE CONSTITUTION AND  
HISTORIC PRACTICE UNDER IT  
DO NOT SUPPORT A BROAD IMMUNITY  
FOR CIVIL OFFICERS PRIOR TO REMOVAL

Analysis of the Constitution's text indicates that no general immunity from the criminal process exists for civil officers who are subject to impeachment.

A. The Only Explicit Immunity in the Constitution is the Limited Immunity Granted Congressmen.

The Constitution provides no explicit immunity from criminal sanctions for any civil officer. The only express immunity in the entire document is found in Article I, Section 6, which provides:

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The Senators and Representatives  
 \* \* \* shall in all Cases except Treason,  
 Felony and Breach of the Peace, be priv-  
 ileged from Arrest during their Attendance  
 at the Session of their respective Houses,  
 and in going to and returning from the  
 same \* \* \*.

Since the Framers knew how to, and did, spell out an immunity, the natural inference is that no immunity exists where none is mentioned. Indeed, any other reading would turn the constitutional text on its head: the construction advanced by counsel for the Vice President requires that the explicit grant of immunity to legislators be read as in fact a partial withdrawal of a complete immunity legislators would otherwise have possessed in common with other government officers. The intent of the Framers was to the contrary. Cf. United States v. Johnson, 383 U.S. 169, 177-185 (1966).

In the face of this strong textual showing it would require a compelling constitutional argument to erect such an immunity for a Vice President. Counsel for the Vice President contend that such an argument is provided by Article I, Section 3, Clause 7, by Article II, Section 4, and by the Twelfth Amendment. We will examine each of these contentions in turn.

**B. The Meaning of Article I, Section 3, Clause 7.**

Article I, Section 3, Clause 7 provides:

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.

Counsel for the Vice President argue that this clause means impeachment must precede indictment. The



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records of the debates of the constitutional convention, however, show that the Framers contemplated that this sequence should be mandatory only as to the President.

During most of the debate over the impeachment clause, the Framers' attention was directed specifically to the Office of the Presidency, and their remarks strongly suggest an understanding that the President, as Chief Executive, would not be subject to the ordinary criminal process. See 2 Farrand, Records of the Federal Convention 64-69, 626 (New Haven, 1911). For example, as the memorandum submitted on behalf of the Vice President points out (Memo., p. 9), Gouverneur Morris observed that the Supreme Court would "try the President after the trial of impeachment." 2 Farrand, supra, at 500. It is, of course, significant that such remarks referred only to the President, not to the Vice President and other civil officers.

However, the Framers did not debate the question whether impeachment generally must precede indictment. Their assumption that the President would not be subject to criminal process was based upon the crucial nature of his executive powers. Moreover, the debates concerning the impeachment clause itself related almost exclusively to the Presidency.\*/ The impeachment clause was expanded

\*/ As a recent commentator has observed:

One thing is clear: in the impeachment debate the Convention was almost exclusively concerned with the President. The extent to which the President occupied center stage can be gathered from the fact that the addition to the impeachment clause of the "Vice President and all civil officers" only took place on September 8, shortly before the Convention adjourned. [Berger, Impeachment: The Constitutional Problems 100 (Cambridge, Mass., 1973)]

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to cover the Vice President and other civil officers only toward the very end of the convention. Berger, Impeachment: The Constitutional Problems 146-147 (Cambridge, Mass., 1973). Indeed creation of the Office of the Vice Presidency itself "came in the closing days of the Constitutional Convention." S. Rep. No. 66, 89th Cong., 1st Sess., p. 9 (1965). Thus none of the general impeachment debates addressed or considered the particular nature of the powers of the Vice President or other civil officers. Certainly nothing in the debates suggests that the immunity contemplated for the President would extend to any lesser officer.

As it applies to civil officers other than the President, the principal operative effect of Article I, Section 3, Clause 7, is solely the preclusion of pleas of double jeopardy in criminal prosecutions following convictions upon impeachments. The President's immunity rests not only upon the matters just discussed but also upon his unique constitutional position and powers. See *infra*, pp. There are substantial reasons, embedded not only in the constitutional framework but in the exigencies of government, for distinguishing in this regard between the President and all lesser officers including the Vice President.

Notwithstanding the paucity of debate or contemporaneous commentary on the issue, it is clear that the Framers and their contemporaries understood that lesser impeachable officers are subject to criminal process. The first Congress, many of whose members had been delegates to the Constitutional Convention, promptly enacted Section 21 of the Act of April 30, 1790, 1 Stat. 117, recognizing that sitting federal judges were criminally punishable for bribery and providing for their disqualification from office upon

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conviction. And in 1796, Attorney General Lee informed Congress that a judge of a territorial court, a civil officer subject to impeachment, was indictable for criminal offenses while in office. 3 Hinds, Precedents of the House of Representatives 982-983 (Washington, 1907). These considerations, together with those rooted in the constitutional text and practicalities of government that we discuss below, have led subsequent commentators to conclude, with virtual unanimity, that the Framers did not intend civil officers generally to be immune from criminal process. See, e.g., Rawle, A View on the Constitution of the United States of America 169, 215 (Philadelphia, 1829); Simpson, *supra*, 52-53; Feerick, Impeaching Federal Judges: A Study of the Constitutional Provisions, 39 Fordham L. Rev. 1, 55 (1970).

The sole purpose of the caveat in Article I, Section 3, that the party convicted upon impeachment may nevertheless be punished criminally, is to preclude the argument that the doctrine of double jeopardy saves the offender from the second trial. This was the interpretation of the clause offered by Luther Martin, a member of the Constitutional Convention and Judge Chase's counsel, during Chase's impeachment. 14 Annals of Congress, 8th Cong., 2d Sess., p. 423. In truth, impeachment and the criminal process serve different ends so that the outcome of one has no legal effect upon the outcome of the other. James Wilson, an important participant in the Constitutional Convention,\*/ put the matter succinctly:

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\*/ "James Wilson was the strongest member of this [the Pennsylvania] delegation and Washington considered him to be one of the strongest men in the convention. \* \* \* He had served several times in Congress, and had been one of the signers of the Declaration of Independence. At forty-five he was regarded as one of the ablest lawyers in America." Farrand, The Framing of the Constitution 21 (New Haven, 1913).

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Impeachments \* \* \* come not \* \* \* within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims, and are directed to different objects; for this reason, the trial and punishment of an offense in the impeachment, is no bar to a trial of the same offense at common law. [Wilson, Works 324 (Cambridge, Mass., 1967).]

Because the two processes have different objects, the considerations relevant to one may not be relevant to the other. For that reason, neither conviction nor acquittal in one trial, though it may be persuasive, need automatically determine the result in the other trial. To take an obvious example, a civil officer found not guilty by reason of insanity in a criminal trial could certainly be impeached nonetheless.

The argument advanced by counsel for the Vice President, which insists that only a party actually convicted upon impeachment may be tried criminally, would tie the two processes together in a manner not contemplated by the Constitution. Impeachment trials, as that of President Andrew Johnson reminds us, may sometimes be influenced by political passions and interests that would be rigorously excluded from a criminal trial. Or somewhat more than one-third of the Senate might conclude that a particular offense, though properly punishable in the courts, did not warrant conviction on impeachment. Hence, if Article I, Section 3, Clause 7, were read to mean that no one not convicted upon impeachment could be tried criminally, the failure of the House to vote an impeachment, or the failure of the impeachment in the Senate, would confer upon the civil officer accused complete and -- were the statute of limitations permitted to run -- permanent immunity from criminal prosecution however

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plain his guilt.<sup>\*</sup> There is no such requirement in the Constitution or in reason. To adopt that view would give Congress the power to pardon by acquittal or even by mere inaction, since the officer would never be a "Party convicted" upon impeachment, even though the Constitution lodges the power to grant clemency exclusively in the President.<sup>21</sup> The Framers certainly never supposed that failure to obtain conviction upon impeachment conferred permanent criminal immunity.

The conclusion seems required, therefore, that the Constitution provides that the "Party convicted" is nonetheless subject to criminal punishment, not to establish the sequence of the two processes, but solely to establish that conviction upon impeachment does not raise a double jeopardy defense in a criminal trial.<sup>\*\*</sup> A similar conclusion has been reached under state constitutions containing provisions

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\*/ The Congress could only avoid this result by attending to complaints of criminal conduct against all civil officers so protected. Since the Office of the Vice President appears indistinguishable in this respect from that of other civil officers, the construction of the Constitution offered by counsel for the Vice President would place a significant burden on the Congress. As the result of historic experience, the Congress has chosen to make sparing use of its impeachment power. The House is not structured to act with any frequency as a prosecutor nor the Senate as a jury. A construction of the Constitution that forces the Congress to choose between impeachment or immunization would deprive Congress of the discretion of how and to what extent it wishes to exercise its impeachment jurisdiction. It might also frequently immobilize the Congress, preventing it from dealing with pressing national affairs, to the harm of both Congress and the country.

\*\*/ Just as an individual may be both criminally prosecuted and deported for the same offense (see Fong Yue Ting v. United States, 149 U.S. 698 (1893)), a civil officer could be both impeached and criminally punished even absent the Article I, Section 3 proviso. Moreover, the civil nature of an impeachment under the Constitution renders the English precedent -- involving an impeachment process that was both criminal and political -- inapposite. Whereas conviction of impeachment under our Constitution has no criminal consequences, impeachment in England was designed to accomplish punishment as well as removal, for peers of the realm were not subject to ordinary criminal process. As a consequence, the relationship between the impeachment power and the criminal process in the two countries is wholly different. See generally, Berger, supra, 78-85.

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modeled upon Article I, Section 3, Clause 7. These state constitutional provisions have been held not to bar prosecution of impeachable state officers while in office. See, e.g., Commonwealth v. Rowe, 112 Ky. 482, 66 S.W. 29 (1902); State v. Jefferson, 90 N.J.L. 507, 101 A. 569 (E. & A., 1917). Indeed, indictment, trial and conviction of state officers while in office has been common. See generally, Anno: Officer - Conviction of Crime, 71 A.L.R. 2d 593 (1960).

C. The Meaning of Article II, Section 4.

Article II, Section 4 provides:

The 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.

The Vice President's contention that he is immune from criminal process while in office rests heavily on the assumption that even initiation of the process of indictment, trial, and punishment upon conviction, would effect his practical removal from office in a manner violative of the exclusivity of the impeachment power (See, e.g., Memo., pp. 2, 5-6). This assumption is without foundation in history or logic.

We agree that conviction upon impeachment is the exclusive means for removing a Vice President from office. Although non-elective civil officers in the executive branch may be dismissed from office by the President, and Senators and Representatives may be expelled by their respective Houses, historically the President, Vice President, and federal judges have been removable from office only by impeachment.\*/ But it is clear from history that a criminal

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\*/ We do not here address the question of whether 18 U.S.C. §201(e) constitutionally operates to remove a civil officer

(footnote con't on next page)

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indictment, or even trial and conviction, does not, standing alone, effect the removal of an impeachable federal officer.

As counsel for the Vice President point out (Memo., pp. 14-15), one of his predecessors, Aaron Burr, was subject to simultaneous indictment in two states while in office, yet he continued to exercise his constitutional responsibilities until the expiration of his term.\*/ Judge John Warren Davis of the United States Court of Appeals for the Third Circuit, and Judge Albert W. Johnson of the United States District Court for the Middle District of Pennsylvania, were both indicted and tried while in office; neither was convicted, and each continued to hold office during trial. See Borkin, The Corrupt Judge 95-186 (New York, 1962). Judge Kerner of the Seventh Circuit, whose conviction is currently pending on appeal, has not yet been removed from office. Similarly, the criminal conviction of Congressmen does not act to remove them from office: "the final judgment of conviction [does] not operate, ipso facto, to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment." Burton v. United States, 202 U.S. 344, 369.

\*/ (footnote from previous page)

without impeachment. We only note that the federal statutes contain no general provision, as do the statutes of many states, providing that a vacancy exists in any civil office whenever the incumbent is convicted of a serious crime. These statutes have been upheld as operating to remove the officer without impeachment. See State v. Sullivan, 188 P.2d 592 (Ariz. 1948). See generally, AnnO: Officer - Conviction of Crime, 71 A.L.R. 2d 593 (1960). If such a statute were passed by the Congress, its application to judges, who serve during "good behavior" (Article III, §1) might be different than its application to the Vice President, who has a term of office of four years (Article II, §1).

\*/ Apparently neither Burr nor his contemporaries considered him constitutionally immune from indictment. Although counsel for the Vice President assert that Burr's indictments were "allowed to die" (Memo., p. 15), that was merely because "Burr thought it best not to visit either New York or New Jersey." Parnet & Hecht, Aaron Burr: Portrait of an Ambitious Man, 231 (New York, 1967).

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This is not to say that trial and punishment would not interfere in some degree with an officer's exercise of his public duties, although, as the case of Aaron Burr illustrates, mere indictment standing alone apparently does not seriously hinder full exercise of the powers of the Vice Presidency. But the relationship between trial and punishment, on the one hand, and actual removal from office, on the other, is far from automatic. As perhaps the leading American commentator on impeachment has observed (Simpson, A Treatise on Federal Impeachment 52 (Philadelphia, 1916)):

A public officer may be criminally convicted of trespass, though acting under a claim of right, or for excessively speeding his automobile, yet neither would justify impeachment. If, however, the conviction was followed by imprisonment, impeachment might be well maintained, for the office would be brought into contempt if a convict were allowed to administer it. It may be said that, in that event, impeachment would depend on the severity or lenity of a trial judge, and this would be so, but for the office's sake, a man may be said to be guilty of a "high misdemeanor" if he so acts as to be imprisoned.

Whether conviction of and imprisonment for minor offenses must lead to removal on conviction of impeachment therefore depends, in any given case, on the sound judgment of the Congress and the President's exercise of his pardoning power. Certainly it is clear that criminal indictment, trial, and even conviction of a Vice President would not, ipso facto, cause his removal; subjection of a Vice President to the criminal process therefore does not violate the exclusivity of the impeachment power as the means of his removal from office.



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D. The Twelfth Amendment

Counsel for the Vice President suggest (Memo., pp. 7-8, 18) that adoption of the Twelfth Amendment, providing for separate elections of the President and Vice President, in some way supports immunity for a Vice President. In fact, the implication of the Amendment is the contrary.

The original constitutional plan was that each elector should vote for two persons for President. The man receiving the greatest vote was to be President and the runner-up was to be Vice President. The Vice President was thus the next most powerful contender for the Presidency. The Framers, however, did not foresee the development of political parties which ran "tickets," one man standing for President and the other for Vice President. An elector would then cast one ballot for each of these candidates which had the embarrassing result that Thomas Jefferson and Aaron Burr, though regarded by their party as candidates for, respectively, President and Vice President, received an equal number of votes. There being no constitutionally elected President, the election was thrown into the House of Representatives.

The Twelfth Amendment, adopted in response, provided separate elections so that a man wanted only as Vice President should not thus block the election of the man wanted as President. The adoption of the Twelfth Amendment, therefore, was recognition that the Vice President, under a party system, is not the second most desired man for President but rather an understudy chosen by the presidential candidate. That recognition does not magnify the constitutional position of a Vice President.\*

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\*/ Counsel for the Vice President additionally argue that since (footnote con't on next page)

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## II

THE STRUCTURE OF THE CONSTITUTION AND THE  
WORKINGS OF THE CONSTITUTIONAL SYSTEM DO  
NOT IMPLY AN IMMUNITY FOR A VICE PRESIDENT

The Constitution is an intensely practical document and judicial derivation of powers and immunities is necessarily based upon consideration of the document's structure and of the practical results of alternative interpretations. McCulloch v. Maryland, 4 Wheat. 316 (1819); Stuart v. Laird, 1 Cranch 299, 308 (1803); Field v. Clark, 143 U.S. 649, 691 (1892); United States v. Midwest Oil Co., 236 U.S. 459, 472-473 (1915); United States v. Curtis-Wright Corp., 299 U.S. 304, 328-329 (1936). We turn, therefore, to a structural and functional analysis of the Constitution in relation to the immunity claimed for Vice Presidents.

A. Immunity Should be Implied for an Officer Only if Subjecting Him to the Criminal Process Would Substantially Impair the Functioning of a Branch of Government.

The real question underlying the issue of whether indictment of any particular civil officer can precede conviction upon impeachment -- and it is constitutional in every sense because it goes to the heart of the operation of government -- is whether a governmental function would be seriously impaired if a particular civil officer were liable to indictment

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\* / (footnote con't from previous page)

the Framers could not have intended the President, through his Attorney General, to harass political rivals, therefore the Vice President must be immune from criminal process (see Memo., p. 18). This argument appears unsound. Once he accepts the secondary office, the Vice President is rarely, if ever, an important political rival of the incumbent President. Moreover, the logical implication of the argument is that all major politicians -- Senators, Governors, and many persons not even holding office -- must be freed of responsibility for criminal acts.

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before being tried on impeachment. The answer to that question must necessarily vary with the nature and functions of the office involved.

1. We may begin with a category of civil officers subject to impeachment whom we think may clearly be tried and convicted prior to removal from office through the impeachment process: federal judges.\*/ A judge may be hampered in the performance of his duty when he is on trial for a felony but his personal incapacity in no way threatens the ability of the judicial branch to continue to function effectively. There have been frequent occasions where death, illness, or disqualification has removed all of the available judges from a district or a circuit and even this extreme circumstance has been met effectively by the assignment of judges from other districts and circuits.

Similar considerations apply to Congressmen, and these practical judgments are reflected in the Constitution. As already noted, Article I, Section 6 provides a very limited immunity for Senators and Representatives but explicitly permits them to be tried for felonies and breaches of the peace. This limited grant of immunity demonstrates a recognition that, although the functions of the legislature are not lightly to be interfered with, the public interest in the expeditious and even-handed administration of the criminal law outweighs the cost imposed by the incapacity of a single

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\*/. The Department of Justice is now contending that a United States court of appeals judge is subject to indictment, conviction, and sentencing prior to removal through the impeachment process. See United States v. Kerner, now pending in the Court of Appeals for the Seventh Circuit. This, of course, is the historic position of the Department. See page 12, supra. It seems too clear for argument that other civil officers, such as heads of executive departments, are fully subject to criminal sanctions whether or not first removed from office.

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Legislator. Such incapacity does not seriously impair the functioning of Congress.

2. Almost all legal commentators agree, on the other hand, that an incumbent President must be removed from office through conviction upon an impeachment before being subject to the criminal process. Indeed, counsel for the Vice President takes this position (Memo, pp. 5-8), so it is not in dispute. It will be instructive to examine the basis for that immunity in order to see whether its rationale also fits an incumbent Vice President, for that is the crux of the question before the Court.

As we have noted, page 6, supra, the Framers' discussions assumed that impeachment would precede criminal trial because their attention was focused upon the Presidency. See also, 2 Farrand, Records of the Federal Convention, supra, p. 500, and Hamilton, The Federalist, Nos. 65 and 69. They assumed that the nation's Chief Executive, responsible as no other single officer is for the affairs of the United States, would not be taken from duties that only he can perform unless and until it is determined that he is to be shorn of those duties by the Senate.

The scope of the powers lodged in the single man occupying the Presidency is shown by the briefest review of Article II of the Constitution. The whole "executive Power" is vested in him and that includes the powers of the "Commander in Chief of the Army and the Navy," the power to command the executive departments, the power shared with the Senate to make treaties and to appoint ambassadors, the power shared with the Senate to appoint Justices of the Supreme Court and other civil officers, the power and responsibility to execute the laws, and the power to grant

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reprieves and pardons. The constitutional outline of the powers and duties of the Presidency, though more complete than noted here, does not flesh out the full importance of the office, but this is so universally recognized that we do not pause to emphasize it.

The singular importance of the Presidency, in comparison with all other offices, is further demonstrated by the Twenty-Fifth Amendment, Sections 3 and 4. The problem, as we have noted, is one of the functioning of a branch of government, and it is noteworthy that the President is the only officer of government for whose temporary disability the Constitution provides procedures to qualify a replacement. This is recognition that the President is the only officer whose temporary disability while in office incapacitates an entire branch of government. The Constitution makes no provision, because none is needed, for such disability of a Vice President, a judge, a legislator, or any subordinate executive branch officer.

3. Without in any way denigrating the constitutional functions of a Vice President — or those of any individual Supreme Court Justice or Senator, for that matter -- they are clearly less crucial to the operations of the executive branch of government than are the functions of a President. Although the office of the Vice Presidency is of course a high one, it is not indispensable to the orderly operation of government. There have been many occasions in our history when the nation lacked a Vice President, and yet suffered no ill consequences. And, as has been discussed above (page 12, supra), at least one Vice President successfully fulfilled the responsibilities of his office while under indictment in two states. There is in fact no comparison between the importance of the Presidency and the Vice Presidency.

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A Vice President has only three constitutional functions: (1) to replace the President in the event of the President's removal from office, or his death, resignation, or inability to discharge the powers and duties of his office (Twenty-Fifth Amendment, Sections 1, 3, and 4); (2) to make, together with a majority of either the principal officers of the executive departments or such other body as Congress may by law provide, a written declaration of the President's inability (Twenty-Fifth Amendment, Section 3); and, (3) to preside over the Senate, which Vice Presidents rarely do, and cast the deciding vote in case of a tie (Article I, Section 3).<sup>\*/</sup>

None of a Vice President's constitutional functions is substantially impaired by his liability to the criminal process.<sup>\*\*/</sup> The only problem that might arise would be the death of a President at the time a Vice President was the defendant in a criminal trial.<sup>\*\*\*/</sup> That would pose no practical difficulty, however. The criminal proceedings could be suspended or terminated and the impeachment process begun. This would leave the nation in the same practical situation

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<sup>\*/</sup> The Framers assumed that Vice Presidents would not regularly preside over the Senate, for they expressly provided in Article I, Section 3, Clause 5 for the election of a President pro tempore to act in the Vice President's absence.

<sup>\*\*/</sup> Counsel for the Vice President stresses the importance of the Vice President's role, under the Twenty-Fifth Amendment, with respect to a declaration of Presidential inability. But that responsibility is not an active, continuous executive function. It is, to the contrary, a responsibility -- never yet exercised -- that entails only a single act, one that could be performed by a Vice President who was, for example, under indictment. Moreover, it is a responsibility that is shared with a majority of the Cabinet members, who are themselves subject to the criminal process.

<sup>\*\*\*/</sup> We assume, for reasons stated above (p. 13, supra), that conviction and imprisonment of a Vice President, or any civil officer, would lead to prompt removal through impeachment.

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as would the institution of impeachment proceedings against an incumbent President, the sole legal difference being that the successor to office would be the Speaker of the House of Representatives rather than the Vice President.

B. The Functions of the President are not only indispensable to the Operation of Government, They are Inconsistent with His Subjection to the Criminal Process; There is no Similar Inconsistency in the Case of a Vice President.

The inference that only the President is immune from indictment and trial prior to removal from office also arises from an examination of other structural features of the Constitution. The Framers could not have contemplated prosecution of an incumbent President because they vested in him complete power over the execution of the laws, which includes, of course, the power to control prosecutions (Article I, Section 3). And they gave him "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment" (Article I, Section 2, Clause 1), a power that is consistent only with the conclusion that the President must be removed by impeachment, and so deprived of the power to pardon, before criminal process can be instituted against him. A Vice President, of course, has no power either to control prosecutions or to grant pardons. The functions of the Vice Presidency are thus not at all inconsistent with the conclusion that an incumbent may be prosecuted and convicted while still in office.

C. Basic Considerations of Law Enforcement Militate Against Extension of Immunity to Officers other than the President.

Thus we conclude that considerations derived from the structure of the Constitution itself indicate that only a President possesses immunity from the criminal process prior to impeachment. The position of a Vice President would appear

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to be similar to that of judges, Congressmen, and other civil officers. There are also, however, practical considerations that point in the same direction. Such considerations are entitled to weight in the absence of compelling constitutional reasons for an immunity of the sort we have shown exist only for the Presidency. In many cases, for instance, problems will be posed by the presence of co-conspirators and the running of the statute of limitations.

An official may have co-conspirators and even if the officer were immune, his co-conspirators would not be. The result would be that the grand and petit juries would receive evidence about the illegal transactions and that evidence would inevitably name the officer. The trial might end in the conviction of the co-conspirators for their dealings with the officer, yet the officer would not be on trial, would not have the opportunity to cross-examine and present testimony on his own behalf. The man and his office would be slandered and demeaned without a trial in which he was heard. The individual might prefer that to the risk of punishment, but the courts should not adopt a rule that opens the office to such a damaging procedure.

This practical problem is raised by the motion here which asks this Court to prohibit "the Grand Jury from conducting any investigation looking to the [Vice President's] possible indictment" and to enjoin the prosecutors from presenting any evidence to the grand jury "looking to [his] possible indictment" (Motion, p. 1).

The criminal investigation being conducted by the grand jury is wide-ranging, and the Vice President is not its sole subject. The evidence being presented, while it touches on the Vice President, involves others also. It



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would be virtually impossible to exclude all evidence relating to the Vice President and at the same time present meaningful evidence relating to possible co-conspirators. Thus, enjoining the investigation and presentation of evidence "looking to the possible indictment of [the Vice President]" would require the investigations of other persons also to be suspended. The relief therefore would plainly "frustrate the public's interest in the fair and expeditious administration of the criminal laws" (United States v. Dionisio, *supra*, 410 U.S. at 17).

The statute of limitations with respect to some of the possible illegal activities being investigated will run as early as October 26, 1973. A suspension of the grand jury's investigation of the Vice President and others could therefore jeopardize the possibility of a timely indictment. Should this Court suspend the grand jury investigation the result would likely be to accord the Vice President and other persons permanent immunity from prosecution through the running of the statute of limitations even though it is unlikely he is entitled even to the temporary immunity, pending conviction upon impeachment, that his counsel claim for him.

#### CONCLUSION

Nothing we have said is intended to deprecate in any way the high office of the Vice Presidency or its importance in the Constitutional scheme. We acknowledge that the issue raised by counsel for the Vice President is a momentous and difficult one for any court. However, in order to assist the Court in resolving this troublesome question, we have set forth arguments that counter those advanced by counsel for the Vice President.

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For the reasons stated, applicant's motions  
should be denied.

Respectfully submitted.

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OCTOBER 5, 1973.

