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Presidential Accountability and the Rule of Law: Can the President Claim Immunity if He Shoots Someone on Fifth Avenue?

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**PRESIDENTIAL ACCOUNTABILITY AND THE RULE OF LAW:
CAN THE PRESIDENT CLAIM IMMUNITY IF HE SHOOTS SOMEONE ON
FIFTH AVENUE?**

*Claire O. Finkelstein**
*Richard W. Painter***

ABSTRACT

*Can a sitting President be indicted while in office? This critical constitutional question has never been directly answered by any court or legislative body. The prevailing wisdom, however, is that, though he may be investigated, a sitting President is immune from actual prosecution. The concept of presidential immunity, however, has hastened the erosion of checks and balances in the federal government and weakened our ability to rein in renegade Presidents. It has enabled sitting Presidents to impede the enforcement of subpoenas and other tools of investigation by prosecutors, both federal and state, as well as to claim imperviousness to civil process, extending even to third parties. In an important recent case, the Supreme Court rejected the idea of presidential immunity as a constitutional doctrine and reasserted that a sitting President is not above the law. In *Trump v. Vance*, the Court made clear that a President's Article II powers do not shield him from criminal investigation. In this Article, we argue that the holding of *Vance* is reinforced by historical discussions from the early days of the Republic, by important Supreme Court precedent, and by a sound understanding of the requirements of democratic governance. As we argue, the *Vance* case suggests that a sitting President can be investigated and indicted while in office. We argue that immunity from criminal prosecution for a sitting President would undermine all other forms of accountability, such as impeachment and the ballot box, as Presidents will be able to commit crimes to avoid the impact of these two important guardrails of democracy with impunity. In keeping with our argument, we urge the Department of Justice to withdraw the two memos it has issued asserting that a sitting President cannot be indicted while in office and revise its advice to make clear that a sitting President who commits a crime should be investigated and potentially indicted. The Department should thus reiterate the basic principle the Founders embraced and that the Court upheld in *Vance*, namely that no person is above the law.*

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INTRODUCTION

The Framers of the U.S. Constitution created three branches of the federal government with co-equal power. If no single branch could dominate, they reasoned, each branch would serve as a constraint on the other two.¹ The Framers were also concerned to protect the states against the arbitrary exercise of power at the hands of a runaway federal government by balancing federal against state power, an aim embodied in the Tenth Amendment.² These two aspects of U.S. constitutional structure—horizontal separation of powers at the federal level and vertical division of power between state and federal government—have proven their worth over the years and have provided the guardrails that ensure our fidelity to democratic governance.

Yet through a series of incremental changes, one branch, the executive branch, has come to dominate the other two federal branches as well as the states. This is despite the great importance placed in democratic theory,³ as well as in judicial opinions,⁴ on both horizontal and vertical checks and balances. With this shift in the original structure of the republican ideal, there lies a threat to democratic governance, a threat we see playing out daily as we struggle to identify the essential features of a society that depends for its political stability on fidelity to the rule of law. In 2020, the shifts were so

¹ See THE FEDERALIST NO. 48 (James Madison) (arguing that the branches of government must have sufficient power to impose some restraints over each other to operate effectively). Historical accounts of the Constitution's treatment of the three branches are plentiful, including classics such as MAURICE J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (New York: Oxford Univ. Press, 1967) (tracing the history of constitutional governance and examining criticisms of the doctrine), and WILLIAM B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION* (1965) (analyzing the doctrine of the separation of powers from its origin to its adoption in the U.S. Constitution).

² U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

³ See, e.g., CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 216 (Thomas Nugent trans., London, Strand 1823) (1748) ("When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers.").

⁴ *Marbury v. Madison*, 5 U.S. 137 (1803) is the earliest and most famous case in which the Supreme Court asserted the power of the judiciary to check the power of the executive as well as Congress. Other contemporary and more recent cases are discussed in this Article.

significant and the constraints on presidential power so reduced that the U.S. seemed to be teetering on the brink of abandoning democracy altogether in favor of autocratic rule.

The Framers anticipated that Presidents might become tyrannical, and they accordingly conceived of two important mechanisms to hold Presidents accountable: impeachment and the opportunity to vote Presidents out of office on a regular basis.⁵ Because presidential elections only occur once every four years, however, impeachment is structurally the only emergency measure the Framers explicitly built into the Constitution to protect against a despotic commander-in-chief. Yet experience dictates that it is nearly impossible to remove a President from office via impeachment. No President has ever been found guilty in a Senate impeachment trial, despite four efforts to remove sitting Presidents from office through the impeachment process. To date, elections have proven the only real safeguard against runaway Presidents. With the 2020 election, however, we learned to question whether even that method of accountability was beyond the reach of a President determined to undermine the vote. We saw in dramatic fashion the degree to which a sitting President can use his vast presidential powers to undermine the integrity of the very elections that will determine his authority to govern.

In this Article, we make the case for the importance of a third means of accountability, namely criminal investigation and indictment of a sitting President.⁶ Indeed, we explain that indicting a sitting President is not just an

⁵ The Framers did not institute term limits. That was introduced into federal law with the Twenty-second Amendment in 1947. A third method of accountability also was not available at the time of the Framers, namely the Twenty-fifth Amendment, which was introduced shortly after the assassination of President John F. Kennedy, Jr. in 1963. Removal for incapacity is not properly speaking a method of accountability at all, given that it is not a penalty but a provision allowing for emergency removal in case the President is unable to govern.

⁶ Previous law review articles on this subject are few, most notably and recently W. Burlette Carter, *Can a Sitting President Be Federally Prosecuted? The Founders' Answer*, 62 HOW. L.J. 331 (2019) (discussing how the Framers intended for a sitting President to be prosecuted for the commission of crimes). Justice Kavanaugh briefly discussed the question of indicting a sitting President in two law review articles in the late 1990s and early 2000s, both of which are discussed in a separate section of this Article below. Most commentary has been in briefer formats such as blog posts and op-eds. See, e.g., Walter Dellinger, *Indicting a President Is Not Foreclosed: The Complex History*, LAWFARE (June 18, 2018), <https://www.lawfareblog.com/indicting-president-not-foreclosed-complex-history> [<https://perma.cc/JQ9Y-V7VK>] (analyzing whether criminal prosecution of the President is precluded); Jan Wolfe, *Can a Sitting U.S. President Face Criminal Charges?*, REUTERS (Feb. 26, 2019), <https://www.reuters.com/article/us-usa-trump-russia-indictment-explainer/can-a-sitting-u-s-president-face-criminal-charges-idUSKCN1QF1D3> [<https://perma.cc/HN3M-CAE2>] (assessing whether a President can constitutionally face criminal charges).

option that can be fairly read into the text of a living Constitution. While that may be true, we claim that there are sound arguments for seeing presidential indictment as part and parcel of the original conception of presidential accountability, and that this check on presidential power is a necessary part of core constitutional safeguards. Federal prosecutors, however, confront the long-standing policy on the part of the Department of Justice (“DOJ”) that it is unconstitutional to indict a sitting President, a position that the DOJ first put forth in an Office of Legal Counsel (“OLC”) memorandum in 1973 and affirmed with a second memo in 2000.⁷ The DOJ memos have led to broader and broader claims of immunity on the part of sitting Presidents, culminating in the extreme position adopted by President Donald J. Trump’s lawyers in seeking to shield his tax returns and other financial documents from a New York grand jury—namely, that it would be impermissible to arrest or investigate the President even if he had “shot someone on Fifth Avenue.”⁸

The purpose of this Article is to expose the problematic nature of the concept of personal presidential immunity, and to suggest that this theory is not required by Article II of the Constitution, contrary to what a number of scholars have claimed. Furthermore, we argue that the concept of presidential immunity is profoundly antithetical to the mainstay of democratic governance, namely the concept of the rule of law. The ability to hold Presidents criminally accountable during their terms in office turns out to be an essential feature of democratic governance, one that is consistently supported by Supreme Court jurisprudence. The doctrine of presidential immunity, therefore, conflicts with important Supreme Court precedent. For both reasons of consistency with democratic principles and to ensure that DOJ policies are congruent with constitutional jurisprudence, we must repudiate any doctrine that places Presidents beyond the reach of the law, particularly beyond the reach of criminal statutes. Accordingly, we argue for a reversal of the position the OLC takes in the above-mentioned

⁷ See *Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office*, Op. O.L.C. (Sept. 24, 1973); *A Sitting President’s Amenability to Indictment and Criminal Prosecution*, Op. O.L.C. (Oct. 16, 2000). Our discussion of the 1973 and 2000 DOJ memos, and another third undisclosed DOJ memo from 2019 on a similar issue, appear in Section I.C of this Article below.

⁸ As we discuss below, President Trump’s lawyers made this claim in oral argument in the Second Circuit in *Trump v. Vance*.

memoranda, as well as a reconceptualization of the doctrine of presidential immunity.

In what follows, we leave to one side questions relating to accountability for presidential abuses of power that fall short of use of the criminal process, as well as questions relating to particular crimes for which a sitting President might be charged. Our central purpose is to expose the ways in which a President who can commit crimes with impunity poses a unique danger, a danger of which the Framers were clearly aware and which they accounted for in the design of the Constitution. This is all the more so, as we so chillingly learned during the Trump presidency, if presidential misconduct has the purpose of enabling the President to protect himself against the processes that would normally protect democratic governance from his abuses—namely removal by impeachment or legally valid elections. Representative democracy is at risk when the President encounters no consequences for demanding that foreign countries assist him with his bid for reelection, that local election officials falsify the vote tally in order to change the results of the election, or that supporters resist the peaceful transition of power after he has been defeated at the polls.

The Framers were well aware of the risk that authoritarian leaders might commit crimes to remain in power. They were aware of examples from history of political assassins⁹ and murderous leaders, many of whom have left their indelible mark on Western literature, history, and myth.¹⁰ Even today, in countries where democratic traditions are not firmly established, it is often taken for granted that there will be political assassinations of opposition candidates or retaliation against individuals who are in a position to damage those in power prior to an election. The Kremlin is suspected of using lethal force against political opponents, as the poisoning of Sergei and Yulia Skripal

⁹ See, e.g., Tim Thornton, *More on a Murder: The Deaths of the 'Princes in the Tower', and Historiographical Implications for the Regimes of Henry VII and Henry VIII*, 106 J. HIST. ASS'N 4 (2021) (discussing political complications in contemporaneous accounts of Richard of Gloucester's [Richard III's] 1483 seizure of power by deposing his nephew the 12-year-old King Edward V, followed by the disappearance and probable murder in the Tower of London of Edward and his younger brother Richard of Shrewsbury, Duke of York).

¹⁰ See, e.g., WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK. *Hamlet* revolves around whether Hamlet will avenge the death of his father, the former King, who was murdered by the King's brother Claudius, who has now ascended to the throne of Denmark by marrying Hamlet's mother, Queen Gertrude. Much of the play revolve around Hamlet's efforts to investigate Claudius's crime and Claudius's countermeasures against Hamlet, including poisoning a dueling sword and a cup of wine.

as well as that of opposition leader Alexei Navalny attest.¹¹ It would not be hard to imagine a bloodier variant of what Trump tried to do in seeking Ukraine's assistance to investigate the son of his political rival, Hunter Biden.¹² Conceivably, presidential immunity could shield, or even incentivize, presidential crime at home in the United States, and for the same purpose as we saw abroad, namely in order to retain control of the office of the presidency by whatever means.¹³

For four years, we had a President who openly boasted that he could shoot someone on Fifth Avenue without losing any voters,¹⁴ and also that Article II of the Constitution allowed him to do whatever he wanted as President.¹⁵ Those supercilious claims were combined and repeated by Trump's legal team in *Trump v. Vance*,¹⁶ in which Trump's lawyers argued that Article II barred a state prosecutor from enforcing a subpoena against his former accountants to obtain Trump's personal financial documents. Under this theory, it would be impermissible to indict, or even to investigate, a President caught in the middle of the commission of a crime, including a President in the middle of a murderous rampage on Fifth Avenue.¹⁷ The U.S. Supreme Court unequivocally rejected Trump's view of presidential

¹¹ See Natasha Bertrand, *Biden Readies His First Major Penalties on Russia*, POLITICO (Feb. 22, 2021), <https://www.politico.com/news/2021/02/22/biden-penalties-russia-470986> [<https://perma.cc/5VJM-9UKU>] (assessing U.S. reaction to these poisonings).

¹² Trump was impeached in 2019 for holding up military aid that Congress had voted for Ukraine in order to use the aid as leverage to force Ukraine to announce an investigation into the business activities of Hunter Biden, the son of Trump's political rival, Joe Biden. The Republican-dominated Senate, however, did not convict Trump following impeachment for this blackmailing of Ukraine.

¹³ In the United States, we have no known cases of political assassinations by Presidents of political rivals, but U.S. operatives are alleged to have participated in such assassinations overseas.

¹⁴ *Trump: "I Could Stand in the Middle Of Fifth Avenue and Shoot Somebody and I Wouldn't Lose Any Voters"*, REALCLEAR POL. (Jan. 23, 2016), https://www.realclearpolitics.com/video/2016/01/23/trump_i_could_stand_in_the_middle_of_fifth_avenue_and_shoot_somebody_and_i_wouldnt Lose Any Voters.html [<https://perma.cc/6MLW-9V8C>].

¹⁵ Michael Brice-Saddler, *Trump Says Constitution Gives Him Right to "Do Whatever I Want"*, WASH. POST (July 23, 2019), <https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/> [<https://perma.cc/8F7B-V8TT>] (reporting on a Trump speech about the wide breadth of power the Constitution gives him).

¹⁶ Reply Brief for Petitioner at 6, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19–635).

¹⁷ See *Trump v. Vance Oral Argument*, C-SPAN, at 35:38 (Oct. 23, 2019), <https://www.c-span.org/video/?465172-1/circuit-hears-oral-argument-president-trumps-tax-returns> [<https://perma.cc/D658-2W9N>] (“[Trump] brings the case both as a private person and as the sovereign.”).

immunity and made clear that sitting Presidents are not above the law.¹⁸ The precise parameters and implications of the *Vance* decision, however, remain unclear. In particular, *Vance* only addressed criminal investigation of a sitting President, not indictment. Does the *Vance* decision imply that a sitting President can be indicted? If so, does this apply equally to the states as well as to the federal government? And what would be the implications of actually proceeding to trial and sentencing a sitting President?

In this Article, we argue that it is critical to protect the other two methods of accountability—impeachment and presidential elections—from criminal interference by the executive branch when a President commits crimes that undermine these constitutional processes in order to maintain his power. If the legal boundaries on presidential authority cannot be enforced during the presidency itself, the other methods of accountability the Framers built into our government as effective hedges against despotism will not be maintained. Combining presidential immunity theory with a capacious view of presidential authority, such as we have increasingly seen in recent years, ultimately exposes democratic governance to the risk of authoritarianism.

In the next part, we focus on debates about the meaning of Article II with regard to presidential immunity, as well as on other constitutional provisions, such as the Impeachment Clause in Article I. Finding no indication that the Constitution contains a doctrine of presidential immunity, we consider the views of the Framers on this question, which we believe supports our reading of the Constitution. We then consider the two Justice Department memoranda mentioned above and compare them to Supreme Court precedent on presidential immunity, namely *U.S. v. Nixon* and *Jones v. Clinton*. Finally, we turn to a careful examination of the *Vance* case, which dealt a blow to the idea of presidential immunity from criminal process and by extension to the idea that a sitting President cannot be indicted.

In Part II, we consider the independent question of whether and how a sitting President can be investigated. We address the challenges of investigating a sitting President against the background of the vast presidential powers that can be marshaled to undermine those investigations. We also consider how investigation of a sitting President relates to the pardon power and the potential for Presidents to use that express constitutional authority to shield themselves from accountability.

¹⁸ *Trump v. Vance*, 140 S. Ct. 2412 (2020).

In Part III, we consider the possibility of state criminal investigations and indictments of a sitting President. The *Vance* Court considered, and largely rejected, the argument that heightened constraints are needed on state criminal processes directed at a President. We discuss existing constraints designed to minimize the risk of abusive state criminal investigations and consider why state criminal processes are a critically important constraint on presidential power in our federal system.

In Part IV, we address the question whether prosecuting a sitting President after he leaves office provides sufficient deterrence against presidential crime. We offer several reasons why, in our view, it does not. We conclude that the concept of presidential immunity is badly out of keeping with the Framers' intent to equip the other branches of government, as well as the states, with the ability to hold Presidents accountable for misdeeds they commit while in office. We argue that presidential immunity is also in tension with the structure of democratic governance more generally, which depends critically on the principle that no person is above the law.

I. CAN A SITTING PRESIDENT BE INDICTED?

The question whether the President is immune from indictment is not directly answered by the text of the Constitution. As with many constitutional questions, one must construct an answer from a combination of minor indications contained in the text, constitutional history, legal precedent and commentary, and finally the structure of democratic norms and values and that which is needed to maintain them. While there are different philosophies about how to approach constitutional questions, such as textualism and originalism, we do not take sides in constitutional debates about methodology. Rather, we hope that by providing a mix of evidence drawn from a variety of sources, a picture will emerge that establishes a compelling case for a single answer to our question, namely that there is no constitutional immunity for sitting Presidents against criminal indictment.

A. *What Does the Constitution Actually Say?*

We begin with the text of the Constitution, of which the most significant passage appears in the Impeachment Clause, namely Article I, Section 3:

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.*¹⁹

Some scholars, such as Cass Sunstein²⁰ and Philip Bobbitt,²¹ see in this phrase a precondition for a criminal indictment and trial of a federal officer, namely that he must first be impeached, tried in the Senate and “convicted” before he can be charged with a crime. They therefore believe that this provision precludes the indictment of any President who has not already been impeached and removed.

This interpretation, however, is highly problematic, given that the Impeachment Clause extends to federal officers besides Presidents. Because Article I, Section 3 refers to the “Party” in “Cases of Impeachment,” it covers other federal officers subject to impeachment. Article II, Section 4 identifies who these persons are: “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.”²² The Impeachment Clause thus applies to all of these federal officers. Under Sunstein’s and Bobbitt’s interpretation of Article I, Section 3, none of these individuals could be indicted for a crime until they were impeached by the House and convicted by the Senate.

¹⁹ U.S. CONST. art. I, § 3 (emphasis added).

²⁰ Cass R. Sunstein, *A Sitting President Can’t Be Prosecuted*, BLOOMBERG QUINT, <https://www.bloombergquint.com/view/a-sitting-president-can-t-be-prosecuted> [https://perma.cc/9PKM-Z8UB] (Aug. 1, 2017, 4:00 PM) (quoting the above language in the Impeachment Clause and then stating “A reasonable interpretation of this provision [the Impeachment Clause] is that it sets out a temporal sequence: Impeachment, then conviction and removal from office—and only after that, indictment, trial, judgment and punishment.”).

²¹ Philip Bobbitt, *Can the President Be Indicted? A Response to Laurence Tribe*, LAWFARE (Dec. 17, 2018), <https://www.lawfareblog.com/can-president-be-indicted-response-laurence-tribe> [https://perma.cc/3QFH-659R] (“Professor Tribe’s argument depends on an artful reading of Article I, Section 3, which provides that ‘the Party convicted [by the Senate in an impeachment proceeding] shall nevertheless be liable and subject to indictment.’ The natural import of these words—their textual meaning to the ordinary reader—would assume, I think, that ‘the Party convicted’ must be someone who has in fact been convicted, i.e., who has gone through an impeachment process prior to being subject to indictment.”).

²² U.S. CONST. art. II, § 4. Although the term “all civil Officers” is not defined in the Constitution, it is widely understood to encompass all civilian “officers of the United States” who are appointed by the President pursuant to the Appointments Clause of the Constitution, including federal judges. The Appointments Clause says that the President “shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States.” U.S. CONST. art. II, § 2, cl. 2.

Other constitutional law scholars, such as Laurence Tribe, and indeed the OLC itself in its memos on indictment of a sitting President,²³ read Article I, Section 3 differently. The point of the Impeachment Clause reference to criminal trial after impeachment and removal, they think, is to avoid an argument that double jeopardy would preclude post-impeachment criminal punishment of an impeached and removed official for the same criminal conduct.²⁴ As Alexander Hamilton explained in Federalist No. 65:

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 his country, he will still be liable to prosecution and punishment in the ordinary course of law.²⁵

Does the Impeachment Clause itself, and Hamilton's explanation of it, mean that an impeachable federal officer can only be convicted of a crime *after* he has been impeached? Hamilton, like Article I, Section 3, does not say.

There are compelling arguments against the Sunstein and Bobbitt view of the Impeachment Clause and in favor of the interpretation supported by Tribe and the OLC. First, consider the implications of Sunstein's and Bobbitt's interpretation. No federal officer who is subject to impeachment could ever be charged with a criminal violation, no matter how serious or trivial, unless he were first impeached in the House and removed by the Senate. As the OLC explains in its 1973 memo, this simply has not been the practice over the two hundred years since the Constitution was ratified, and we have seen federal officers other than the President indicted while in office.²⁶ As the OLC also points out, Congress in 1790 specifically provided

²³ We discuss these OLC memos in a separate subsection below.

²⁴ Laurence H. Tribe, *Yes, the Constitution Allows Indictment of the President*, LAWFARE (Dec. 20, 2018), <https://www.lawfareblog.com/yes-constitution-allows-indictment-president> [https://perma.cc/3HMH-VXQ9] (“Without that language, it might have been argued that the ban on double jeopardy would preclude such post-removal proceedings that seek to punish the removed official criminally for the very same conduct that led to the official’s conviction and removal by the Senate.”).

²⁵ THE FEDERALIST NO. 65 (Alexander Hamilton).

²⁶ *Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office*, Op. O.L.C. 4 (Sept. 24, 1973) (“During the life of the Republic impeachment proceedings have been instituted only against 12 officers of the United States. CONGRESSIONAL DIRECTORY, 93 Cong., 1st Sess., p. 402. In the same time, presumably scores, if not hundreds, of officers of the United States have been subject to criminal proceedings for offenses for which they could have been impeached.”).

by statute that any federal judge convicted of bribery shall “forever be disqualified to hold any office of honour, trust or profit, under the United States.”²⁷ This demonstrates that the First Congress believed criminal conviction of a judge for bribery ordinarily should come first; then impeachment and removal.²⁸

Indeed, an interpretation of the Impeachment Clause that precludes criminal indictment of a federal officer makes little sense. If this clause barred pre-impeachment indictment of an impeachable federal officer, a vast array of the most powerful executive and judicial branch officials could commit crimes with impunity unless and until impeached and convicted by two-thirds of the Senate. Such crimes might even include bribing members of the House to avoid impeachment or members of the Senate to avoid conviction. This idea of immunity of federal officers subject to impeachment from criminal prosecution up until the point of impeachment and removal therefore makes little sense if federal officers are to be held accountable to the rule of law.

Consider also that making criminal indictment conditioned on a two-thirds vote in the Senate places impeachable federal officers beyond the reach of the criminal law for the duration of their terms in office. For Article III judges, who enjoy lifetime tenure, it would be unthinkable that a judge or justice would be immune from indictment for any number of crimes, such as

²⁷ *Id.* at 5 (citing the Act for the Punishment of Certain Crimes Against the United States, Pub. L. No. 1–9, 1 Stat. 117 (1790)).

²⁸ Indeed, only two years before the OLC’s 1973 opinion on indictment of a sitting President, United States Court of Appeals Judge Otto Kerner, former Governor of Illinois, was indicted by a federal grand jury on charges of bribery, perjury and tax evasion. Seth S. King, *Federal Judge Kerner Indicted on Bribe, Perjury, Tax Charges*, N.Y. TIMES (Dec. 16, 1971), <https://www.nytimes.com/1971/12/16/archives/federal-judge-kerner-indicted-on-bribe-perjury-tax-charges-judge.html> [https://perma.cc/9VVP-D95T]. Judge Kerner did not resign from his judicial office until July 22, 1974—after he had lost his final appeal of his criminal conviction, and seven days before he went to prison. Seth S. King, *Otto Kerner Goes to Jail Today His Once Shining Career at End*, N.Y. TIMES (July 29, 1974), <https://www.nytimes.com/1974/07/29/archives/otto-kerner-goes-to-jail-today-his-onceshining-career-at-end-income.html> [https://perma.cc/44Q8-QKAF]. The same Justice Department that indicted Judge Kerner before his impeachment could not, and did not, in the OLC memos ground its conclusions about indicting a sitting President in the language of the Impeachment Clause.

sexually assaulting law clerks or taking or paying bribes, as long as they had the support of thirty-four senators. As the OLC concluded in 1973:²⁹

[A] rule that impeachment must precede indictment could operate to impede, if not bar, effective prosecution of offending civil officers. The sensible course, as a general proposition, is to leave to the judiciary the trial of indictable criminal offenses, and to Congress the scope of the overlapping impeachment jurisdiction. The gross impracticalities of a rigid rule that impeachment precede indictment demonstrate that it would be an unreasonable, and improper construction of the Constitution.³⁰

We discuss the OLC's reasoning behind this conclusion more fully in Section I.C below. We merely wish to point out here the irony of a constitutional interpretation that would make federal judges, who are charged with enforcing the law, categorically immune from prosecution under the law. Add to that a similarly lawless cabinet and other superior officers, and such an interpretation of the Impeachment Clause would start to look highly implausible.

What this demonstrates is that the Impeachment Clause does not provide the support for the blanket immunity of federal officers from criminal prosecution for which some have argued. Whether the President is unique and entitled to immunity because of some other constitutional principle is a different question. But immunity of the President from criminal prosecution would have to be found elsewhere in the Constitution, if at all.

The only place in the Constitution that does expressly confer immunity from criminal prosecution on federal officers is the Speech and Debate Clause of Article I, Section 6, which applies uniquely to members of Congress. The general principle is that members of Congress may be charged with crimes while in office, a principle amply reinforced by numerous criminal indictments and convictions.³¹ The Speech and Debate

²⁹ See *Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office*, Op. O.L.C. 7 (Sept. 24, 1973) (“In sum, the analysis of the text of the Constitution and its practical interpretation indicate that the Constitution does not require the termination of impeachment proceedings before an officer of the United States may be subjected to criminal proceedings.”). An entire ten-page section of the 1973 OLC Memo is titled “Troublesome Implications of a Proposition that Impeachment Must Precede Indictment.” See *id.* at 7–17.

³⁰ *Id.* at 16.

³¹ The most recent such criminal conviction was of a New York Congressman convicted of insider trading. See Jerry Zremsky, *Critics Outraged, Republicans Silent as Trump Pardons Ex-Rep. Chris Collins*, BUFFALO NEWS (Dec. 22, 2020), <https://buffalonews.com/news/critics-outraged-republicans->

Clause provides a narrowly crafted exception. Representatives and senators “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 in going to and from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.”³² This grant of immunity explicitly exempts treason, felony or breach of the peace and does not extend to arrest for any offense outside of the legislative session.³³ Most importantly, there is no parallel constitutional provision providing any immunity, even from arrest, for the President.³⁴ It is difficult to conceive of the Founders having intended broader immunity for the President than for members of Congress, without a clear provision establishing such immunity in the text of the Constitution.

Senator Charles Pinckney of South Carolina, a Federalist who had been a delegate to the Constitutional Convention and was later John Adams’s running mate in the 1804 presidential election, explained the limited immunity from arrest and other privileges given to members of Congress in the Speech and Debate Clause in a speech in the Senate on March 5, 1800. He emphasized that undefined privileges had been exercised oppressively in Great Britain, that the Constitution had only specified and limited privileges and that such privileges were not bestowed on the President.³⁵ Pinckney

silent-as-trump-pardons-ex-rep-chris-collins/article_fef6b3cc-44b2-11eb-9842-f7428af473ae.html [https://perma.cc/XZ2G-E5DK] (reporting former Congressman Chris Collins pled guilty to insider trading charges and resigned from Congress).

³² U.S. CONST. art. 1, § 6, cl. 1.

³³ *Id.* Moreover, this clause does not actually preclude criminal indictment or trial for any crime whatsoever, but merely arrest.

³⁴ See Tribe, *supra* note 24 (discussing the absence of any constitutional provision providing immunity for the President parallel for the limited immunity given to members of Congress in the Speech and Debate Clause).

³⁵ CHARLES PINCKNEY IN THE UNITED STATES SENATE (Mar. 5, 1800), reprinted in RECORDS OF THE FEDERAL CONVENTION OF 1787, VOLUME III, 384–85 (Max. Farrand ed., 1911). Pinckney said:

The remainder of the [Speech and Debate] clause respecting privilege is so express on the subjects of privilege from arrest, government of members, and expulsion, that every civil officer in the United States, and every man who has the least knowledge, cannot misunderstand them. I assert, that it was the design of the Constitution, and that not only its spirit, but letter, warrant me in the assertion, that it never was intended to give Congress, or either branch, any but specified, and those very limited, privileges indeed. They well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here. They knew that in free countries very few privileges were necessary to the undisturbed exercise of legislative duties, and those few only they determined that Congress should possess; they

observed that privileges should be quite limited in a representative democracy and that the Framers were reluctant to bestow constitutional privileges on federal officers because they were likely to be abused, as they had been in Great Britain.³⁶ As the Speech and Debate Clause shows, the Framers knew how to bestow immunity on federal officers in the constitutional text, and that they did so sparingly.

There being no support for presidential immunity from indictment in the Impeachment Clause in Article I or elsewhere in the Constitution, proponents of presidential immunity seek other constitutional validation. Cass Sunstein, for example, argues that the Framers intended to deal with presidential wrongdoing through impeachment alone.³⁷ Justice Alito echoes this view in his dissent in *Trump v. Vance*, in which he states: “[t]he constitutional provisions on impeachment provide further support for the rule that a President may not be prosecuted while in office.”³⁸ As discussed above, however, and as the OLC recognized in its 1973 memo discussed more extensively below,³⁹ impeachment and criminal adjudication are two distinct processes and have two completely different objectives.

never meant that the body who ought to be the purest, and the least in want of shelter from the operation of laws equally affecting all their fellow citizens, should be able to avoid them; they therefore not only intended, but did confine their privileges within the narrow limits mentioned in the Constitution Let us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect No privilege of this kind was intended for your Executive, nor any except that which I have mentioned for your Legislature. The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more.

The 1973 OLC memorandum is misleading in that it cites this speech in footnote 12 on page 18 without explaining Pinckney’s point, namely that the Founders were concerned about abuses of privileges in Great Britain and did not want to mimic that aspect of British government here. Op. O.L.C. 7 (Sept. 24, 1973).

- ³⁶ Here, Pinckney uses the word “privilege” to refer to constitutional exemptions for high-ranking federal officers from ordinary application of the law, including their immunity from arrest in specified circumstances.
- ³⁷ See generally Sunstein, *A Sitting President Can’t Be Prosecuted*, *supra* note 24 (“The drafters of the Constitution spent a lot of time on the question of how to respond to presidential wrongdoing. Their remedy was impeachment (by the House of Representatives) and then conviction (by the Senate) which could only occur for ‘Treason, Bribery and other High Crimes and Misdemeanors.’ That means you can’t indict and try a sitting President. He has to be removed first.”).
- ³⁸ *Trump v. Vance*, 140 S. Ct. 2412, 2444 (2020) (Alito, J., dissenting).
- ³⁹ Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office, Op. O.L.C. 16 (Sept. 24, 1973).

The impeachment process at most results in removal from office and potential disqualification from future office following conviction in the Senate by a two-thirds majority, with an additional majority vote to remove from office. Impeachment cannot be combined with criminal punishment in the same proceeding in the United States. Article I, Section 9 of the Constitution expressly prohibits Congress from imposing criminal penalties on anyone, including the President, in the form of a “Bill of Attainder,”⁴⁰ namely a legislative bill that targets a particular individual for punishment.⁴¹ Older English statutes, by contrast, had given noblemen immunity from prosecution by the King in whose name criminal process ordinarily issued, substituting the guarantee of a trial before their peers in the House of Lords.⁴² The Founders explicitly rejected the concept of legislative branch criminal trials and punishment in the Bill of Attainder Clause, and there is no language in the Constitution embracing immunity due to office or rank.

Criminal indictment of a sitting President or any other officer, moreover, does not necessarily mean removal. Indictment is not trial; trial is not conviction; conviction is not punishment; and punishment is not removal. As we have seen with other countries, a President or Prime Minister indicted and even convicted for some criminal offenses, particularly misdemeanors, might be allowed to remain in office.⁴³ Indeed, not all criminal convictions

⁴⁰ U.S. CONST. art. 1, § 9, cl. 3 provides, “No Bill of Attainder or ex post facto Law will be passed.”

⁴¹ Bills of Attainder were used in Great Britain, particularly for trials of persons of high rank, but have not been seriously attempted since the House of Lords voted to convict Queen Caroline for adultery in 1820, a bill which was then withdrawn in the House of Commons. A CORRECT, FULL AND IMPARTIAL REPORT OF THE TRIAL OF HER MAJESTY CAROLINE, QUEEN CONSORT OF GREAT BRITAIN, BEFORE THE HOUSE OF PEERS; ON THE BILL OF PAINS AND PENALTIES (J. H. Adolphus ed., London, Jones & Co., 1820).

⁴² The Statute of Edward III, passed by Parliament in 1341, provided:

“Whereas before this time the peers of the land have been arrested and imprisoned, and their temporalities, lands, and tenements, goods and cattels, asseized in the king’s hands, and some put to death without judgment of their peers: It is accorded and assented, that no peer of the land, officer, nor other, because of his office, nor of things touching his office, nor by other cause, shall be brought in judgment to lose his temporalities, lands, tenements, goods and cattels, nor to be arrested, nor imprisoned, outlawed, exiled, nor forejudged, nor put to answer, nor be judged, but by *award (sentence)* of the said peers in Parliament.”

Lysander Spooner, AN ESSAY ON THE TRIAL BY JURY 93 (Boston, Bela Marsh, 1852).

⁴³ Consider the example of Benjamin Netanyahu, former Prime Minister of Israel, who continued to serve, despite having been indicted for corruption, fraud and bribery charges. David M. Halbfinger, *He Indicted Netanyahu, but Sees No Reason to Bar Him from Office*, N.Y. TIMES (Apr. 30, 2020), <https://www.nytimes.com/2020/04/30/world/middleeast/israel-netanyahu-corruption-mandelblit.html> [<https://perma.cc/T6HJ-BLYT>].

rise to the level of “High Crimes and Misdemeanors,” treason or bribery, which is needed to justify impeachment and removal from office. A President who committed a crime could be allowed to remain in office. And indeed, some impeachable offenses might not be crimes at all, and therefore a President could be removed without being subject to criminal indictment. The criminal trial is separate from the process of impeachment and removal; these are two different processes under the jurisdiction of two different branches of government.⁴⁴

The remaining question is whether there is something unique about the office of the President such that jurisdiction in these two different proceedings must be sequential, with impeachment always preceding indictment, rather than the other way around. For answers to that question, both proponents and opponents of presidential immunity often turn to Article II of the Constitution.

B. What Did the Framers Think?

Having considered the language of the Impeachment Clause itself and found no support for the doctrine of immunity of a federal officer from criminal prosecution prior to impeachment, the question naturally arises whether the Framers nonetheless intended for the President to be immune from indictment and prosecution.

The textual source of presidential authority is found in Article II of the U.S. Constitution. While Article II has many narrow and precise provisions, most interpretations of presidential power depend on a small number of broad provisions like the Vesting Clause (“The executive Power shall be vested in a President of the United States of America”⁴⁵), or the “Take Care Clause” (the requirement that the President “take Care that the Laws be

⁴⁴ W. Burlette Carter, *Can a Sitting President Be Federally Prosecuted? The Founders' Answer*, 62 HOW. L.J. 331, 333 (2019). We are in agreement with Professor Carter with regard to her main conclusion, namely that the existence of impeachment does not preclude criminal indictment of a sitting President. Where we appear to differ, however, is with respect to the range of crimes for which a sitting President can be indicted. Carter appears to argue that there could not be indictment of any crime for which there could be impeachment, such as bribery, treason or anything that would count as a high crime and misdemeanor, because indictment could result in incarceration, which would be a kind of constructive removal. We do not see criminal conviction as a form of removal or as implicating removal, and therefore we do not see any conflict with impeachment.

⁴⁵ U.S. CONST. art 2, § 1, cl. 1, known as the “Vesting Clause.”

faithfully executed”⁴⁶). But if presidential immunity from criminal indictment was a major point of disagreement among the Founders, written records do not reveal it, given that there are no reported direct statements in which any of them argued that a President could not be indicted while in office.

The most that can be found on this subject is a handful of remarks by Hamilton in the Federalist Papers about both impeachment and criminal liability being methods for holding a renegade President accountable. Twice, Hamilton uses language suggesting that he envisions impeachment and removal of a President as preceding criminal trial and punishment, but he never stated that it could not be the other way around. In Federalist No. 69, Hamilton says:

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 person of the king of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution. In this delicate and important circumstance of personal responsibility, the President of Confederated America would stand upon *no better ground than a governor of New York, and upon worse ground than the governors of Virginia and Delaware.*⁴⁷

Hamilton’s comparison of Presidents to governors is notable on the question of immunity for the latter. To that point, the subject of a governor’s arrest and criminal prosecution had gone unaddressed, and indeed was not addressed until a prominent case involving the indicted but acquitted Illinois Governor Len Small in 1920.⁴⁸ That case was followed by the successful

⁴⁶ U.S. CONST. art 2, § 3, cl. 1, known as the “Take Care Clause.”

⁴⁷ THE FEDERALIST NO. 69 (Alexander Hamilton) (italics added). Much of Federalist No. 69, including the sentence after the one quoted here is focused on distinguishing the U.S. President from the King of Great Britain, who is absolutely immune from prosecution under British law. Hamilton repeatedly refers to comparisons between the powers and privileges of the President and the governors of the various states, often making the point that the President’s power and privileges do not exceed those of a governor.

⁴⁸ See Harv. L. Rev. Ass’n, *Immunity of State Executive from Arrest*, 35 HARV. L. REV. 185, 185 (1921) (stating that at the time of the arrest and indictment of then Illinois Governor Len Small “[t]he question of whether the chief executive of a state may be arrested on a criminal charge during his term of office has never been directly decided”). Governor Small was tried and acquitted on corruption charges while in office, then reelected after eight of the jurors got jobs with the state. Stephan Benzkofer, *Len Small: Perhaps the Dirtiest Illinois Governor of Them All*, CHI. TRIB. (June 19,

indictment of more sitting governors in the hundred years since. If Hamilton had written Federalist No. 69 today, perhaps he would have said that “the President stands on no better ground than a governor of Illinois.”⁴⁹

Hamilton also says that an impeached and removed President “would afterwards be liable to prosecution,”⁵⁰ a point enthusiasts of presidential immunity seize on to support their interpretation that both the text of the Constitution and the Federalist Papers support criminal conviction of a sitting President only *after* impeachment. Thus Justice Samuel Alito in his dissent in the *Vance* case pointed to the above passage in Federalist No. 69 to support the proposition that Article I, Section 3, Clause 7 means precisely that: “The plain implication is that criminal prosecution, like removal from the Presidency and disqualification from other offices, is a consequence that can come about only after the Senate’s judgment, not during or prior to the Senate trial.”⁵¹ This passage in Federalist No. 69, however, does nothing more than recapitulate the language in the Impeachment Clause itself.⁵² Nowhere does Hamilton state that a President is unlike other federal officers with regard to prosecution prior to impeachment and removal.

The other Hamilton publication sometimes cited by proponents of presidential immunity is Federalist No. 77, in which Hamilton references impeachment and removal of a President and subsequent trial “in the

2011), <http://www.chicagotribune.com/news/opinion/ct-per-flashback-small-0619-20110619-story.html> [<https://perma.cc/WEF5-AQXG>].

⁴⁹ A later sitting Illinois governor was not as lucky as Governor Small. See Jeff Coen, et al., *Blagojevich Arrested; Fitzgerald Calls It a Political Corruption Crime Spree*, CHI. TRIB. (Dec. 10, 2008), <https://www.chicagotribune.com/news/chi-rod-bлагоjevich-1209-story.html> [<https://perma.cc/RKB9-WLQR>] (reporting the arrest of the sitting Governor Blagojevich by federal agents on corruption charges). He was later impeached and removed from office. See Ray Long & Rick Person, *Impeached Illinois Gov. Rod Blagojevich Has Been Removed from Office*, CHI. TRIB. (Jan. 30, 2009), <https://www.chicagotribune.com/news/chi-bлагоjevich-impeachment-removal-story.html> [<https://perma.cc/5WWA-XQRX>] (reporting senators unanimously voted to remove Blagojevich).

⁵⁰ See e.g., O.L.C. 1973 Memo at 19, note 11, quoting part of this passage from Federalist No. 69: (“The President [unlike the king] would be liable to be impeached, tried, and, upon conviction * * * removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law.”). The OLC omits from its quote Hamilton’s comparison of Presidents to governors in the very same paragraph of Federalist No. 69.

⁵¹ *Trump v. Vance*, 140 S. Ct. 2412, 2444.

⁵² See U.S. CONST. art. I, § 3 (“[T]he Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”)

common course of law.”⁵³ Proponents of presidential immunity infer that Hamilton contemplated an impeachment-then-indictment order from the word “subsequent” buried in this passage.⁵⁴ Among defenders of this view are attorneys in the OLC who defended this position in its 1973 memo on presidential immunity.⁵⁵ But this brief allusion by Hamilton to a criminal trial *after* an impeachment and conviction does not preclude a criminal indictment of a sitting President or any other federal officer *before* his impeachment. Indeed, as noted in the previous Section, Hamilton used similar language in Federalist No. 65 to describe the impeachment and subsequent trial of any federal officer, not just a President. All he did was reiterate the language of the Impeachment Clause applicable to all federal officers. As also discussed in the preceding Section, the Impeachment Clause almost certainly does not preclude the criminal indictment of these other federal officers prior to their impeachment.

Furthermore, reading the entire passage, not just the single phrase including the word “subsequent,” it is clear that Hamilton intended Federalist No. 77 to be a “survey of the structure and powers of the executive department.”⁵⁶ If he truly believed that structure included presidential immunity from criminal prosecution, he presumably would have said so directly. Hamilton also ends this passage in Federalist No. 77 saying that “these precautions, great as they are, are not the only ones which the plan of

⁵³ In the last paragraph of Federalist No. 77, Hamilton says:

“We have now completed a survey of the structure and powers of the executive department, which, I have endeavored to show, combines, as far as republican principles will admit, all the requisites to energy. The remaining inquiry is: Does it also combine the requisites to safety, in a republican sense, a due dependence on the people, a due responsibility? The answer to this question has been anticipated in the investigation of its other characteristics, and is satisfactorily deducible from these circumstances; from the election of the President once in four years by persons immediately chosen by the people for that purpose; and from his being at all times liable to impeachment, trial, dismissal from office, incapacity to serve in any other, and to forfeiture of life and estate by subsequent prosecution in the common course of law. But these precautions, great as they are, are not the only ones which the plan of the convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States would, by that plan, be subjected to the control of a branch of the legislative body.”

THE FEDERALIST NO. 77 (Alexander Hamilton).

⁵⁴ For example, the 1973 OLC Memo quotes a snippet from this passage from Federalist No. 77 in footnote 13 on page 19: “The President is at all times liable to impeachment, trial, dismissal from office and to forfeiture of life and estate by subsequent prosecution in the common course of law.”

⁵⁵ See discussion of the 1973 OLC memo *infra* Section I.C.

⁵⁶ See THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 53.

the convention has provided in favor of the public security,”⁵⁷ and that the President is subject to the control of the legislative branch. One of the things the legislative branch does is enact criminal statutes. Nowhere does Hamilton say that these statutes do not apply to the President.

Finally, Hamilton’s views—whatever he thought on the immunity question—were not necessarily the views of the majority of the drafters of the Constitution or the state legislatures that ratified it. Many Jeffersonians strongly disliked Hamilton, including President Jefferson’s Vice President Aaron Burr who killed Hamilton in a duel in 1804. We do not know whether Hamilton believed that a sitting President could shoot someone on the street and escape criminal prosecution, but we do know that a sitting Vice President shot Hamilton dead. Burr was indicted for murder in New Jersey and apparently also in New York but was not prosecuted.⁵⁸ Burr fled from New Jersey as far as Florida and he was not impeached for the duel either.⁵⁹ His 1804 murder indictment was dug up 170 years later to refute claims by lawyers for another Vice President, Spiro Agnew, to argue that Agnew could not be indicted while in office.⁶⁰ The broader point is that constitutional interpretation based on discerning the intent of the Framers from the stated views of Hamilton, Burr or other men who so strongly disagreed with one another, and occasionally even shot each other, can be an exercise of limited utility, particularly when used to fancifully project onto the text of the Constitution concepts like presidential immunity from prosecution, when the Constitution itself does not support this view.

Lacking sufficient support from Hamilton and other Federalists, modern proponents of presidential power sometimes turn to debunking the writings

⁵⁷ *Id.*

⁵⁸ See Michael Stokes Paulsen, *Could Aaron Burr Have Been Impeached for the Duel*, LAW & LIBERTY (July 11, 2018), <https://lawliberty.org/could-aaron-burr-have-been-impeached-for-the-duel/> [<https://perma.cc/E386-FNUG>].

⁵⁹ *See id.*

⁶⁰ Burr’s indictment was resurrected from a library in New Jersey in 1973 when Vice President Agnew’s lawyers raised constitutional questions about whether a sitting Vice President could be indicted. “The [1804] Burr indictment, and a New York indictment against him deriving from the duel, could become evidence in determining the legal precedents for the indictment of a sitting Vice President, The New York indictment has not been found. Lawyers for Vice President. Agnew, who is under investigation in Maryland, have gone to Federal court to challenge the authority of any legal jurisdiction outside Congress to indict a sitting Vice President with a criminal act.” *Indictment of Burr Is Found in Trenton*, N.Y. TIMES (Oct. 4, 1973), <https://www.nytimes.com/1973/10/04/archives/indictment-of-burr-is-found-in-trenton.html> [<https://perma.cc/B4LX-JULL>].

of Anti-Federalists, many of whom feared the American President would become like a European king: immune from criminal prosecution and all powerful. These Anti-Federalists often wrote exaggerated descriptions of the risks of presidential power, which two hundred and forty years later can be distorted to claim that their opponents, the Federalists, believed that the American President was in fact bestowed with the powers of a king. Citing publications collectively known as the “Anti Federalist” papers, published anonymously under the pen name “Cato,”⁶¹ for example, former OLC lawyer John Yoo argues that the powers of the President were likely to be as sweeping as those of the King of England, particularly where matters of war and peace are concerned:

Cato correctly concluded that in the realm of practical politics, the President’s authority under the Constitution did not differ in important measure from that of the King. Antifederalists asked how Congress could control the President if the executive in Great Britain had come to such power even in the face of formal parliamentary powers over the purse. In terms of practical politics, the President would have the same authority as the British monarch to plunge the nation into war, or lead it into peace.⁶²

Yoo’s argument here is problematic, both because of the misleading use it makes of historical sources and because of the profoundly anti-democratic nature of his conclusion. Although Yoo’s point here is about war powers, not presidential immunity from prosecution, his backwards induction argument is similar to that used by the Solicitor General in *Trump v. Vance* to defend the concept of presidential immunity: If an Anti-Federalist attributes to Federalists the view that the President, like a king, is all powerful and immune from prosecution, that proves not only that Federalists actually believed this, but that extremely broad presidential powers should be read into the Constitution. As we point out below, Solicitor General Noel J. Francisco in his 2020 amicus brief in *Trump v. Vance* similarly invoked a 1789 account of Federalist rhetoric by anti-Federalist Pennsylvania Senator William Maclay for the proposition that the Constitution embodied the

⁶¹ The identity of “Cato” has not been proven but is widely believed to be George Clinton, the first Governor of New York State.

⁶² John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 275–76 (1996).

presidential immunity that Maclay passionately believed was inconsistent with representative democracy.⁶³

In fact, there is every reason to think that the Framers were extremely worried about replicating the monarchy they had just fought a war to reject. They disagreed among themselves about the power of the federal government *vis à vis* the states, and the powers of the President *vis à vis* the other two branches of the federal government. But there is little if any evidence that any of them wanted another king, even a king who served only for a term of four years. Hamilton took pains to emphasize that a President was no more like a king than the governor of a state.⁶⁴ Others emphasized even more emphatically that the President lacked the prerogatives and privileges of a king.⁶⁵

What evidence is there that in the face of their concerns about creating another king, the Framers were simultaneously willing to immunize the American President against criminal prosecution? In view of the substantial impact presidential immunity would have for broader issues of constitutional interpretation, proponents of presidential immunity surely bear the burden of proof on this issue. What historical evidence there is, however, suggests

⁶³ See Brief of the United States at 9, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19–635) (citing and quoting from portions of the Journal of William Maclay that repeat statements allegedly made in a private conversation by Vice President John Adams about immunity of the President from prosecution).

⁶⁴ Hamilton noted these comparisons at the beginning of Federalist No. 69: “The first thing which strikes our attention is, that the executive authority, with few exceptions, is to be vested in a single magistrate. This will scarcely, however, be considered as a point upon which any comparison can be grounded; for if, in this particular, there be a resemblance to the king of Great Britain, there is not less a resemblance to the Grand Seignior, to the khan of Tartary, to the Man of the Seven Mountains, or to the governor of New York.” THE FEDERALIST NO. 69 (Alexander Hamilton).

⁶⁵ The OLC recognized this distinction of the President from the British monarch in its 1973 memo: “The Framers of the Constitution made abundantly clear that the President was intended to be a chief executive, responsible subject to the law, and lacking the prerogatives and privileges of the king of England.” 1973 OLC Memo. at 20 n.14, referencing “James Wilson’s statements that the prerogatives of the British monarch were not to be the proper guide in defining Executive powers,” in Farrand, *Records of the Federal Convention*, Vol. I. p. 65, and also James Wilson’s statement that “the President would not be above the law, nor have a single privilege annexed to his character.” *Id.* at 20 n. 14 citing 2 Elliot’s Debates 480. The OLC also cited James Iredell’s speech comparing the position of the King of England who “has great powers and prerogatives, and can do no wrong, with that of the President who is no better than his fellow citizens and can pretend no superiority over the meanest man in the Country.” *Id.* citing 4 Elliot’s Debates 109. We discuss and quote Iredell in more detail in this Article below.

the opposite to be the case. As noted historian Pauline Maier points out,⁶⁶ at least one Federalist, James Iredell, at his state ratification convention explicitly argued that broad presidential powers under Article II were justified because the President, like anyone else, could be charged with a crime. Commenting on the role of the privy council in Great Britain and its relationship with the monarch, Iredell remarks:

In that country, the executive authority is vested in a magistrate who holds it by birthright. He has great powers and prerogatives, and it is a constitutional maxim, *that he can do no wrong*. We have experienced that he can do wrong, yet no man can say so in his own country. There are no courts to try him for any high crimes; nor is there any constitutional method of depriving him of his throne. If he loses it, it must be by a general resistance of his people, contrary to *forms* of law, as at the revolution which took place about a hundred years ago.

He proceeds to emphasize the rather different nature of the American presidency:

Under our Constitution we are much happier No man has an authority to injure another with impunity. No 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, and no other man merely to screen him. If he 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, and in capital cases may be deprived of his life*. This being the case, there is not the same reason here for having a council which exists in England.⁶⁷

Iredell's basic point is that the President's powers under Article II—including his control over other federal officers and the absence of an independent privy council—are justified precisely because the President is fully answerable to the people under the law. He is answerable both to the representatives of the people under the Impeachment Clause and to trial in the courts for ordinary crimes. As Iredell suggests, a President who had the immunity of a king would need to have his powers constrained, along the

⁶⁶ PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 416 (2010).

⁶⁷ Speech by James Iredell at the North Carolina Ratifying Convention 28 July 1788, in THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, 4:108–10 (Jonathan Elliot ed., 1888), reprinted by Univ. of Chi. Founders Documents. https://press-pubs.uchicago.edu/founders/documents/a2_2_1s13.html [<https://perma.cc/H59K-PJZP>] (emphasis added).

lines of the model that the British used to constrain their king, a model that contemplated removal of a privy council officer only with the consent of the legislature. But because the President is not a king, and therefore is not above the law, the constraint of a privy council was deemed unnecessary and thus was not included in the Constitution. If Iredell's account of the constitutional deliberations is accurate, the Framers gave the President unfettered control over the executive branch because he would not be allowed to commit crimes in office.⁶⁸ Bestowing king-like privileges and immunities on a President is not compatible with the way Iredell and others described the new constitution to their respective states during the ratification process.⁶⁹

Another important source from the time of the founding on this issue is the famous *Journal of William Maclay*.⁷⁰ Maclay, a Senator from Pennsylvania in the 1789–91 Congress, was worried that George Washington would exercise king-like powers with the support of the Federalists. Perhaps exaggerating some of the arguments he had with his political opponents in the Federalist party, Maclay details the debates between the parties about presidential authority. On September 26, 1789, for example, Maclay had an argument with three Federalists—Vice President John Adams, Senator Oliver Ellsworth, and Representative Fisher Ames—about whether the President was subject to the authority of the federal courts. The argument started over the seemingly technical issue of whether the House of Representatives had been correct in failing to require that all process served by federal courts be issued in the name of the President, by analogy with the way British courts issued summons and other process in the name of the King. Then came discussion of the broader underlying issue of whether the President presided over the federal courts or was subject to the authority of

⁶⁸ Whether Congress by statute can constrain the President's control over the executive branch is another question. We do not address in this Article the "unitary executive theory" holding that a President may remove a superior federal officer in the executive branch at will regardless of a statute protecting that officer's tenure. *See, e.g., Seila Law v. CFPB*, 140 S. Ct. 2183 (2020) (holding that the President has the constitutional power to remove the director of the Consumer Financial Protection Bureau). The broader one interprets "unitary executive theory" the more compelling is the point that Iredell made at the South Carolina ratifying convention that presidential power should be checked by accountably under the law, including the criminal law.

⁶⁹ Alexander Hamilton also distinguished the President from a king in the Federalists papers he sent to the people of New York. *See supra* text accompanying note 47.

⁷⁰ Maclay's remarks were quoted, but distorted, by the Solicitor General in the *Vance* case. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 9, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19–635) [hereinafter Brief of the Solicitor General in *Trump v. Vance*].

the courts like every other citizen. Maclay writes that following the departure of Ames from the discussion:

[Adams and Ellsworth] said the President, personally, was not the subject of 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.⁷¹

The debate recorded in Maclay's journal that day then turns to precisely the topic under discussion here, namely whether a sitting President could be indicted before he has been impeached. Maclay firmly believed that the President could be criminally charged, and he made this clear in a passage using a hypothetical that is nearly identical to the hypothetical that Trump himself raised of his shooting someone on Fifth Avenue during his 2016 campaign:

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 meantime he runs away. But I will put up another case. Suppose he continues his murders daily, and neither House is willing to impeach him?" Oh, the people would arise 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.⁷²

In sum, the Framers disagreed about the powers and privileges of the President, and although they rarely discussed the immunity question, at least one person—Maclay—was adamant that a President could be charged with crimes while in office. He was also adamant about the broader point that had started the entire discussion, namely that the President was subject to judicial process and that because a President could be charged with a crime

⁷¹ WILLIAM MACLAY, JOURNAL OF WILLIAM MACLAY 166–67 (E. Maclay ed., 1890), quoted in the Brief of the Solicitor General in *Trump v. Vance* at 9, and in *Impeachment or Indictment: Is a Sitting President Subject to the Compulsory Criminal Process? Hearings Before the Subcomm. on the Const., Federalism, and Prop. Rts of the Senate Comm. on the Judiciary*, 105th Cong. 11 (1998).

⁷² MACLAY, *supra* note 71, at 167.

like anyone else it would make no sense for judicial process in a federal court to issue in the name of the President. In fact, such has never been the case. Judicial process does not issue in the name of the President, and the President is subject to the rulings of the judges and justices, one of three coequal branches of the federal government.

On the broader point, Maclay was ultimately vindicated by the Supreme Court's subsequent decision in *Marbury v. Madison*.⁷³ Although the case was brought against Secretary of State James Madison, not directly against President Thomas Jefferson, the Court made it clear that both the President and Congress are subject to the legal rulings of federal courts: "It is emphatically the province and duty of the Judicial Department to say what the law is."⁷⁴ To the extent that Adams, Ames, or Ellsworth had argued as Maclay said they did, namely that the President was beyond the authority of the courts, that view did not prevail either in the text of the Constitution or in the Supreme Court's interpretation of the Constitution. Furthermore, if these three men arguing with Maclay or other Federalists actually believed strongly in presidential immunity from criminal prosecution, they likely would have written those views down or spoken of them in a more formal setting than a casual cloakroom discussion about whether federal courts should issue process in the name of the President. Alternatively, it is also possible that Maclay was exaggerating what Adams said to illustrate Maclay's own fears about the dangers of presidential immunity.

It is admittedly difficult to separate opportunistic arguments from philosophical principle when it comes to the Framers, particularly when there is so little writing from that period on the questions under consideration. But assuming John Adams, George Washington's Vice President and Washington's successor as President, did indeed say what Maclay reported, we can at least partially dismiss those remarks as an effort to strengthen offices which Adams himself held, at least until the Federalists lost control of the Executive Branch in 1800. Adams was not the only one. Even states' rights advocate Thomas Jefferson could change his tune when

⁷³ *Marbury v. Madison*, 5 U.S. 137 (1803).

⁷⁴ *Id.* at 177. The facts of the case are well-known. Jefferson's Secretary of State, Madison, had acted illegally by withholding from Marbury a judicial commission signed by the previous President John Adams, but Congress also had violated the constitution by giving the Supreme Court original jurisdiction instead of appellate jurisdiction over a case such as this one involving a writ of mandamus.

his own circumstances changed. In the 1807 case of *United States v. Burr*,⁷⁵ for example, in which President Jefferson defied a subpoena to produce evidence in the prosecution of former Vice President Burr for treason, Justice John Marshall also discussed the difference between the U.S. President and the king of England, saying that in the case of the king, “it is said to be incompatible with his dignity to appear under the process of the court” Whereas in the case of the U.S. President, he wrote:

[I]t is not known ever to have been doubted, but that the chief magistrate of a state might be served with a subpoena *ad testificandum*. If, in any court of the United States, it has ever been decided that a subpoena cannot issue to the [P]resident, that decision is unknown to this court If, in being summoned to give his personal attendance to testify, the law does not discriminate between the [P]resident and a private citizen, what foundation is there for the opinion that this difference is created by the circumstance that his testimony depends on a paper in his possession, not on facts which have come to his knowledge otherwise than by writing? The court can perceive no foundation for such an opinion. *The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it.* A subpoena *duces tecum*, then, may issue to any person to whom an ordinary subpoena may issue, directing him to bring any paper of which the party praying it has a right to avail himself as testimony; if, indeed, that be the necessary process for obtaining the view of such a paper.⁷⁶

As the *Burr* court emphasized, the judgment whether to issue a subpoena pertains to the relevance of the material being subpoenaed, not to the identity of the individual who must be sent such subpoena.

Defenders of presidential immunity have gone to great lengths to minimize the importance of the holding in *Burr*. John Yoo, for example, argues that the Supreme Court in *United States v. Nixon* put too much emphasis on *Burr*.⁷⁷ But the Supreme Court itself begs to differ. The Court’s 2020

⁷⁵ *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807).

⁷⁶ *Id.* at 3410–35 (emphasis added).

⁷⁷ See John C. Yoo, *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 MINN. L. REV. 1435, 1464 (1999) (“The way that *Burr* has been read, however, is quite different than the way in which it was resolved. It is difficult to interpret *Burr* as standing firmly for the propositions that: 1) the judiciary has the power to compel [P]residents to obey its commands without question; and 2) that the courts have the final say on questions of executive privilege.”); *id.* at 1465 (“In this light, we can see that *United States v. Nixon*’s reliance upon *Burr* was somewhat misplaced. *Burr* does establish the principle that the President is subject to judicial process, but only in the absence of a conflict with the chief executive’s constitutional duties. Chief Justice Marshall’s opinions and

opinion in *Trump v. Vance*, which we discuss more fully below, includes a lengthy expose on *Burr*⁷⁸ as well as the importance of that holding in assessing the President's amenability to criminal process over two hundred years later. And while there was no doubt disagreement among the Framers about the role of the judiciary in constraining the President, since *Burr* it has been clear that the President is subject to both criminal and civil subpoena. The question whether the President is also subject to criminal indictment and trial while in office was rarely discussed—William Maclay's journal being the noted exception—and was never fully resolved. That question remains largely unresolved today.

Looking at the political circumstances more broadly, there are good reasons to believe that the Framers would not have accepted complete presidential immunity from criminal prosecution. The Democrat-Republicans were skeptical of a strong centralized government and likely would have objected strenuously to an unaccountable President. But the Federalists also had good reason to avoid a President who could not be held accountable under the criminal law.⁷⁹ The Framers were aware that England's brief experiment with Republican government after the English revolution in the mid-17th century ended in dictatorship and eventual restoration of the monarchy.⁸⁰ The aristocratic Federalists strongly disliked the more plebian Cromwellian persona. John Adams spoke of Oliver

actions, however, as well as those of President Jefferson, provide little support for the *Nixon* Court's holding that the federal judiciary may exercise the power to determine the constitutional powers of the executive branch.").

⁷⁸ See *Trump v. Vance*, 140 S. Ct. 2412, 2421–24 (2020) (describing the district court's holding that President Jefferson was not immune from complying with Burr's subpoena).

⁷⁹ Julius Ceasar and later Roman consuls including Nero consolidated executive power by appealing to the common people against the wealth and privilege of the senatorial class. See RICHARD W. PAINTER & PETER GOLENBOCK, *AMERICAN NERO: THE HISTORY OF THE DESTRUCTION OF THE RULE OF LAW IN THE UNITED STATES AND WHY DONALD TRUMP IS THE WORST OFFENDER* 1–2 (2020) (discussing increasing concentration of power in the hands of Roman consuls and then emperors and Emperor Nero's appeal to the masses in his political struggle with rivals).

⁸⁰ Oliver Cromwell had appealed to his political base of religious fundamentalists, abused his role as commander in chief, dissolved the Parliament by military force after a dispute over elections in 1653, pursued ethnic cleansing in Ireland—the “Cromwellian genocide” against Ireland's Catholic population—and installed himself as England's “lord protector for life.” See generally PAUL LAY, *PROVIDENCE LOST: THE RISE AND FALL OF CROMWELL'S PROTECTORATE* 155 (2020) (“By conflating foreign and domestic policy, Cromwell hardened his anti-Catholic rhetoric. When he accused the Spanish of being the enemy of ‘all that is God in you,’ he alluded to their influence at home.”).

Cromwell being antithetical to the republican ideal,⁸¹ and Hamilton in Federalist No. 21 grounded his case for a strong central government in part in fears that an unchecked Cromwellian leader could gain ascendancy in one or more of the individual states.⁸² It is unlikely that these Federalists, even while advocating for a strong central government, would advocate for a President who could commit crimes with impunity as long as he had the support of one third of the Senate.

Furthermore, the Framers knew that the Constitution would bestow on the President far more power and independence from the legislative branch than, say, that possessed by a British prime minister. A British prime minister cannot unilaterally stop a bill from passing the House of Commons; a U.S. President can veto a bill subject only to override by two-thirds of both houses of Congress. A British prime minister generally can be removed and replaced by a majority vote in the Commons, whereas a U.S. President can only be removed if impeached for “high crimes and misdemeanors” by a majority of the House and convicted by two-thirds of the Senate. Having given broad powers and protection of tenure to the President, the Framers would not have wanted to allow the President to engage in criminal conduct unchecked by prosecution for as long as he remained in office.

Since the founding there has only been one recorded instance in which a President was charged with a crime, and that for a minor offense, namely Ulysses S. Grant, who famously was arrested and paid a speeding ticket for

⁸¹ See Letter from John Adams to Unknown (April 27, 1777), in 6 LETTERS OF DELEGATES TO CONGRESS, January 1, 1777–April 30, 1777, 664 (“I make no Scruple to confess that I think Oliver totally destitute of the Republican Principle of public Virtue. He thought himself honest and sincere. So did Balaam, when he asked Leave to curse Israel. There never was a greater self deceiver than Oliver Cromwell. The Man after Gods own Heart, to whom Nathan Said Thou art the Man, deceived himself in the Same manner. How sincere was he, when he felt such honest Indignation against the Man who had taken his poor Neighbours Lamb.”).

⁸² See THE FEDERALIST NO. 21. (Alexander Hamilton) (“Without a guaranty the assistance to be derived from the Union in repelling those domestic dangers which may sometimes threaten the existence of the State constitutions, must be renounced. Usurpation may rear its crest in each State, and trample upon the liberties of the people, while the national government could legally do nothing more than behold its encroachments with indignation and regret. A successful faction may erect a tyranny on the ruins of order and law, while no succor could constitutionally be afforded by the Union to the friends and supporters of the government. The tempestuous situation from which Massachusetts has scarcely emerged, evinces that dangers of this kind are not merely speculative. Who can determine what might have been the issue of her late convulsions, if the malcontents had been headed by a Caesar or by a Cromwell? Who can predict what effect a despotism, established in Massachusetts, would have upon the liberties of New Hampshire or Rhode Island, of Connecticut or New York?”)

driving his carriage too fast through Rock Creek Park.⁸³ Admittedly, then, as a nation we have not had to grapple much with the question of what to do about a criminal President. But the weight of the text of the Constitution, what little we know of the views of the Framers, and common sense all tilt in the direction of accepting the possibility of criminal indictment of a sitting President.

C. *Office of Legal Counsel Memoranda*

Since 1973, the Justice Department has been officially of the opinion that it is unconstitutional to indict a sitting President and has guided its attorneys accordingly. The Department made this clear in two memoranda issued by the OLC, one in 1973 in the run up to the *U.S. v. Nixon* case, and the other after the independent prosecutor investigation of President Clinton in 2000. These two memos have done significant damage to the efforts to hold Presidents accountable for their actions.

A third OLC memorandum on a closely related issue was written in March of 2019 after Robert Mueller’s investigation of President Trump. The memo addresses whether the evidence of obstruction of justice set out by Robert Mueller in the second half of his report makes out a prima facie case of criminal obstruction under federal law. Citizens for Responsibility and Ethics in Washington (“CREW”) successfully sued the DOJ for release of the memo under the Freedom of Information Act, and a federal court ordered its release.⁸⁴ The Justice Department appealed that order in 2021, thus continuing the Department’s defense of presidential privilege and siding with the Trump Administration’s approach to such matters.⁸⁵ As of the time of

⁸³ See *That Time a President Got in Trouble with the Police*, NPR, (Dec. 22, 2018, 8:01 AM) <https://www.npr.org/2018/12/22/679448648/that-time-a-president-got-in-trouble-with-the-police> [<https://perma.cc/ZZX9-9U8G>] (last visited Sept. 15, 2021) (discussing President Grant’s arrest for speeding and his payment of the fine).

⁸⁴ See *Citizens For Resp. & Ethics in Wash. v. U.S. Dep’t of Just.*, No.19–1552 ABJ, Mem. Op. &J. (D. D.C., May 3, 2021) (granting CREW’s request for Mueller’s March 24, 2019 memorandum to the Attorney General).

⁸⁵ We have been critical of the Biden DOJ’s policy of defending former President Trump’s executive privilege with respect to this OLC memo as well as President Trump’s communications with his White House Counsel Don McGahn. See Claire O. Finkelstein & Richard W. Painter, *Trump Had a Sweeping View of ‘Executive Privilege.’ Now Biden Is Defending It*, WASH. POST (May 29, 2021, 6:00 AM) <https://www.washingtonpost.com/outlook/2021/05/29/executive-privilege-immunity-biden-trump/> [<https://perma.cc/3Z4T-23RN>] (last visited Sept. 15, 2021) (describing such a

this writing, the memo has been released in heavily redacted form, with all substantive analysis blacked out. The visible portion of the memo, however, says that “the evidence described in Volume II of the [Mueller] Report is not, in our judgment, sufficient to support a conclusion beyond a reasonable doubt that the President violated the obstruction-of-justice statutes.”⁸⁶

Despite the detailed description of Trump’s possible obstruction of justice in Part II of the special counsel report, Mueller ultimately accepted the OLC’s conclusion that a sitting President could not be indicted, in view of “the role of the Special Counsel as an attorney in [the] DOJ and the framework of the Special Counsel regulations”⁸⁷ Mueller felt his hands were tied by the DOJ memos, but he recognized grounds for holding Trump accountable. First, he pointed out that the Department’s tradition of refraining from indictment in the case of a President did not apply to a criminal investigation during the President’s term; second, that a sitting President does not have immunity from prosecution after leaving office; third, that others might be prosecuted for obstruction if they were involved in the President’s obstructive conduct; and fourth that there is a “strong public interest in safeguarding the integrity of the criminal justice system.”⁸⁸ Mueller concluded that there were grounds for identifying President Trump’s behavior as obstructive, though his phrasing was rather elusive.⁸⁹ In this case, the DOJ could have found that because the President is not subject to criminal indictment, it did not need to consider the substantive case for obstruction. Yet the OLC went out of its way to make a substantive comment on Trump’s potential liability, maintaining that “were there no

situation as common because “[w]hen the White House changes hands, preservation of presidential privilege continues because of implicit understandings between [P]residents, even of opposite political parties, that each successive [P]resident will prioritize the power and secrecy of the office.”)

⁸⁶ Memorandum for the Attorney General, Review of the Special Counsel’s Report, March 24, 2019. <https://int.nyt.com/data/documenttools/olc-mueller-report-memo/d5a8c423fee97ec3/full.pdf> [<https://perma.cc/G7WM-ZCN8>].

⁸⁷ ROBERT S. MUELLER, III, U.S. DEP’T OF JUST., REP. ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1 (2019) [hereinafter MUELLER REPORT]. Released to the public in redacted form on April 18, 2019.

⁸⁸ *Id.* at 1–2.

⁸⁹ The Mueller Report put the point in elliptical fashion: “if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, we are unable to reach that judgment. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.” *Id.* at 446.

constitutional barrier, we would recommend, under the Principles of Federal Prosecution, that you decline to commence such a prosecution.”⁹⁰

Mueller’s short treatment of the presidential immunity question did not explore the OLC memos in any detail. The holding in *Trump v. Vance*, namely that the President is subject to a state grand jury subpoena, had not yet been delivered. One can only speculate about whether that holding would have made a difference to Mueller’s willingness to adhere to the OLC position on presidential indictment. It is our contention, however, that the DOJ memos must be reevaluated in light of a tension that exists between those memos and the holdings of the *Nixon* and *Clinton* cases, and most importantly, in light of the most recent addition to the Supreme Court’s jurisprudence on presidential immunity, namely the *Vance* case. In the discussion that follows, we consider the 1973 and 2000 DOJ memos in some detail and explain why we believe that even these memos do not establish that a sitting President cannot be indicted. We then turn to the three Supreme Court cases on the President’s amenability to judicial process—*Nixon*, *Clinton*, and *Vance*. The weight of Supreme Court jurisprudence, combined with the textual evidence and the limited evidence of the Framer’s intent on this question, suggest that these DOJ memos should be withdrawn and a new memorandum issued to bring the Department’s position more into line with Supreme Court jurisprudence. The OLC’s categorical rule against indicting a sitting President in the 1973 and 2000 memos should be replaced by a more nuanced approach that acknowledges the constitutional permissibility in appropriate cases of indicting a sitting President and gives federal courts a role in ensuring that further criminal process does not unduly interfere with the President’s Article II duties.

The 1973 memo was written during the investigations into President Nixon’s role in the Watergate scandal and as well as a scandal engulfing Vice President Agnew. As discussed above, this memo rejects the argument offered by some enthusiasts of presidential immunity, including Professors Bobbitt and Sunstein,⁹¹ that the Impeachment Clause of the Constitution precludes criminal indictment of federal officers prior to their impeachment and removal.⁹² The 1973 OLC memorandum states:

⁹⁰ *Id.*

⁹¹ See *supra* text accompanying notes 20–21.

⁹² 1973 O.L.C. Memo at 2. See also *supra*, text accompanying notes 20–21 (discussing the Impeachment Clause in Article I, Section 3).

The suggestion has been made that Article I, [S]ection 3, [C]lause 7 prohibits the institution of criminal proceedings against a person subject to impeachment prior to the termination of impeachment proceedings. . . . Article I, [S]ection 3, [C]lause 7, however, does not say that a person subject to impeachment may be tried only after the completion of that process. Instead the constitutional provision uses the term “nevertheless.” The purpose of this clause thus is to permit criminal prosecution in spite of the prior adjudication by the Senate—i.e., to forestall a double jeopardy argument.

The memo then goes on to explain the likely purpose of the constitutional provision, citing originalist evidence to back up its point:

A speech made by Luther Martin—who had been a member of the Constitutional Convention—during the impeachment proceedings of Justice Chase shows that Article I, Section 3, [C]lause 7 was designed to overcome a claim of double jeopardy rather than to require that impeachment must precede any criminal proceedings.⁹³

The 1973 OLC memo also observed that the Impeachment Clause applies to all federal officers subject to impeachment, not just the President. Making all of those officials immune from criminal prosecution while in office is something that the Framers very likely would have said explicitly if they had intended it. Indeed, the 1973 OLC memo recognizes that as of 1973 only twelve federal officers had ever been impeached, yet “scores, if not hundreds,” of federal officers had been prosecuted for crimes for which they could have been impeached.⁹⁴

Another problem with the “impeachment is the only remedy” argument is that impeachment is both broader and narrower than the body of statutory crimes with which a federal officer might be charged. Impeachment can follow offenses that are not necessarily statutory crimes, and at the same time not all statutory crimes are impeachable. The 1973 OLC memo recites authority for the proposition that impeachment is for wrongs of a *political* nature, meaning the Impeachment Clause covers more than statutory crimes but also does not cover “private” crimes “of the sort that a non-officer may also commit.”⁹⁵ This divergence of impeachment from the criminal code

⁹³ 1973 O.L.C. Memo at 3, citing 14 ANNALS OF CONG., 432 (1805).

⁹⁴ 1973 O.L.C. Memo at 4.

⁹⁵ *Id.* at 12–13.

suggests that the two proceedings serve different purposes and are not intended to interfere with one another.⁹⁶

There are also different procedures as well as different remedies in impeachment and in criminal trials. Prosecution by the House and trial by the Senate are vastly different from trial by jury. The 1973 OLC memo notes that the Constitution limits impeachment to removal and disqualification from future office. The impeachment model used in Great Britain at the time the U.S. Constitution was adopted, by contrast, allowed the House of Lords to impose criminal sanctions, including the death penalty.⁹⁷ These two functions were disentangled in the U.S. framework. Accordingly, the argument that impeachment is the sole remedy for crimes in office is substantially weaker in the U.S. than it was in its British counterpart.

Furthermore, the 1973 OLC memo raises the complex topic of tolling the statute of limitations for criminal charges against federal officers. It points out the need for tolling if federal officers cannot be prosecuted until after they leave office. Congress apparently has never seen the need to enact tolling provisions by statute until recently. In December 2021, the U.S. House passed the Protecting our Democracy Act, a bill aimed at curbing abuses of presidential power.⁹⁸ Following an amendment inspired in part by an op-ed of the current authors,⁹⁹ Section 202 of the bill implicitly acknowledges that a sitting President or Vice President can be indicted in a criminal case by authorizing a delay in the trial if it would “interfere with the performance of the defendant’s duties while in office.”¹⁰⁰ The bill also provides for equitable

⁹⁶ A federal officer charged with a crime, for example, cannot defend against conviction on the grounds that the offense is not impeachable. *Id.* at 15.

⁹⁷ *Id.* at 3 n.3, citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, vol. I, §§ 784, 785 (1833).

⁹⁸ Protecting Our Democracy Act, H.R. 5314, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/5314/text> [<https://perma.cc/HHH2-7ZRG>].

⁹⁹ Claire O. Finkelstein & Richard W. Painter, *Tolling the Statute of Limitations to Prosecute a Former President: A Double-Edged Sword*, *LAWFARE* (Sept. 30, 2021), <https://www.lawfareblog.com/tolling-statute-limitations-prosecute-former-president-double-edged-sword> [<https://perma.cc/G6WV-A2HA>].

¹⁰⁰ Section 202 of the Protecting our Democracy Act provides:

(d) DELAY IN TRIAL OR OTHER LEGAL PROCEEDINGS.—In the case of an indictment of any person serving as President or Vice President of the United States, a trial or other legal proceeding with respect to such indictment may be delayed at the discretion

tolling of the statute of limitations during a President or Vice President's term in office, an acknowledgment that the DOJ may nonetheless decline to prosecute a sitting President. The Protecting our Democracy Act, which at this time faces an uncertain future in the Senate, does not directly alter the constitutional question addressed in this Article, but it is a clear indication that the House, in passing the bill, believes that a President constitutionally can be indicted while in office and constitutes an implicit rejection of the OLC memos on this subject.

As we have argued elsewhere, such tolling provisions would be problematic in the absence of an accompanying provision making clear that congressional intent to toll the statute of limitations does not have implications for the question of presidential indictment.¹⁰¹

The 1973 memo appears to adopt Professor Tribe's side of the debate over the meaning of the Impeachment Clause of the Constitution and against the interpretation that under this language impeachment of a federal officer must precede indictment,¹⁰² given that it appears to acknowledge that there is no provision of the Constitution that expressly confers immunity upon the President.¹⁰³ Indeed, the memo even reinforces the point made by the Court in *Burr*, namely that while the courts do not have the same jurisdiction over the President as they do over an ordinary citizen, it remains the case that Presidents are not absolutely immune from court proceedings.¹⁰⁴ Instead, the memo suggests that "[t]he proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and functions of the Presidency."¹⁰⁵ Accepting its own invitation to

of a court of competent jurisdiction to the extent that ongoing criminal proceedings would interfere with the performance of the defendant's duties while in office.

(e) BURDEN OF PROOF.—With respect to an exercise of discretion under subsection (d), the burden of proof shall be on the defendant to demonstrate that an ongoing criminal proceeding would pose a substantial burden on the defendant's ability to fulfill the duties of the defendant's office."

¹⁰¹ *Id.* at 17. In September 2021 a provision that would toll the statute of limitations for prosecution of a former President was proposed in the Protecting Our Democracy Act, which was introduced in the House. The authors of this article have urged that the House, particularly if it chooses to include this tolling provision, also expressly confirm that a President also can be indicted while in office. See Finkelstein & Painter, *Tolling the Statute of Limitations to Prosecute a Former President: A Double-Edged Sword*, *supra* note 99.

¹⁰² See *supra* text accompanying notes 20–21 (discussing the Tribe-Bobbitt debate).

¹⁰³ 1973 O.L.C. Memo at 18.

¹⁰⁴ *Id.* at 24.

¹⁰⁵ *Id.* at 24.

“balance” the relevant factors, however, the second part of the 1973 memo relies upon generalizations about indicting a sitting President to reach a surprising conclusion: any indictment of a sitting President must be considered categorically forbidden, as it would interfere with performance of the President’s duties under Article II of the Constitution.

The 1973 OLC memo focuses heavily on the highly political nature of a presidential trial, and the difficulty of assuring a fair trial.¹⁰⁶ The memo concludes that indicting a President, even if any criminal trial were postponed, would create a politicized atmosphere that could make it impossible for a President to govern.¹⁰⁷ The memo worries that the majority of a grand jury could force the resignation of a President.¹⁰⁸ The memo goes on to say that impeachment and removal from office is the only “appropriate” way to deal with an alleged crime by a President while in office. The perceived interference with a President’s Article II duties elevates these concerns to the level of a constitutional principle. Taking today’s circumstances into account in interpreting constitutional meaning, the OLC notes that “[d]uring the past century the duties of the Presidency, however, have become so onerous that a President may not be able fully to discharge the powers and duties of his office if he had to defend a criminal prosecution.”¹⁰⁹ The OLC then endorses a categorical rule against indicting a sitting President, namely that he must be impeached and removed prior to indictment.

The OLC memo was written on September 24, 1973, two months after federal district judge Sirica heard arguments over special prosecutor Archibald Cox subpoena of White House tapes in July 1973,¹¹⁰ and a month before Cox was fired by Nixon and impeachment proceedings began against Nixon in the House on October 30, 1973. The memo does not mention any evidence of a crime committed by President Nixon, what Nixon could have

¹⁰⁶ *Id.* at 25.

¹⁰⁷ *Id.* at 31.

¹⁰⁸ *Id.* at 32.

¹⁰⁹ *Id.* at 28.

¹¹⁰ See R.W. Apple, *Nixon Contests Subpoenas, Keeps Tapes; Hearing Set August 7 on Historic Challenge*, N.Y. TIMES, (July 27, 1973)
<https://web.archive.org/web/20170909052727/http://www.nytimes.com/1973/07/27/archives/nixon-contests-subpoenas-keeps-tapes-hearing-set-a-ug-7-on-historic.html>
[<https://perma.cc/23ES-FKJV>] (recounting the refusal of Nixon comply with the subpoena requiring him to turn over tape recordings).

been charged with if he were to be indicted by the special prosecutor and how specifically any such criminal charges could have interfered with Nixon's Article II duties. Despite mounting evidence that crimes could have been committed by President Nixon, and a DOJ special prosecutor who was issuing criminal subpoenas to the White House, the OLC memo addresses the question of indicting a sitting President purely in the abstract. Based entirely on abstract assumptions about a hypothetical criminal trial of a sitting President, the OLC concluded that criminal trial of a President was constitutionally impermissible.

The memo concludes with a section finding that the same rule does not apply to the Vice President and that he could appropriately be indicted while in office. This was a bit less hypothetical. Two weeks after the September 24, 1973 OLC memo, Vice President Spiro Agnew resigned on October 10, 1973, the same day he pled "no contest" to a charge of federal income tax evasion in exchange for federal prosecutors dropping charges of bribery and other political corruption. Solicitor General Robert Bork had presented the memo to the court accepting Agnew's guilty plea five days earlier on October 5. It was clear that one purpose of the 1973 OLC memo was to allow federal prosecutors to arrange their plea deal with Agnew. This purpose with respect to the Vice President could have been accomplished without the OLC reaching any determination at all about the prosecution of a sitting President. It appears also, however, that another purpose of the OLC memo was to preclude a federal indictment of Nixon in the midst of a rapidly escalating constitutional conflict between the White House and the special prosecutor.

The Office of Legal Counsel's view on presidential immunity was revised and repeated in 2000 at the time of the investigation into President Clinton's sexual conduct with Monica Lewinsky.¹¹¹ In 2000, it was time for the OLC—staffed as usual with the President's political appointees in the senior positions—to provide cover for President Clinton. The October 16, 2000 memo confirms that "the conclusion reached by the Department in 1973 still represents the best interpretation of the Constitution." Much of this memo reiterates the arguments made in the 1973 memorandum, conferring a new blessing on each one.

The 2000 OLC memo then quotes excerpts from an intervening Supreme Court case—*Nixon v. Fitzgerald*—to support the theory of

¹¹¹ A Sitting President's Amenability to Indictment and Crim. Prosecution, 24 Op. O.L.C. 222 (2000).

presidential immunity.¹¹² But *Fitzgerald* was entirely off point in this context: that case involved a *civil* suit against a President *after* his presidency for official acts he had committed while President. That question—whether a former President had absolute immunity from suits for damages on account of official acts in office while other federal officials had only qualified immunity—is entirely different from the issue of a sitting President’s immunity from criminal prosecution. *Fitzgerald* is a slender reed to lean on, but that is what the 2000 OLC memorandum does. The OLC’s argument was similar to the argument offered by law professor Akhil Amar who, in 1997, also picked up the *Fitzgerald* case to support his contention that a sitting President could not be criminally indicted. Amar went so far as to say that “[the President’s] temporary privilege from prosecution is less of a threat to the rule of the law than the immunity given to Presidents acting in their official capacities. President Nixon said that ‘if the President does it, it’s not illegal’ and the Supreme Court (in the case of *Nixon v. Fitzgerald*) essentially agreed with him.”¹¹³ Amar had written another article in 1995 saying that following the logic in *Fitzgerald*, Paula Jones was constitutionally barred from suing President Clinton.¹¹⁴ Amar’s articles were not cited by the OLC in its 2000 memo, though both appeared in Justice Alito’s dissent in *Trump v. Vance*,¹¹⁵ even though Amar’s position on presidential immunity had been rejected by the Supreme Court in *Clinton v. Jones*.¹¹⁶ With constitutional scholars defending executive authority to this degree, as well as affirming Nixon’s and Clinton’s immunity, it is no wonder that Trump believed he could violate the law with impunity. Twenty years later the Solicitor General in his brief in *Trump v. Vance* would do the same thing, citing *Fitzgerald* for a broad presidential immunity principle. As we discuss below, however, that

¹¹² *Id.* at 240–41.

¹¹³ See Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11, 16 (1997) (opining that “[s]itting [P]residents cannot be prosecuted”).

¹¹⁴ Akhil Reed Amar & Neal Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701 (1995). Mr. Katyal was a student at Yale Law School at the time this article was written.

¹¹⁵ See *Trump v. Vance*, 140 S. Ct. 2412 (Alito, J., dissenting), slip op. at 4, 12. (citing Amar to support his opinion that “[w]ithout a President who is able at all times to carry out the responsibilities of the office, our constitutional system could not operate.”).

¹¹⁶ *Clinton v. Jones*, 520 U.S. 681, 684 (1997) (holding unanimously that except in highly unusual circumstances, a sitting President is subject to civil suit despite burdens the suit might impose on the time and attention of the president).

was taking the immunity argument a bit too far, and ultimately this broad interpretation of presidential immunity did not prevail.

The 2000 OLC memo then tries mightily to distinguish the more directly relevant intervening case law—*United States v. Nixon* and *Clinton v. Jones*—two cases that are both devastating for the theory of presidential immunity. *United States v. Nixon* the 2000 memorandum distinguishes because *Nixon* was an action to enforce a special prosecutor’s subpoena and a subpoena imposes a substantially lesser burden on the presidency than a criminal trial. The memo points out that the *Nixon* Court, by its own admission, might have decided the case differently if the subpoenaed materials had involved national security. The 2000 memo gave relatively little weight to the fact that the Court’s language in *Nixon* rejects any categorical principle that as a matter of constitutional law the President is absolutely immune from the criminal justice process. And the 2000 OLC memo’s reference to the fact that national security related documents were a qualifier in the *Nixon* holding was largely a side point. This was particularly true in the context of President Clinton’s legal exposure, which had to do with personal misconduct rather than matters of state.

After a lengthy summary of the 1973 OLC memo, the 2000 memo cites the Justice Department’s own brief in *Jones* for a proposition rejected by the Court in that very case, namely that the President is immune from prosecution. True, the 2000 OLC memo addresses criminal prosecution, whereas the *Jones* court rejected presidential immunity from civil prosecution. But, in many ways it appears that after the tortured path the *Jones* litigation took—the President’s perjury in a deposition, a special prosecutor investigation and an impeachment that put a substantial dent in the Clinton presidency—the OLC did not want to give up on the losing arguments that the Justice Department had made in *Jones*. The 2000 memo appeared to want to revisit *Jones*, saying that there was interference with the President’s Article II duties and arguing that at least criminal prosecution of the President should be taken off the table. The argument is not very convincing.

Finally, the 2000 OLC memo also inserts a largely tangential discussion of reasons why a President cannot be imprisoned.¹¹⁷ This analysis, even if correct, has little to do with the question of indicting a sitting President. The

117 *Id.* at 247–48.

road from indictment to trial to sentencing and ultimately to punishment is a long one. Arguing the case for presidential immunity backwards from imprisonment is unconvincing.

So where do we stand with these two memoranda combined? The Nixon Justice Department OLC was at least honest in pointing out that the Framers did not intend to make impeachment the exclusive remedy for crimes committed by a sitting President. The 1973 memo then listed many reasons—all pragmatic—why it would interfere with Article II duties to indict a President while in office. Then the Clinton Justice Department jumped in 25 years later with a memorandum that repeats all of these arguments from the Nixon era, but also tries to distinguish intervening Supreme Court precedent rejecting presidential immunity, and then repeats many of the arguments that Nixon and Clinton both had tried before the Court—and lost. Old wine in new bottles. Twenty years after that, it was the same thing all over again in the Trump DOJ. A third undisclosed DOJ memo from 2019 apparently says much the same thing about the impermissibility of indicting a sitting President. As the French are fond of saying, *plus ça change, plus c'est la même chose*.¹¹⁸

It is clear from both the 1973 and the 2000 OLC memos that the reasons given for the DOJ's conclusion about presidential immunity are pragmatic, and as such they are lacking in constitutional dimension other than the OLC's conjecture that a presidential indictment would unconstitutionally interfere with performance of presidential duties under Article II. Moreover, the OLC memoranda interpreting the law are advisory only; they do not create binding legal precedent and as such are not owed deference by courts. Moreover, the Justice Department is headed by an Attorney General who is appointed by and serves at the pleasure of the President. Even in the absence of such an articulated policy, the Justice Department would be unlikely to indict the President to whom that agency is beholden, and thus the policy articulated in the OLC memos comes as no surprise. But that does not support parlaying an internal Justice Department policy into a principle of constitutional stature as the OLC memos have been interpreted by many.

Finally, the deference by the DOJ to the President has nothing whatsoever to do with the powers of the states to investigate and prosecute the President. The fact that the Justice Department chooses to adhere to its

¹¹⁸ Trans., “The more things change, the more they stay the same.”

own OLC memoranda does not mean that a state cannot investigate the President in the exercise of its police powers. In the absence of exonerating conditions, killing someone on Fifth Avenue is a crime under the laws of the State of New York. In a country that lives by the rule of law, a person who participates in a serious crime must be investigated and criminally charged under the laws of that state. The President is not above the law. We discuss the powers of the states to investigate and prosecute a President separately in Part III of this Article.

D. What Nixon and Clinton Taught Us About Presidential Immunity

Decisions regarding presidential immunity are few and far between in our constitutional jurisprudence. But the cases that exist are fairly uniform in rejecting the notion of presidential immunity. The first in the series of such cases was *United States v. Aaron Burr*,¹¹⁹ discussed above.¹²⁰ Any debate among the Founders about whether the President is answerable to the federal courts was resolved in the affirmative by this case, in which the district court held that President Jefferson could be served with a subpoena in the criminal case against his own Vice President.

In the more than two hundred years since the *Burr* case was decided by the district court, there have been exactly three significant Supreme Court cases in this same line. Though each of the three cases addressed a rather different aspect of presidential accountability, each held firm to the principle first set out in *Burr* that a sitting President is not immune from the reach of the coercive arm of the federal courts.¹²¹

*United States v. Nixon*¹²² arose forty-eight years ago when President Nixon tried to obstruct the Watergate investigations to avoid his own accountability.

¹¹⁹ *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807).

¹²⁰ *See supra* Section I.B.

¹²¹ One case, however, held that a former President could not be civilly sued by private parties seeking monetary damages for his official conduct in office. *See Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (holding that “petitioner, as former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts”).

¹²² *United States v. Nixon* held that a sitting President is not immune from judicial process. *See United States v. Nixon*, 418 U.S. 683, 713 (1974) (“[t]he President’s broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.”). *United States v. Nixon* is particularly relevant in that it pertains to a criminal subpoena, as was involved in *Trump v. Vance*, and the Court

Like his successor in presidential overreach, Donald Trump, Nixon invoked his “unitary executive” powers under Article II of the Constitution to demand that his Attorney General fire Special Prosecutor Archibald Cox in the infamous “Saturday Night Massacre” in 1973, in which two successive attorneys general refused to carry out Nixon’s order. The third, Robert Bork, finally ceded to Nixon’s demands. The ultimate check on Nixon’s abuse of power, however, came from Congress, when a bipartisan group of senators called for his impeachment.¹²³ The outrage in Congress led to the appointment by the Justice Department of a new special prosecutor to succeed Cox, namely Leon Jaworski. In the absence of this powerful response from Congress on both sides of the aisle, Nixon would have succeeded in ending an investigation into his own misdeeds through the exercise of his “removal powers” under Article II.

Nixon then appealed to another staple of presidential power—executive privilege—to withhold evidence from Jaworski. The famous showdown over the White House tapes went all the way to the Supreme Court, which in *United States v. Nixon* ordered Nixon to turn over the tapes.¹²⁴ These tapes contained incriminating statements by Nixon and were a large part of the impeachment case that eventually drove him from office.

The foregoing events raise important questions about the nature of executive power, such as the meaning of the “unitary executive” and whether the President’s Article II power extends to the firing of executive branch officials like Archibald Cox when such removal is primarily motivated by a desire to obstruct justice. The question of the scope of the President’s removal powers, however, is a separate issue from whether a sitting President

is clear that “a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of ‘a workable government’ and gravely impair the role of the courts under Art. III.” See *United States v. Nixon*, 418 U.S. 683, 707 (1974) (holding that the need for presidential confidentiality is plainly confined to circumstances in which the interests of national security demanded it). Chief Justice Burger wrote,

[a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of [p]residential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.

United States v. Nixon, 418 U.S. 683, 706 (1974).

¹²³ Jules Witcover, *Pressure for Impeachment Mounting*, WASH. POST, Oct. 21, 1973, at A01. Republicans in both the House and Senate made public statements condemning Nixon’s actions.

¹²⁴ *United States v. Nixon*, 418 U.S. 683 (1974).

can be investigated or indicted.¹²⁵ For present purposes, the important point underscored by *Nixon* is that the President is subject to criminal process, despite the fact that the subpoena in question came from an official of his own DOJ. The 2000 OLC memo took into consideration the reasoning of *Nixon*, yet, as discussed in the previous section, the OLC's commitment to preserving presidential immunity has been so strong that that office did not alter its position between the first and the second memo.¹²⁶

Clinton v. Jones presented another challenge for the OLC in holding that a private plaintiff can sue the President for his personal conduct and demand compliance with civil subpoenas. The case did not involve a criminal indictment, and the 2000 OLC memo strains to explain how upholding the civil suit in *Jones* is consistent with the OLC position that there is a categorical constitutional impediment to charging a President with a crime. After *Vance*, which we address in the next section, presidential immunity theory as expressed in the two OLC memos must inconveniently coexist with Supreme Court cases holding that a sitting President is subject to both federal and state criminal subpoenas as well as civil actions by private plaintiffs.

Such a construction of Article II is counterintuitive. Suppose, for example, a President had committed a criminal sexual assault while in office or immediately prior to becoming President. The victim could sue the President for damages under *Jones*. Why should there be an asymmetry with regard to a criminal indictment? To justify presidential immunity from criminal indictment, *Jones* either must be reversed or distinguished by making a compelling case that criminal indictment of a President in all cases imposes a greater burden on the exercise of Article II duties than a civil case. Impeachment of course is provided for as a remedy in the Constitution, but not all crimes are “high crimes and misdemeanors” warranting removal from office, and arguably Clinton's crimes are an example of that. Criminal

¹²⁵ An inferior federal officer who cannot be removed by the President and is entitled to civil service protection can sue the government if wrongfully removed but cannot sue a former President in his personal capacity for money damages. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). But this immunity to civil suit for official acts is far removed from the issue of whether a President is criminally liable for official acts or personal acts. See *supra* text accompanying notes 112–116 (distinguishing *Nixon v. Fitzgerald*).

¹²⁶ For a discussion about presidential privilege and the commitment of each successive administration to preserving it, see Finkelstein & Painter, *supra* note 85 (describing efforts of the Biden administration in “protecting the Trump administration's assertions of executive privilege to prevent information from reaching Congress and the public”).

indictment of a sitting President also does not necessarily impose a greater burden on Article II duties than the constitutional remedy of impeachment. Reading into the Constitution a requirement that impeachment be the only remedy for presidential crimes may in some cases impose a greater burden on the presidency than allowing criminal indictment as an alternative. What actually happened with Clinton shows that allowing a civil case against the President followed by his impeachment can impose a great burden on the exercise of Article II powers, possibly an even greater burden than a criminal investigation and indictment.

One way out of this inconsistency between civil and criminal process against the President would be for the Court to reverse *Jones* and hold that a sitting President is not subject to civil process. But a closer look at our recent experience with President Trump—the most litigious President in U.S. history—has shown us that *Clinton v. Jones* was rightly decided. With a highly litigious President in the Oval Office, chaos in the litigation system could ensue if the President could evade civil suit. Among the various questions that this kind of immunity would raise, what would happen to all of the President's litigation during his presidency? Would all of it be put on hold? Or only some of it? Would only the litigation against the President be stayed, or would litigation against business entities controlled by the President be stayed as well? What would happen to litigation against third parties that hold property or records belonging to the President or to his businesses, such as third-party stakeholders in the *Vance* case? A President who could not be sued civilly would be permitted to commit torts throughout his presidency as President Trump allegedly did according to a slander suit brought by E. Jean Carroll who had also accused him of sexual assault.

There are numerous interesting and difficult questions about how a reversal of *Jones* would work that we cannot fully explore here. One particularly intriguing one is the question whether if a President cannot be sued personally, or cannot be subjected to discovery in a lawsuit, would it make sense to allow the President to sue others in return? Taking away the President's right to sue could be unconstitutional as a denial of due process. But if a President does sue someone, and demands discovery in the lawsuit should not the person sued by the President be entitled to reciprocal discovery? Indeed, it was Trump who in *Trump v. Vance* sued to enjoin the state grand jury subpoena of Trump Organization financial documents. On the theory that any right to sue must be reciprocal, we might ask whether, if

Clinton v. Jones were reversed, cases like *Trump v. Vance* would have to be stayed until Trump left office. Without the rule in *Clinton v. Jones*, however, there would be no way of holding a President accountable and hence no rule of law for four years and potentially eight. The President and his businesses could breach contracts with impunity, and other parties could breach contracts between themselves and the President or his businesses with impunity. The President and his businesses could commit torts with no repercussions and other parties could commit torts against the President or his businesses at will.¹²⁷

The rule in *Clinton v. Jones*, which rejects the idea of any blanket presidential immunity from civil process, thus appears to be the only workable approach. Courts might constrain discovery requests of the President on a case-by-case basis that are overly burdensome; that's a different issue. But a blanket stay on all civil litigation by or against the President during his entire term in office is as unworkable as it is unconstitutional.

Perhaps the most frequently heard objection to holding Presidents accountable to both civil and criminal processes is that it would distract them from the business of governing and thus interfere with the exercise of their Article II duties. While this is a pragmatic argument, and not one that should provide the foundation for immunity against all forms of presidential investigation, it is as close as the arguments against investigating a sitting President come to establishing a constitutional basis for presidential immunity. Admittedly, there inevitably will be some impact on the President's Article II duties in civil suits such as *Clinton v. Jones*. That burden, however, is not likely to prove substantially greater than would be the burden imposed by a criminal trial for similar conduct.¹²⁸

Furthermore, the constitution already has a mechanism for relieving a President who, whether because of a criminal case or for any other reason, believes he is incapable of carrying out his duties: the Twenty-Fifth

¹²⁷ Consider another favorite litigation venue of President Trump—divorce court. Should presidential divorce cases be barred under the doctrine of presidential immunity? What if a future President were to get divorced while in office? No divorce until the President leaves office, or can the President only have a consensual divorce? Would there be a constitutionally mandated delay of up to eight years in resolving contested property issues or custody of a minor child? Perhaps, if *Clinton v. Jones* were reversed, any contested divorce involving the President would be unconstitutional.

¹²⁸ Jones alleged that Clinton had exposed himself to her in a hotel room, a crime under Arkansas law. Ark. Code Ann. § 5-14-112 (2019).

Amendment provides for temporary transfer of power and duties of the presidency to the Vice President.¹²⁹ A President facing criminal investigation or indictment could avail himself of this mechanism to manage the disruption of his schedule.

The claims that the President's Article II duties are unduly burdened by his becoming the defendant in a civil or criminal trial were energetically rejected by conservatives during the Clinton crisis. In oral argument in *Clinton v. Jones*, for example, Justice Scalia heaped scorn on this suggestion:

JUSTICE SCALIA. But we see Presidents riding horseback, chopping firewood, fishing for stick fish, playing golf and so forth and so on. Why can't we leave it to the point where, if and when a court tells a President to be there or he's going to lose his case, and if and when a President has the intestinal fortitude to say, "I am absolutely too busy," so that he'll never be seen playing golf for the rest of his Administration, if and when that happens, we can resolve the problem.

MR. DELLINGER. Justice Scalia----

JUSTICE SCALIA. But, really, the notion that he doesn't have a minute to spare is, is just not credible.¹³⁰

Justice Scalia rightly suggests that playing golf is not among the Article II duties of the President and that time lost on that activity for the sake of answering a subpoena is not to be lamented.

Scalia may seem, however, to be ignoring concerns that civil litigation against sitting Presidents is motivated at least in part by the desire to harass, and that therefore the distraction from Article II duties can be intentionally imposed by enemies of the President. This was no doubt the case in the Clinton litigation, as was clear from the fact that Jones was represented by attorneys paid for by Republican political opponents of Clinton.¹³¹ This

¹²⁹ See U.S. CONST., amend XXV, § 3 ("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.")

¹³⁰ Excerpts From Arguments Before the Supreme Court in Clinton Case, N.Y. TIMES (Jan. 14, 1997) <https://www.nytimes.com/1997/01/14/us/excerpts-from-arguments-before-the-supreme-court-in-clinton-case.html> [https://perma.cc/7GTV-UT36].

¹³¹ See Murray Waas, *Newsreel: The Men Who Kept Paula Jones Lawsuit Going: How Associates of Billionaire Clinton-Hater Richard Mellon Scaife Kept Paula Jones's Legal Battle Going*, SALON (April 2, 1998, 5:42PM), https://www.salon.com/1998/04/02/cov_02news/ [https://perma.cc/LXC8-EE45] (revealing that the individuals funding the legal campaign of Jones "were involved with the Arkansas Project, a three-year, \$2.4 million campaign to investigate and discredit President Clinton").

concern, however, should be less acute where criminal prosecution is concerned. Prosecutors unlike plaintiffs' lawyers are paid for out of the public purse. Ethics rules for prosecutors are different than they are for private civil attorneys. Plaintiffs' lawyers in civil litigation may not bring frivolous suits and file frivolous motions,¹³² but plaintiffs' lawyers are not subject to the stricter rules of prosecutorial ethics that require prosecutors to restrict criminal charges to those supported by probable cause,¹³³ as well as to disclose exonerating or mitigating evidence to the defendant,¹³⁴ among other standards that do not apply to attorneys representing private litigants.¹³⁵ Discovery in civil litigation generally is very broad, while discovery is somewhat more limited in criminal cases. Refusing to testify generally is not an option for a defendant in a civil case; it is an option in a criminal case. Putting all of this together, we cannot be certain that a criminal trial of Clinton on charges similar to the allegations made by Jones would have imposed a higher burden on Clinton and on his presidency than the civil trial that the Supreme Court approved of in *Jones*. We return to this matter below.

Clinton's alleged criminal conduct during the *Jones* proceedings, namely perjury, is an example of a situation where the criminal justice system would likely have provided a better tool for holding the President accountable than impeachment and trial in the Senate. Independent Counsel Kenneth Starr¹³⁶ did not indict Clinton for perjury, but Starr submitted a Report to

¹³² See MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 1983) (stating that "[a] lawyer shall not bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous").

¹³³ See MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 1983) (stating that "[t]he prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause").

¹³⁴ *Id.*; see also *Brady v. Maryland*, 373 U.S. 83, 86 (1963) (holding that a prosecutor's suppression of exonerating evidence is a violation of the defendant's Fourteenth Amendment's Due Process rights.)

¹³⁵ See CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION (AM. BAR ASS'N 2017) (stating that the prosecutor "should act with integrity and balanced judgment"). The risk of harassing litigation from prosecutors may be higher in the case of state criminal cases, as we discuss in Section III.C below.

¹³⁶ Starr was appointed under the now defunct Independent Counsel statute. We do not explore in this Article the separate question of the constitutionality of that statute, upheld by the Court in *Morrison v. Olson*, 487 U.S. 654 (1988) or how Justice Department lawyers would be involved in such a case against the President under a new not-yet-enacted version of that statute or, alternatively, in a criminal case pursuant to an indictment of a sitting President by a special counsel such as Robert Mueller appointed under DOJ regulations. We also do not discuss here whether criminal

Congress,¹³⁷ after which the House of Representatives voted to authorize an impeachment inquiry. Clinton was impeached in the House, and he was ultimately acquitted by the Senate, but meanwhile the political chaos surrounding the Clinton impeachment lasted a full five months. Impeachment was a great distraction from the President's Article II duties, which included, among other things, protecting the United States from terrorist attacks following the 1993 attack on the World Trade Center. We will never know what would have happened if President Clinton, the White House staff, the DOJ, and members of Congress, had spent October 1998 through February 1999 focused on the duties of their jobs rather than on the drama of impeachment. Thus the argument that the claim that impeachment is a better alternative to a criminal trial for a sitting President because it involves less interference with Article II duties is not always compelling.

The subject matter of Clinton's alleged crime was arguably only tangentially related to his official duties, namely lying under oath about sex with a White House intern. However repugnant that conduct might have been, it was arguably not "high crimes and misdemeanors" within the meaning of the Impeachment Clause, or so the majority of the American people seemed to think according to most polls,¹³⁸ as did a majority of the Senate.¹³⁹ Now imagine that Starr had instead indicted President Clinton for perjury and that no impeachment process had occurred. A criminal trial for perjury would have been appropriate; perjury is a crime whether it relates

obstruction of justice statutes would bar the President from removing a special counsel such as Mueller. The question we address here is whether any indictment brought by a federal or state prosecutor would so unduly interfere with a President's Article II duties that it categorically would be unconstitutional, as the OLC memos suggest, or whether criminal process against a sitting President should be assessed by courts on a case-by-case basis to assure accountability of the President while at the same time not interfering with exercise of Article II powers.

¹³⁷ KENNETH W. STARR, REFERRAL FROM INDEPENDENT COUNSEL KENNETH W. STARR IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, SECTION 595(C) (Sept. 11, 1999).

¹³⁸ Cf. Drew DeSilver, *Clinton's Impeachment Barely Dented His Public Support, and it Turned Off Many Americans*, PEW RSCH. CTR. (Oct. 3, 2019), <https://www.pewresearch.org/fact-tank/2019/10/03/clintons-impeachment-barely-dented-his-public-support-and-it-turned-off-many-americans/> [https://perma.cc/C8MN-5XTN] (finding that Bill Clinton's approval ratings did not significantly decrease during his impeachment trial, although the trial turned off many Americans).

¹³⁹ The vote was 55–45 for acquittal on the first Article of impeachment for perjury. The vote was 50–50 for acquittal on the second Article of impeachment for obstruction of justice.

to personal conduct or official duties. Anyone can commit perjury, including a President. Clinton arguably had perjured himself twice—in the civil deposition and then before the grand jury.¹⁴⁰ While his crime had little to do with performance of his duties as President, a criminal prosecution would have been justified under the same reasoning the Court had invoked in *Jones*. A criminal trial on the perjury charge would have been relatively straightforward and might have lacked the political drama of the impeachment process.

If a criminal trial threatened to interfere with Clinton's official duties, a federal court might have granted a request to postpone it until early 2001. Even if a criminal trial of Clinton had occurred during Clinton's presidency it probably would have been less disruptive than his impeachment. If the President had been convicted, any sentence imposed could have been stayed until completion of his term in January 2001. Alternatively, Clinton could have entered into a plea bargain with federal prosecutors. Without knowing what would have been least disruptive of President Clinton's ability to carry out his Article II duties, it is worth considering that the arguments made to that effect against criminal investigation and prosecution may not be warranted as compared with other mechanisms of presidential accountability.

E. The Supreme Court Speaks, Again: Trump v. Vance

On July 9 of 2020, the Supreme Court handed down its opinion in *Trump v. Vance*,¹⁴¹ which arose out of a subpoena of a President by a New York State grand jury in an effort to obtain President Trump's tax records and other financial documents from his former accounting firm, Mazars. As Chief Justice Roberts explained in his opinion for the majority, this was a matter of first impression:

In our judicial system, “the public has a right to every man’s evidence.” Since the earliest days of the Republic, “every man” has included the President of the United States. Beginning with Jefferson and carrying on through Clinton, Presidents have uniformly testified or produced documents in criminal proceedings when called upon by federal courts. This case involves—so far as we and the parties can tell—the first *state* criminal

¹⁴⁰ See Kenneth Starr, *Official Report of the Independent Counsel's Investigation of the President: Narrative Pt. XIV: The Deposition and Afterward*, WASH. POST (1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/6narrxiv.htm#L131> [<https://perma.cc/852P-CDWJ>].

¹⁴¹ *Trump v. Vance*, 140 S. Ct. 2412 (2020).

subpoena directed to a President. The President contends that the subpoena is unenforceable. We granted certiorari to decide whether Article II and the Supremacy Clause categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President.¹⁴²

The Court's answer was absolutely consistent with the three cases that had preceded it on related themes: *United States v. Burr*, a district court opinion by Chief Justice John Marshall, holding that a criminal defendant, in this case Burr, had the right to subpoena the President for information relevant to his case; *United States v. Nixon*, holding that the Constitution does not preclude a criminal subpoena of the President in the course of the criminal investigation; and *Clinton v. Jones*, holding that a sitting President is subject to subpoena in a civil case.

Chief Justice Roberts began his analysis in *Vance* by categorically rejecting the theory that the President is immune from service of process in a criminal case, recalling the *Burr* case for that proposition. "In the summer of 1807," Roberts wrote, "all eyes were on Richmond, Virginia. Aaron Burr, the former Vice President, was on trial for treason . . ." President Jefferson, Roberts made clear, was bound to comply with the criminal process and President Trump was required to do the same. Neither, however, ultimately complied: although Jefferson was ordered to turn over documents relating to the Burr case, he apparently never complied with the court order, and the same can be said of Trump, who continued to appeal, despite the clear precedent against his desired outcome. As the *Vance* Court noted, President Trump's argument "runs up against the 200 years of precedent establishing that Presidents, and their official communications, are subject to judicial process, even when the President is under investigation."¹⁴³

A central issue with which the *Vance* court had to grapple, however, was a more subtle one, namely whether the Manhattan District Attorney had to meet a heightened standard of need to establish the right to subpoena a sitting President's financial records, or whether the President could be subpoenaed like everyone else. The majority of the justices declined to impose a heightened standard for a state criminal subpoena of a President's personal papers, reserving the higher showing required of the prosecutor in *United States v. Nixon* for subpoenas of official records such as President

¹⁴² *Id.* at 2420 (emphasis in original) (footnotes omitted); See Tittha Sutta: Sectarians 1, (Ud 6:4) (Thanissaro Bhikkhu, trans.), https://www.dhammadata.org/suttas/KN/Ud/ud6_4.html [<https://perma.cc/5YDY-TE5V>].

¹⁴³ *Trump v. Vance*, 140 S. Ct. at 2427 (citations omitted).

Nixon's White House tapes.¹⁴⁴ The Court dispensed quickly with Trump's argument that the President would be distracted from his official duties by subpoenas: "Indeed, we expressly rejected immunity based on distraction alone . . . in *Clinton v. Jones*."¹⁴⁵ The Court observed "two centuries of experience confirm that a properly tailored criminal subpoena will not normally hamper the performance of the President's constitutional duties."¹⁴⁶

The Court also rejected President Trump's argument that the stigma of being subject to a state criminal subpoena would interfere with official duties,¹⁴⁷ as well as the argument that such subpoenas should be categorically barred because they could be used for "harassment" of the President and take the President's time and attention away from the business of governing.¹⁴⁸ The Court noted both federal and state law safeguards against subpoenas used for harassment or subpoenas that unduly interfere with a President's official duties, holding that these arguments did not suffice to justify making the President absolutely immune from a state criminal subpoena.¹⁴⁹

Trump's lawyers and the Solicitor General tried to make some headway quoting portions of the Court's holding in *Nixon v. Fitzgerald* that the President

¹⁴⁴ *Id.* at 2429.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2426.

¹⁴⁷ *Id.* at 2427 ("The President next claims that the stigma of being subpoenaed will undermine his leadership at home and abroad. Notably, the Solicitor General does not endorse this argument, perhaps because we have twice denied absolute immunity claims by Presidents in cases involving allegations of serious misconduct.").

¹⁴⁸ *Trump v. Vance*, 140 S. Ct. 2412, 2418 (2020) ("And, while we cannot ignore the possibility that state prosecutors may have political motivations . . . here again the law already seeks to protect against the predicted abuse.").

¹⁴⁹ The majority opinion notes that "First, grand juries are prohibited from engaging in 'arbitrary fishing expeditions' and initiating investigations 'out of malice or an intent to harass.'" *Id.* at 2428 (quoting *U.S. v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991)); "And, in the event of such harassment, a President would be entitled to the protection of federal courts." *Id.* The majority opinion also notes that "Second, contrary to Justice Alito's characterization, our holding does not allow States to 'run roughshod over the functioning of [the Executive B]ranch.'" *Id.* "The Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties Given these safeguards and the Court's precedents, we cannot conclude that absolute immunity is necessary or appropriate under Article II or the Supremacy Clause." *Id.* at 2428–29.

could not be sued by a private plaintiff for his official acts.¹⁵⁰ But the Court in *Trump v. Vance* recognized that the *Fitzgerald* Court dealt with the adverse impact on presidential decision making by the prospect of later civil suits against a President for money damages, a completely different issue from the question of whether the President must answer to a criminal subpoena.¹⁵¹

Despite his strong policy objections to investigating a sitting President, discussed in the next part of this Article, Justice Kavanaugh joined the majority in supporting the enforceability of the New York grand jury subpoena in *Trump v. Vance*. In his concurrence with Justice Gorsuch, Justice Kavanaugh said that he would have imposed on the prosecutors a higher showing of need for the documents than the majority of the Justices did in their opinion.¹⁵² Nonetheless Kavanaugh recognized that it is largely the province of the legislature, rather than federal courts, to define the permissible scope of any criminal investigation of a sitting President.

Justice Thomas also agreed with the majority of the Court that the President has no absolute immunity from issuance of a grand jury subpoena,¹⁵³ but he dissented on the grounds that President Trump should have been allowed to show in the court below that enforcement of the subpoena would take up too much time or otherwise interfere with his Article

¹⁵⁰ See *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (holding that a former President cannot be sued in his official capacity for official acts such as dismissal of a federal employee). In *Nixon v. Fitzgerald*, Chief Justice Burger suggests in a concurrence that the Founders understood Article II “to protect the ‘independent functioning’ of the President’s unique office.” Brief for Petitioner at 9, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19–635) (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 760–61 (1982) (Burger, J., concurring)). Yet, as noted above, *Nixon v. Fitzgerald* is completely irrelevant to the issue at hand. In that case, the Supreme Court ruled 5–4 that Nixon, by then a former President, “is entitled to absolute immunity from damages liability predicated on his official acts.” *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). *Fitzgerald* has to do with civil suits against the President in his official capacity for damages for his official acts, and has nothing to do with the question of whether a sitting President can be investigated, subpoenaed and perhaps even indicted for crimes he has committed in his personal capacity.

¹⁵¹ “But *Fitzgerald* did [sic.] not hold that distraction was sufficient to confer absolute immunity. We instead drew a careful analogy to the common law absolute immunity of judges and prosecutors, concluding that a President, like those officials, must ‘deal fearlessly and impartially with the duties of his office’—not be made ‘unduly cautious in the discharge of [those] duties’ by the prospect of civil liability for official acts.” *Vance*, 140 S. Ct. at 2426, (quoting *Fitzgerald*, 457 U.S. 731, 752 (1982)).

¹⁵² “Because this case again entails a clash between the interests of the criminal process and the Article II interests of the Presidency, I would apply the longstanding *Nixon* ‘demonstrated, specific need’ standard to this case. The majority opinion does not apply the *Nixon* standard in this distinct Article II context, as I would have done.” *Id.* at 2432 (Kavanaugh, J., concurring).

¹⁵³ *Id.* at 2434 (Thomas, J., dissenting).

II duties.¹⁵⁴ Justice Alito also dissented. Although he like Justice Thomas did not categorically reject the power of a state prosecutor to subpoena a President, Justice Alito argued for a stricter standard of review for such subpoenas, emphasizing his concern about distraction from the President's official duties as well as federalism concerns and potential abuses by prosecutors of the state grand jury process when directed at a sitting President.¹⁵⁵ Justice Alito raised legitimate concerns about a prosecutor unchecked by courts, but his dissent envisions the worst possible scenarios. He discusses presidential fingerprinting and imprisonment¹⁵⁶ to make his case that Article II duties can be unconstitutionally burdened by a prosecutor. The other justices in *Vance*, however, apparently recognized that imprisonment is a different issue from the President's amenability to criminal process. Furthermore, pronouncing a categorical prohibition on imprisoning a sitting President is not helpful without thoroughly analyzing the very rare circumstance in which such an extreme measure might be needed: the unlikely but nightmarish scenario of a President attempting a coup to extend his term or to broaden his power.¹⁵⁷ Presidential imprisonment would be extraordinary, and hopefully will never happen, but should not be taken off the table entirely without a thorough discussion of the consequences.

In the case of *Trump v. Vance*, however, no such extreme measures were even contemplated. The discovery burden on the President was minimal. The majority opinion observed:

¹⁵⁴ "If the President is unable to comply because of his official duties, then he is entitled to injunctive and declaratory relief." *Id.* at 2436 (Thomas, J., dissenting).

¹⁵⁵ *See id.* at 2450 (Alito, J., dissenting) ("The Court discounts the risk of harassment and assumes that state prosecutors will observe constitutional limitations . . . and I also assume that the great majority of state prosecutors will carry out their responsibilities responsibly. But for the reasons noted, there is a very real risk that some will not."); *see also id.* at 2448 (agreeing with the majority opinion that not all state prosecutors' subpoenas of a sitting President should be barred); *id.* at 2449 (articulating a standard of review that would require a state prosecutor to provide a general description of the offenses under investigation, describe how the subpoena relates to those offenses and explain why it is important that the subpoenaed records be obtained now as opposed to after the President's term is over).

¹⁵⁶ *Id.* at 2445.

¹⁵⁷ The option of deploying the military to impose martial law and re-do the presidential election apparently was discussed in a meeting in the White House in November 2020. Executing such a plan probably would have been criminal sedition. Claire O. Finkelstein & Richard Painter, *Invoking Martial Law to Reverse the 2020 Election Could Be Criminal Sedition*, JUST SEC. (Dec. 22, 2020), <https://www.justsecurity.org/73986/invoking-martial-law-to-reverse-the-2020-election-could-be-criminal-sedition/> [<https://perma.cc/P5GW-P973>].

[T]wo centuries of experience confirm that a properly tailored criminal subpoena will not normally hamper the performance of the President's constitutional duties. If anything, we expect that in the mine run of cases, where a President is subpoenaed during a proceeding targeting someone else, as Jefferson was, the burden on a President will ordinarily be lighter than the burden of defending against a civil suit.

. . . The President's objection therefore must be limited to the additional distraction caused by the subpoena itself. But that argument runs up against the 200 years of precedent establishing that Presidents, and their official communications, are subject to judicial process . . . even when the President is under investigation.¹⁵⁸

Unlike *Clinton v. Jones*, where the President was asked about his personal conduct inside the White House, the New York grand jury subpoena in *Vance* did not appear to concern anything that Trump had done during his presidency. Furthermore, the discovery requests were not directed to Trump at all. They were directed at a third-party accounting firm, Mazars, that had custody of financial records and tax returns belonging to the Trump Organization. Harkening back to Justice Scalia's comments about presidential golf in the oral argument in *Clinton v. Jones*,¹⁵⁹ President Trump didn't miss much golf either. Forbes Magazine reported in 2019 that President Trump's golf trips could cost taxpayers over \$340 million.¹⁶⁰ In any event, the President's golf schedule is not a sufficient basis for a judicial holding that the President can block a subpoena or otherwise is above the law.

The Court's decision in *Vance* thus categorically rejected the theory of presidential immunity. Chief Justice Roberts wrote for the Court "a king is born to power and can 'do no wrong.' The President, by contrast, is 'of the people' and subject to the law."¹⁶¹ The President, the Court held, is subject to criminal process while in office. The question is what the majority opinion implies about the critical question of whether an investigation of the President can constitutionally progress from investigation to indictment. Justice Alito goes out of his way in his dissent to say that he believes a sitting

¹⁵⁸ *Vance*, 140 S. Ct. at 2427 (citations omitted).

¹⁵⁹ Excerpts From Arguments Before the Supreme Court in Clinton Case, N.Y. TIMES, Jan. 14, 1997 (excerpting Justice Scalia's exchange with counsel about presidential golf in the oral argument of *Clinton v. Jones*).

¹⁶⁰ Chuck Jones, *Trump's Golf Trips Could Cost Taxpayers Over \$340 Million*, FORBES, July 10, 2019.

¹⁶¹ *Vance*, 140 S. Ct. at 2422 (citations omitted) (quoting U.S. v. Burr, 25 F. Cas. 27, 34 (C.C. Va. 1807) (Marshall, C.J.)).

President cannot be indicted,¹⁶² but the majority opinion does not expressly discuss indictment of a sitting President.

Trump v. Vance constitutes a forceful rejection of presidential immunity theory, and one way of reading that conclusion is to see it as rejecting the idea that a sitting President cannot be indicted. Moreover, presidential immunity theory has been repeatedly and soundly rejected in cases holding there was no immunity from criminal or civil subpoenas. Although the issue has not yet arisen as such in the courts, this precedent points strongly in the direction of holding that a President also can be indicted while in office, leaving questions of potential interference with the President's Article II duties to be resolved on a case-by-case basis rather than through a categorical rule prohibiting indictment. Even if in a particular case, practical considerations concerning performance of the President's official duties might, at worst, require a delay in his trial, the indictment alone is not likely to interfere with presidential duties.¹⁶³

The *Vance* ruling probably cannot be extended further to provide clear guidance on the conduct of a criminal trial of a President while in office and when such a trial would interfere with the Article II powers of the President. That is a question for another day, but a question entirely apart from, and not dependent upon, the simpler question of whether a President can be indicted, whether or not the trial is postponed. Even here, however, most of the arguments against criminal trial of a sitting President are pragmatic, not inherently constitutional. There may be pragmatic reasons for delaying a criminal trial of a sitting President. As discussed above, two memoranda from the Office of Legal Counsel lay out the reasons for deferring any such prosecution until after a President leaves office. The Office of Legal Counsel memos turn these pragmatic arguments into a constitutional argument for the DOJ's refusal to indict a sitting President. Such a proposition—categorical presidential immunity from criminal process—is rejected by the Court in *Vance*.

The decision in *Trump v. Vance* is thus a repudiation of presidential immunity theory. The Court held that even the simplest of criminal laws—

¹⁶² *Id.* at 2444 (Alito, J., dissenting).

¹⁶³ See Claire O. Finkelstein & Richard W. Painter, *Trump's Unitary Executive Theory Meets Cyrus Vance on Fifth Avenue*, BLOOMBERG LAW (July 17, 2020, 4:01 AM), <https://news.bloomberglaw.com/us-law-week/insight-trumps-unitary-executive-theory-meets-cyrus-vance-on-fifth-avenue> [<https://perma.cc/3D5W-RNMY>].

a state law requiring compliance with a grand jury subpoena—applies to the President as it applies to everyone else. Article II of the Constitution defines the duties of the President but does not put the President above the law.

There are still ways for a President to manipulate the legal system to delay an investigation, reducing substantially the chances that the President himself, or even anyone close to him, is indicted before he leaves office. But delaying tactics rather than the immunity theory will have to be the resort of future Presidents. Part II of this Article explores some of the ways that Presidents can exploit expansive visions of presidential authority to try to make themselves exempt from investigation and risk of indictment for as long as possible.

In defining the scope of presidential authority, we should look not to unsubstantiated arguments about absolute presidential immunity existing in a vacuum, but to more general constitutional arguments, as well as structural arguments having to do with separation of powers, the nature of the executive branch, and general principles of accountability and the importance of maintaining the rule of law. A basic part of the law is that a person who commits a crime can and should be indicted for that crime. The President is no exception. Impeachment for high crimes and misdemeanors is one response to criminal conduct by a federal official, including the President. The Constitution says nothing that rules out a criminal subpoena or an indictment while a President is in office and, barring any other constitutional source of law on this question, the President should be treated like any other citizen.

II. DOES CRIMINAL INVESTIGATION OF A SITTING PRESIDENT SUFFICE?

As we discussed in the previous Part, there is ample precedent to support investigating a sitting President by both federal prosecutors and Congress. Presidential immunity theory, which is invoked to defeat federal indictment of a sitting President, does not apply to mere criminal investigation. As we discussed in Part II, *United States v. Burr* and *United States v. Nixon* made this clear. The Supreme Court also reinforced this message in a different context in *Morrison v. Olson*,¹⁶⁴ which upheld the Independent Counsel statute that

¹⁶⁴ *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978).

Congress enacted specifically in order to allow the DOJ to investigate senior administration officials, including the President. Then in *Trump v. Vance*, the Supreme Court held that the susceptibility of a sitting President to federal criminal process applies not only to federal criminal proceedings but to state prosecution as well. But the Court does not address whether the same conclusion would hold with respect to indictment as well.¹⁶⁵ Justice Alito's dissent certainly seemed to think so, as he said that "[t]he scenario apparently contemplated by the District Court is striking" and then immediately went to great lengths to describe a scenario involving the charging, fingerprinting and even imprisonment of a sitting President.¹⁶⁶

Nevertheless, President Trump's lawyers argued in the *Vance* case that if a sitting President could not be indicted, he could also not be investigated, since investigation might lead to indictment.¹⁶⁷ Trump's lawyers did have a point: it is at least awkward to claim that a sitting President can be criminally investigated if one is firmly of the belief that that investigation cannot culminate in indictment. The Supreme Court did not opine on this point in *Trump v. Vance*, but it did make clear, as the Supreme Court has in other cases, that a sitting President *can* be investigated. If we believe the logic of the former President's lawyers, then, the holding in *Vance* implies that a sitting President can be indicted after all.

Some will argue that there are good reasons to adopt the OLC approach to this question and treat investigation and indictment differently. Investigation during a President's term, they argue, ensures that evidence is not lost, but once an investigation has been completed, there is no reason that indictment, trial and sentencing must take place before the end of a President's term. In this part we will explain why we believe this split approach is a mistake. There are multiple reasons why investigation of a putative criminal President must be accompanied by the possibility of indictment during a President's term, and why it is not adequate to investigate and then leave the indictment phase until after the President has

¹⁶⁵ *Trump v. Vance*, 140 S. Ct. 2412 (2020).

¹⁶⁶ *Id.* at 2445 (Alito, J., dissenting) ("If a sitting President were charged in New York County, would he be arrested and fingerprinted? He would presumably be required to appear for arraignment in criminal court, where the judge would set the conditions for his release. Could he be sent to Rikers Island or be required to post bail?").

¹⁶⁷ Brief for the Petitioner, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19–635); *see also* *Trump v. Vance Oral Argument Before the Second Circuit*, C-SPAN (Sept. 25, 2020), <https://www.c-span.org/video/?475971-1/trump-v-vance-oral-argument> [<https://perma.cc/A7RC-UA58>].

left office. As we discuss below, our constitutional system could not tolerate a sitting President under investigation committing crimes to undermine the investigation itself, such as bribing the investigators or threatening the personal safety of investigators or witnesses. The damage that could occur from allowing such crimes to go unaddressed during a President's term in office is potentially devastating and could enable a President to engage in extreme measures to remain in office with impunity.

In this Part, we focus on the demands of investigation and make clear that the proposition that a sitting President can be investigated would be meaningless if not accompanied in our system by the ability to prosecute a President who illegally interferes with the investigation. In Part IV, we will return to related themes when we consider the more general question of whether sufficient accountability would be achieved if all prosecution of a President occurred after the President left office.

A. Investigation of a President by the Department of Justice

Except for a handful of radical revisionists like Trump's attorneys in the *Vance* case, it is no longer subject to doubt that a sitting President can be criminally investigated. As we discussed above, this was already clear from the *Nixon* and *Clinton* cases, as well as from the decision in *Morrison v. Olson*¹⁶⁸ upholding the provisions of the Ethics in Government Act of 1978, under which independent counsels were appointed until those provisions expired in 1999.¹⁶⁹ It is also clear from the common practice of the DOJ assigning special counsel, such as Archibald Cox or Robert Mueller, to investigate matters of proximity to the President even in the absence of an independent counsel statute. If there was any doubt about criminal investigation of a sitting President based on the interplay between prior Supreme Court cases and the OLC memos, the *Vance* case should have fully laid such doubt to rest.

Nevertheless, it is not difficult for a sitting President to exert control over investigations into his own wrongdoing, particularly when the investigation is being conducted by his own Justice Department. The President has broad authority over the DOJ, and most importantly, he has the power to remove

¹⁶⁸ *Morrison*, 487 U.S. 654 (1988).

¹⁶⁹ 28 U.S.C. §§ 591–599 (1987). The statute provided that the independent counsel would be appointed by and be under the authority of a three-judge panel of the Court of Appeals for the District of Columbia. There were over a dozen investigations under the Independent Counsel statute during the two decades while it was in force.

the Attorney General nearly without explanation. A profound question is how we should understand the putative clash between the President's removal power under Article II, and the authority of an independent prosecutor, whether statutorily grounded or otherwise, to conduct a full and fair investigation of the President without interference from the subject of the investigation. Because the President's removal powers are understood on many accounts to be grounded in his constitutional authority over the executive branch, he has a ready defense against a federal prosecutor whose authority ultimately depends on the President himself, or at best is grounded in a federal statute enacted by Congress. In 2017, for example Professor Akhil Amar, adhering to a position on presidential power and immunity similar to the position he had adopted during the Clinton Administration, testified before the Senate about the "unconstitutionality" of Congress passing a bill to constrain the President's power to remove Special Counsel Robert Mueller.¹⁷⁰ Others also argued that it would not be an impeachable offense for Trump to order the DOJ to fire Mueller.¹⁷¹ And thus it may seem as though there is no protection against a sitting President who is determined to upend an investigation into his own misdeeds other than the political outrage that may ensue if the President seeks to end an investigation into his own acts by removing the investigator.

There are limits to what the President can do to hobble an ongoing investigation, despite his near absolute control over the DOJ. Federal obstruction laws, which make it unlawful to interfere with an ongoing official case or federal proceeding, should apply to the President as they would to any other individual. Obstruction statutes therefore place at least theoretical limits on what the President is free to do to obstruct an investigation into himself. In practice, however, federal obstruction law only provides protection against a sitting President if the latter can be investigated, indicted

¹⁷⁰ See *Special Counsels and the Separation of Powers: Hearing Before the Comm. on the Judiciary*, 115th Cong. 1–2 (2017) (statement of Akhil Reed Amar, Sterling Professor of Law and Political Science, Yale Law School) (stating, among other things, that a proposed bill protecting Mueller from being fired by Trump would be unconstitutional). Professor Amar expressed strong disagreement with the Supreme Court's holding in *Morrison v. Olson*, 487 U.S. 654 (1988) that a statute preventing at will removal of an independent counsel was constitutional. See *supra* text accompanying notes 113–15 (discussing Professor Amar's position during the 1990s on the issue of the President's amenability to judicial process).

¹⁷¹ See Joe Concha, *Dershowitz: Firing Mueller 'Would Not Be an Impeachable Offense'*, THE HILL (Nov. 29, 2018, 9:59 AM), <https://thehill.com/homenews/media/418870-dershowitz-firing-mueller-would-not-be-an-impeachable-offense> [<https://perma.cc/PLD9-DBU2>].

and tried for obstruction, since otherwise the President will be free to obstruct the inquiry into the obstruction itself. In that sense, the possibility of indicting the President for obstruction is a precondition to conducting a thorough investigation into that President, since otherwise the President will face no constraint when he attempts to dismantle the investigation or influence its course.

The various attempts to investigate the Trump administration have amply demonstrated the challenge of trying to investigate a President's misdeeds where there is no realistic chance of prosecuting that same President for obstruction should he interfere with the investigation. The investigations into the 2016 Trump Campaign by the federal government, known as "Crossfire Hurricane," were obstructed and stymied almost from the beginning. The firing of former FBI Director James Comey was a dramatic reminder that the President can invoke his control over the executive branch, particularly his removal powers, to eliminate the threat of accountability. President Trump was up front in his Twitter account, his press conferences and interviews that he had fired Comey because of the "Russia thing."¹⁷² He also tweeted that firing Comey was "a great service" and that Comey had been "insubordinate" in his handling of the Hilary Clinton email investigation.¹⁷³

Firing Comey was a grave miscalculation on Trump's part, as the appointment of Robert Mueller as special counsel followed hard upon it. Mueller himself came to the conclusion that "a thorough FBI investigation would uncover facts about the campaign and the President personally that the President could have understood to be crimes or that would give rise to personal and political concern."¹⁷⁴ The Report also detailed that the White House had "advanced a pretextual reason to the press and the public for Comey's termination" based on the DOJ's supposed recommendations, but that the President had admitted that "he was going to fire Comey regardless

¹⁷² Devlin Barrett & Philip Rucker, *Trump Said He Was Thinking of Russia Controversy When He Decided to Fire Comey*, WASH. POST (May 11, 2017), https://www.washingtonpost.com/world/national-security/trump-says-fbi-director-comey-told-him-three-times-he-wasnt-under-investigation-once-in-a-phone-call-initiated-by-the-president/2017/05/11/2b384c9a-3669-11e7-b4ee-434b6d506b37_story.html [<https://perma.cc/ZML7-GG3C>].

¹⁷³ Mary Clare Jalonick, et al., *Trump Tweets That Firing James Comey Was a 'Great Service'*, PBS NEWSHOUR (June 15, 2018, 9:01 AM), <https://www.pbs.org/newshour/politics/trump-tweets-that-firing-james-comey-was-a-great-service> [<https://perma.cc/62J4-6BPG>].

¹⁷⁴ See MUELLER REPORT, *supra* note 87, at 76.

of [the] DOJ's recommendations."¹⁷⁵ The same sort of effort to obstruct occurred with regard to the Mueller investigation. In that effort, claims of presidential immunity, as well as privilege, in addition to other presidential assertions of power, made truly independent investigations of a sitting President a challenging undertaking.

In this case, attempts to interference with the Mueller investigation took many forms, including a public relations campaign orchestrated by Attorney General Bill Barr to control the public reception of the final report. Attorney General Barr was pressed into service to control the roll out of the Mueller Report as well as to prevent access to the full Report by Congress and members of the public. For weeks all that was in the public domain was a four-page letter from Barr to Congress describing the Report and exonerating Trump,¹⁷⁶ even though the Report expressly said that it did not exonerate Trump.¹⁷⁷ Mueller himself complained to Barr that Barr's letter was misleading.¹⁷⁸ When the Mueller Report was finally released to Congress and to the public, it was heavily redacted—particularly Part I of the Report concerning Russian interference in the election and ties between Trump and his 2016 campaign and the Russians.¹⁷⁹ And, as we discuss in the next section, House subpoenas for the unredacted Mueller Report were simply ignored by the DOJ. The 1973 OLC Memo worries that an indicted President would lose the capacity to govern “[g]iven the realities of modern politics and mass media.”¹⁸⁰ As demonstrated with the roll out of the Mueller

¹⁷⁵ See *id.* at 77.

¹⁷⁶ See Letter from William P. Barr, Att’y Gen., to Chairmen and Ranking Members of the House and Senate Judiciary Cmtys. (Mar. 24, 2019) (“I have concluded that the evidence developed during the Special Counsel’s investigation is not sufficient to establish that the President committed an obstruction-of-justice offense.”).

¹⁷⁷ See MUELLER REPORT, *supra* note 87, at 2, 8.

¹⁷⁸ See Richard Gonzales & Sasha Ingber, *Mueller’s Letter to Barr Complained that Trump-Russia Report Summary Lacked ‘Context’*, NPR (Apr. 20, 2019, 11:12 PM), <https://www.npr.org/2019/04/30/718883130/mueller-complained-that-barr-summary-of-trump-russia-probe-lacked-context> [<https://perma.cc/T92E-827D>] (attaching letter from Mueller to Barr dated March 27, 2019).

¹⁷⁹ Shortly before the November 2020 election Judge Reggie Walton of the United States District Court for the District of Columbia ordered release of some of the previously redacted portions of the Mueller Report in ruling on a Freedom of Information Act request by BuzzFeed News. See Jason Leopold & Ken Bensinger, *A Judge Has Ordered the Justice Department to Release More Portions of the Mueller Report Before Election Day*, BUZZFEED NEWS (Sept. 30, 2020, 8:22 PM), <https://www.buzzfeednews.com/article/jasonleopold/judge-orders-more-mueller-report-unredacted> [<https://perma.cc/PYE6-Y4DR>].

¹⁸⁰ 1973 O.L.C. Memo at 31.

Report by Barr's DOJ, the political reality is that the President controls virtually all messaging from the DOJ, including messaging about DOJ criminal investigations of the President.

In sum, there is ample support for the proposition that a sitting President can be investigated by his own DOJ or by an independent prosecutor assigned by the DOJ, but this formal legal permission to investigate does ensure that a special prosecutor or other investigatory body can in fact conduct a complete and unbiased investigation into presidential misdeeds. As long as presidential immunity is thought to exist with respect to indictment, particularly indictment for obstruction, and to the extent that Presidents are afforded broad latitude with respect to presidential privilege, immunity and related doctrines, they will be able to manipulate and control the investigation by hobbling the effort to bring in witnesses and gain access to documents. They will also have significant ability to control the public reception of investigative findings and the dissemination of information regarding them.

Presidents routinely invoke executive privilege to withhold documents or witnesses from those conducting the investigation, thereby shielding themselves from scrutiny. This forces the special counsel to decide between going to court with a subpoena, as special prosecutors Cox and Jaworski did in *United States v. Nixon*, and forgoing the evidence being withheld. Trump's stalling tactics with Mueller worked insofar as Trump avoided a personal interview with Mueller. Rather than spend a year or more fighting the presidential immunity issues with Trump, with uncertain results in the Supreme Court, it may have been a reasonable decision on Mueller's part to decide to forgo the interview.

While a sitting President is not categorically immune from criminal prosecution, a President has powerful tools at his disposal to frustrate a criminal investigation of which he is the target. Simply refusing to provide evidence, and asking others not to provide evidence, unless ordered to do so by a court, is one of them. Whether such conduct by a President amounts to criminal obstruction of justice is a topic for another day. But suffice it to say here that such conduct, if permitted, makes it extraordinarily difficult to ensure even the most rudimentary of criminal investigations into the conduct of a sitting President while he is still in office.

B. Did You Bring Your Handcuffs? Enforcing Congressional Subpoenas

Just as it is settled law that it is constitutional for the federal government to investigate a sitting President, it should also be beyond question that Congress possesses the constitutional authority to conduct its own investigation of a sitting President. Furthermore, the Supreme Court has also recently made clear that Congress has the right to rely on the federal court system to enforce its subpoenas for this purpose, though the latter proposition has been much contested. The strongest case for the exercise of congressional investigative authority over a sitting President occurs in the context of an impeachment proceeding, where Congress' authority relative to the executive branch is at its height. Had Congress been involved in an active impeachment inquiry when it sought to obtain Trump's financial records from the Mazars accounting firm, there is little doubt that the Supreme Court would have enforced its subpoenas, as Chief Justice Roberts' opinion in *Trump v. Mazars*, the companion to the *Vance* case, has recently made clear.¹⁸¹

In *Mazars*, the Supreme Court held that Congress is entitled to have its subpoenas enforced, even as against the President, and confirmed that no heightened showing of need, such as the Court applied in *Nixon*, would be necessary to enforce congressional subpoenas with regard to the President's personal papers or his private businesses.¹⁸²

[Executive] privilege safeguards the public interest in candid, confidential deliberations within the Executive Branch; it is "fundamental to the operation of Government." *Nixon*, 418 U. S., at 708. As a result, information subject to executive privilege deserves "the greatest protection consistent with the fair administration of justice." *Id.*, at 715, 94 S. Ct. 3090. We decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations.¹⁸³

¹⁸¹ *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (explaining that Congress may subpoena the President's information for a legitimate legislative purpose); see also Claire O. Finkelstein & Richard W. Painter, *Trump's Bid to Stand Above the Law*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/05/08/opinion/supreme-court-trump-executive-privilege.html> [https://perma.cc/MCA9-GNFK].

¹⁸² See *Mazars*, 140 S. Ct. at 2031 ("Indeed, from President Washington until now, we [The Supreme Court] have never considered a dispute over a congressional subpoena for the President's records.").

¹⁸³ *Id.* at 2032–33.

Despite the finding that in the particular circumstances of the *Mazars* case, the requisite legislative purpose did not exist and the subpoena could not be enforced, the Court reinforced the basic message of the *Vance* case here as well: a sitting President is not above the law, and as such is subject to investigation.

Immunity theory, however, crops up in the context of congressional investigations of a sitting President, even in impeachment inquiries or proceedings, and is often asserted as a basis for arguing against the ability of Congress to use the federal courts to enforce its subpoenas where the executive branch is concerned. The argument here takes a roundabout form: instead of arguing that a sitting President is immune from congressional investigations under Article II, which does not fly in the case of impeachment, enthusiasts of presidential immunity argue that Congress is limited to its own powers and resources for investigating a sitting President and that federal courts should not enforce congressional subpoenas.¹⁸⁴ Whether or not courts ultimately intervene, litigation often takes so long that resistance to a congressional subpoena often outlives the presidency, and most disputes over subpoenas are resolved with a negotiated settlement. For example, litigation over the House Oversight Committee's 2011 and 2012 subpoenas of President Obama's Justice Department for documents related to "Operation Fast and Furious" lasted until the matter was finally resolved with a 2018 settlement in which many of the responsive documents were finally produced by the Trump Administration.¹⁸⁵ Litigation over the House Judiciary Committee subpoena of President Trump's White House Counsel Don McGahn was finally resolved by the District of Columbia Circuit in an en banc decision in 2020, but the testimony did not take place until June 4, 2021, four months into the Biden Administration.¹⁸⁶ Few, if any

¹⁸⁴ This was the position taken by the Trump Administration with respect to the House Judiciary Committee subpoena of White House Counsel Don McGahn. The three-judge panel of the District of Columbia Circuit agreed that the courts should not enforce the subpoena, which the panel viewed as essentially a political dispute between the executive branch and Congress. The Circuit Court reversed en banc. See discussion of these cases in text accompanying notes 194–201 *infra*.

¹⁸⁵ See Conditional Settlement Agreement of Mar. 7, 2018, Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Jeff B. Sessions, II, No. 1:12-cv-01332 (D.D.C. 2018) (Berman Jackson, J.) (case originally brought with Attorney General Eric Holder as named defendant).

¹⁸⁶ McGahn's June 2021 testimony before the House Judiciary Committee was constrained by the DOJ which continued to assert executive privilege over communications between McGahn and Trump on subjects other than those discussed in publicly released portions of the Mueller Report.

congressional subpoenas contested by a President in the courts have been judicially enforced resulting in production of the responsive documents during the presidency in question.

The issue of witnesses was a deeply fraught one in both impeachment proceedings brought against Donald Trump during his presidency. Had a Senate vote been cast in favor of having witnesses in either of the impeachment proceedings, Congress would have faced a further hurdle, namely convincing reluctant witnesses to testify, or if necessary, issuing subpoenas to compel them and then backing up its subpoenas with enforcement by a federal court. In general, for impeachment investigations to be effective, Congress must have the ability to subpoena witnesses and to enforce those subpoenas strenuously, even in the face of a demand from the sitting President that the witnesses defy Congress and refuse to testify. Presidents George W. Bush¹⁸⁷ and Barack Obama,¹⁸⁸ for example, on isolated occasions allowed their appointees to ignore congressional subpoenas. President Trump emphatically believed that he was entitled to use his authority to prevent witnesses from testifying or to withhold incriminating documents or other evidence, and he accordingly openly encouraged witnesses to defy subpoenas,¹⁸⁹ as well as asserted executive privilege to block administration officials from testifying.¹⁹⁰ These moves were consistent with Trump's view that Article II allowed him to do

See Claire O. Finkelstein & Richard W. Painter, *Why is Merrick Garland's DOJ Covering for Trump*, SLATE (June 3, 2021, 2:12 PM), <https://slate.com/news-and-politics/2021/06/don-mcgnahn-testimony-trump-doj-interference.html> [<https://perma.cc/4Y37-TNRQ>].

¹⁸⁷ See Comm. on the Judiciary, U.S. House of Representatives v. Harriet Miers, 558 F. Supp. 2d 53, 62 (D.D.C. 2008).

¹⁸⁸ See Comm. on Oversight and Gov't Reform, U.S. House of Representatives v. Eric Holder, 979 F. Supp. 2d 1, 3 (D.D.C. 2013) (Berman Jackson, J.) ("The fact that this case arises out of a dispute between two branches of government does not make it non-justiciable; Supreme Court precedent establishes that the third branch has an equally fundamental role to play, and that judges not only may, but sometimes must, exercise their responsibility to interpret the Constitution and determine whether another branch has exceeded its power.").

¹⁸⁹ Charlie Savage, *Trump Vows Stonewall of 'All' House Subpoenas, Setting Up Fight Over Powers*, N.Y. TIMES (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html> [<https://perma.cc/78NT-L2RM>].

¹⁹⁰ Brett Samuels, *Trump Says He Would 'Love to' Have Officials Testify But Is 'Fighting for Future Presidents'*, THE HILL (Nov. 26, 2019, 11:26 AM), <https://thehill.com/homenews/administration/472084-trump-says-he-would-love-to-have-officials-testify-but-is-fighting> [<https://perma.cc/7FPT-SCZT>].

whatever he wants,¹⁹¹ but unfortunately, there are legal scholars who reinforce these exaggerated claims about presidential power under Article II.

Defiance of congressional subpoenas reached new heights under the Trump Administration, and a deeply problematic rejection of congressional authority did much to damage Congress' authority and its ability to engage in oversight of the executive branch. As Attorney General Barr quipped to House Speaker Nancy Pelosi when she complained that he was ignoring House subpoenas: "did you bring your handcuffs?"¹⁹² If the Attorney General refuses to comply with a subpoena, is the Speaker of the House dependent upon whatever force she can muster with the Sergeant of Arms and a pair of handcuffs? A similar problem awaits at Senate impeachment trials. Although Senate Impeachment Rules provide that "[t]he Senate shall have power to compel the attendance of witnesses" and to "enforce obedience to its orders," the Sergeant-at-Arms of the Senate does not have a jail or a police force at his disposal.¹⁹³ Whether congressional subpoenas will be enforced turns on whether Article III courts will intervene against the executive branch to assist Congress in enforcing its subpoenas.

In *United States v. Nixon*, which we discuss above, the Supreme Court had suggested an answer to this question: If a subpoena comes from a federal prosecutor, it is appropriate for federal courts to enforce it. *Trump v. Vance* upheld a subpoena of a President from a state prosecutor. The enforceability of congressional subpoenas is not so clear. In two seminal cases—*House Judiciary Committee v. Donald McGahn*, concerning a subpoena of President Trump's former White House counsel, and *Trump v. Mazars*, concerning a House subpoena of Trump organization financial records from his accounting firm—President Trump was able to frustrate enforcement of House subpoenas until well past the 2020 election.

¹⁹¹ Jason Lemon, *Trump Insists the Constitution's Article II 'Allows Me to Do Whatever I Want'*, NEWSWEEK, (June 16, 2019, 2:58 PM), <https://www.newsweek.com/trump-insists-constitution-allows-do-whatever-want-1444235> [https://perma.cc/366Z-8XFK].

¹⁹² Nicholas Fandos, *Pelosi and Barr Share a Gag About Jail and Handcuffs*, N.Y. TIMES (May 15, 2019), <https://www.nytimes.com/2019/05/15/us/politics/pelosi-barr.html> [https://perma.cc/7WWQ-Q5GP].

¹⁹³ Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, 99th Cong. (1986).

Despite the *Nixon* precedent, the three-judge panel in *U.S. House Committee on the Judiciary v. Donald McGahn*¹⁹⁴ decided by a 2–1 vote that it could not force Don McGahn to testify before Congress and that the House had no standing to sue in federal court.¹⁹⁵ Had the initial decision been upheld in *McGahn*, it would have meant that congressional subpoenas are not legally enforceable in federal court. Disputes between the executive and legislative branches over subpoenas would therefore be merely a political matter. Fortunately, the full District of Columbia Circuit heard the *McGahn* case en banc and reversed 7–2 on August 7, 2020.¹⁹⁶ After the Supreme Court decided *Trump v. Vance*, and particularly *Trump v. Mazars* in July 2020, it was clear that the Court would enforce some subpoenas against the President, including congressional subpoenas. The House did lose its bid to enforce its subpoena in *Mazars* because the House had not met the necessity test, but the Court strongly suggested that if there had been an open impeachment investigation the result would have been different.¹⁹⁷ As the *McGahn* en banc opinion went on to observe: “As far back as 1796, George Washington, the Nation’s first President, acknowledged that the House may compel the President to turn over some executive branch information if sought as part of an impeachment investigation.”¹⁹⁸

This Article is not a complete discussion of these two cases, but we do note that without support from the federal courts the power of Congress to investigate a sitting President will be severely circumscribed. The Supreme Court’s holding in *Trump v. Mazars* and the District of Columbia Circuit’s en banc holding in *McGahn* together make the point that federal courts are willing to enforce congressional subpoenas, but as *Mazars* makes clear, that willingness is limited if there is not a strong congressional predicate for the subpoena, such as a presidential impeachment investigation.

The en banc holding in *McGahn* left unresolved the question whether the President could assert executive privilege over particular communications

¹⁹⁴ See Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 951 F.3d 510 (D.C. Cir. 2020).

¹⁹⁵ *Id.*

¹⁹⁶ See Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 951 F.3d 510 (D.C. Cir. 2020) (outlining decision on rehearing en banc).

¹⁹⁷ *Trump v. Mazars USA*, 140 S. Ct. 2019 (2020).

¹⁹⁸ Comm. on Judiciary of U.S. House of Representatives v. McGahn, 968 F.3d 755, 765 (D.C. Cir. 2020)

with McGahn, and if so, what the scope of such privilege should be.¹⁹⁹ McGahn was compelled to testify before the House by court order, but the court did not determine which questions he had to answer. In 2021 the Biden Administration, which now represents the interests of the White House in the case, negotiated with the House to reach a compromise about the extent of McGahn's testimony.²⁰⁰ Given the chasm that separates the former Trump administration from the Biden administration in nearly all matters, it may seem curious that the Biden Administration would try to limit McGahn's testimony. However, this case will set a precedent on executive privilege, and therefore may serve as a benchmark for testimony expected by Congress if in the future a Biden Administration White House Counsel were served with a similar subpoena. The Biden Administration indeed continued to assert executive privilege over much of McGahn's testimony.²⁰¹

Historically, congressional subpoenas simply have not had the force that special counsel subpoenas have, and it is thus difficult to draw any conclusions about executive privilege in such cases, given the rather different context in which they appear. The difference is of course illustrated by the different outcomes in *Trump v. Vance* as compared with *Trump v. Mazars*: the subpoenas from the Manhattan District Attorney in the context of a grand jury investigation were enforceable in the *Vance* case, but the congressional subpoenas at issue in the *Mazars* case were not. The upshot is that Congress of course has no "handcuffs" to enforce its subpoenas, Presidents often assert

¹⁹⁹ The Court thus observed that "[g]iven McGahn's previous role as a close presidential advisor, it is plausible that executive privilege could be properly asserted in response to at least some of the Committee's questions, depending on their substance. Such a potentially available privilege is a powerful protection of the President's interest in Executive Branch confidentiality, and it remains unaffected by an order compelling McGahn to appear and testify before the Committee." *Comm. On the Judiciary of the U.S. House of Representatives v. McGahn*, No. 19-5331, slip op. at 27. The court cited to *United States v. Nixon*, 418 U.S. 683, 705 (1974) (discussing the scope of the executive privilege).

²⁰⁰ See Katelyn Polantz, *Biden Administration Begins Negotiating over Don McGahn Testimony to House*, *New Court Filing Says*, CNN (Feb. 17, 2021, 11:06 PM), <https://www.cnn.com/2021/02/17/politics/biden-administration-don-mcghahn-house-testimony/index.html> [<https://perma.cc/RT4S-9BZD>] (citing Department of Justice filings with the United States Court of Appeals for the District of Columbia, which is set to hear oral arguments in the case the week of February 20). On February 18, the D.C. Circuit Court of Appeals ordered a two-month delay in the case. Josh Gerstein & Kyle Cheney, *Judges Order 2-Month Delay in Case to Compel McGahn Testimony to House*, POLITICO (Feb. 18, 2021, 8:55 PM), <https://www.politico.com/news/2021/02/18/delay-mcghahn-testimony-house-470023> [<https://perma.cc/MP9H-2SZZ>].

²⁰¹ Finkelstein & Painter, *supra* note 186.

“executive privilege” when refusing to comply with a subpoena, litigation in federal courts to enforce subpoenas takes a long time with uncertain results, and while the House might impeach a President for obstruction of Congress, the chances of sixty-seven senators voting to convict the President of this offense are slim to none.

Indeed, using executive privilege to flout congressional subpoenas has become so routine that even a former President, Donald Trump, felt entitled to use it to fend off congressional subpoenas to procure the testimony of former officials and White House documents.²⁰² There are countless examples of Presidents turning the records of their predecessors over to Congress.²⁰³ Former President Nixon sued to overturn a federal statute providing for public access to his papers in the possession of the General Services Administration, but he was unsuccessful.²⁰⁴ The ultimate decision

²⁰² See Letter from Bennie G. Thompson, Chairman, Cong. Select Comm. to Investigate the Jan. 6th Attack on the United States, to George Terwilliger III (Nov. 11, 2021), <https://january6th.house.gov/sites/democrats.january6th.house.gov/files/20211111%20Terwilliger%20Letter.pdf> [<https://perma.cc/LH9R-R2FV>] (stating that executive privilege does not support Mark Meadows’ claim of executive privilege against a subpoena regarding the January 6th attack on the U.S. government). Charlie Savage & Luke Broadwater, *Trump Sues to Block Release of White House Papers to Jan. 6 Inquiry*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2021/10/18/us/politics/trump-lawsuit-capitol-riot.html> [<https://perma.cc/6QBX-9BGU>]. One of the authors of this Article (Richard Painter) joined other former White House attorneys as amici in opposing former President Trump’s assertion of executive privilege after President Biden expressly waived the privilege vis a vis a congressional investigation of the events of January 6, 2021. See Amended Brief of Amici Curiae Citizens for Responsibility and Ethics in Washington and Former White House Attorneys in Support of Appellees in *Trump v. Bennie G. Thompson*, (D.C. Cir. Case No. 21–5254) (on appeal from the U.S. District Court for the District of Columbia) (Nov. 22, 2021). “When a court is presented with this type of direct and substantial conflict between an incumbent and former President on a claim of executive privilege, the incumbent’s views must be accorded far greater weight.” *Id.* at 2.

²⁰³ See Ryan Goodman, Christine Berger & Margaret Shields, *Modern History of Disclosure of Presidential Records: On the Boundaries of Executive Privilege*, JUST SEC. (Sept. 30, 2021), <https://www.justsecurity.org/78413/modern-history-of-disclosure-of-presidential-records-on-the-boundaries-of-executive-privilege/> [<https://perma.cc/JR7C-VRV9>] (detailing account of instances in which past Republican and Democratic administrations have disclosed presidential records to Congress, including records of prior Presidents). “As included in the lists below, the historical record includes significant examples of incumbent [P]residents turning over a former President’s records.” *Id.*

²⁰⁴ *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). The Court noted that control of the documents rested with Nixon’s successors. “We reject at the outset appellant’s argument that the Act’s regulation of the disposition of [p]residential materials within the Executive Branch constitutes, without more, a violation of the principle of separation of powers. Neither President Ford nor President Carter supports this claim. The Executive Branch became a party to the Act’s

about assertion of executive privilege belongs to the current President. Yet the Supreme Court has declined to rule on whether a former President can assert the privilege, instead holding that Trump's claim to privilege in the investigation of the January 6 insurrection would not have passed muster under *United States v. Nixon* even if he were still president.²⁰⁵

Resolution of these congressional subpoenas, even of a former President's records with the support of the current President, may take time. One former Trump ally, Steve Bannon refused to testify before the U.S. House Select Committee to Investigate the January 6th Attack, even though in January 2021 he had been a private citizen advising Trump three years after Bannon left the White House in 2017; the House has found him in contempt and referred the case to the DOJ for possible prosecution.²⁰⁶ Bannon has been criminally charged for contempt of Congress, but whether Bannon or anyone else who flouts congressional subpoenas will be criminally convicted or compelled to testify remains to be seen.

C. *Kavanaugh on Investigating a Sitting President*

No justice of the Supreme Court has been more focused on questions relating to the investigation of sitting Presidents than Justice Brett Kavanaugh. Kavanaugh's approach to such matters, however, has not always been consistent.

As an attorney, Kavanaugh was a member of the legal team assembled by Independent Counsel Kenneth Starr to investigate President Clinton. While working for Starr, Kavanaugh expressed great enthusiasm for the independent counsel's power to investigate the President, including for conduct only tangentially related to core functions of the presidency. In a

regulation when President Ford signed the Act into law, and the administration of President Carter, acting through the Solicitor General, vigorously supports affirmance of the District Court's judgment sustaining its constitutionality. Moreover, the control over the materials remains in the Executive Branch." *Id.* at 441. Subsequent to this case, the Presidential Records Act of 1978 negated the personal property interest in presidential records that Nixon had asserted by changing the legal ownership of a President's official records from private to public, and establishing a system of managing the records by the National Archives. 44 U.S.C. §§ 2201–07.

²⁰⁵ *Trump v. Thompson*, 142 S. Ct. 680, 680 (2022) (denying Trump's application for a stay of the January 6 Committee subpoenas).

²⁰⁶ See Luke Broadwater, *House Finds Bannon in Contempt for Defying January 6 Inquiry Subpoena*, N.Y. TIMES (Oct. 21, 2021), <https://www.nytimes.com/2021/10/21/us/politics/bannon-contempt-jan-6-subpoena.html> [<https://perma.cc/3BJX-HEY8>].

memo to Ken Starr dated August 1, 1998, Kavanaugh wrote: “I am strongly opposed to giving the President any ‘break’ in the questioning regarding the details of the Lewinsky relationship—unless before his questioning on Monday he either (a) resigns or (ii) confesses perjury and issues an apology to you.”²⁰⁷ The memo urged a searching evaluation of the President’s conduct with Lewinsky: “[i]t may not be our job to impose sanctions on [Clinton], but it is our job to make his pattern of revolting behavior clear piece by painful piece Aren’t we failing to fulfill our duty to the American people if we willingly ‘conspire’ with the President in an effort to conceal the true nature of his acts?”²⁰⁸ Despite the fact that the Lewinsky matter was not central to the original subject matter of the investigation, Kavanaugh saw no reason to exercise constraint in the interrogation of a sitting President. In particular, Kavanaugh included in the memo a series of graphic questions for Starr’s team to ask Clinton about the affair.²⁰⁹

At the same time as he was drafting memos for Ken Starr on the Clinton investigation, Kavanaugh paradoxically joined a chorus of conservative lawyers who were highly critical of the independent counsel statute under which Starr was exercising his authority. In a 1998 symposium in the *Georgetown Law Journal*, Kavanaugh urged that the independent counsel statute be amended to provide for appointment of the counsel by the President and confirmation by the Senate, rather than having the independent counsel appointed by a three-judge panel as provided for under the Ethics in Government Act of 1978.²¹⁰ Kavanaugh also made the

²⁰⁷ Memorandum from Brett M. Kavanaugh to All Att’ys at the Off. of the Indep. Counsel, Nat’l Archives (Aug. 31, 1998) (on file with the National Archives).

²⁰⁸ *Id.*

²⁰⁹ For example, Kavanaugh drafted for Starr questions to be asked of Clinton in an interview or deposition under oath. Kavanaugh’s proposed questions for Clinton included:

“If Monica Lewinsky says that on several occasions in the Oval Office area, you used your fingers to stimulate her vagina and bring her to orgasm, would she be lying?”

“If Monica Lewinsky says that on several occasions you had her give oral sex, made her stop, and then ejaculated into the sink in the bathroom of the Oval Office, would she be lying?”

“If Monica Lewinsky says that you masturbated into a trash can in your secretary’s office, would she be lying?”

“IS IT TOO GRAPHIC?” Kavanaugh asked in an August 31, 1998 memo to Starr aides.

“SHOULD IT BE MORE GRAPHIC (kidding)?”

See Memorandum from Brett M. Kavanaugh to Judge Starr and All Att’ys at the Off. of the Indep. Counsel (Aug. 15, 1998); Josh Gerstein, *Kavanaugh Proposed Graphic Questions for Bill Clinton During Starr Probe*, POLITICO (Aug. 20, 2018, 12:36 PM), <https://www.politico.com/story/2018/08/20/brett-kavanaugh-bill-clinton-explicit-questions-lewinsky-789599> [<https://perma.cc/H7B4-SMWX>].

²¹⁰ Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2157–61 (1998).

problematic suggestion that the independent counsel should be removable by the President in the same manner as any other federal officer: “[C]oncerns about ‘accountability’ would be alleviated if the independent counsel were appointed (and removable) in the same manner as other high-level executive branch officials.”²¹¹ In short, he proposed that the President should have sole power to appoint and remove the special counsel, a system that would pose a severe problem for the integrity of any investigation conducted by such counsel. Congress did not adopt Kavanaugh’s proposal. Instead, it simply allowed the independent counsel statute to lapse according to the twenty-year sunset provision in the Ethics in Government Act of 1978.²¹² Accordingly, the two federal independent counsel investigations that have occurred since Ken Starr’s time were both appointed simply by the Justice Department, without express congressional authorization.²¹³

In his 1998 article, Kavanaugh went on to opine on the question whether a sitting President can be indicted. Without reaching a definitive conclusion, Kavanaugh expressed doubts about the constitutionality of indicting a sitting President and urged Congress once again to lay ambiguities to rest by explicitly providing a statute to speak to the issue:

Congress should establish that the President can be indicted only after he leaves office voluntarily or is impeached by the House of Representatives and convicted and removed by the Senate. Removal of the President is a process inextricably intertwined with its seismic political effects. Any investigation that might conceivably result in the removal of the President cannot be separated from the dramatic and drastic consequences that would ensue. This threat inevitably causes the President to treat the special counsel as a dangerous adversary instead of as a federal prosecutor seeking to root out criminality. Whether the Constitution allows indictment of a sitting President is debatable (thus, Congress would not have the authority to establish definitively that a sitting President is subject to indictment). *Removing that uncertainty by providing that the President is not subject to indictment would expedite investigations in which the President is involved . . .*²¹⁴

Once again Kavanaugh appears to have taken the side of presidential authority, in contrast with his approach as a member of Ken Starr’s independent counsel team. The suggestion that Congress should declare by

²¹¹ *Id.* at 2136.

²¹² *See* 18 U.S.C. § 599.

²¹³ Since Ken Starr there have been two independent counsels appointed: Nicholas Bua, who was appointed by Attorney General William Barr, followed by Robert Mueller.

²¹⁴ Kavanaugh, *supra* note 210, at 2137 (emphasis added).

fiat that a sitting President cannot be indicted because this would help expedite investigations involving the President is a point difficult to credit given Kavanaugh's own enthusiasm for a detailed and drawn out investigation of a sitting President. Moreover, taken on its own, the argument has little merit: investigations of wrongdoing can always be accelerated if we make them less searching and less effective, thus rendering them toothless. As Kavanaugh clearly understood, a detailed presidential investigation seeking true accountability is slow and painstaking, and must be undertaken, as Kavanaugh himself once urged, "piece by painful piece."

In 2009, ten years before Kavanaugh joined the Supreme Court, Kavanaugh wrote yet another law review article on investigating the President, this one in the *Minnesota Law Review*.²¹⁵ The 2009 article reiterated Kavanaugh's concern that indicting a sitting President might be unconstitutional without taking a definitive position on that question. His solution once again was to look to Congress: "Congress might consider a law exempting a President—while in office—from criminal prosecution and investigation, including from questioning by criminal prosecutors or defense counsel."²¹⁶ Kavanaugh here stressed the importance of accountability, saying that "the country needs a check against a bad-behaving or law-breaking President."²¹⁷ But he believed that the Constitution provided that check in the form of impeachment. "No single prosecutor, judge, or jury should be able to accomplish what the Constitution assigns to the Congress."²¹⁸ The new statute Kavanaugh envisioned would provide that "temporary deferral also should excuse the President from depositions or questioning in civil litigation or criminal investigations."²¹⁹ He recognized, however, that his proposal might require an extension of the relevant statutes of limitations,²²⁰ a matter we take up in Section IV.C below.

Nowhere did Kavanaugh argue that investigation of a sitting President was unconstitutional or that *U.S. v. Nixon* should be overturned. He even implied that *Clinton v. Jones* was correctly decided, despite urging Congress to

²¹⁵ Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454 (2009).

²¹⁶ *Id.* at 1461.

²¹⁷ *Id.* at 1462.

²¹⁸ *Id.*

²¹⁹ *Id.* at 1462, n. 35.

²²⁰ *Id.* at 1462, n. 32.

bar civil suits against the President while in office. His argument strikes a chord after the twentieth anniversary of the 9/11 terrorist attacks:

Looking back to the late 1990s, for example, the nation certainly would have been better off if President Clinton could have focused on Osama bin Laden without being distracted by the Paula Jones sexual harassment case and its criminal-investigation offshoots. . . . But the law as it existed was itself the problem, particularly the extent to which it allowed civil suits against [P]residents to proceed while the President is in office. With that in mind, it would be appropriate for Congress to enact a statute providing that any personal civil suits against [P]residents, like certain members of the military, be deferred while the President is in office.²²¹

Kavanaugh seemingly felt no qualms about proposing federal legislation eliminating civil suits against a sitting president, despite the fact that it would have rendered his own investigation of Clinton either pointless or illegal.

Kavanaugh's approach treats investigation of a sitting President as well as the amenability of a sitting President to civil suit as a policy matter to be resolved by Congress, rather than as a constitutional question to be resolved by the courts. The only open constitutional question Kavanaugh recognizes, without definitively resolving, is whether a sitting President can be indicted.²²² By proposing that Congress address the issue of indicting a sitting President by statute, Kavanaugh is implicitly allowing that it could be constitutional to indict a sitting President (he says in his article that it is "debatable"). The statute Kavanaugh proposes, after all, would not be necessary if Article II constrained the Justice Department from investigating a sitting President.

Justice Kavanaugh's concurring opinion in *Trump v. Vance* recognizes this point. In that opinion, he raises no Article II objections to investigating or even indicting a sitting president, and neither do most of the other justices. Kavanaugh's concurrence differs from the Court's majority opinion only in that it proposes applying to a grand jury subpoena the stricter standard of heightened scrutiny articulated in *United States v. Nixon*,²²³ which requires the prosecutor to demonstrate a specific need for the President's information. Because the subpoenaed information involved personal, not official presidential records, as was the case with *Nixon*, the majority of the Court in

²²¹ *Id.* at 1460–61.

²²² See Kavanaugh, *supra* note 210, at 2137 ("Whether the Constitution *allows* indictment of a sitting President is debatable.").

²²³ *United States v. Nixon*, 418 U.S. 683, 700 (1974) (requiring the Special Prosecutor to clear the hurdles of "(1) relevancy; (2) admissibility; (3) specificity" to obtain President Nixon's tapes).

Trump v. Vance was not willing to adopt the “heightened need” standard.²²⁴ Justice Kavanagh, along with the rest of the Court, recognized that proposals to restrict criminal investigation of the President belong in bills introduced in Congress. They are not part of a proper analysis of Article II presidential powers under the Constitution.

D. Does the Pardon Power Immunize the President?

The President’s pardon power is one of the few aspects of presidential authority that is expressly provided for in the text of Article II of the U.S. Constitution. Because the pardon power is presented as nearly absolute,²²⁵ the possibility exists that a President might use the pardon power to immunize himself against criminal investigation and indictment in a variety of ways.

The first and most obvious example of self-immunization using the pardon power is the possibility of self-pardon. A President who has the power to pardon himself would stand in a unique position to the law. He alone would be untouchable by the criminal law, not just for the duration of his presidency, but with respect to crimes he may have committed prior to taking office. He would be like the proverbial individual referenced by Glaucon in Plato’s *Republic* who possessed a “Ring of Gyges,” which, when he wore it, enabled him to turn himself invisible and thus commit any crimes he wanted without risk of detection or punishment.²²⁶ A President with the power of self-pardon could exempt himself from the law in this same sense, and thus avoid liability for any crime he might have committed either prior to or during his presidency. Most relevantly for the continued vitality of U.S. democracy, he could engage in any number of criminal activities for the purpose of remaining in office.

To date, there have been no instances in U.S. history of a President using his pardon power to exonerate himself directly, but given the incentive that a sitting President may have to commit crimes to stay in office, the distinct

²²⁴ See *Trump v. Vance*, 140 S. Ct. 2412, 2430 (2020) (“Requiring a state grand jury to meet a heightened standard of need would hobble the grand jury’s ability to acquire ‘all information that might possibly bear on its investigation.’”).

²²⁵ U.S. CONST. art. II, § 2, cl. 1 (“The President Shall . . . have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”).

²²⁶ PLATO, *THE REPUBLIC*, BOOK 2, at 40 (G.R.F. Ferrari ed., Tom Griffith trans., Cambridge Univ. Press 2000).

possibility arises that a President will attempt to issue a self-pardon to avoid liability for such crimes. Crimes such as bribery, solicitation of election fraud, extortion of foreign powers, incitement of sedition, riot and insurrection, as well as potentially even murder, are the types of crimes that Presidents seeking to remain in office might have an incentive to commit. Is it plausible that the Framers, with their fear of despotism, would have equipped the President with so powerful a tool with which to manipulate the law in his favor and thus avoid accountability?

According to Al Alschuler, there is reason to doubt that the Founders would have wanted the pardon power to extent to self-pardons, given the long-recognized principle that a man cannot be a judge in his own case.²²⁷ For this reason, the Founders would likely have included express language providing that the President could pardon himself if they intended to include an exception to the prohibition against self-judging.²²⁸ Moreover, the implications of the availability of a self-pardon would be deeply antithetical to our constitutional principles. As Alschuler observes:

A [P]resident who may pardon himself on his last day in office . . . knows from his first day in office that he can commit any crime he likes without risking prosecution. In effect, he has a blanket pardon for future crimes. The [P]resident may assault selected Members of Congress with impunity. He might even incite a mob to storm the Capitol and block Congress from certifying his electoral defeat.²²⁹

The self-pardon is only the most obvious way in which a criminal President could use the pardon power to immunize himself against liability for his crimes. Another way is the use of the pardon power to interfere with incriminating testimony by witnesses to alleged crimes. In the ordinary course of a criminal investigation, prosecutors secure useful testimony by striking a deal with potential witnesses to induce them to cooperate with law-enforcement in the hope of avoiding their own criminal liability. A President might “dangle pardons” to persuade such witnesses not to cooperate.²³⁰

²²⁷ Albert Alschuler, *Limiting the Pardon Power*, 63 ARIZ. L. REV. 546, 555 (2021) (citing Dr. Bonham’s Case, 77 Eng. Rep. 646 (C.P. 1610)) (articulating the long-standing prohibition on self-judging).

²²⁸ See Alschuler, *supra* note 227, at 556 (“The Constitution’s Framers almost certainly did not mean to depart from the ancient prohibition of self-judging.”).

²²⁹ *Id.* at 558.

²³⁰ 18 U.S.C. § 1512(b) (“Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to (1) influence, delay, or prevent the testimony of any person in an official proceeding;

Recall that the pardon power was used liberally by President Trump in the middle of the Mueller investigation.²³¹ Four high-profile recipients of pardons from Trump—Michael Flynn, Roger Stone, Paul Manafort and Steven Bannon—had previously been interviewed by prosecutors as witnesses in the investigation. These pardons appeared to be rewards for the loyalty of their recipients and their willingness to hold firm against the invitation by investigators to implicate Trump. Mueller noted in his report that such use of the pardon power to buy the silence of witnesses could constitute obstruction of justice.²³² If any of the pardons were offered or given in exchange for false testimony or noncooperation with a federal investigation, Trump’s decision to issue these pardons could constitute a criminal act, most likely obstruction of justice.²³³

The question is a critical one. The pardon power is a strong one—one of the few specific presidential powers articulated in Article II. But a President who uses that power to immunize himself from civil or criminal liability uses that power improperly. Can a President be guilty of a crime such as obstruction of justice for exercising his pardon power for corrupt purposes, such as ensuring that a witness fails to implicate him in a criminal investigation? Constitutional scholars disagree on this. Alan Dershowitz, for example, argues that because the pardon power is constitutionally absolute, no statute—including the federal statute that criminalizes the obstruction of justice—can supplant the Constitution: “[A] President may never be charged with obstruction of justice for . . . pardoning potential witnesses against him The [C]onstitution explicitly authorizes the President to pardon

(2) cause or induce any person to— (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding; . . . shall be fined under this title or imprisoned not more than 20 years, or both.”).

²³¹ See Alschuler, *supra* note 227, at 594–606 (discussing how President Trump used the pardon power to pardon multiple associates, including Roger Stone and Paul Manafort).

²³² See MUELLER REPORT, *supra* note 87, at 173 (2019) (discussing circumstances where dangling pardons to witnesses can be obstruction of justice). See also Alex Whiting, *Why Dangling a Pardon Could be an Obstruction of Justice—Even if the Pardon Power Is Absolute*, JUST SEC. (Mar. 28, 2018), <https://www.justsecurity.org/54356/dangling-pardon-obstruction-justice-even-pardon-power-absolute/> [<https://perma.cc/W39D-GK5M>] (discussing how dangling of pardons can be an obstruction of justice).

²³³ Alschuler, *supra* note 227, at 604. (“Exchanging clemency for a witness’s noncooperation is a criminal act twice over. . . . [I]t constitutes obstruction of justice. . . . Bribery, moreover, consists of trading anything of value for an official act. Granting clemency is an official act, and a witness’s silence and lies are ‘things of value.’”) (citations omitted).

anyone.”²³⁴ Laurence Tribe disagrees²³⁵ and insists that a President could be guilty of obstruction of justice:

A [P]resident who offers to keep the FBI Director in his job if but only if the Director agrees to “go easy” on a national security director who has lied to the FBI about his dealings with a hostile foreign power is both offering a bribe and obstructing justice. And, if he does so with the motive of covering up his campaign’s conspiracy against the United States in orchestrating foreign interference with our presidential election, that [P]resident is engaged in a particularly pernicious form of obstruction whether or not the technical requirements for the federal statutory crime of bribery have been met.²³⁶

Al Alschuler similarly opines that the pardon power “was not meant to exempt the [P]resident from basic, broadly enforced criminal laws that restrict him no more than they restrict private individuals.”²³⁷

A third way in which a corrupt President could use the pardon power to immunize himself against liability is to use the promise of a pardon to induce individuals in his entourage to commit a crime. This is in effect the transfer of the Ring of Gyges from the President to others associated with the president, in order to induce their participation in a criminal plan that most benefits the President and ensures his hold on the office of the presidency. Such instigation, backed up by a promise of a pardon, is particularly damaging to the rule of law, since on this scenario, the President would quite literally be soliciting others to commit crimes, and assuring them they will not incur liability if they do so.

It is difficult to imagine that the Framers envisioned the President’s pardon power being used to obviate his own criminal responsibility or that of his associates in the foregoing ways. More sensibly, we should recognize that there are limitations on the President’s pardon power, and that without such limits, the pardon power would be both inconsistent with other core constitutional provisions and antithetical to the rule of law. Extending pardons in exchange for potential witnesses covering for the President or his

²³⁴ Alan M. Dershowitz, *Why Donald Trump Can’t Be Charged with Obstruction*, MACLEAN’S (Dec. 14, 2017), <https://www.macleans.ca/opinion/why-trump-cant-be-charged-with-obstruction/> [<https://perma.cc/375N-TCWS>].

²³⁵ See Laurence H. Tribe, *Why Donald Trump Can Be Charged with Obstruction*, MACLEAN’S (Dec. 15, 2017), <https://www.macleans.ca/opinion/why-trump-can-be-charged-with-obstruction/> [<https://perma.cc/P9SS-G3MZ>] (discussing his belief that you can hold a sitting President fully accountable for abusing his executive powers).

²³⁶ *Id.*

²³⁷ Alschuler, *supra* note 227, at 566.

associates in the face of prosecutorial demands for cooperation with a criminal investigation would be a serious threat to the rule of law—in some ways an even greater threat than the President selling pardons for money. If Article II powers, including the pardon power, were not constrained by criminal law, including witness tampering statutes,²³⁸ the President could use his pardon power to place himself beyond the reach of all accountability.

There are at least some internal limits on the President's pardon power all will acknowledge. To start with a straightforward example, even the most ardent defenders of presidential power would presumably agree that a President cannot pardon a crime committed after the date of the pardon.²³⁹ To think otherwise, one would have to believe that a President could prospectively pardon himself for any crime he might commit after leaving office, and thus immunize himself not just with respect to past acts, but with respect to any future crimes he might contemplate in the future as a private citizen. The same could be said of any offer the President might make to immunize his associates for as yet unspecified future crimes. That the criminal act take place by the time of the pardon is thus an obvious and necessary limitation on the pardon power, despite the fact that such a limitation appears nowhere in the text of Article II.

A related, but somewhat different question, is whether a President can legally promise a pardon in order to induce one of his associates to commit a crime. In addition to possible obstruction of justice or other crimes, a clear impediment to such a use of the pardon power is the fact that a President who did this would likely be an accomplice to the associate's underlying crime. As Alschuler observes:

A [P]resident who offered to pardon a future crime (and wasn't kidding) would be guilty of the crime as an accomplice if someone who received his offer carried it out. The [P]resident would be guilty of conspiracy if the recipient responded by agreeing to commit the crime. Making an

²³⁸ See 18 U.S.C. § 201 (providing criminal penalties for anyone who “directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom”).

²³⁹ See Alschuler, *supra* note 227, at 552 (“Although the Constitution does not allow the President to pardon future crimes, it does not block him from encouraging crimes by announcing that he will pardon them.”).

unaccepted offer might constitute a criminal solicitation or possibly an attempt, and it could justify impeachment even if it was not criminal.²⁴⁰

However, the question of whether the use of the pardon power would be valid is a separate question from whether the exercise of that power would constitute a crime. Here we are mostly focused on the former question, and our claim is that in some cases, the exercise of the pardon power would be invalid, despite the fact that there is no express limitation on the use of the pardon in those situations in the text of the Constitution.

Like the effort to self-pardon in order to immunize himself against prosecution for a crime, the President's issuance of a blanket pardon in anticipation of, but prior to the commission of a crime, should not be a valid exercise of the pardon power. We believe with Alschuler, moreover, that the same can be said of offering someone a pardon in order to induce that person to commit a crime. Such exercises of the pardon power would not only be criminal, but they would also be invalid as far as the issuance of the pardon was concerned. To recognize the possibility of a blanket, prospective pardon, whether a self-pardon or a pardon of one of the President's associates, would undermine all semblance of the rule of law and place the President beyond any legal process that might serve as a check on his activities. It is difficult to believe that the Founders would have deliberately built in such an invitation to lawlessness and knowingly undermine the ability of the Constitution's other accountability provisions to serve their function.

As a further example, note that the Constitution explicitly identifies "bribery" as an impeachable offense. But bribery is also a statutory crime. A President offering a pardon in exchange for official action also could be guilty of bribery if the person to whom the pardon is promised is a public official. As Alschuler points out, "offering a future pardon in exchange for building a border wall or another official act also would appear to be a bribe."²⁴¹ A President also cannot legally solicit or accept bribes for himself in exchange for a pardon without being subject to prosecution for bribery. Furthermore, a President who promised a pardon to military officers to induce them to attempt a military coup would, along with military officers who accepted the offer, be subject to prosecution for sedition or insurrection. The Founders, when they gave the President the pardon power, likely

²⁴⁰ Alschuler, *supra* note 227, at 553.

²⁴¹ *Id.* at 7.

contemplated that the pardon power would be used to forgive crimes, not to commit additional crimes.

This is not the place for a detailed exploration of the presidential pardon power and its impact on prosecuting obstruction of justice. We raise it here because of its significance for the question we are addressing, namely whether the pardon power confers on a President a kind of *de facto* immunity from federal prosecution. This in turn seems to depend partly on whether a sitting President may pardon himself,²⁴² as well as on whether he may use the pardon power to pardon those who would otherwise implicate him, an issue not addressed by the text of the Constitution.

Finally, a critical limitation on the use of the pardon power by the President is that the federal pardon does not touch state prosecutions. There the governor of each state holds the pardon power with respect to criminal proceedings within that state. This is not a minor safeguard. Many crimes are punishable under state, rather than, or in addition to, federal law. And given the role that states and state laws play in the functioning of elections, there are some limits to what a President who is willing to commit crimes can do to induce criminal acts by others to interfere with an election. For example, a President who asks an election official in Georgia to “come up with” an extra 11,000 votes after an election could be prosecuted for solicitation of election fraud in Georgia,²⁴³ as could the election official if he complied. Politics in Georgia might or might not interfere with such a prosecution, but the federal pardon power could not.

We read this and other limitations into Article II of the Constitution because they are necessary from the standpoint of preserving democracy and protecting the rule of law. But we also perceive such limitations as an inherent part of the pardon power because we could not give effect to the general operation of federal criminal law if the President were to self-exempt

²⁴² One of us, in an op-ed coauthored with former Ambassador Norman Eisen and Laurence Tribe, has already concluded that the President cannot pardon himself. See Norman Eisen, Richard W. Painter & Laurence H. Tribe, *No, Trump Can't Pardon Himself. The Constitution Tells Us so*, WASH. POST (July 21, 2017) (arguing that the President cannot pardon himself because no one is above the law, including the president), https://www.washingtonpost.com/opinions/no-trump-cant-pardon-himself-the-constitution-tells-us-so/2017/07/21/f3445d74-6e49-11e7-b9e2-2056e768a7e5_story.html [<https://perma.cc/KQV2-39RC>].

²⁴³ See GA. CODE § 21–2–604 (2016) (Criminal Solicitation to Commit Election Fraud) (providing criminal penalties for anyone who “solicits, requests, commands, importunes, or otherwise attempts to cause the other person to engage in such conduct”).

at will from their operation. Critically, not even the provisions in our Constitution for the legitimate transfer of power could be reliably enforced if the President could ensure his own reelection by committing crimes to guarantee his continuation in office and then pardoning himself and those associates who helped ensure his victory. That the states control the operation of their own criminal offenses is one of the most essential aspects of a federal system.

We now turn to consider one aspect of state criminal law, namely the ability of a state to criminally investigate, and potentially indict, a sitting President. The specter of a state prosecutor, without buy-in from the federal government, crippling a U.S. President by saddling him with phony investigations designed only to harass is one of the reasons frequently given for the idea of presidential immunity. As we address in the next Part, however, there is no reason to suppose that state prosecutors will ultimately be more harassing than federal investigators, and there are many reasons to recognize the vital role state sovereignty plays in defending and protecting the rule of law.

III. INVESTIGATION AND INDICTMENT OF THE PRESIDENT BY THE STATES

The Department of Justice has come under criticism in recent years for its lack of independence vis à vis the White House, and the traditional expectation of relative independence of the attorney general from the President has been increasingly called into question. The Department seemed reached its nadir during the tenure of Attorney General Bill Barr, whose consistent defense of White House interests made the DOJ seem more like a branch of the President's reelection campaign than like a federal agency with a mandate for independent thought in the service of the rule of law. From Barr's manipulation of the Mueller Report as it was first released to the Department's role in attacking peaceful protesters in Portland and Lafayette Square, to its defense of Trump with regard to subpoenas to third parties to turn over Trump's personal financial records, to the Solicitor General's extreme defense of presidential immunity in the *Vance* case, the Justice Department during the Trump Administration was anything but independent from the White House. It was thus well understood during that administration that there was no realistic possibility that the Department would conduct any legal process against Trump based on the Mueller Report

or any other revelation of potential legal violations on the part of the President.

As a consequence, it was left to state and local prosecutors to take action to hold President Trump and his associates accountable. State prosecutors and attorneys general played an important role in investigating potentially criminal activity on the part of the president,²⁴⁴ and states took the lead in filing civil suits against some of the more extreme executive orders Trump issued during the course of his presidency.²⁴⁵ The wisdom of the Framers in designing a system of checks and balances that operates not only horizontally within the federal government but vertically between state and national government, was once again made apparent during the Trump years. The reverse of the Civil Rights Era, when state and local governments were aligned against civil rights and the rule of law, when the Department stood up for them in the form of legal suits to defend school integration, voting rights, and individual rights in a host of other domains, many states during the Trump Administration served as a counterweight to the worst abuses of both Trump officials and Trump Administration policies.

Where criminal prosecutions are concerned, the independence of the states is critical to achieving accountability in the U.S. justice system in several respects. First, as we discuss in the next section, the DOJ's prosecutorial guidelines do not apply to the states, and that gives state

²⁴⁴ See *Trump v. Vance*, 140 S. Ct. 2412, 2420 (2020) (discussing how the lawsuit stemmed from the New York County District Attorney's investigation into the Trump Organization). A year after the Supreme Court decided this case upholding a state grand jury subpoena of financial records, the Trump Organization may be indicted on tax charges. See Jonathan Dienst, *Trump Organization Expects to Face Criminal Charges in Manhattan, Attorney Says*, NBC NEWS (June 25, 2021), <https://www.nbcnewyork.com/news/local/crime-and-courts/trump-organization-expects-to-face-criminal-charges-in-manhattan-attorney-says/3125808/> [<https://perma.cc/5CWD-VBVK>] (reporting that criminal tax charges were expected to be filed against the Trump Organization). Georgia prosecutors are investigating President Trump's alleged solicitation of election fraud. See Richard Fausset & Danny Hakim, *Georgia Prosecutors Open Inquiry into Trump's Efforts to Subvert Election*, N.Y. TIMES (Feb. 10, 2021), <https://www.nytimes.com/2021/02/10/us/politics/trump-georgia-investigation.html> [<https://perma.cc/N8VK-6FE7>] (reporting that prosecutors in Georgia started a criminal investigation of President Trump's attempts to overturn the 2020 election results in Georgia).

²⁴⁵ See, e.g., Tony Barboza & Anna M. Phillips, *California Sues Trump Again for Revoking State's Authority to Limit Auto Emissions*, L.A. TIMES (Nov. 15, 2019, 12:26 PM), <https://www.latimes.com/california/story/2019-11-15/california-trump-administration-lawsuit-auto-emissions-climate-change> [<https://perma.cc/KCL7-NXBN>] (discussing a recent lawsuit by California and a coalition of other states who challenged the Trump Administration's Executive Order that restricted states' ability to set tougher automobile emissions standards).

prosecutors a degree of independence from national politics that federal prosecutors lack. Second, the President's pardon power does not apply to state crimes, thus depriving the President of the ability to immunize himself by dangling pardons. More generally, the structure of our federal system and the role of the states in protecting democracy provides a vital check on the presidency and the President's ability to use federal executive branch agencies to protect himself from scrutiny. Understanding how federalism works in favor of presidential accountability is critical to maintaining the guardrails on U.S. democracy.

The flip side of prosecutorial independence is the potential for abuse. Accordingly, Section III.C will consider the safeguards needed to ensure we can protect a good faith and rule of law-oriented President against an overzealous state prosecutor whose primary motive is to harass and incapacitate legitimate federal governmental initiatives. It is to these important dimensions of federalism in U.S. criminal justice that we now turn.

A. Department of Justice Guidelines Do Not Apply to the States

The first and most obvious difference between state and federal investigations of a sitting President is that the two OLC memos disallowing prosecution of a sitting President do not apply to their state counterparts. Recall from our earlier discussion that the basis for their conclusions was not specific textual language in the Constitution protecting the President from indictment, but rather pragmatic factors having to do with interference with the President's duties and the impracticability of subjecting a sitting President to the criminal process. Such DOJ guidance does not apply to state prosecutors, particularly given the weakness of the constitutional rationale for the DOJ's position. Unless there is a constitutional basis for the prohibition on indicting a sitting President that would supersede state law, state and local prosecutors may treat a President like any other citizen within their jurisdiction, at least when it comes to violations of state or local law such as financial crimes or criminal interference with state elections. Such violations are fair game for local prosecutors provided the alleged acts fall outside the scope of the President's official duties.²⁴⁶

²⁴⁶ We acknowledge that federalism issues, including the Supremacy Clause, would come into play if a state were to prosecute the President or any other federal official for alleged crimes in connection

Trump's legal team in the *Vance* case argued strenuously that presidential immunity applied to state criminal proceedings, at the same time that they stressed the importance of the DOJ memos.²⁴⁷ This position made little sense, given that DOJ guidelines were intended, by their very nature, to guide the conduct of federal prosecutors. To Trump lawyers, however, this move made sense, since they were casting the DOJ precedent as constitutionally based, even though the constitutional rationale for the DOJ's position is weak, as we explain above.²⁴⁸ Were presidential immunity grounded in the President inherent Article II powers, then immunity theory would pre-empt state law. However, Article II contains no such provision bestowing any type of immunity on the president, and the DOJ guidance is built around a litany of pragmatic considerations from a hypothetical presidential prosecution that hardly comprise a cogent Article II argument. State prosecutors have no need to follow the DOJ's guidance when deciding whether to prosecute a President.

B. States Can Vindicate Their Own Laws, Even Against the President

General considerations of federalism suggest the importance of allowing states to vindicate their own laws in their own courts, provided that the state law matter in question is not preempted by federal law. The Fourteenth and Fifteenth Amendments bestowed critical powers on the federal government to enforce certain individual rights against the states, but those changes did not touch the jurisprudence of Article II. The Founders intended for the states to control the manner in which presidential electors are chosen, and for the states to enforce their laws insofar as they were not inconsistent with federal law. Although much has been written about the overlay of federal and state law in many contexts, including elections, it is evident that if a state prosecutor cannot prosecute a President for criminal violations of its own election law, we will have abandoned the constitutional republic the Founders envisioned.

with performance of official duties. We do not address those substantive law questions here, rather our focus is on whether a sitting President is subject to criminal process in state court, regardless of the nature of the alleged offense.

²⁴⁷ See *Trump v. Vance Oral Argument Before the Second Circuit*, C-SPAN (Oct. 23, 2019), <https://www.c-span.org/video/?475971-1/trump-v-vance-oral-argument> [<https://perma.cc/D77W-LRW3>] (containing the audio recording from the *Trump v. Vance* oral argument).

²⁴⁸ *Id.*

Allowing states to police their own laws is critical for federalism, but it is also critical for protecting certain areas of federal law as well. As Herbert Wechsler once argued in a famous 1954 article:

The continuous existence of the states as governmental entities and their strategic role in the selection of the Congress and the President are so immutable a feature of the system that their importance tends to be ignored. Of the Framers' mechanisms, however, they have had and have today the larger influence upon the working balance of our federalism. The actual extent of central intervention in the governance of our affairs is determined far less by the formal power distribution than by the sheer existence of the states and their political power to influence the action of the national authority.²⁴⁹

Recent events have underlined the importance of Wechsler's words: the basic machinery of our presidential and congressional elections is governed by state and local law. The Elections Clause of the Constitution specifically provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators."²⁵⁰ Giving this power to the state legislature is meaningless if state criminal law cannot regulate the conduct of federal elections and if candidates, including the president, who appear on the ballot with senators and representatives, can commit crimes with impunity.

The U.S. presidential election is in effect fifty different elections plus another in the District of Columbia, run by each state for the purpose of selecting the electors whose votes will determine the electoral college certification. The fact that the integrity of the presidential vote turned on state law questions in most cases meant that state courts were in charge of

²⁴⁹ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544 (1954). Wechsler published this the year the Court decided *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954), a case that fundamentally altered the relationship between state and federal law in the area of racial segregation, which the Court held was barred by the Fourteenth Amendment. In a much-criticized law review article, Wechsler later was unable to identify a satisfying neutral principle underlying the legal reasoning in *Brown* even if he agreed with the result. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). We do not delve into this or other areas of law where federalism can undermine constitutional principles, but we observe here that Wechsler's words still are a powerful rebuttal to arguments trivializing the rights of states to enforce their criminal laws when a President is committing a crime.

²⁵⁰ U.S. CONST. art. I, § 4, cl. 1.

determining most of the 60 plus lawsuits filed by President Trump as part of his effort to overturn the election results. For example, the U.S. Supreme Court agreed with the Pennsylvania Supreme Court that questions of Pennsylvania election law should be determined by Pennsylvania courts alone. The High Court twice declined to hear challenges to Pennsylvania's Act 77, which allowed for no excuse mail-in voting, which Republicans claimed violated a provision of the Pennsylvania state Constitution.²⁵¹ Admittedly, federalism has not always been a force for good in election law, as recognized by the drafters of the Fifteenth Amendment.²⁵² But this much is true of any of the checks and balances that are built into the U.S. Constitution. State election laws, including criminal laws designed to prevent election fraud and voter intimidation, are designed as one set of guardrails on a renegade President trying to manipulate federal elections.

For purposes of this Article, we are most concerned with one category of state crime, namely crimes Presidents can potentially commit for the purpose of remaining in office, such as crimes connected with elections or acts of obstruction designed to impede a state investigation. The phone call President Trump had with Georgia Secretary of State Brad Raffensperger, for example, in which he asked the Georgia Secretary of State in a phone call

²⁵¹ See, e.g., *Barbara Sprunt, Supreme Court Rejects GOP Bid To Reverse Pennsylvania Election Results*, NPR (Dec. 8, 2020, 6:30 PM), <https://www.npr.org/2020/12/08/944230517/supreme-court-rejects-gop-bid-to-reverse-pennsylvania-election-results> [<https://perma.cc/QB6L-7KY5>] (discussing the Supreme Court's rejection of the lawsuit brought by Mark Kelly challenging Pennsylvania's Act 77); Robert Barnes & Elise Viebeck, *Supreme Court Denies Trump Allies' Bid to Overturn Pennsylvania Election Results*, WASH. POST (Dec. 8, 2020, 5:45 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-trump-pennsylvania-election-results/2020/12/08/4d39e16c-397d-11eb-98c4-25dc9f4987e8_story.html [<https://perma.cc/6LTH-GED5>] (explaining the Supreme Court's denial of a requested injunction in the Pennsylvania lawsuit brought by President Trump's allies); Melissa Quinn, *Supreme Court Rejects GOP Bid to Overturn Biden's Victory in Pennsylvania*, CBS NEWS (Dec. 9, 2020, 7:36 PM), <https://www.cbsnews.com/news/supreme-court-rejects-pennsylvania-gop-suit-overturn-presidential-election-results/> [<https://perma.cc/YR6Z-7XQN>] (describing the lawsuit challenging Pennsylvania's Act 77 and the order denying the requested injunctive relief). See also *Kelly v. Pennsylvania*, 141 S. Ct. 950, 950 (2020) ("The application for injunctive relief presented to Justice Alito and by him referred to the Court is denied.").

²⁵² The premise of states' rights under the Tenth Amendment was used to perpetuate racial discrimination in denying voting rights. The Fifteenth Amendment sought to cure that problem but was not enforced by Congress until the 1965 Voting Rights Act. The Supreme Court in a highly controversial decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), struck down Section 4(b), a key provision of the Act, holding that it was no longer necessary.

to “come up with” 11,000 votes,²⁵³ is the perfect case in point. Had Trump won the election and was now in his second term in office, he would not be subject to criminal investigation under a theory of presidential immunity for another four years, at which point the statute of limitations on his crime may have run, and at the very least, the case would be markedly more difficult to prosecute. As a former president, however, he is now under investigation in Georgia for criminal solicitation of election fraud, a time-sensitive investigation that would have been difficult to defer even if technically still prosecutable four years from now.²⁵⁴ Our argument from democratic structure and the defense of the rule of law, then, particularly identifies the importance of investigating and potentially prosecuting a sitting President for state crimes that go to the President’s ability to hang on to power.²⁵⁵ The ability of New York, Georgia and other states to enforce their criminal laws against a sitting president, particularly, but not exclusively in connection with election-related crimes, is an important check on a President’s ability to engage in a criminal enterprise and to use the powers of his office to ensure his own immunity.²⁵⁶

²⁵³ See Amy Gardner & Paulina Firozi, *Here’s the Full Transcript and Audio of the Call Between Trump and Raffensperger*, WASH. POST (Jan. 5, 2021, 1:15 PM), https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html

[<https://perma.cc/UD3P-VBXU>] (containing the audio recording and transcript of the call where President Trump asked Secretary of State Raffensperger to investigate allegations of election fraud and “come up with” 11,000 votes).

²⁵⁴ See GA. CODE § 21-2-604(a)(1) (2016) (describing Criminal Solicitation of Election Fraud, stating in part: “A person commits the offense of criminal solicitation to commit election fraud in the first degree when, with intent that another person engage in conduct constituting a felony under this article, he or she solicits, requests, commands, importunes, or otherwise attempts to cause the other person to engage in such conduct”).

²⁵⁵ See discussion of *Trump v. Vance*, *supra*, Section I.E of this Article. Vance’s investigation of the Trump Organization pertaining to the alleged use of New York financial institutions for violations of campaign finance laws in the 2016 Presidential Election are also critically important, but for reasons other than we discuss in the current Article.

²⁵⁶ Note, however, that an assault upon an immigrant in a detention center might nevertheless be prosecutable under state law. See, e.g., Victoria López & Sandra Park, *ICE Detention Center Says It’s Not Responsible for Staff’s Sexual Abuse of Detainees*, ACLU (Nov. 6, 2018, 1:15 PM), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/ice-detention-center-says-its-not-responsible> [<https://perma.cc/A52S-F42F>] (discussing how all 50 states and the District of Columbia impose criminal liability on correctional facility staff who have sexual contact, regardless of the use of force, with people in their custody). Some official capacity conduct of federal employees is beyond the reach of state prosecutors, not because federal employees are immune, but because the law governing their conduct is preempted by federal law.

An argument made repeatedly is that state criminal jurisdiction over a President is precluded because of the Supreme Court ruling in the famous case of *McCulloch v. Maryland*,²⁵⁷ a case involving an attempt by the State of Maryland to tax the Bank of the United States, a predecessor to the Federal Reserve System. *McCulloch* ruled unconstitutional state laws that have the effect of “arresting all the measures of the [federal] government,”²⁵⁸ meaning that if the federal government had the power to establish a national bank, the state did not have the power to undercut that federal power by taxing the bank. This extrapolation from *McCulloch* appears in a 1998 article by law professor Akhil Amar.²⁵⁹ Amar writes: “Ordinarily, in other words, states can enforce their laws and prosecute federal officials without ‘arresting’ and ‘prostrating’ the normal functions of the federal government. But this is not so with the President, and so under *McCulloch* they cannot prosecute him until he has left office.”²⁶⁰ The same argument appears again in the Solicitor General’s amicus brief in *Trump v. Vance*,²⁶¹ as well as in Justice Alito’s dissent.²⁶² As we pointed out in our own amicus brief in *Vance*, however, *McCulloch* is inapposite.²⁶³ There is no mention in *McCulloch* of a sitting President being immune from criminal process, only broad language about the states not being allowed to interfere with the operations of the federal government. As the majority in *Vance* recognized, *McCulloch* stands for a proposition that states may not interfere with the execution of laws passed by Congress, not for the unconstitutionality of subjecting the President to

²⁵⁷ 17 U.S. (4 Wheat.) 316 (1819).

²⁵⁸ *Id.* at 432.

²⁵⁹ See Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11, 11 (1997) (exploring the concept of federalism and whether a sitting President can be criminally prosecuted).

²⁶⁰ *Id.* at 14.

²⁶¹ See Brief of the Solicitor General in *Trump v. Vance*, *supra* note 70, at 12 (arguing that there is no precedent for the issuance of a state criminal subpoena for a sitting President’s personal records).

²⁶² *Trump v. Vance*, 140 S. Ct. 2412, 2444 (2020) (Alito, J., dissenting) (discussing *McCulloch* and how those principles relate to the prosecution of a sitting President).

²⁶³ See Brief for Claire Finkelstein & Center for Ethics and the Rule of Law at the University of Pennsylvania as Amici Curiae Supporting Respondent at 24, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19–635) (“The shibboleth of states’ rights, previously repeated by political conservatives, has now been summarily swept aside with not even a passing glance in the direction of the main source of checks and balances on the executive branch, namely the principle of federalism.”).

criminal process of a state grand jury.²⁶⁴ Likewise, the impermissibility of a state taxing a bank established by Congress, says nothing about the constitutionality of indictment of a sitting President by a state prosecutor.

C. *Fear of Presidential Harassment*

An argument advanced by Trump through his Solicitor General in the *Vance* case was that with over 2300 state prosecutors' offices nationwide,²⁶⁵ allowing states to subpoena the President or his records "would pose a serious risk of both harassment and diversion."²⁶⁶ The concern is that if states could investigate and ultimately prosecute a sitting president, the President would be subject to large numbers of bogus investigations, prosecutions and civil suits. Is this a reasonable concern? Justice Alito reiterates this concern about state investigations of a sitting President in his dissent in *Trump v. Vance*.²⁶⁷ Justice Alito, in his dissent in *Trump v. Vance*, also points to the harassment factor, speculating that a state prosecutor could use subpoenas for politically motivated reasons, going to extreme means such as seeking to obtain and execute a search warrant on the President's residence in the White House or getting a state court order for surveillance of a telephone the President was known to use.²⁶⁸ But even Justice Alito does not endorse a categorical rule that state criminal subpoenas of a sitting President should never be enforced; his quibble with the majority opinion in *Vance* is over the standard of review

²⁶⁴ See *Vance*, 140 S. Ct. at 2425 (majority opinion) (citing *McCulloch* for the proposition that the states lack the ability to control the operation of the laws enacted by Congress or to impede the President's execution of the laws but not for the proposition that the President is not subject to a state criminal subpoena or indictment).

²⁶⁵ *National Survey of Prosecutors (NSP)*, BUREAU OF JUST. STATS. (May 26, 2009), <https://bjs.ojp.gov/data-collection/national-survey-prosecutors-nsp#publications-0> [<https://perma.cc/P64F-4ZNE>] ("The 2007 NSP data collection was a census . . . [that] included 2,330 prosecutors' offices.").

²⁶⁶ Brief of the Solicitor General in *Trump v. Vance*, *supra* note 70, at 16. The Solicitor General argues, "[t]he risk of harassment is particularly serious when, as here, a State uses criminal process for the President's personal records to investigate the President himself, not just to obtain evidence for use in the prosecution of another." He says that "[i]n routine criminal investigations, a prosecutor's legal and ethical obligations provide a sufficient check against the prospect of abuse."

²⁶⁷ See *supra* text accompanying notes 155–156 for a discussion of Justice Alito's dissenting opinion in *Vance*.

²⁶⁸ See *Vance*, 140 S. Ct. at 2446 (Alito, J., dissenting).

to be applied to such subpoenas, with Justice Alito favoring a standard far more deferential to the President.²⁶⁹

It is not unreasonable to be concerned that the President could be subject to harassment by local prosecutors if they had the ability to prosecute him while he is in office. However, the risk of pretextual prosecutions that could interfere with the President's ability to govern has to be counterbalanced against the risk of presidential crimes going unaddressed. Which poses the greater risk? Without a doubt, the risk that Presidents will commit crimes for the purpose of remaining in office looms larger than the risk that a President will be subject to pretextual prosecutions by a county prosecutor or state attorney general. First, it is harder to fabricate criminal charges than it is to duck the prosecution of a powerful political leader who has committed crimes. In addition, both federal and state courts rein in prosecutors who pursue defendants solely for purposes of harassment, the demonstration of which could subject a prosecutor to discipline for violating ethics rules. Additional constraint of state prosecutors lies in the fact that they can be held accountable under ethics rules prohibiting conflicts of interest, abusing charging of criminal cases, harassment, and other misconduct.²⁷⁰

Consider the same worry with respect to harassment of a state governor. Despite the fact that governors are in roughly the same position as Presidents with regard to the possibility of political harassment, no one argues that governors should enjoy absolute immunity against prosecution. Consider, for example, Peter Lucido, a former Michigan state Senator who successfully campaigned for election as Macomb County Michigan prosecutor with a promise to investigate Governor Whitmer for "criminal" neglect in implementation of her COVID-19 protocols for nursing homes in Michigan. Upon assuming office, Lucido took initial steps to open a criminal investigation of the Governor. The two authors of this Article joined a Michigan ethics expert in filing an ethics complaint against Lucido grounded

²⁶⁹ See *id.* at 2448 ("I agree with the Court that not all such subpoenas should be barred."). See also *id.* at 2449 (proposing that a state prosecutor should be required to provide a general description of the offenses, describe how the subpoena relates to those offenses, and explain why the information is needed now as opposed to at the conclusion of the President's term).

²⁷⁰ See MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2020) (establishing special responsibilities of the prosecutor); MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2020) (prohibiting concurrent conflicts of interest); MODEL RULES OF PRO. CONDUCT r. 3.4 (AM. BAR ASS'N 2020) (prohibiting a lawyer's obstruction of the opposing party and counsel).

mostly in his personal conflicts of interest and attempt to criminalize a political dispute.²⁷¹

As of the publication of this Article, it appears that much of Lucido's efforts to investigate the Governor have receded. Most relevantly for present purposes, nobody has suggested that the Governor needs to be exempt from criminal prosecution in order to prevent harassment by political enemies. Courts, bar disciplinary boards and other authorities are fully capable of addressing the situation without needing to protect executive branch officials, whether state or federal, by placing them beyond the reach of the criminal law.

Indeed, a very uneven playing field would result if a President were immune from criminal prosecution while a governor or other high-ranking official who could be the President's opponent in an election were not immune from prosecution. Curtailing politically motivated prosecutions is important, but the cure is not to immunize the President from prosecution but nobody else. A President immune from prosecution could use bribery, coercion and other criminal means to induce federal and state prosecutors to investigate and even indict his political opponents while himself being beyond the reach of the criminal law for as long as he stayed in office. Making Presidents alone immune from state prosecutions is an invitation to such mischief.

This Article argues that a categorical rule against indictment is not necessary to protect a President against harassment by a politically motivated prosecutor, any more than is a categorical preclusion of indictment of a sitting governor needed to protect the constitutional duties of the governor. State courts, state supervision of prosecutors' offices, and if necessary federal courts, are all capable of implementing the necessary checks and balances to protect against the grossest abuses of prosecutorial discretion. Our conclusion here aligns with the majority opinion in *Trump v. Vance*, in which the Court held federalism concerns do not support a President's claim to absolute immunity from a state grand jury subpoena.

[W]hile we cannot ignore the possibility that state prosecutors may have political motivations . . . here again the law already seeks to protect against

²⁷¹ See Letter from Lawrence Dubin, Claire Finkelstein, and Richard Painter to the Michigan Att'y Grievance Comm'n (Mar. 29, 2021) (on file with authors) (alleging conflicts of interest and other ethics violations in Macomb County D.A. Peter Lucido's efforts to open a criminal investigation of Governor Whitmer).

the predicted abuse. First, grand juries are prohibited from engaging in “arbitrary fishing expeditions” and initiating investigations “out of malice or an intent to harass.” . . . And, in the event of such harassment, a President would be entitled to the protection of federal courts. . . . Second, [t]he Supremacy Clause prohibits state judges and prosecutors from interfering with a President’s official duties. . . . Any effort to manipulate a President’s policy decisions or to “retaliat[e]” against a President for official acts through issuance of a subpoena . . . would thus be an unconstitutional attempt to “influence” a superior sovereign “exempt” from such obstacles . . . [F]ederal law allows a President to challenge any allegedly unconstitutional influence in a federal forum Given these safeguards and the Court’s precedents, we cannot conclude that absolute immunity is necessary or appropriate under Article II or the Supremacy Clause.²⁷²

A similar logic should apply not only to a state grand jury subpoena but to the decision of a state grand jury or prosecutor to indict a sitting President.

Furthermore, shifting focus to federal prosecution, it seems more likely that conflicts of interest would affect the work of DOJ officials investigating the President who appointed them than the work of state attorneys general who are independent of the President and elected by the people of their states.²⁷³ As shown by firings and reassignments in United States Attorneys’ offices in New York in 2020,²⁷⁴ and an earlier 2006 scandal involving firings of United States Attorneys during the Bush Administration,²⁷⁵ the President can influence investigations in U.S. Attorney’s offices all over the country. Against this backdrop, we can assume that state prosecutors might behave with greater integrity than federal prosecutors in the situation we have addressed, namely a case in which a U.S. President is seeking to misuse his office and other agencies of the federal government for the sake of remaining in power.

²⁷² *Vance*, 140 S. Ct. at 2428–29.

²⁷³ *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS’N 2020) (describing the special responsibilities of a prosecutor); N.Y. RULES OF PRO. CONDUCT r. 3.8 (N.Y. BAR ASS’N 2021) (describing special responsibilities for prosecutors and government lawyers within New York); *see also* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION (AM. BAR ASS’N 2017).

²⁷⁴ *See* Claire O. Finkelstein & Richard W. Painter, Opinion, *The ‘Friday Night Massacre Spells’ the Downfall of William Barr*, NEWSWEEK (June 23, 2020, 5:08 PM), <https://www.newsweek.com/friday-night-massacre-spells-downfall-william-barr-opinion-1512935> [<https://perma.cc/H74C-SBEV>] (discussing the controversy over the firing of the U.S. Attorney for the Southern District of New York by the Trump Administration).

²⁷⁵ *See* Ari Shapiro, *Timeline: Behind the Firing of Eight U.S. Attorneys*, NPR (Apr. 15, 2007, 3:07 PM), <https://www.npr.org/templates/story/story.php?storyId=8901997> [<https://perma.cc/X2MH-U7A7>] (discussing the circumstances behind the Bush Administration’s firing of several U.S. attorneys on a single day).

Returning to the broad principles of federalism with which we began our discussion in this Part, state prosecutors have a legitimate role in holding the President accountable to the criminal law, and this function is an important corollary to the right of states to run their own elections. With the exception of that provided by the Speech and Debate Clause, which is explicitly articulated in the Constitution, no Member of Congress is constitutionally immune from prosecution by the states, including the states that sent them to Congress,²⁷⁶ and neither is the President.

IV. PROSECUTING A PRESIDENT AFTER HE LEAVES OFFICE

While criminal prosecution of a sitting President is legally contentious, the same cannot be said of the prosecution of a former President. There is no immunity for a President once he leaves office—a point the 1973 and 2000 OLC memos both make clear. Indeed, as we discussed above, the Impeachment Clause itself expressly states that an impeached and removed federal officer, including a president, can be criminally charged after leaving office.²⁷⁷ Although there is no immunity for a former president, there are doctrines that former Presidents can invoke as a practical matter in order to immunize themselves. We discuss such impediments to post-presidential prosecution in Section IV.C below.

An initial question arises in this area. Given that it is always possible to prosecute a former president, and that presidential immunity for personal crimes ends with the office, why is it *ever* necessary to prosecute a sitting president? Why not just avoid the thorny issues of prosecuting a sitting President and wait until he leaves office? After all, we have the impeachment process for crimes committed while in office. We discussed above the reasons why impeachment is not sufficient to protect the country from a President who abuses his office, perhaps impeachment, combined with the power to prosecute a President once he leaves office, is adequate. In this Part, we explain why the combined availability of impeachment during office and prosecution after office still cannot protect against a despotic President who is willing to use every means at his disposal to remain in office.

²⁷⁶ We discuss the very limited immunity of members of Congress in the Speech and Debate Clause of the Constitution at Section I.A *supra*. The Constitution references no such immunity for the President.

²⁷⁷ See *supra* text accompanying notes 22–83.

A second question is as follows: Suppose the Justice Department were to maintain a compromise position. Suppose it is possible to *indict* a sitting president, but not possible to *try* or *sentence* him until he leaves office. In other words, the Department could allow for indictment while in office, but defer other legal proceedings until after a President has left office. As we discuss below, however, this weaker version of the deferral of presidential criminal justice will also prove inadequate to protect the democratic process. While in some cases, this bifurcated method may prove adequate, this will not always be the case. The question is when it is imperative to be able to indict *and* prosecute a sitting President.

A. *Why Impeachment Does Not Suffice*

As we touched on in the Introduction, impeachment and voting elected officials out of office are sometimes thought to be the only methods for protecting against abuse of presidential authority. After all, impeachment is the only method the Founders explicitly identified in the Constitution, other than presidential elections every four years, for ridding the nation of a corrupt or despotic President. Moreover, once the people of the United States elect a president, the argument is that an unelected prosecutor, judge and jury should not have the power to incapacitate a democratically elected President or force him from office before his term has expired.²⁷⁸ This argument is even sometimes made with regard to indicting a former President.²⁷⁹ The claim is that using the criminal law to punish presidential misconduct, whether during or after his term in office, is necessarily a partisan activity, used primarily to score political points by impugning the party whose candidate won the prior election.²⁸⁰

²⁷⁸ See, e.g., Craig Sandler, *Impeachment Is the Only Remedy for a Corrupt and Lawless President*, PUB. CITIZEN (Oct. 16, 2019), <https://www.citizen.org/news/impeachment-only-remedy/> [<https://perma.cc/4PS2-XQWG>] (contending that the Constitution provides impeachment as the sole method of removing a President).

²⁷⁹ See Conor Shaw, *Yes, Trump Could Be Indicted if He Leaves Office In 2021, But Is That Likely?*, JUST SEC. (Aug. 13, 2019), <https://www.justsecurity.org/65772/yes-trump-could-be-indicted-if-he-leaves-office-in-2021-but-is-that-likely/> [<https://perma.cc/4J4U-J92F>] (discussing reasons, mostly political, why an indictment and trial of a former President could be difficult and unlikely).

²⁸⁰ See, e.g., Aaron Blake, *The GOP's Looming Impeachment Strategy: Focus on the Constitution, Not Trump*, WASH. POST (Jan. 23, 2021, 7:00 AM), <https://www.washingtonpost.com/politics/2021/01/23/can-you-impeach-former-president/> [<https://perma.cc/GGE5-BXXG>] (discussing the political undertones of the impeachment arguments made by each political party).

Yet, as the last two impeachments taught us, impeachment turns out to be completely ineffective as a method of actually removing a sitting President. As such, it provides much less protection against presidential misconduct than the Framers likely intended. Thus despite two impeachments by the House and two impeachment “trials” in the Senate, impeachment utterly failed to address plausible allegations of criminal activity by Donald Trump. Instead, or in addition, he might have been indicted for any of the following crimes, among others: (1) obstructing justice as identified in the Mueller investigation,²⁸¹ (2) bribing²⁸² and/or extorting²⁸³ Ukraine with military aid to investigate his political opponent Joe Biden and conduct another investigation undermining the Mueller investigation,²⁸⁴ (3) coercing cabinet members and other federal employees to engage in partisan political activity in violation of the criminal political coercion provisions of the Hatch Act,²⁸⁵

²⁸¹ See MUELLER REPORT, *supra* note 87 (enumerating acts of President Trump that probably violated the federal obstruction of justice statute 18 U.S.C. § 1512(c)(2), and repudiating arguments that Article II of the Constitution precludes application of this statute to official acts of the President).

²⁸² See 18 U.S.C. § 201(b)(2) (stating that whoever “(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for: (A) being influenced in the performance of any official act” commits the crime of bribery). 18 U.S.C. § 2 provides that if one person “solicits” another person to commit a crime, the first person will be treated as though he had committed the crime himself. The federal solicitation statute contains two requirements: the circumstances must suggest that the defendant had the intent to engage in conduct amounting to a violent felony and that he “solicits, commands, induces or otherwise endeavors” to persuade others to engage in such conduct. 18 U.S.C. § 373.

²⁸³ See 18 U.S.C. § 872 (“Whoever, being an officer, or employee of the United States or any department or agency thereof, or representing himself to be or assuming to act as such, under color or pretense of office or employment commits or attempts an act of extortion, shall be fined under this title or imprisoned not more than three years, or both.”).

²⁸⁴ The obstruction of justice statute cited *supra* at note 230 might also apply to the Ukraine phone call if the requested acts would interfere with other ongoing investigations. Also, President Trump mentioned Attorney General Barr on the phone call as well as Rudy Giuliani. If Trump pressured Justice Department officials to give assistance to his reelection campaign, this would be a violation of the criminal provisions of the Hatch Act. See 18 U.S.C. § 610 (“It shall be unlawful for any person to intimidate, threaten, command, or coerce, or attempt to intimidate, threaten, command, or coerce, any employee of the Federal Government as defined in section 7322(1) of title 5, United States Code, to engage in, or not to engage in, any political activity.”).

²⁸⁵ See 18 U.S.C. § 610 (coercion of political activity); Letter from Claire O. Finkelstein and Richard W. Painter to Corey Amund, Chief Pub. Integrity Section, Dep’t of Just. (Oct. 26, 2020), <https://www.law.upenn.edu/live/files/10951-trump-criminal-hatch-act-complaint> [<https://perma.cc/EV2V-EE8A>] (documenting multiple instances in which President Trump coerced political activity by cabinet members and other federal employees before the 2020 election); Claire O. Finkelstein and Richard W. Painter, *Could a New Government Report Spell Felony Charges for*

(4) soliciting election fraud in a phone call to the Georgia Secretary of State in November 2020,²⁸⁶ (5) criminal sedition²⁸⁷ in authorizing preparation of the unsigned draft Executive Order dated December 16, 2020 pursuant to which President Trump would have ordered the Secretary of Defense to seize voting machines in certain states to look for evidence of election fraud,²⁸⁸ and (6) inciting insurrection at the Capitol on January 6, 2021.²⁸⁹ These alleged politically-related crimes are over and above the financial crimes being

Trump: It's Time for Merrick Garland to Appoint a Special Prosecutor to Investigate Possible Criminal Hatch Act Violations, SLATE (Nov. 16, 2021), <https://slate.com/news-and-politics/2021/11/trump-felony-charges-government-hatch-report.html> [<https://perma.cc/S7EJ-6EKA>] (discussing continuation of coerced political activity by the DOJ and other agencies in Trump's effort to overturn the 2020 election as well as pre-election Hatch Act violations of 13 senior officials documented in an Office of Special Counsel investigation); U.S. OFF. OF SPECIAL COUNS, INVESTIGATION OF POLITICAL ACTIVITIES BY SENIOR TRUMP ADMINISTRATION OFFICIALS DURING THE 2020 PRESIDENTIAL ELECTION (Nov. 9, 2021), [https://osc.gov/Documents/Hatch Act/Reports/Investigation%20of Political Activities by Senior Trump Administration Officials During the 2020 Presidential Election.pdf](https://osc.gov/Documents/Hatch%20Act/Reports/Investigation%20of%20Political%20Activities%20by%20Senior%20Trump%20Administration%20Officials%20During%20the%2020%20Presidential%20Election.pdf) [<https://perma.cc/2A2F-W9BL>].

²⁸⁶ See GA. CODE § 21-2-604(a)(1) (2016) (“A person commits the offense of criminal solicitation to commit election fraud in the first degree when, with intent that another person engage in conduct constituting a felony under this article, he or she solicits, requests, commands, importunes, or otherwise attempts to cause the other person to engage in such conduct.”).

²⁸⁷ 18 U.S.C. § 2384 (conspiracy “to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof”); Claire O. Finkelstein & Richard W. Painter, *Invoking Martial Law to Reverse the 2020 Election Could be Criminal Sedition*, JUST SEC. (Dec. 22, 2020), <https://www.justsecurity.org/73986/invoking-martial-law-to-reverse-the-2020-election-could-be-criminal-sedition/> [<https://perma.cc/KC56-2JGB>].

²⁸⁸ Presidential Findings to Preserve Collect and Analyze National Security Information Regarding the 2020 Presidential Election (Dec. 16, 2020) (unsigned draft executive order) <https://www.documentcloud.org/documents/21183521-jan-6-draft> [<https://perma.cc/SM4M-RDH5>].

²⁸⁹ The crime of “rebellion or insurrection,” 18 U.S.C. § 2383, can be formulated as a conspiracy crime, 18 U.S.C. § 371, or “conspiracy to engage in rebellion or insurrection.” Alternatively, Trump could have been charged with “seditious conspiracy,” 18 U.S.C. § 2384, based on the concept of “sedition” rather than “rebellion.” The federal complicity statute, 18 U.S.C. § 2, provides that if one person “solicits” another person to commit a crime, the first person will be treated as though he had committed the crime himself. The federal solicitation statute, 18 U.S.C. § 373, contains two requirements: the circumstances must suggest that the defendant had the intent to engage in conduct amounting to a violent felony and that he “solicited, commanded, induced or otherwise endeavored” to persuade others to engage in such conduct. The federal solicitation statute, 18 U.S.C. § 373, contains two requirements: the circumstances must suggest that the defendant had the intent to engage in conduct amounting to a violent felony and that he “solicits, commands, induces or otherwise endeavors” to persuade others to engage in such conduct.

investigated by the Manhattan District Attorney, who has already indicted the Trump Organization and its chief financial officer.²⁹⁰

Among other difficulties, members of Congress of the President's own party can be so closely aligned with the President that they decline to exercise their powers under the Impeachment Clause, siding instead with assisting the President to avoid accountability in order to remain in power. When this occurs, the tools of congressional oversight lie fallow, and there is no political will in Congress to investigate the President's conduct, let alone impose consequences for his lack of fidelity to the Constitution. This was made abundantly clear in 2019 during the first impeachment proceeding against Donald Trump, in which nearly all members of his own party in the Senate voted against conviction. The lone exception, Senator Mitt Romney, was attacked for his decision by others of his party nationwide, including in Utah where they drew up a petition for censure.²⁹¹ Moreover, because they held a majority in the Senate, members of the GOP were able to hobble the impeachment process itself, by blocking the ability of House managers to call critical witnesses who might have helped to prove the allegations against the President. The second impeachment proceeding against Trump for his role in inciting the January 6 attack on the Capitol building drove the point home all the more forcefully. Shockingly, within an hour of a successful vote to hear witnesses at the impeachment trial, Democratic and Republican leaders cut a deal agreeing that there would be no live witnesses.²⁹² Despite controlling both houses of Congress and the White House and needing only a majority to call witnesses, Democrats were forced to abandon their trial plans. Needless to say, they were also unable to command the two-thirds super-majority needed for conviction, despite the fact that the January 6

²⁹⁰ See Indictment, *People v. Trump Corp.* (N.Y. Sup. Ct., June 30, 2021), <https://www.nytimes.com/interactive/2021/07/01/nyregion/trump-organization-indictment.html> [<https://perma.cc/2UPD-GU3N>].

²⁹¹ See Justine Coleman, *Petition Seeking Romney Censure Circulating Among Utah Republicans*, THE HILL (Feb. 15, 2021, 3:48 PM), <https://thehill.com/homenews/state-watch/538895-petition-seeking-romney-censure-circulating-among-utah-republicans> [<https://perma.cc/E5Y3-LVHK>] (discussing a petition by Utah Republicans to censure Senator Romney for his vote to convict former President Trump during his impeachment trial).

²⁹² See Brian Naylor, *Agreement Reached to Avoid Witnesses in Trump's Impeachment Trial*, NPR (Feb. 13, 2021, 1:20 PM), <https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/13/967650922/agreement-reached-to-avoid-witnesses-in-trumps-impeachment-trial> [<https://perma.cc/6TYH-HFCS>] (reporting that two hours after the Senate voted to call witnesses, the leaders of both parties reached an agreement not to call witnesses).

attack on the Capitol targeted members of Congress and the Republican Vice President himself.²⁹³ Even more troubling was the fact that several of the senators may themselves have actively contributed to the incitement in the run up to January 6, according to complaints filed with the Senate Ethics Committee.²⁹⁴

The reality of impeachment, then, is quite different from the theory. While the theory may present an attractive thesis about why we should regard impeachment over prosecution as the only alternative to presidential elections for addressing the crimes of a corrupt president, the reality is that impeachment cannot truly be considered a method of removal. At best, impeachment is a means of enabling the House and potentially the Senate to conduct discovery on a President who may have committed crimes, because Congress's powers to engage in oversight of White House officials, for example by demanding testimony and subpoenaing documents, is at its height during an impeachment inquiry.²⁹⁵

B. Why Post-Presidential Prosecution Does Not Suffice

If impeachment does not provide the protection against despotism for which the Framers might have hoped, what other protections might be compatible with our constitutional design short of prosecuting a President while he is still in office? In particular, does the prospect of prosecuting a President after he leaves office, coupled with investigations while that President is still in office, provide the deterrent efficacy needed to forestall presidential crimes and ensure that other mechanisms of presidential accountability are able to function as intended?

The main problem with relying on post-presidential accountability, as we have stressed throughout this Article, is that the crimes a sitting President is most likely to commit if he is immune from prosecution are the crimes that

²⁹³ This time seven Republican senators voted to convict former President Trump. Dareh Gregorian, *Trump Acquitted in Impeachment Trial; 7 GOP Senators Vote with Democrats to Convict*, NBC NEWS (Feb. 13, 2021, 10:44 PM), <https://www.nbcnews.com/politics/donald-trump/trump-acquitted-impeachment-trial-7-gop-senators-vote-democrats-convict-n1257876> [<https://perma.cc/MXE5-LMP4>].

²⁹⁴ See Burgess Everett, *Secretive Ethics Panel Will Judge Hawley and Cruz*, POLITICO (Jan. 31, 2021, 7:00 AM), <https://www.politico.com/news/2021/01/31/senate-ethics-hawley-cruz-investigation-463806> [<https://perma.cc/3P8P-8D5M>] (describing the Senate investigation into the role Senators Cruz and Hawley may have played in inciting the January 6th insurrection).

²⁹⁵ See *supra* Section II.B (discussing *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020)).

will most increase his chances of remaining in office. A President who is immune from criminal prosecution thus poses a very real danger that he will commit crimes that will secure not only his continuation in office, but also thereby allow him to protect himself against impeachment during his (next) term and immunize himself against prosecution once he is no longer in office. Prosecution that takes place after a President leaves office thus fails to address the central and most concerning danger, namely that a President will commit crimes to avoid having to leave office or for the purpose of avoiding accountability once he is out of office.

Immunity from criminal prosecution invites illegal conduct, and the longer it takes to prosecute the formerly immune individual, the more additional crimes may be committed. For example, if a lawyer pleads guilty to campaign finance violations for making secret payoffs on behalf of a client, but the co-conspirator (“Individual 1”) remains unindicted, the chances increase that Individual 1 will commit another crime, simply because he is undeterred, or in order to cover up the first crime before his role in it is discovered. If a President obstructs justice in an investigation into his initial electoral victory, for example, is not impeached or indicted at the time, the chances increase that the same President will seek to induce or coerce interference by another country in the next election. In addition, he might engage in crimes of obstruction to cover up his commission of the first crime.

We know from history that presidential crimes tend to escalate if left unchecked. If President Nixon could hire burglars to break into Democratic Party Headquarters in the Watergate Hotel, and then commit further crimes to cover up his participation in the first one, it is not unthinkable for a future President to hire hitmen to murder witnesses or to intimidate investigators looking into his prior crimes. Absolute rulers murdering political opponents throughout history²⁹⁶ may have been more the norm than the exception, at least in an earlier age. And crimes committed to cover up other crimes or to impede investigations is standard fare. Presidential crimes must be addressed

²⁹⁶ See, e.g., Tim Thornton, *More on a Murder: The Deaths of the ‘Princes in the Tower,’ and Historiographical Implications for the Regimes of Henry VII and Henry VIII*, 106 J. HIST. ASS’N 4–5 (2021) (discussing political complications in contemporaneous accounts of Richard of Gloucester’s [Richard III’s] 1483 seizure of power by deposing his nephew the 12-year-old King Edward V, followed by the disappearance and probable murder in the Tower of London of Edward and his younger brother Richard of Shrewsbury, Duke of York).

as close to the time they occur as possible, or the momentum they create can send a nation into a downward spiral of criminality and corruption.

In addition, each President knows that whatever his vulnerability to criminal process, once he leaves office there will be little incentive on the part of the new administration to prosecute the President from the former administration. Indeed, prosecuting, or even investigating, the former administration often seems to be counterproductive from the standpoint of the new administration's aims. It takes time and energy away from the priorities of the new administration. But it may also be seen as an attack on executive power and thus create vulnerabilities for the new President. Where federal prosecution is concerned, a former President's *de facto* immunity is thus virtually assured, and knowing that in advance, the vulnerability to prosecution after leaving office will not carry much deterrent efficacy. Thus, despite major examples of illegal conduct in various presidential administrations, political resistance on the part of the Department of Justice to pursuing accountability for any member of the executive branch, whether current or former, remains formidable.

The case for prosecuting a former President is as strong as it has ever been in the case of Donald Trump, and thus the actions of the Biden Administration's DOJ provide a test case of the feasibility and potential efficacy of federal prosecutions of a former President. Yet as of this writing, there is no indication that Donald Trump or any members of his inner circle are targets of a DOJ criminal investigation, despite the wide-ranging investigation that the Department has undertaken into the events of January 6, 2021, on the one hand, and state and city investigations of the Trump Organization and Trump himself, on the other. The failure on the part of the DOJ to announce an investigation of the former president, or announce the appointment of a special council to do the same, attests to the degree of resistance federal attorneys general have to seeking accountability for members of a prior administration. We witnessed the same in the transition from the administration of George W. Bush to Barak Obama, where, confronted with massive evidence of widespread violation of U.S. and international laws forbidding torture, President Obama announced he preferred to look forward, not backwards and declined the clear mandate to appoint a special counsel to investigate the Rendition, Detention and

Interrogation program instituted by the previous administration shortly after the attacks on 9/11.²⁹⁷

The apparent unwillingness of the current administration to appoint a special counsel to investigate the events of January 6, 2021 is similarly puzzling, given that many of the defendants under indictment for breaching the Capitol Building have provided testimony that they were part of an extensive and organized effort that tracks back to several Republican members of Congress, members of the President's inner circle, and ultimately to the President himself.²⁹⁸ The same can be said for the extensive evidence provided by Robert Mueller in Part II of the Mueller Report, which indicated Trump obstructed justice and evidence that he may have committed election related crimes following the 2020 election.²⁹⁹

Recent developments at the DOJ suggest that the current Justice Department is not inclined to prosecute or even investigate Donald Trump's possible legal violations. At times the DOJ has gone so far as to defend his position in litigation. With the exception of President Biden's decision not to assert executive privilege vis à vis Congress's request for White House documents in its investigation of the January 6 insurrection, the DOJ has taken a stance on a wide variety of issues in which the Department is adopting the same line of argument as the Department pressed under Garland's predecessors in the Trump Administration. The common theme of these cases is the protection of presidential privilege and the defense of the principle of presidential immunity, two doctrines that have helped Presidents across time retain their hold on power and control the executive branch. Presumably this explains why, despite his deep ideological differences with his predecessors, Merrick Garland has repeatedly sided with the former administration and the principle of executive power over the rule of law.

The current Department began its support for the Trump Justice Department initiatives by appealing a federal judge's order that it release an Office of Legal Counsel memo from 2019, in which DOJ lawyers had

²⁹⁷ See CLAIRE FINKELSTEIN & STEPHEN N. XENAKIS, INTERROGATION AND TORTURE 493, 504 (2020) (describing the implications of declining to investigate the use of torture and its basis in political expediency).

²⁹⁸ See Hunter Walker, *Exclusive: Jan. 6 Protest Organizers Say They Participated in 'Dozens' of Planned Meetings with Members of Congress and White House Staff*, ROLLING STONE (Oct 24, 2021), <https://www.rollingstone.com/politics/politics-news/exclusive-jan-6-organizers-met-congress-white-house-1245289/> [<https://perma.cc/Y7LS-65K4>].

²⁹⁹ See *supra* text accompanying notes 176–82.

concluded that Trump should not be prosecuted for obstruction of justice following the release of the Mueller Report.³⁰⁰ The DOJ continued to assert executive privilege over communications between former White House Counsel Don McGahn and Donald Trump, despite a congressional subpoena from the House Judiciary Committee demanding that McGahn testify to the Committee³⁰¹ and an en banc decision of the United States Court of Appeals for the District of Columbia upholding the subpoena.³⁰² The DOJ also continued to defend the Department's actions in June 2020 in which Attorney General Barr ordered federal officers to assault peaceful protestors in Lafayette Park in advance of an appearance in the park by President Trump, who passed through en route to the famous photo-op outside St. John's Church. There are four cases against the government and current and former officials arising out of the Lafayette Park incident seeking damages and injunctive relief, one of which is now captioned *Black Lives Matter v. Joseph R. Biden, Jr., President of the United States of America*.³⁰³ Rather than acknowledge wrongdoing, the Department has continued to litigate and has urged a federal court to dismiss the cases against former Trump officials.³⁰⁴ At the urging of the DOJ, one of the cases was dismissed by a Trump appointed federal district judge in June of 2021.³⁰⁵

We see a similar logic at work in the E. Jean Carroll defamation case brought against Trump in his personal capacity in New York state court.³⁰⁶ While not a criminal matter, the Department's stance on the case helps to reveal the Biden Administration's sympathies with regard to claims of executive authority. Carroll claimed that Trump raped her in a New York

³⁰⁰ See *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Justice*, No. 19-1522, at 19 (D.D.C. May 3, 2021); Finkelstein & Painter, *supra* note 85 (referencing the Justice Department's 2019 memorandum about the legality of indicting the President).

³⁰¹ See Finkelstein & Painter, *supra* note 186 (assessing the DOJ's continued assertion of executive privilege over Don McGahn's congressional testimony).

³⁰² See *Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 968 F.3d 755, 778 (D.C. Cir. 2020) (upholding the enforceability of the subpoena and explicitly leaving open the question of whether portions of McGahn's potential testimony would be privileged).

³⁰³ Notice Regarding Preliminary Settlement Discussions, *Black Lives Matter v. Biden*, No. 20-1469 (D.D.C. June 16, 2021).

³⁰⁴ Celine Castronuovo, *DOJ Asks Judge to Dismiss Cases Against Trump, Barr for Lafayette Square Clearing*, THE HILL (May 29, 2021), <https://thehill.com/regulation/court-battles/556077-doj-asks-judge-to-dismiss-cases-against-trump-barr-for-lafayette> [https://perma.cc/K589-MUSX].

³⁰⁵ *Black Lives Matter v. Trump*, No. 20-1469 at 49, 51 (D.D.C. June 21, 2021).

³⁰⁶ See *Complaint and Jury Demand, Carroll v. Trump* (N.Y. Sup. Ct. 2019) (alleging Trump made defamatory statements about plaintiff Carroll).

City department store twenty years ago. Concerned about the impact of this allegation on his reelection campaign, Trump called Carroll a “liar” and added, “she’s not my type.”³⁰⁷ When Carroll sued Trump for defamation, the DOJ intervened on Trump’s behalf, removing the case to federal court and claiming that the DOJ’s engagement was appropriate because this was “a lawsuit against an ‘employee’ of the United States for something done in the course of employment” under the Westfall Act.³⁰⁸ Although *Clinton v. Jones*³⁰⁹ makes clear that a sitting President cannot avoid a civil suit for personal wrongdoing, the matter is otherwise with regard to liability for official acts. In the latter case, first, a President will be immune from suit for official acts under *Nixon v. Fitzgerald*.³¹⁰ And second, he will be entitled to DOJ representation in any civil action against him to which he is not immune. The question then boils down to whether the President’s verbal attacks on E. Jean Carroll constitute official capacity acts, as both his legal team and the DOJ claimed, or whether they constituted private conduct. Against the Biden DOJ’s position, a federal district judge rejected the official capacity argument and with it, the claim of absolute immunity.³¹¹

The *Carroll* case is currently on appeal to the Second Circuit Court of Appeals, and with a federal judiciary often protective of presidential power, backed up by President Biden’s DOJ, Trump’s position might just prevail.³¹² But the DOJ’s position in this case, which would treat a President’s denials of a personal accusation as official presidential business, threatens to swallow

³⁰⁷ *Id.* at 19–20.

³⁰⁸ See 28 U.S.C. § 2679(b)(1) (making the Federal Tort Claims Act the only means of perusing claims for civil damages for the official acts of a U.S. government employee). The Westfall Act modifies the Federal Tort Claims Act to protect federal employees from common law tort suit while engaged in their duties from government. It also commits the federal government to representing the federal employee if sued. In the Carroll case, the representation was questionable because Donald Trump’s comments on Carroll arguably were not offered in the course of his employment, but rather were personal in nature.

³⁰⁹ *Clinton v. Jones*, 520 U.S. 681, 692–93 (1997) (“We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President before he leaves office.”).

³¹⁰ *Nixon v. Fitzgerald*, 457 U.S. 731, 758 (1982) (defining the scope of an official’s absolute privilege).

³¹¹ *Carroll v. Trump*, 498 F. Supp. 3d 422, 457 (S.D.N.Y. Oct. 27, 2020). See also Reply Brief of Appellant at 16, *Carroll v. Trump*, (Nos. 20–3977 & 20–3978) (arguing Trump’s statements were within the scope of his employment).

³¹² See Mark C. Niles, *What’s the Justice Department Doing in the E. Jean Carroll Lawsuit*, LAWFARE (June 21, 2021), <https://www.lawfareblog.com/whats-justice-department-doing-e-jean-carroll-lawsuit> [<https://perma.cc/YJH3-Z7P6>] (discussing the DOJ’s purported interest in expanding the scope of presidential immunity for official acts by broadening the definition of an official act).

up the line of cases according to which a sitting President is subject to civil and criminal process for personal wrongdoing.³¹³ The DOJ clearly thinks it can draw a sensible line just beyond the Carroll case. Mo Brooks, for example, argued the same thing Trump did when both he and Trump were faced with a lawsuit by Eric Swalwell relating to his role in the January 6th insurrection. Brooks had fanned the flames by encouraging an angry mob to storm the Capitol, and his claim was that he was doing so as official congressional business. Here, unlike in the Carroll case, the DOJ took the more sensible position and said that Brooks' statements were not issued in his official capacity.³¹⁴ But the ability of the Department to draw a consistent line and the dangers of an overly broad interpretation of presidential statements and actions as "official" are significant. In support of Trump's motion to dismiss the complaint, his attorneys had argued that Trump's conduct in encouraging the mob to attack the Capitol building fell within the "outer perimeter" of his official presidential duties,³¹⁵ a claim District Court judge Amit Mehta thoroughly rejected.³¹⁶

Imagine a President who harasses a woman as Clinton allegedly harassed Jones while he was Governor of Arkansas. Or a President who orchestrates a fraudulent securities transaction for his personal brokerage account when calling his stockbroker from the White House. Or a President who negligently shoots someone on a hunting trip, as Vice President Cheney did in 2007. Or a President who tells his supporters to beat up protestors at a campaign rally, or who incites his supporters to storm the Capitol where they kill a police officer and threaten the lives of members of Congress. Are all of

³¹³ A President is subject to criminal prosecution for crimes committed in a personal or an official capacity; whether that prosecution occurs during his presidency or thereafter is the subject of this Article. Nonetheless, official acts of a President are within his Article II powers, creating an arguable conflict between Article II and statutory crimes. We analyze one such potential conflict, involving obstruction of justice statutes, in a separate article. We point out here however, that identifying a President's acts as official, whether Trump defaming Jean Carroll in statements to the press or his firing the F.B.I. Director in the middle of an investigation of his presidential campaign, is a first step in additional legal arguments made to shield the President from both civil and criminal liability.

³¹⁴ See United States' Response to Defendant Mo Brooks's Petition to Certify He Was Acting Within the Scope of His Office or Employment at 1, *Swalwell v. Trump* (D.D.C. July 27, 2021) (No. 21 Civ. 586), ECF No. 34.

³¹⁵ See Memorandum in Support of Donald J. Trump and Donald J. Trumps Jr.'s Motion to Dismiss at 8-11, *Swalwell v. Trump* (D.D.C. May 24, 2021) (No. 21 Civ. 586), ECF No. 14-1.

³¹⁶ Memorandum Opinion and Order, *Swalwell v. Trump* (D.D.C. Feb. 18, 2022) (No. 21 Civ. 586), ECF No. 56, <https://perma.cc/RE9M-AK6U>.

these “official” acts of the President and therefore not amenable to civil suit, either while the President is in office or after he leaves office? If everything the President does is an official act within the meaning of *Fitzgerald*, then *Clinton v. Jones* would not apply to any acts of a President while he is in office, since any act performed by a sitting President would be considered official action.

As of this writing, it is unclear what position the DOJ will take with regard to civil litigation over the deadly insurrection at the Capitol on January 6, 2021. But the logic of the DOJ’s position in the *Carroll* case would suggest that the incendiary statements Trump made at a campaign rally on the White House lawn might also be considered official acts.³¹⁷ The mere possibility that the DOJ could apply its approach to official acts to defending Trump for his incendiary remarks on January 6 shows just how damaging the DOJ’s current position on this matter is. Among other things, such a position would threaten the holding in *Clinton v. Jones* and would seriously impede the ability to hold a sitting President to the law. It would also undermine the rationale for the 2020 holding in *Trump v. Vance*, namely the proposition that a sitting President is not above the law.

To its credit, the DOJ in July 2021 notified former Trump Administration officials that they could testify before congressional committees investigating efforts to subvert the 2020 election and the January 6 insurrection.³¹⁸ President Biden also decided not to assert executive privilege over Trump White House documents requested by Congress in its investigation of the insurrection of January 6. Trump has sued to prevent release of the documents.³¹⁹

The foregoing political considerations underscore the importance of the Department of Justice rescinding its prior advice and instructing its attorneys, including any future special counsel in Mueller’s position, that they *can*

³¹⁷ See Peter Eisler & Joseph Tanfani, *Analysis: Biden’s Justice Dept May Defend Trump in Capitol Riot Lawsuits*, REUTERS (June 23, 2021), <https://www.reuters.com/world/us/bidens-justice-dept-may-defend-trump-capitol-riot-lawsuits-2021-06-22/> [<https://perma.cc/HZC4-VJ3V>] (reporting that Trump’s lawyers adopt the Justice Department’s reasoning to argue that the former President was speaking on “matters of public concern” in his Jan. 6 speech).

³¹⁸ See Katie Benner, *Trump Officials Can Testify in Inquiries Into Efforts to Subvert Election Outcome and Jan. 6 Riot, Justice Dept. Says*, N.Y. TIMES (July 27, 2021), <https://www.nytimes.com/2021/07/27/us/politics/trump-officials-jan-6-testify.html> [<https://perma.cc/R4Y4K-XDND>].

³¹⁹ See Savage & Broadwater, *supra* note 202.

prosecute a sitting president, as well as the importance of protecting the ability of states, who are not bound by DOJ policy, to investigate and if need be indict current or former Presidents. The Framers showed foresight in anticipating that in addition to the three branches of government serving as a check on one another, the states and the federal government might mutually hold one another in check in addition to the checks and balances built into the structure of the federal government. Reigning in presidential power is one area in which states may play a critical role. The challenge of calling the extraordinarily powerful office of the U.S. President to account cannot be accomplished by one mechanism alone.

C. Legal Impediments to Deferred Prosecution

Were there no legal impediment to prosecuting a sitting president, a federal prosecutor or special counsel might still choose to wait until a President has left office to bring charges. There are, after all, several advantages of waiting to prosecute a President until after he leaves office. Quite apart from the protection a sitting President receives from the DOJ's current ban on presidential prosecution, there are a number of doctrines that purport to stem from presidential Article II powers that a sitting President could use to protect himself in case of criminal investigation or prosecution. As discussed above, assertions of privilege available to a sitting President are largely unavailable to a former President. And the ability of a President to control the actions of his attorney general, through threats of firing or other means, equips a sitting President with multiple mechanisms for impeding investigations.

The ability of a sitting President to use the powers of his office to interfere with a criminal investigation must be weighed against the obstacles to prosecuting a former President. These require careful consideration. Below we identify six factors that would likely interfere with any criminal investigation or prosecution of a former President.

First, there is the possibility that the President will obtain a pardon from his successor, particularly when his successor is from his own political party.³²⁰ This is famously what happened with President Nixon, who was pardoned by Gerald Ford, despite the fact that Nixon's crimes were flagrant,

³²⁰ The pardon need not come from an immediate successor and a former President could condition his support for presidential candidates on their promise to him of a pardon.

and he was on the verge of being removed from office by senators from both major parties at the moment that he resigned. This “pardon effect” already interferes with the ability to gain cooperation from potentially useful witnesses against a criminal President while in office.

That same logic applies to prosecuting Presidents after they leave office, both because they themselves may receive a pardon, but also because they may already have pardoned, or their successor may pardon, those in their cabinet and inner circle who would be the most likely witnesses against them. For example, George H.W. Bush pardoned Casper W. Weinberger less than two weeks before the latter was due to stand trial on charges that he lied to Congress about his knowledge of the Iran-Contra Affair.³²¹ President Bush also pardoned five other individuals involved in the Iran-Contra scheme who could have served as witnesses against both Weinberger and Reagan, much to the chagrin of independent prosecutor Lawrence E. Walsh, who was at the time in full swing of investigating Weinberger and others for their role in the scheme.³²²

A second impediment to prosecuting a President after he leaves office is that it will always be politically difficult for a President to authorize the prosecution of his predecessor. There is significant pressure to move on and treat the dangers of criminality from a former President as having passed. Indeed, deferring prosecution of presidential crimes foists upon the successor’s attorney general politically fraught questions, complicating the new President’s relationship with Congress and arguably interfering with other items on his agenda. State prosecutors may make similar determinations about prosecuting a former President on political grounds, depending on the signals they are receiving from their federal counterparts.

Third, a former President can try to assert executive privilege to prevent discovery of relevant evidence by congressional committees or prosecutors, as Donald Trump already has. As discussed above, Trump’s claims of executive privilege over documents sought through subpoenas issued by the January 6 committee have been wending their way through the federal court system. The D.C. District Court and the U.S. Court of Appeals for the D.C.

³²¹ David Johnston, *Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails ‘Cover-Up’*, N.Y. TIMES (Dec. 25, 1992), https://archive.nytimes.com/www.nytimes.com/books/97/06/29/reviews/iran-pardon.html?_r=2&oref=login&oref=slogin [<https://perma.cc/AS84-P8VS>].

³²² *Id.*

Circuit³²³ rejected Trump's claim of privilege which did not have the support of the Biden Administration. The Court of Appeals did not believe a former President could assert privilege in these circumstances, but also held that Trump's privilege claim did not meet the *United States v. Nixon* standard that would have applied were he still President. In January 2022, the Supreme Court refused Trump's request for a stay of the lower court injunction solely on the grounds that the *Nixon* standard had not been met.³²⁴ The Court expressly stated that it was not deciding the issue of whether a former President can assert executive privilege without the support of the current President. This leaves open the possibility that a former President who met the *Nixon* standard might persuade the Supreme Court to uphold a claim of privilege even without support from the current President. In other situations, a former President may be successful in persuading a current President to accept his assertion of executive privilege. Indeed, as we note above, even the Biden Administration has at times acted to protect Trump Administration executive privilege.³²⁵

Fourth, in cases where prosecution of a sitting President is deferred until he leaves office, statutes of limitations on the former President's crimes may expire, absent a statutory provision tolling the statute of limitations. Federal or state prosecutors who defer prosecution of a sitting President may not be able to count on an "equitable tolling" of the statute of limitations during the period in which the President was in office.³²⁶ The statute of limitations issue

³²³ *Trump v. Thompson*, No. 21-CV-2769, 2021 WL 5218398 (D.D.C. Nov. 9, 2021), *aff'd*, 20 F.4th 10, 33 (D.C. Cir. 2021).

³²⁴ *Trump v. Thompson*, 142 S. Ct. 680, 680 (2022). The Court, in denying the application for a stay explained: "Because the Court of Appeals concluded that President Trump's claims would have failed even if he were the incumbent, his status as a former President necessarily made no difference to the court's decision. . . . Any discussion of the Court of Appeals concerning President Trump's status as a former President must therefore be regarded as nonbinding dicta." *Id.* Justice Thomas would have granted Trump's request for the stay, and Justice Kavanaugh wrote a statement accompanying the Court's order stating that in his view in circumstances where the Nixon test is met "[a] former President must be able to successfully invoke the [p]residential communications privilege for communications that occurred during his Presidency, even if the current President does not support the privilege claim." *Id.*

³²⁵ See text accompanying notes 299–300 *supra*, discussing the DOJ's continued assertion of privilege over a 2019 DOJ memo on potential criminal charges against then President Trump, as well as the DOJ's assertion of privilege with respect to portions of the subpoenaed congressional testimony of former White House counsel Don McGahn.

³²⁶ See Amanda Lineberry & Chuck Rosenberg, *Equitable Tolling and a Prosecution of a President*, LAWFARE (Apr. 17, 2019), <https://www.lawfareblog.com/equitable-tolling-and-prosecution-president>

is particularly pointed for a President who serves two terms; the five-year statute of limitations common in federal criminal law would expire before the end of the second term for many crimes committed during the first term. In his dissent in *Trump v. Vance*, Justice Alito dismisses these concerns with the suggestion that the problem can be dealt with by a waiver of the statute of limitations,³²⁷ but he provides no explanation for how a President would effectuate such a waiver, why a President would ever incur the negative political implications of entering into any agreement with prosecutors with respect to a crime that he had committed, and what possible incentive a President would have to do this if there were a categorical rule that a President could not be indicted while in office.

Although the 1974 and 2000 OLC memoranda opining that the President should not be criminally charged while in office mention the possibility of tolling the statute of limitations,³²⁸ such tolling would have to be specifically authorized by Congress to be reliably asserted. Such a tolling provision is included in proposed legislation, the *Protecting Our Democracy Act*, passed by the House in December, 2021.³²⁹ Thus far, the rare cases in which

[<https://perma.cc/M2RV-KTH3>] (discussing *Young v. United States*, 535 U.S. 43 (2002) in which Justice Scalia observed that all statutes of limitations are subject to equitable tolling). *See also* *United States v. Midgley*, 142 F.3d 174, 178–79 (3d Cir. 1998) (holding that criminal statutes can be subject to equitable tolling but then denying equitable tolling to prosecutors who sought to charge crimes that had been dropped in a plea bargain later broken by the defendant). The Court in *Midgley*, however, refused to toll the statute of limitations, noting that Congress had the statutory authority to make an exception tolling the statute and had declined to do so. *See also* *United States v. Grady*, 544 F.2d 598, 601–02 (2d Cir. 1976) (holding that the statute of limitations tolled when “a superseding indictment [is] brought at any time while the first indictment is still validly pending, if and only if it does not broaden the charges made in the first indictment”).

³²⁷ *See Trump v. Vance*, 140 S. Ct. 2412, 2449 (2012) (Alito, J., dissenting) (“Even if New York law does not automatically suspend the statute of limitations for prosecuting a President until he leaves office, it may be possible to eliminate the problem by waiver.”). To support this proposition, Justice Alito cites *People v. Parilla*, 8 N.Y. 3d. 654 (2007), a case in which a defendant waived the statute of limitations by entering a guilty plea, a situation completely inapposite to that of a President accused of a crime that he has no intention of pleading guilty to.

³²⁸ *See* *Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office*, Op. O.L.C. 1, 32 (1973) and *A Sitting President’s Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 232 (2000) (discussing the statute of limitations as a “drawback” to deferred prosecution of a President).

³²⁹ Section 202 of the *Protecting Our Democracy Act*, H.R. 8363, amends 18 U.S.C. § 3282(c) to toll the statute of limitations for prosecution of a sitting President during his term in office. *See also* Finkelstein & Painter, *supra* note 101, urging that Congress add to this bill express language confirming that a President can also be indicted while in office, an amendment that was eventually introduced by Congressman Jaimie Raskin and was added to the House bill prior to passage.

federal courts have used a doctrine resembling equitable tolling for criminal statutes of limitations involve the unique circumstances of a superseding indictment brought outside the statute of limitations while an original indictment brought within the statute of limitations is validly pending.³³⁰ Under the Protecting Our Democracy Act, however, the statute of limitations on presidential crimes could be tolled, within the court's discretion, but only where criminal prosecution of the President while in office must be deferred to avoid interference with the President's Article II duties. Moreover, the President would have the duty of demonstrating that such interference would occur if prosecution were not delayed. If this bill passes the Senate and is signed into law, it would constitute a clear statement that Congress rejects the DOJ policy of barring the prosecution of a sitting President. Without such a statement, as we have argued elsewhere, a tolling provision would create misleading support for the DOJ memos, and thus would reinforce the incorrect impression that it is unconstitutional to indict a sitting President.³³¹

Yet a fifth factor is that for an effective prosecution of a former President to take place, statutes of limitations, even if amended to specifically provide for tolling in the case of the president, would also need to toll with regard to other individuals whose testimony might be needed to implicate the President. Unless a criminal investigation is allowed to proceed while the President is in office, the evidence required to pressure, and ultimately indict various witnesses may only surface after the statutes of limitations have run. Extending all such persons within the ambit of a statutory tolling provision would likely be unworkable, moreover, because the scope of potential criminal conduct involving a President is potentially vast, with rather grey edges. A related concern is how far presidential immunity theory might extend outside of the White House and the cabinet to members of the vast business empire controlled by the President and his family. Should businesses in joint ventures with the President's businesses also be immune from subpoenas and indictment while he is in office? If a business entity currently under criminal investigation were to be sold to a business organization controlled by the president, would that entity become immune from criminal process? How wide would the tolling of the statute of limitations need to extend for prosecutors to conduct an effective

³³⁰ United States v. Grady, 544 F.2d 598 (2d Cir. 1976).

³³¹ See *supra* note 101, as well as discussion in *supra* note 326.

investigation into the nexus of activities between a former President and those involved in his criminal activities? It becomes quickly clear that attempting to prosecute the President's entire criminal network only after he left office would make what is necessarily a challenging task nearly impossible.

In addition, if a constitutionally immune President were to solicit others to commit a crime, those other persons would normally not be immune from prosecution under federal law, even if the president, as principal, had immunity. But under the type of broad presidential immunity for which Trump and his lawyers argued in the *Vance* case, third parties could be immune if they committed their crimes at the behest of the President. Targets of criminal investigations could claim presidential involvement in the alleged crimes and refuse to turn over documents. A lawyer in the position of Michael Cohen, for example, might have a colorable claim that like the Mazars firm in the *Vance* case, the President had the right to prevent him from cooperating with any federal investigation into the President's actions.

A sixth factor is that even if statutes of limitations were to toll against all defendants, including the president, prosecutors would still be required to deal with stale evidence and witnesses who may be deceased or unavailable once the President's term expires. A presidential immunity theory so broad as to prohibit not only prosecution of the President but also subpoenas of a sitting president—and perhaps even business entities owned by the president—would make many criminal investigations touching on the President practically impossible.

Taken all together, these impediments to prosecuting a former President and members of an extended criminal enterprise surrounding his activities suggest a nearly insurmountable series of obstacles to prosecuting a President and his associates after he leaves office. Some of these impediments are present in the case of the prosecution of a sitting President as well, but some multiply once the President in question leaves office. The two biggest factors relate to the effects of the President's pardon power, on the one hand, and the impact of the passage of time and the statute of limitations on the other. The prospects for blunting the impact of either are dim, and thus realistically Presidents are unlikely to be prosecuted once they leave office by the succeeding administration.

D. The Insurgent President and Disqualification from Future Office

As recently as two years ago, the topic of presidential insurgency might have seemed like a far-fetched law school classroom hypothetical, and likely would not have been considered suitable publication material for a serious law review article. Then in November 2020, we heard of a meeting Trump had in the Oval Office to consider a plan to send the military in to assist in reversing the presidential election.³³² This was followed by the President's repeated baseless claims of "election fraud," as we are increasingly learning, a concerted plot involving the President, law professors and lawyers like John Eastman, and a number of the President's aides, members of Congress and other individuals within the President's orbit to overturn the results of the 2020 election. Then on January 6, 2021 during the counting of the electoral college votes, a mob invaded the U.S. Capitol Building for the purpose of halting the vote count and seeking to do violence to the Vice-President and to the Speaker of the House, among others.³³³ We do not here address whether these acts were part of a criminal seditious conspiracy involving the president, but we know now that prospect of a president—whether motivated to remain in office, or at the behest of a foreign power, or for any other reason—leading an insurrection to overthrow the workings of our democracy is a possibility we can no longer consider fanciful.

At a critical moment in our nation's history, just after another insurrection of much greater proportions, namely the Civil War, Congress passed a new amendment inspired in part by events of the day. A critical passage in the Fourteenth Amendment, Section 3 was designed to prevent participants in that insurrection or any other future insurrection from

³³² See Claire O. Finkelstein & Richard W. Painter, *Invoking Martial Law to Reverse the 2020 Election Could be Criminal Sedition*, JUST SEC. (Nov. 22, 2020), <https://www.justsecurity.org/73986/invoking-martial-law-to-reverse-the-2020-election-could-be-criminal-sedition/> [<https://perma.cc/Y874-39FB>] ("Following Flynn's public remarks, the idea of a military coup took shape in earnest last Friday, when the [P]resident met with Flynn and Flynn's (and the Trump campaign's) former lawyer, Sidney Powell, as well as with executive branch staff, to discuss various methods for overturning the results of the election, including the use of martial law.").

³³³ After House Republicans refused to support a bipartisan commission to investigate the riot of January 6, 2021, Speaker Pelosi appointed a panel with Democrats and some Republicans willing to serve. See Chris Marquette & Niels Lesniewski, *Pelosi's Picks for January 6 Select Committee Include Liz Cheney*, ROLL CALL (July 1, 2021), <https://www.rollcall.com/2021/07/01/pelosis-picks-for-jan-6-select-committee-include-liz-cheney/> [<https://perma.cc/2ENF-3EN8>] ("Speaker Nancy Pelosi on [July 1] announced her eight appointments to the Select Committee to Investigate the January 6th Attack on the U.S. Capitol.").

holding office in the United States government.³³⁴ The provision disqualifies anyone who has engaged in “insurrection, rebellion or giving aid or comfort to the enemies of the United States” and says that such acts “shall disqualify a person from holding public office.” An “office” for purpose of this provision includes the presidency. The Fourteenth Amendment does not expressly identify the body—Congress or a court—that is empowered to adjudicate whether a person is guilty of insurrection and thus whether disqualification should ensue. But a criminal conviction for participating in, inciting or aiding and abetting an insurrection or rebellion would clearly suffice. Presumably so also would impeachment and removal by two-thirds of the Senate for any of the enumerated offenses, but that method of adjudication requires a two-thirds vote to convict in the Senate.

Yet Section 3 of the Fourteenth Amendment appears to say the opposite, namely that if a person commits any of the listed offenses, the constitutionally mandated disability from holding office can only be waived by a two-thirds vote of both the House and Senate. The usual way to determine whether someone has committed a crime is that he or she has been found guilty of that crime. Thus the suggestion of this disqualification clause clearly seems to be that, as an alternative to disqualification through impeachment, a federal officer, including the president, can be found guilty of insurrection and in this way disqualified from holding public office ever again. That speaks in favor of proceeding with prosecution in the particular case of an insurgent president: if he cannot be impeached because he has conspired with members of his own party in Congress to hobble the impeachment process, and he is seeking to extend his time in office by any means necessary, the Fourteenth Amendment provides a mechanism by which he would be disqualified from holding future office if culpability for betraying the country can be shown.

³³⁴ What would happen to a country that allowed an insurrectionist to remain or to become its chief executive? We know of one notorious example in the 20th century; Germany allowed Adolf Hitler to be appointed Chancellor in 1933 despite his prior criminal conviction and prison sentence for inciting the Beer Hall Putsch in 1923. Even the New York Times opined in 1924 that after the failed insurrection Hitler was “tamed by prison” and would no longer be as serious a threat. *See Hitler Tamed by Prison.; Released on Parole, He is Expected to Return to Austria*, N.Y. TIMES, Dec. 21, 1924. That would have been disqualifying in the United States under the Fourteenth Amendment, Section 3. That is not an insignificant part of our Constitution.

Is criminal conviction necessary under this provision? The express language of the provision suggests that a person who has taken the oath of office is immediately and automatically ineligible to hold further public office—including the presidency—as soon as that person “shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.” And that might suggest that no official determination of any sort would be needed for the provision to apply. Could Congress pass legislation that would allow, by a simple majority vote, a resolution that the President had engaged in one of the enumerated acts? Would a majority vote to “censure” the president, after a failed attempt to convict former President Trump in the Senate following impeachment in the House, suffice as a determination of insurrection to invoke the disqualification? Exploring such questions further is beyond the scope of the present inquiry. For our purposes, the relevance of the disqualification provision lies in its indication that the drafters of the Fourteenth Amendment contemplated that a sitting President could be criminally convicted of a crime of rebellion while in office. And that further suggests that at least the drafters of the Fourteenth Amendment, less than one hundred years after founding, believed that a sitting President could be indicted and thereby barred from holding future office.

CONCLUSION

The United States currently faces a crisis of accountability in government, primarily located in the executive branch, but with reverberations in the other two branches of the federal government. Presidents have expanded legal doctrines defining presidential power beyond all recognition, culminating with President Trump who seemed to push the powers of the presidency to their outermost limits.

In this Article, we have examined one aspect of presidential power—the question of presidential immunity from criminal process. *Trump v. Vance* rejected presidential immunity from criminal investigations under state law, building upon earlier holdings in *United States v. Nixon*, that the President is not immune from federal criminal investigation, and *Clinton v. Jones*, that the President is not immune from civil suits. From this pair of cases, and from the constitutional text and history, we infer that a sitting President not only can be investigated but can be indicted as well.

This Article has focused on the permissibility of indicting a sitting president, but it did not explore the many scenarios for how a criminal trial of a President might actually unfold. There are of course procedural due process issues, including venue, jury selection and pre-trial publicity, for the trial of a sitting President or a former president, just as there are with criminal trials of other high-profile defendants, including politicians, celebrities and police officers criminally charged for unjustified killings. Courts have ample opportunity based on due process jurisprudence to address these issues. Immunity from criminal prosecution, however, is not a viable option for any of these other defendants and should not be for Presidents either. It is also possible that a criminal trial could unduly interfere with a President's execution of his duties under Article II, but this also turns on specific facts such as the nature of the criminal charges, the involvement of other high ranking government officials in the United States or other countries, and the amount of time the President would need to spend on his own defense.

Article III courts are well-equipped to address these concerns. The Supreme Court in both the *Vance* and *Mazars* cases recognized the importance of ensuring that an investigation does not impose undue burdens on the presidency, while at the same time avoiding a categorical rule that the President is somehow immune from subpoena. Categorical presidential immunity from criminal indictment or trial is a blunt instrument for addressing specific burdens that a particular criminal trial might impose on a President's Article II powers. Judges can address these concerns on a case-by-case basis, and in rare instances might grant a President's request that trial of a criminal indictment be postponed until the conclusion of his presidency.

This is a critical moment to clarify the extent of executive authority and the mechanisms for calling the President to account. The argument that the President has broad immunity against criminal process, investigation, civil suit, etc. has been advanced repeatedly for many years, with the aid of broad doctrines of presidential privilege and the workings of the overly broad and misused doctrine of the unitary executive theory, even as the Supreme Court as well as lower courts, have consistently rejected such arguments in a string of cases involving Presidents Nixon, Clinton and Trump.

The Department of Justice has been wrong for over five decades and under three separate Presidents in its assertion that a sitting President is constitutionally immune from prosecution, and the pragmatic arguments for presidential immunity in the 1973 and 2000 OLC memos simply do not

stand up to the consequences of failing to prosecute presidential crimes. Presidential immunity undermines the Framers' understanding of the ability of the other branches of government and the states to call Presidents to account and to deter corruption of democratic norms. Recent events have demonstrated how dangerous presidential immunity can be, particularly if a President commits crimes for the purpose of obstructing other methods of accountability such as criminal or civil investigations, impeachments and elections. The Department of Justice, with the support of Congress, should explicitly reverse its position on prosecuting a sitting President and state unequivocally that a President who commits a crime, can and should be indicted by federal or state prosecutors. In that way, the Department could reinforce the position of the Supreme Court in *Trump v. Vance* and earlier cases, namely that in a functioning representative democracy, no person, not even the president, is above the law.