COMMENT

AVAILABILITY OF TOLLING IN A PRESIDENTIAL PROSECUTION

KEVIN FOLEY†

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† Senior Editor, Volume 168, University of Pennsylvania Law Review; J.D. Candidate, 2020, University of Pennsylvania Law School.

(1789)
INTRODUCTION

There have been only a few instances in the history of the United States when the conduct of the President has drawn the legitimate attention of criminal prosecutors.

In 1973, President Richard Nixon came under scrutiny when several of his aides were convicted of crimes stemming from “a massive campaign of political spying and sabotage conducted on behalf of” the President’s 1972 reelection effort.¹ A special prosecutor was appointed to investigate Nixon’s involvement, before being fired by Nixon himself in the “Saturday Night Massacre.”² Several months later, after the Supreme Court held that the President could not claim privilege over taped conversations between he and his aides,³ the House Judiciary Committee passed the first of three articles of impeachment. Rather than face trial in the Senate, Nixon resigned, becoming the first and only U.S. President to resign the office. While Nixon’s resignation relieved prosecutors of the need to test whether they were constitutionally permitted

to indict the President while he remained in office, the special prosecutor’s staff carefully considered the bounds of the President’s immunity in the months leading up to Nixon’s departure. Watergate thus provided the initial battleground for constitutional law scholars to debate the President’s amenability to indictment and criminal process.

In 1994, an Independent Counsel was appointed to investigate President Bill Clinton’s involvement in a failed Arkansas real estate deal dubbed “Whitewater.” The investigation proceeded in several phases over the succeeding four years, largely under the leadership of Kenneth Starr, a former federal judge who served as Solicitor General during the George H.W. Bush Administration. While the Clintons were never charged in connection with the Whitewater matter, Starr’s investigation eventually expanded to encompass several other controversies, including the firing of White House travel office employees and, most notably, President Clinton’s sexual relationship with former White House intern Monica Lewinsky. Starr’s report on the Lewinsky matter ultimately concluded that President Clinton committed perjury and obstruction of justice through various public statements he made regarding the alleged affair—charges for which Clinton was eventually acquitted at an impeachment trial. Although Starr ultimately chose not to pursue an indictment against Clinton, he commissioned a report

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4 See Memorandum from Carl B. Feldbaum et al., Assistant Special Prosecutor, to Leon Jaworski, Special Prosecutor, Re: Recommendation for Action by the Watergate Grand Jury 1-9 (Feb. 12, 1974) (concluding that the President could be compelled to appear before the Watergate Grand Jury). Nixon’s allies in the Justice Department also considered the issue of presidential immunity as the Watergate Scandal unfolded, producing a memorandum that concluded the President was not amenable to indictment while in office. Memorandum from Robert G. Dixon, Jr., Assistant Atty Gen., Office of Legal Counsel, Re: Amenability of the President, Vice President, and other Civil Officers to Federal Criminal Prosecution While in Office 32 (Sep. 24, 1973) [hereinafter 1973 OLC Memo].

President Ford later granted Nixon a “full, free, and absolute pardon” for all crimes he committed or may have committed while he was in office. See Proclamation No. 4311, 39 Fed. Reg. 32601 (Sept. 10, 1974).


8 See generally KENNETH W. STARR, REFERRAL FROM INDEPENDENT COUNSEL KENNETH W. STARR IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, SECTION 595(C), H.R. DOC. NO. 105-310, at 310 (1998) (finding that Clinton had “made false statements about whether he had lied under oath or otherwise obstructed justice”).

on the indictability of the President, which concluded the Independent Counsel's office was legally permitted to indict Clinton. At the same time, Clinton's Justice Department prepared its own memorandum opining on the issue and concluded the opposite, largely drawing from the work of a memorandum prepared by the Nixon Administration that found the same. The Starr investigation generated a renewed battle among commentators over the question of presidential immunity

This issue became relevant again in June 2017, when Special Counsel Robert Mueller began investigating current President Donald Trump for obstruction of justice related to his campaign's contacts with Russian diplomats—an investigation that ultimately concluded without recommending criminal action against the President. Nevertheless, as several of Trump's current and former associates pled guilty, suffered convictions, or were indicted as a result of the Mueller probe, the debate

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10 See Memorandum from Ronald D. Rotunda, Professor of Law, Univ. of Ill. College of Law, to Kenneth W. Starr, Indep. Counsel, Re: Indictability of the President 44-46 (May 13, 1998) ("The decision to prosecute or not prosecute [the President] ... lies with the Independent Counsel ... .")

11 See A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 258-60 (2000) [hereinafter 2000 OLC Memo] ("[W]e believe that the Constitution requires recognition of a presidential immunity from indictment ... while the President is in office.").

12 Throughout this Comment, I use the term "presidential immunity" to mean the President's immunity from indictment and/or criminal process.


over presidential immunity once again came to the forefront.18 This argument is even more important now because, unlike in the cases of Nixon and Clinton, Congress is not fully controlled by the President’s opponents, rendering the possibility of conviction at an impeachment trial highly unlikely.19 Thus, to the extent prosecutors were convinced of President Trump’s criminality, indictment may have been the only outlet for them to seek justice against him.

The three controversies discussed above have produced voluminous scholarship on the question of whether a sitting president is amenable to indictment and criminal process, some of which I discuss in Part I. In several


19 Ed Kilgore, Republican Solidarity Will Protect Trump From Impeachment, INTELLIGENCER (Jan. 6, 2019), http://nymag.com/intelligencer/2019/01/republican-solidarity-will-protect-trump-from-impeachment.html (https://perma.cc/DS8E-X2R3) (“There have been two successful presidential impeachments in U.S. history (neither of which led to a Senate conviction), and one near-impeachment that produced a presidential resignation. In all three cases, Congress was controlled by the president’s opponents.”). The unlikelihood of an impeachment conviction by a politically-aligned Senate was on display during President Trump’s recent impeachment trial, where Republican Senators largely made up their minds to acquit the President before the trial even began. See Savannah Behrmann, Rand Paul on Senate Trial: ‘I Don’t Think Any Republicans are Going to Vote for Impeachment’, USA TODAY (Jan. 17, 2020), https://www.usatoday.com/story/news/politics/2020/01/16/trump-impeachment-rand-paul-said-senators-have-made-up-their-minds/449349002/ (https://perma.cc/AHQ6-3J7A).
of these works, commentators on both sides of the issue have identified a critical statute of limitations problem that arises when it is assumed that a sitting president is unindictable.

Suppose that a President commits a federal bribery offense in January 20x1, the first year of his presidency. This offense is quickly exposed by the media, and a special counsel is appointed to investigate. By January 20x4, investigators have all they need to charge the President with bribery, but we assume, as many have argued, that any criminal process against the President is unavailable while he or she remains in office. Much to their dismay, investigators soon come to realize that Congress, wherein both houses are overwhelmingly controlled by the President’s party, refuses to impeach the President for this offense, or any other for that matter. Meanwhile, voters in the President’s party remain fiercely loyal to him despite the charge and, as a majority of the electorate, are happy to reelect him to another term beginning in 20x5.20 One year later, in January 20x6, prosecutors are dismayed when the 5-year statute of limitations period for the bribery offense expires, without the President ever being brought to justice. Certainly this cannot be the result the Framers would have wanted—even though they may not have anticipated that extreme party polarization could render the impeachment process

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20 A situation not wholly unlike this unfolded recently in Israel, where incumbent Prime Minister Benjamin Netanyahu ran for office while facing imminent indictment for fraud, bribery, and breach of trust. See e.g., Isabel Kershner, With Netanyahu Facing Indictment, Israel Braces for a Wild Election, N.Y. TIMES (Mar. 1, 2019), https://www.nytimes.com/2019/03/01/world/middleeast/netanyahu-indictment-election.html [https://perma.cc/JW2M-KXXA] (noting that Prime Minister Netanyahu “still retains a strong base” despite “facing indictment for corruption”). While the Mueller investigation concluded without recommending criminal charges against President Trump, it is not unreasonable to think a similar situation could have unfolded in the United States had Trump faced criminal charges. Polls showed that Republican support for the President was largely unwavering during the Mueller investigation, with many GOP voters agreeing with the sentiment that the probe was a “witch hunt.” Domenico Montanaro, Poll: Republicans are Only Group That Mostly Sees Mueller Probe as a ‘Witch Hunt’, NPR (Dec. 7, 2018), https://www.npr.org/2018/12/07/674335848/poll-republicans-are-only-group-that-mostly-sees-mueller-probe-as-a-witch-hunt [https://perma.cc/847Z-ZJH5]. Republican voters also largely remained loyal to Trump after his impeachment. See Tess Bonn, Poll: 17 Percent of Republicans Support Trump Impeachment, Removal from Office, THE HILL (Jan. 13, 2020), https://www.thehill.com/hlvv/rising/478029-poll-17-percent-of-republicans-support-trump-impeachment-removal-from-office [https://perma.cc/HMX9-JC6] (discussing a poll conducted after President Trump’s impeachment by the House showing that only 17 percent of Republican voters thereafter supported his removal from office).
ineffective\textsuperscript{21}—for it has been a principle since the founding that not even the President is “above the law.”\textsuperscript{22}

Foreseeing the intractability of this result, commentators arguing in favor of presidential immunity have theorized that, in such a case, some form of “tolling” could be invoked by a court to delay expiration of the applicable statute of limitations. For example, in his impeachment handbook, constitutional law scholar Charles Black stated that “an incumbent president cannot be put on trial in the ordinary courts for ordinary crime . . . [a] simple and obvious solution would be . . . to delay indictment until after his term [with the statute of limitations] ‘trolled’ . . . until the president’s term is over.”\textsuperscript{23} Likewise, Professor Akhil Amar, in one of several pieces he has authored arguing in favor of presidential immunity, theorized that “[t]he statute of limitations can be stayed” to preserve the ability to prosecute the President after he or she leaves office.\textsuperscript{24} Former Assistant Attorney General Randolph Moss, in the aforementioned 2000 OLC Memo, suggested that the doctrine of equitable tolling could be invoked to delay expiration of the statute of limitations in such a case.\textsuperscript{25} Following the logic proposed by these scholars, in our example above, the President could be indicted for bribery the minute he or she leaves office. However, no work proposing this solution has performed an analysis of current precedent on tolling rules to support the conclusion that this remedy would be available to prosecutors facing such a dilemma. Here, I seek to fill this gap in the scholarship by analyzing whether history and precedent would permit the use of some form of tolling to delay expiration of the statute of limitations for a crime committed by a President.

\textsuperscript{21} See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (“[R]ise of the party system has made a significant extrConstitutional supplement to real executive power . . . . Party loyalties and interests, sometimes more binding than law, extend [the President’s] effective control into branches of government other than his own, and he may often win, as a political leader, what he cannot command under the Constitution.” (Jackson, J., concurring)); Eric M. Freedman, On Protecting Accountability, 27 Hofstra L. Rev. 647, 702 (1999) (noting “the possibility that the Congress might be dominated by members of the President’s political party” may frustrate the ability of the impeachment process to operate as it was intended).

\textsuperscript{22} Thomas Paine, Common Sense and Other Writings 31 (Gordon S. Wood ed., Random House 2003) (1776) (“[I]n America the law is king. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other.”); Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States, (1787), reprinted in Collected Works of James Wilson 236 (Kermit L. Hall & Mark David Hall eds. 2007) (“Add to all this, that [the President] is placed high, and is possessed of power far from being contemptible; yet not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment.”).


\textsuperscript{24} Akhil Reed Amar & Brian C. Kalt, The Presidential Privilege Against Prosecution, 2 Nexus 11, 16 (1997).

\textsuperscript{25} 2000 OLC Memo, supra note 11, at 256 & n.33 (suggesting that the statute of limitations may be tolled if the President cannot be indicted).
who is immune from criminal process. I approach this question by asking whether a tolling rule could be adopted to satisfy this problem grounded in either (1) general equitable considerations or (2) the policies and procedures of other federal law.

In Part I, I discuss the legal bases furthered in support of presidential immunity and the practical reasons for assuming this doctrine applies to the current President. In Part II, I address the tolling question posed above by analyzing whether a court may be permitted to toll the applicable statute of limitations in a case against the President by relying on either general equitable considerations or its power to implement the policies of other federal law. Finally, in Part III, I provide two alternative solutions to solving the statute of limitations problem to the extent judicial tolling is unavailable.

I. PRESIDENTIAL IMMUNITY

While presidential immunity is far from a settled issue,26 many reputable constitutional law scholars contend that it exists. As discussed above, the supposed existence of presidential immunity is what produces the important legal question that this Comment addresses; to the extent it exists, the President may be able to escape prosecution for a crime if he or she can ride out the statute of limitations for the offense while in office. Because I seek only to explore the practical realities that flow from presidential immunity, I will assume that it exists without evaluating the merits of its justifications. In this Section, I briefly discuss the historical and prudential arguments furthered in favor of presidential immunity and the practical reasons for assuming such immunity exists. In addition to informing the tolling analysis, these arguments are important to consider when crafting solutions to the statute of limitations problem (to the extent they are necessary), as any proposed solution must not violate the legal justifications underlying presidential immunity.

A. Textual and Historical Considerations

The Constitution provides no clear answer on whether the President is subject to criminal prosecution. As a result, commentators have pieced together evidence of how the Framers may have thought about this issue from various constitutional provisions. An obvious starting point is the provisions discussing impeachment, which address presidential wrongdoing head-on.

Article I mandates that impeachment be invoked by the House of Representatives and tried by the Senate, with the Chief Justice presiding. In addition, the Impeachment Judgment Clause states that:

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

Article II confirms that the President is subject to this process for certain enumerated offenses and “other high Crimes and Misdemeanors.” These provisions indicate that the Framers anticipated misconduct by future Presidents and, as a consequence, provided a detailed process for effectuating their removal. The question that remains unanswered by these provisions is whether impeachment was meant to be the public’s sole remedy against the President’s criminal conduct while he or she is in office, or whether it was prescribed in addition to potential criminal prosecution.

While the Founders clearly rejected the ancient English concept that “the King can do no wrong,” there is relatively little documentation of their views on oversight of the President outside of the constitutional provisions on impeachment. However, presidential immunity supporters have found some ammunition among the Founders’ communications to support the theory. For example, some commentators argue that the text of the Impeachment Judgment Clause, supported by Alexander Hamilton’s discussion of this provision in the Federalist Papers, forecloses criminal process against the President because, by its terms, it only contemplates indictment after conviction at an impeachment trial. Commentators make this argument by

27 U.S. CONST. art. I, § 2, cl. 5. (“The House of Representatives . . . shall have the sole Power of Impeachment.”); U.S. CONST. art. I, § 3, cl. 6. (“The Senate shall have the sole Power to try all Impeachments . . . , the Chief Justice shall preside.”).

28 Id. art. I, §3, cl. 7.

29 Id. art. II, §4.

30 See Clinton v. Jones, 520 U.S. 681, 697 n.24 (1997) (“Although we have adopted the related doctrine of sovereign immunity, the common-law fiction that ‘the king . . . is not only incapable of doing wrong, but even of thinking wrong,’ . . . was rejected at the birth of the Republic.” (citing Nevada v. Hall, 440 U.S. 410, 415 (1979))).

31 See THE FEDERALIST NO. 65, at 398-99 (Alexander Hamilton) (Clint Rossiter ed., 1961) (“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.”); THE FEDERALIST NO. 69, id. at 416 (“The President of the United States 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 FEDERALIST NO. 77, id. at 464 (stating that the President is “at all times liable to impeachment, trial, dismission from office . . . and to the forfeiture of life and estate by subsequent prosecution in the common course of law.”).
adding emphasis to certain words (in the Impeachment Judgment Clause and the cited provisions from the Federalist Papers) to infer a proclamation by the Framers that criminal process may follow, but not precede, impeachment. By emphasizing “conviction” in the Impeachment Judgment Clause, for example, it may be argued that the Framers only sanctioned indictment of a President after he or she was successfully impeached. Similarly, emphasizing the various timing words in certain passages in the Federalist Papers (noted above), wherein Alexander Hamilton discusses criminal process against the President (e.g. “after having been sentenced,” “would afterwards be liable,” “subsequent prosecution”) may give rise to the conclusion that the approval of this process after Impeachment also amounted to a prohibition of this process before it.

Professor Akhil Amar has also cited statements by John Adams and Oliver Ellsworth as historical support for his position that the President may not be indicted. However, even those commentators arguing in favor of presidential immunity have at times admitted that the historical evidence is conflicting and provides a much weaker basis for the theory than prudential considerations.

32 See 2000 OLC Memo, supra note 11, at 224 (“The textual argument that the criminal prosecution of a person subject to removal by impeachment may not precede conviction by the Senate arises from the reference to the ‘Party convicted’ being liable for ‘Indictment, Trial, Judgment and Punishment.’”); see also CASS R. SUNSTEIN, IMPEACHMENT: A CITIZEN’S GUIDE 163 (2017) (noting that the text of the Impeachment Judgment Clause “may suggest a temporal limitation: first impeachment, then judgment and removal, then prosecution”).

33 See Akhil Reed Amar, On Prosecuting Presidents, 27 Hofstra L. Rev. 671, 671-72, 672 nn.4 & 5 (1999) (concluding through this argument that Hamilton supported Presidential immunity).

34 See Amar & Kalt, supra note 24, at 16 (stating that John Adams and Oliver Ellsworth supported temporary immunity and believed that a sitting President could be indicted for murder when he is no longer President; Amar, supra note 33, at 671-72 (noting that the position “that a sitting President claiming the full privileges of his office may only be criminally tried by this ‘court,’ the Senate, sitting in impeachment and can be criminally tried elsewhere only after he has left office” was held firmly by both John Adams and Oliver Ellsworth).

35 Here, as with many historical arguments on constitutional questions, “[a] century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of [the] question.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

36 Former Assistant Attorney General Randolph Moss noted in the 2000 OLC Memo that the likely purpose of the Impeachment Judgment Clause was to foreclose a double jeopardy argument by a President who was subject to criminal prosecution after being successfully impeached, and not to comment on the amenability of a President to indictment while in office. 2000 OLC Memo, supra note 11, at 224. The 1973 OLC Memo provides further historical support for this conclusion. See 1973 OLC Memo, supra note 4, at 3-4 (citing works by Constitutional Convention member Luther Martin, Justice Story, and former lawyer and early commentator William Rawle as support); accord Scott W. Howe, The Prospect of a President Incarcerated, 2 NEXUS 86, 89 (1997) (“[T]he impeachment provision indicates the separate and distinct functions to be accomplished by impeachment and judicial prosecution, not that impeachment must precede judicial prosecution. It indicates that impeachment does not bar subsequent, judicial prosecution, but does not clarify whether judicial prosecution must precede impeachment.”).
B. Prudential Considerations

While the Supreme Court has never been afforded the opportunity to determine whether the President is amenable to criminal prosecution, it has heard several cases involving past presidents that are relevant to the question. In each case, the Court employed a balancing methodology to determine the amenability of the President to judicial process in different contexts. And given that the historical and textual evidence for presidential immunity is weak, such a balancing test, to the extent it would be employed in determining the President’s amenability to criminal process, would likely be decided based on the weight of prudential considerations favoring or disfavoring immunity. Thus, prudential considerations are critical to constructing an effective argument in favor of presidential immunity. Here, I present the prudential considerations raised by commentators as weighing in favor of presidential immunity, which largely take the following form: (1) impeachment must be the sole mechanism for removing a President from office, (2) the need to defend against criminal charges would unduly burden the President in performing his or her official duties, and (3) allowing criminal process against the President would subject him or her to frivolous litigation from overzealous prosecutors. I discuss each of these arguments in turn.

First, some commentators argue that impeachment is the only appropriate means for prosecuting a sitting President because, as Congress is a political body representing the interests of the whole nation, it is the only appropriate body for prosecuting and removing an official elected by all of the people. Permitting a prosecutor to indict the President and subject him or her to criminal sanctions, including imprisonment, would place the power of removal not with the people, through Congress, but in the hands of the prosecutor and jury. As Professor Akhil Amar contends, the need for accountability in exercising the momentous decision to remove a President...
dictates that this power should be vested only in the Congress. Furthermore, “the impeachment process is better suited to the task” of presidential prosecution “than is a criminal proceeding.” It “allows for a much more flexible and stripped-down version of procedure;” it would conclude faster given there can be “no appeal from the verdict;” it “makes geographical sense” given an impeachment trial would be held down the street from the President’s office; and it would be conducted by a political body which “the President is already institutionally equipped to deal with.”

Second, presidential immunity supporters contend that subjecting the President to criminal process is untenable because it would hamper his or her ability to adequately perform the unique duties of the executive office, thereby arresting an entire branch of government. Because the President is entrusted with nondelegable powers, providing temporary immunity while he or she remains in office not only makes sense, but is critical to the proper functioning of the office. The Framers anticipated that defense against criminal charges would require significant mental and physical involvement by the defendant, and would likely provide a distraction different in manner and degree from those experienced by past presidents. Furthermore, the

39 See Amar & Kalt, supra note 24, at 20 (“When a President is removed, it is not by an unaccountable state official or an even less accountable special prosecutor. It is done instead by the most august, most representative, most constitutionally elaborated, and most accountable deliberative body we have, the Congress . . . . Impeachment, then, is the sole means of removing a sitting President, and is a good one at that.”); see also BLACK, supra note 23, at 1 (“Voting in the presidential election is certainly the political choice most significant to the American people, and most closely attended to by them. No matter, then, can be of higher political importance than our considering whether, in any given instance, this act of choice is to be undone, and the chosen president dismissed from office in disgrace.”).
40 2000 OLC Memo, supra note 11, at 231.
41 Amar & Kalt, supra note 24, at 19.
42 2000 OLC Memo, supra note 11, at 231.
43 Amar & Kalt, supra note 24, at 19.
44 Id.
45 Id. at 12 (“When the President is substantially distracted from his job, he is half-absent and his job goes half-undone. If he is arrested, so too is the executive branch of the government.”); Howe, supra note 36, at 87 (“Immunity can help to ensure that a President is undistracted from official duties by the need to defend against a criminal prosecution.”); see also SUNSTEIN, supra note 32, at 164 (“Unlike a civil action, a criminal prosecution imposes a unique kind of stigma and threat, such that the president’s ability to undertake his constitutionally specified tasks really would be at risk.”).
46 See 2000 OLC Memo, supra note 11, at 229 (“The institution of criminal proceedings against a sitting President ‘would interfere with the President’s unique official duties, most of which cannot be performed by anyone else.’” (quoting 1973 OLC Memo, supra note 4)); Howe, supra note 36, at 88 (“The President’s distraction in defending against criminal charges and in fulfilling any sentence imposed could impede his best efforts to make decisions that we entrust to the President alone.”).
47 See 2000 OLC Memo, supra note 11, at 231 (“The constitutional provisions governing criminal prosecutions make clear the Framers’ belief that an individual’s mental and physical involvement and assistance in the preparation of his defense both before and during any criminal trial would be intense, no less so for the President than for any other defendant.”).
demands on the President have only increased since the founding, making any significant distraction more impactful now than in the past. For these reasons, the imposition of criminal charges against the President presents a burden on the executive branch that demands he or she be afforded temporary immunity from indictment.

Third, pro-immunity commentators reason that allowing criminal process against the President would open the floodgates to frivolous or politically motivated charges from federal and state prosecutors alike. This consideration seems to hold less weight, given that there is no evidence of any attempts by prosecutors to bring such charges in the past while the possibility of presidential indictment remained open. Nevertheless, this argument relies on the premise that the consequences of an action cannot be observed until after it is implemented and thus, the prospect of a spike in criminal prosecutions against the President theoretically remains possible once prosecutors are certain that such an option is constitutionally permitted.

C. Immunity Assumption

As seen in the foregoing discussion, there are strong practical considerations justifying the conclusion that the President is immune from compulsory criminal process while in office, although this remains an open and as-yet-untested question. To conclude my discussion on presidential immunity, I note briefly why the assumption I adopt here—that the President is in fact immune from indictment while in office—is a reasonable one given the current state of affairs, regardless of one’s view of this position on the merits.

First, this position is the one originally taken by the Justice Department in 1973 (in the 1973 OLC Memo) and reaffirmed in 2000 (in the 2000 OLC Memo)—a position that would likely bind a federal prosecutor seeking to

48 Compare 1973 OLC Memo, supra note 4, at 28 (“During the past century the duties of the Presidency . . . 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.”), with Jonathan Turley, From Pillar to Post: The Prosecution of American Presidents, 37 AM. CRIM. L. REV. 1049, 1081 (2000) (acknowledging the argument that presidents may be “less important to the actual operation of the Executive Branch” today than they were in the eighteenth century, as “the federal government is now composed of a plethora of different agencies and subagencies which are run with little or no involvement of the White House”).

49 See Howe, supra note 36, at 87 (arguing that denying temporary immunity would allow a “myriad of federal or state prosecutors throughout the country [to] bring the President to task for petty or politically-influenced allegations”).

50 See id. (“Such charges might not be leveled often, as evidenced by the absence of such charges in the past.”); see also Turley, supra note 48, at 1087; noting that “only three sitting Presidents in history have been subjected to suits for their private actions” and that “[n]o President has ever been formally charged with a criminal violation” (internal quotation marks and citations omitted)).
indict the President in the future. 51 Second, as seen throughout the scholarship on presidential immunity discussed above, the affirmative position on presidential immunity is one often taken by conservative legal scholars. Given that this question would ultimately be decided by the Supreme Court, which in its current form maintains a strong conservative majority, it is reasonable to assume that the current justices, (without delving in-depth into their potential views on the subject) would most likely decide in favor of presidential immunity. 52 Given both of these realities, it is reasonable to conclude that the current position of the highest courts and prosecutorial agencies is that the President is immune from indictment while in office. This makes the tolling inquiry critical to determining whether presidential immunity may, in certain instances, render the President “above the law,” or whether it merely delays the government’s ability to bring the President to justice.

II. THE TOLLING QUESTION

Having discussed the arguments in favor of presidential immunity, and the reasons for assuming this immunity obtains for the current Executive, I now turn to the question this Comment seeks to answer: whether a tolling rule could be invoked to delay expiration of the statute of limitations for a crime committed by the President while he or she is immune from criminal


52 During Justice Kavanaugh’s nomination process in 2018, politicians and legal scholars called attention to previous articles he had written on the subject of presidential prosecution. See Brett M. Kavanaugh, Separation of Powers During the Forty-Fourth Presidency and Beyond, 93 MINN. L. REV. 1454, 1459-62 (2009)(discussing the merits of providing sitting presidents with temporary deferrals of civil suits, criminal prosecutions, and criminal investigations); Brett M. Kavanaugh, The President and the Independent Counsel, 86 GEO. L.J. 2133, 2178 (1998) (describing the adversarial relationship between a sitting president and an independent counsel as a “fundamental flaw,” instead advocating for clearer roles for Congress and the President in policing executive conduct). Commentators debated whether these articles tipped Kavanaugh’s hand as to where he stands on the President’s amenability to indictment. See Salvador Rizzo, Does Brett Kavanaugh Think the President is Immune from Criminal Charges?, WASH. POST (July 11, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/07/11/does-brett-kavanaugh-think-the-president-is-immune-from-criminal-charges/?utm_term=.7e3c42c1053a [https://perma.cc/E6CB-PHE3] (concluding that Kavanaugh’s work does not support an indisputable assumption that he believes the Constitution prohibits the indictment of the President).
I follow two paths to answering this question. First, I consider whether a court facing such a case would have the ability to toll the applicable statute of limitations in order to implement general equitable principles. In other words, I ask whether a court could invoke the doctrine of equitable tolling to preserve prosecution against the President. In Section II.B, I address this question by first considering whether equitable tolling would be available in a criminal prosecution in the first instance, and then applying existing precedent on equitable tolling to the circumstances of our hypothetical case against a former President. This analysis responds to the 2000 OLC Memo, which specifically pointed to equitable tolling as a doctrine that could be used to solve the statute of limitations problem. Next, I consider whether a court could adopt a novel tolling rule to preserve charges against the President in order to implement the policies of other federal law. In Section II.C, I address this question by discussing when and how federal courts have adopted tolling rules in the past to effectuate the provisions of other federal law, and applying the logic of these cases to the hypothetical case against a former President facing otherwise time-barred charges. This analysis responds to commentators such as Charles Black and Professor Akhil Amar, who have hypothesized that some form of tolling would solve the potential statute of limitations problem without specifying an existing tolling doctrine that a court should or could employ.

As noted above, the answer to the tolling question is critical to determining whether presidential immunity can coexist with enforcement of the rule of law. To the extent the President can evade prosecution for a crime merely by ascension to the office, certainly he or she could not be considered “an ordinary citizen differing from his or her peers only in being temporarily delegated to perform certain functions.”

A. Criminal Statutes of Limitations

Before addressing the tolling question as outlined above, I briefly discuss the traditional interests served by criminal statutes of limitations, which discussion will inform both prongs of the analysis I pursue in the latter parts of this Comment.

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53 Freedman, supra note 21, at 705.
Criminal statutes of limitations “have been a hallmark of American law since the Founding.” Colonies enacted these statutes as early as 1652, and a limitations period was adopted for most federal crimes in 1790. This practice distinguished the United States from England, “where the doctrine that 'no lapse bars the King' has made statutes imposing limitations on criminal prosecutions extremely rare.” The purpose of criminal statutes of limitations is to "limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions." They represent a “legislative determination that the purposes of criminal law may best be served under some circumstances by limiting the power to proceed against an alleged criminal.” This determination is supported by two sets of interests: (1) promoting fairness and protecting repose by preventing defendants from having to defend themselves against old charges, and (2) improving efficiency and ensuring predictability by encouraging the government to promptly investigate suspected criminal activity.

1. Fairness, Accuracy, and Repose

First, criminal limitations periods “protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time.” Protecting defendants in this way not only ensures accuracy by eliminating reliance on stale evidence but also serves to “promote individual and societal interests in repose.”

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54 Lindsey Powell, Unraveling Criminal Statutes of Limitations, 45 AM. CRIM. L. REV. 115, 115 (2008). The use of criminal statutes of limitations followed from ancient Roman law, which barred prosecution of most offenses after twenty years. Most civil law countries followed this practice and now impose limitations periods which largely vary with the seriousness of the crime. Id. at 121.


56 Id. at 631. The original rule provided for a general two-year limitations period for most federal crimes, which subsequently rose to three years in 1876 and five years in 1954, where it remains today. Powell, supra note 54, at 116.

57 United States v. Levine, 658 F.2d 113, 125 (3d Cir. 1981); see also Powell, supra note 54, at 121 n.40 (“Britain and Canada continue to impose no statutory restriction on the government’s delay in indicting most crimes.”).


59 The Statute of Limitations in Criminal Law, supra note 55, at 630.

60 See Powell, supra note 54, at 115-16 (describing the two major sets of interests that limitations theories are intended to further).

61 Tussie, 397 U.S. at 114.

62 Powell, supra note 54, at 129; see also United States v. Marion, 404 U.S. 307, 322 (1971) (“[Statutes of limitations] are made for the repose of society and the protection of those who may [during the limitation] . . . have lost their means of defence.” (citation omitted)).
“Authorities on the law of evidence and psychologists recognize that there is a relation between the passage of time and the extent of accuracy and memory,” and courts have acknowledged that this reality in part drives the evidentiary justification for statutes of limitations. A defendant’s ability to prepare a successful defense is undeniably impaired when the state decides to prosecute him or her long after the alleged criminal act. Witnesses that are important to the defendant’s claims may die or move away, critical records may be lost or destroyed, memories fade, and without a fair warning of the charges against him or her, a defendant has no notice of the need to preserve exculpatory evidence. These problems demonstrates that limitations periods are relevant to almost any type of offense, as defendants will always need to rely on some amount of witness testimony or documentary evidence to demonstrate their innocence, the availability of each of which is risked when prosecution is delayed for a significant time. The potential loss of important evidence also erodes confidence in the ability of the government to achieve a proper outcome: “[w]here material evidence has become unavailable, [the] prosecution is also less likely to produce a reliable result, and the public interest in the prosecution is therefore diminished.”

63 The Statute of Limitations in Criminal Law, supra note 55, at 637 (footnotes omitted).
64 See Stogner v. California, 539 U.S. 607, 615 (2003) (explaining that the judgment that “after a certain time, no quantum of evidence is sufficient to convict” typically rests in part on “evidentiary concerns—for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable”).
65 See Gary M. Ernsdor & Elizabeth F. Loftus, Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression, 84 J. CRIM. L. & CRIMINOLOGY 129, 141 (1993) (“With passing time, a defendant faces an increasingly difficult task in formulating and mounting an effective defense.”); Rinat Kitai-Sangero, Between Due Process and Forgiveness: Revisiting Criminal Statutes of Limitations, 61 DRAKE L. REV. 423, 426 (2013) (“At the criminal level, defendants may be unable to mount a defense many years after the offense.”).
66 The Statute of Limitations in Criminal Law, supra note 55, at 632; see also P. G. Barton, Why Limitations in the Criminal Code?, 40 CRIM. L.Q. 188, 190 (1997) (“As time passes . . . witnesses move away or die.”).
67 The Statute of Limitations in Criminal Law, supra note 55, at 632.
68 Id.; see also Ernsdor & Loftus, supra note 65, at 141 (“[W]ith the passage of time . . . memories fade.”).
69 See Stogner, 539 U.S. at 631 (2003)(describing laws that create new criminal limitation periods as “depriving the defendant of the fair warning . . . that might have led him to preserve exculpatory evidence” (internal quotations omitted)).
70 Notwithstanding their relevance to nearly all types of offenses, Congress and the states have decided for various reasons that certain crimes, such as murder, should not be subject to a limitations period. See, e.g., CHARLES DOYLE, CONG. RESEARCH SERV., RL31253, STATUTE OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW 17-21 (2017) (listing the federal offenses that are not subject to a statute of limitations period).
71 Powell, supra note 54, at 129; see also Barton, supra note 66, at 190 (“It is suggested that a conviction based upon older evidence might be less reliable and therefore less acceptable to the public than one based upon fresh evidence.”).
Limiting prosecutions to periods when we believe reliable evidence will remain available also promotes society’s interest in repose; an interest that courts have recognized is “fundamental to our system of criminal law.” Repose reflects the judgment that, after a certain period of time, punishment may be less warranted and prosecution is not worth disrupting social healing. Providing for a limitations period “embodies a moral judgment that if a person has lived blamelessly for a significant time, he should not have the anxiety of potential prosecution hanging over him forever.” When a person demonstrates self-rehabilitation through the omission of criminal activity for an extended period, society’s retributive and incapacitative interests in punishment are diminished. On the other hand, individuals who have committed crimes more recently pose a more immediate threat to society and there is no extended stretch of good behavior to compel the conclusion that they are rehabilitated.

2. Efficiency and Predictability

Second, criminal statutes of limitations “encourage law enforcement officials promptly to investigate suspected criminal activity.” This leads to the efficient conduct of investigations: by providing a limited period in which a crime may be charged, prosecutors are incentivized to vigilantly pursue

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72 See United States v. Levine, 658 F.2d 113, 125 (3d Cir. 1981) (“[S]tatutes of limitations embody historically important rights of repose and fairness for defendants which are fundamental to our system of criminal law . . . .”); see also Bridges v. United States, 346 U.S. 209, 215-16 (1953) (stating that the “long-standing congressional ‘policy of repose’ . . . is fundamental to our society and our criminal law.”).

73 See Powell, supra note 54, at 130 (“Statutes of limitations are also made for the repose of society. The prosecution of old crimes perpetuates ill feeling and prevents social healing, and limitations periods are meant to impose an end-point after which prosecution cannot revive such sentiments.” (footnotes omitted) (quotations omitted)).

74 Scott Turow, Still Guilty After All These Years, N.Y. TIMES (Apr. 8, 2007), https://www.nytimes.com/2007/04/08/opinion/08turow.html [https://perma.cc/3L7B-YYRU]; see also The Statute of Limitations in Criminal Law, supra note 56, at 634 (“The pursuit of only more recent criminals is consistent with that aim of criminal law which seeks to rehabilitate wrongdoers and serves to free the citizen from vexatious fear of prosecution for old crimes.”). But see Kitai-Sangero, supra note 65, at 433 (“Withdrawal from criminal conduct should not exempt one from liability for past crimes.”).

75 Amy Dunn, Note, Criminal Law—Statutes of Limitation on Sexual Assault Crimes: Has the Availability of DNA Evidence Rendered Them Obsolete?, 23 U. ARK. LITTLE ROCK L. REV. 839, 845 (2001) (“Another policy justification typically cited in favor of time limits on prosecuting crimes is the idea that the need for punishment wanes as time passes. Various legal scholars note that society’s instinct for retribution may, in some instances, fade . . . . Theoretically, those who have committed criminal acts in the past and have not since engaged in criminal behavior have ‘self-rehabilitated,’ making punishment long after their wrongs moot.”) (footnotes omitted)).

suspected criminal activity soon after it happens.77 Requiring a prompt investigation also augments the defendant’s constitutional right to a speedy trial, which is triggered only after an indictment is returned against him,78 by forbidding the government from dragging its feet before bringing charges.79 In addition, the provision of a limitations period saves costs by “spar[ing] the courts from litigation of stale claims,”80 which would inevitably raise complicated evidentiary and burden of proof questions. Statutes of limitations also provide some assurance that prosecutors are incentivized to pursue the most significant or important allegations; creation of a limited window encourages prosecutors to litigate the most serious charges first, and significant “[d]elay suggests that the matter is not that important.”81 Finally, limitations periods further efficiency interests by “providing predictability about when causes of action will expire.”82 By providing a bright-line rule for when the government’s prosecutorial authority over a matter is exhausted, prosecutors and would-be defendants are spared from expending time and other resources that would otherwise be spent determining their rights and opportunities.83

B. Equitable Tolling

Being informed of the purposes underlying criminal statutes of limitations, I now evaluate whether the tolling of such statutes would be permitted to fill the potential loophole produced by the theorized existence of presidential immunity.

It is settled law that federal courts have the judicial power to toll statutes of limitations when doing so is “consonant with the legislative scheme.”84 This power stems from the authority of the court to “fashion rules that are required

77 See Kitai-Sangero, supra note 65, at 429 ("Statutes of limitations thus encourage law enforcement agencies to be efficient in investigating and prosecuting crimes."); Powell, supra note 55, at 130 ("Criminal limitations periods also further efficiency interests . . . . Without any limit on the period in which an indictment may issue, investigators and prosecutors would have less incentive to be diligent.").

78 See United States v. Hills, 618 F.3d 619, 629 (7th Cir. 2010) ("The constitutional right to a speedy trial is triggered when an indictment is returned against a defendant.").

79 See Statute of Limitations in Criminal Law, supra note 55, at 633 ("[A] statute of limitations is no assurance as to time of trial, since the finding of an indictment tolls the running of the statute but does not determine when trial will be held. It is at this point that the constitutional right to a speedy trial . . . . supplements the aim of the limitation." (footnotes omitted)).

80 Powell, supra note 54, at 131.

81 Barton, supra note 66, at 190.

82 Powell, supra note 54, at 131; see also United States v. Marion, 404 U.S. 307, 322 (1971) ("[Criminal limitations] statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant’s right to a fair trial would be prejudiced.").

83 Powell, supra note 54, at 131.

for the protection of existing federal law.” In cases that involve “claims brought in federal court under federal statutes with their own limitations provisions,” there exists “federal judicial lawmaking power to fashion a tolling rule so long as it is (1) consistent with the statutory limitations provision and (2) implements either general equitable principles, against the background of which Congress is deemed to legislate, or the provisions of, or policies underlying, other federal law.” In this Section, I focus on rules that implement general equitable principles, and analyze whether a court could use its judicial power under this logic to craft a tolling rule that solves the statute of limitations problem this Comment addresses. Unlike the tolling rules discussed in Section II.C, equitable tolling rules are not employed to effectuate institutional interests, but to “modify a statutory time bar where its rigid application would create injustice.” And while judicial tolling rules akin to American Pipe tolling are concerned with producing proper policy outcomes that are consistent with the underlying legislative scheme, equitable tolling rules are concerned with doing justice in individual cases, particularly in response to the behavior of one or more parties. In this Section, I analyze whether, under current precedent, equitable tolling could be invoked by a court to delay expiration of the statute of limitations for a crime committed by the President while he or she is immune from criminal prosecution. I begin by briefly introducing the concept of equitable tolling and considering whether it can theoretically be applied in a criminal case. I then discuss current precedent on equitable tolling and analyze how it may be applied in our hypothetical case against the President. Based on this analysis, I conclude that (1) equitable tolling is incompatible with the underlying purposes of criminal law statutes of limitations, and (2) even if equitable tolling could theoretically be applied, the existence of presidential immunity alone may not provide sufficient grounds for invoking the doctrine.

1. Use of Equitable Tolling in Criminal Cases

Equitable tolling is a doctrine that permits a court, through the use of its equitable powers, to extend the statute of limitations when, through extraordinary circumstances, a party is prevented from complying with the statutory deadline despite reasonable diligence throughout the period before the deadline passed. The purpose of the doctrine is to permit the extension

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86 Id. at 38.
88 See infra Section II.C.
89 Equitable Tolling, BLACK’S LAW DICTIONARY (11th ed. 2019).
of statutory deadlines in limited circumstances when a party is prevented from complying with them through no fault or lack of diligence of their own.\textsuperscript{90} Because it undermines the important interests served by statutes of limitations, equitable tolling is an “extraordinary remedy”\textsuperscript{91} invoked “only sparingly”\textsuperscript{92} in the “rare situation where [it] is demanded by sound legal principles as well as the interests of justice.”\textsuperscript{93}

While its place in civil cases is well defined, a review of the caselaw reveals no case to date in which a federal court has applied equitable tolling to a criminal statute of limitations. Indeed, “the term ‘equitable tolling’ comes up so rarely in the legal literature in connection to criminal prosecution, it appears to be something more imagined than real.”\textsuperscript{94} Furthermore, it seems that prosecutors have hardly even considered asking for such a remedy in response to a statute of limitations defense by a criminal defendant, likely because of their determination that it is unavailable. In this Section, I explain why equitable tolling does not comport with criminal law as a theoretical matter, contrary to the argument put forward in the 2000 OLC Memo.

The 2000 OLC Memo, in arguing that equitable tolling may be allowed in a criminal case against the President, cited several cases to support its conclusion that equitable tolling could be implemented to solve the statute of limitations problem. One such case was \textit{United States v. Midgley}.\textsuperscript{95} There, the defendant was initially charged in a six-count indictment with various drug and firearms offenses, before agreeing to plead guilty to one charge in exchange for the government dropping the rest.\textsuperscript{96} Several years later, while the defendant was doing time for this offense, the Supreme Court’s holding in \textit{Bailey v. United States}\textsuperscript{97} mandated vacation of Midgley’s sentence, which he was granted pursuant to a habeas petition filed with the District Court.\textsuperscript{98} At the same time, the District Court denied the government’s request to reinstate the previously dismissed charges because the limitations period had expired.\textsuperscript{99} The government appealed, arguing that equitable considerations

\textsuperscript{90} Neves v. Holder, 613 F.3d 30, 36 (1st Cir. 2010).
\textsuperscript{91} Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000).
\textsuperscript{92} See Irwin v. Dept of Veterans Affairs, 498 U.S. 89, 96 (1990) (“[A]n examination of cases in which we have applied the equitable tolling doctrine as between private litigants affords petitioner little help. Federal courts have typically extended equitable relief only sparingly.”).
\textsuperscript{93} Alvarez-Machain v. United States, 96 F.3d 1246, 1251 (9th Cir. 1996).
\textsuperscript{95} 142 F.3d 174 (3d Cir. 1998).
\textsuperscript{96} Id. at 175.
\textsuperscript{97} 516 U.S. 137 (1995).
\textsuperscript{98} \textit{Midgley}, 142 F.3d at 175-76.
\textsuperscript{99} Id. at 175.
demanded that the statute of limitations be tolled from the time of the original dismissal order. On review, the Third Circuit, quoting its prior decision in *Powers v. Southland Corp.*, stated that while equitable tolling is typically applied to limitations periods in civil actions, “there is no reason to distinguish between the rights protected by criminal and civil statutes of limitations.”

Notably, the *Midgley* court left out the final words of this quotation from *Powers*, a civil case, where the court said, “in this context.” In *Powers*, this “context” was the court’s decision as to whether a District Court’s denial of a motion to dismiss based on the statute of limitations was immediately reviewable on appeal. The *Powers* court went on to say that because they had previously decided that, in a criminal case, the rights protected by statutes of limitations are not irreparably lost absent immediate review, the same could be said of civil statutes of limitations and thus, the court did not have jurisdiction to review the District Court’s denial of the defendant’s motion. This is a far different question from whether equitable tolling is applicable to a criminal statute of limitations in the same way as a civil one. Certainly, there is good reason to distinguish between the rights protected by criminal and civil statutes of limitations in that context. While the interests served by criminal statutes of limitations, as discussed above, are reflective of those furthered by civil statutes, adherence to their principles is much more important in the criminal context for several reasons.

First, unlike civil litigation, which only involves an exchange of money, criminal prosecution involves the potential imposition of criminal sanctions against a defendant—including imprisonment or even death—the most serious action society can take against a person. Given that a defendant’s life and liberty, as opposed to monetary liability, is at stake in a criminal proceeding, there is a much stronger justification for strict adherence to rules, such as statutes of limitations, that protect defendants in the criminal

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101 4 F.3d 223 (3d Cir. 1993).
102 *Midgley*, 142 F.3d at 179 (quoting *Powers*, 4 F.3d at 233).
103 *Powers*, 4 F.3d at 232.
104 Id. at 233.
105 See 4 WILLIAM BLACKSTONE, COMMENTARIES *10–11 (“To shed the blood of our fellow-creature is a matter that requires the greatest deliberation and the fullest conviction of our own authority.”); L. Song Richardson, *When Human Experimentation is Criminal*, 99 J. CRIM. L. & CRIMINOLOGY 89, 108 (2009) (“In our society, the criminal sanction is viewed, uncontroversially, as the most serious statement of moral blameworthiness.”).
106 See *In re Winship*, 397 U.S. 338, 363 (1970) (“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.”).
versus the civil context. Further, “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.” Crafting a criminal limitations period involves an important balancing of interests between criminal defendants, victims, and society as a whole—a policy judgment that is much better suited to the legislature than the courts. While the creation of a limitations period that binds the government leaves open the possibility that some wrongdoers will benefit from it, Congress has already considered this cost and determined that it is outweighed by the interests that the statute of limitations seeks to protect. Courts should not be free to upend this determination through the use of equitable tolling in criminal proceedings on an ad hoc basis.

Second, the high stakes of criminal proceedings demand predictability for defendants, which favors the use of bright-line rules over pliable standards based on an individual court’s weighing of equitable considerations. Because of this, the Supreme Court has demanded that Congress be specific in defining crimes, in order to provide a clear signal to society about what conduct is criminal and what is not. The same mandate is logically applicable to statutes that define the rights of defendants in criminal proceedings. Defendants should be given a fair warning not only about what conduct is criminal, but also about when and how they can be prosecuted for it. The general federal criminal statute of limitations, 18 U.S.C § 3282, fulfills this requirement by providing a clear rule for when and how a criminal proceeding must be initiated by the government, and it allows for no express exceptions. Courts should not impair the necessary predictability that this

107 See Mitchell v. United States, 526 U.S. 314, 328 (1999) (“Another reason for treating civil and criminal cases differently is that the ‘stakes are higher’ in criminal cases, where liberty or even life may be at stake, and where the government’s ‘sole interest is to convict.’”).


109 See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (“Courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.”); Lochner v. New York, 198 U.S. 45, 69 (1905) (Harlan, J., dissenting) (“Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation.”).

110 See 4 BLACKSTONE, supra note 105, at *2-3 (“[Criminal law] should be founded on principles that are permanent, uniform, and universal.”).

111 The Court stated,

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

rule provides by inferring exceptions to it that Congress did not intend, even if good policy reasons exist for doing so.\textsuperscript{112} Third, criminal law is not an area of the law where "equity finds a comfortable home."\textsuperscript{113} Unlike civil litigation, which typically involves the enforcement of common-law doctrines such as negligence, fraud, and breach of contract, criminal law is fundamentally statutory.\textsuperscript{114} "That all federal criminal law derives from statutes is a cornerstone of the federal criminal jurisprudence," and common law crimes "run afoul of our deepest notions of due process and raise the specter of the judiciary imposing its will . . . against its citizens."\textsuperscript{115} The codification movement in criminal law reflects the collective judgment of our society that "legislators rather than judges should create and define criminal offenses."\textsuperscript{116} Thus, the task of a court adjudicating a criminal matter is to interpret and give effect to the intention of the legislature in adopting the substantive criminal law and the statutes that govern its procedure.\textsuperscript{117} This stands in contrast to civil litigation, where courts are often charged with defining the substantive and procedural rights of the parties. This difference in the judicial role in the civil and criminal context demonstrates why equitable tolling is more amenable to the former than the latter.\textsuperscript{118} While the civil procedure often gives judges wide latitude to ascertain the truth over ensuring the protection of either party, criminal procedure’s primary goal is to establish adversarial protections that safeguard the accused.\textsuperscript{119} The use of equitable tolling, while consistent with the former proposition, is wholly inconsistent with the latter. Though tolling in the civil

\textsuperscript{112} See United States v. Peloquin, 810 F.2d 911, 913 (9th Cir. 1987) (stating that courts should not infer exceptions to the explicit language of 18 U.S.C. § 3282, regardless of the policy reasons that may justify a departure).

\textsuperscript{113} Holland v. Florida, 560 U.S. 631, 647 (2010).

\textsuperscript{114} See Liparota v. United States, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." (emphasis added)).


\textsuperscript{116} Kevin C. McMunigal, A Statutory Approach to Common Law, 48 ST. LOUIS U. L.J. 1285, 1285 (2004). As Professor McMunigal notes, this movement started after the Supreme Court abolished the use of federal common law crimes over 200 years ago. See United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence"); accord United States v. Coolidge, 14 U.S. (1 Wheat.) 415, 416-17 (1816).

\textsuperscript{117} See Susan L. Pilcher, Ignorance, Discretion, and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law, 33 AM. CRIM. L. REV. 1, 4 (1995) (noting how courts are charged with interpreting the legislature’s intent with respect to a criminal law).

\textsuperscript{118} See Powell, supra note 54, at 121 ("The general absence of equitable principles from the federal criminal limitations regime likely results from the fact that criminal limitations periods did not exist at common law but rather evolved through legislative enactments and adjustments.").

context may be appropriate to determine the truth of the matter against a party’s interest, invoking equitable tolling to extend the time for prosecution upsets the adversarial protections that safeguard the accused: specifically, the safeguard against requiring the defendant to prepare a defense using stale evidence. For the foregoing reasons, there is good reason to distinguish between the rights protected by civil and criminal statutes of limitations.

Although the court in Midgley went on to apply an equitable tolling analysis akin to one that would prevail in a civil case, it expressed trepidation about its ability to do so:

Section 3282 establishes a fixed limitation period with no exception. However tempting it may be to create equitable exceptions to bright line rules, we must concur with Chief Judge Rambo’s observation in Gaither that “the very existence of a statute of limitations entails the prospect that wrongdoers will benefit,” and that this reason alone cannot serve as the basis for an exception to the statute. Ultimately, the clear and unambiguous rule afforded by the criminal statute of limitations is preferable to a shifting standard based on the perceived equity of the defendant’s conduct. While Congress and the courts may continue to weigh competing policy interests concerning the administration of justice, the unqualified limitation period of § 3282 reflects a balance that has already been struck.

The court here correctly identifies some of the problems, inherent in attempting to apply equitable principles to a criminal statute of limitations, that I addressed above. The general federal limitations statute (18 U.S.C. § 3282) is firm in its mandate, provides no exceptions, and already reflects a policy judgment by Congress that the government’s right to initiate a prosecution against a defendant should be cut off after a certain point to protect the important interests the limitations period furthers. While the court in Midgley did apply an equitable tolling analysis to § 3282, it may have merely conceded its applicability given the disposition would have been the same either way. This is demonstrated by the fact that the court initially provided no color on its seemingly novel decision to move forward with the equitable tolling inquiry for a criminal statute, while later providing compelling reasons for why the decision to do so was potentially unwarranted in the first instance.

Another court facing the same scenario as the Midgley court declined the opportunity to apply equitable tolling to the criminal limitations statute. In United States v. Podde, the district court granted the government’s motion to reinstate time-barred charges when, as in Midgley, a favorable Supreme Court
ruling required reversal of a conviction the defendant previously pled guilty to. The defendant was convicted of the reinstated charges, but the Second Circuit reversed on appeal, refusing to permit any equitable considerations to toll the period prescribed by § 3282. The court first reasoned that the criminal statute of limitations served a critical purpose in guarding against the “danger of erosion of defenses over time,” which required it to be liberally interpreted in the defendant’s favor. It went on to hold that neither (1) the good faith and diligence of the government nor (2) the defendant’s breach of the plea agreement provided an adequate basis to amend the statute, saying:

[The] law provides, in no uncertain terms, that “no person shall be prosecuted ... for any offense ... unless the indictment is found ... within five years next after such offense shall have been committed.” Even if the parties’ promises to each other were negated, the fact remains that the indictment was reinstated more than eight years after the events in question.

Here, Judge Calabresi correctly reasoned that the policy judgment embedded in the statute should not be overridden by a court’s consideration of the equities. Because of the important purposes that the statute serves, a literal interpretation and application are necessary.

While Third Circuit cases subsequent to Midgley have not foreclosed the potential applicability of equitable tolling in a criminal case, and federal prosecutors in that circuit have argued for it on occasion, no other circuits have intimated at the possibility. The lack of application of the doctrine over the course of history itself provides strong evidence of its (un)availability, and its omission from criminal law can be justified on both theoretical and practical grounds. As I discussed above, there are many reasons for distinguishing between civil and criminal law with respect to the application of equitable tolling: criminal cases involve higher stakes and require heightened protection for defendants, the potential implication of criminal sanctions demands assurance of predictability by adhering to bright-line rules rather than standards, and criminal law is not generally amenable to the import of equitable principles. Furthermore, the express and plain language

122 105 F.3d 813, 815 (2d Cir. 1997).
123 Id. at 820.
124 Id.
125 Id. at 821 (citation omitted).
of the statute (§ 3282) and the need to interpret it in a way that is faithful to the important interests it serves foreclose courts’ ability to invoke equitable tolling to circumvent its mandate. For these reasons, equitably tolling has no place in criminal law in the first instance.128

2. Application of the Civil Equitable Tolling Framework to the Criminal Limitations Statute

Even assuming equitable tolling could theoretically be applied in a criminal case, it is not clear that, under current precedent, the President’s temporary immunity from prosecution would itself be enough to successfully invoke the doctrine. Determining whether a party is entitled to equitable tolling of a statute of limitations involves a two-part inquiry. First, the party must establish that the limitations statute at issue is subject to equitable tolling. If so, the party must then show that (1) it has been pursuing its rights diligently throughout the limitations period and (2) some extraordinary circumstance prevented timely filing of its case.129

a. Is § 3282 Subject to Equitable Tolling?

The Supreme Court’s decision in Holland v. Florida130 provides a useful framework for determining whether a statute of limitations is subject to equitable tolling. There, the court was charged with deciding whether the Antiterrorism and Effective Death Penalty Act’s (“AEDPA”) statutory limitations period may be tolled for equitable reasons.131 First, the court noted, citing Irwin v. Department of Veterans Affairs132, that federal limitations statutes are normally afforded a rebuttable presumption in favor of equitable tolling.133 And in the case of AEDPA, this presumption was strengthened by

128 The other case cited by the 2000 OLC Memo as support for equitable tolling in a criminal case was United States v. Levine. 2000 OLC Memo, supra note 11, at 256. In Levine, the court was charged with deciding whether the pretrial denial of a motion to dismiss on statute of limitations grounds is immediately appealable under the collateral order exception to the final judgment rule. United States v. Levine, 658 F.2d 113, 116 (3d Cir. 1981). The court declared that statutes of limitations are generally subject to “tolling, suspension, and waiver.” Id. at 120. However, a footnote referenced to “tolling” included only citations to cases for which sealed indictments were held to have “tolling” the statute of limitations when they were sealed, not cases supporting the use of equitable tolling. For further discussion of this issue, see infra Section II.A. In addition, other mentions by the court of “tolling” referred to certain forms of statutory, rather than equitable, tolling. Id. at 120–21. Thus, this case fails to provide any support for the proposition that equitable tolling should or could be available to toll a criminal statute of limitations.
131 Id. at 645.
133 Holland, 560 U.S. at 645–46.
the fact that equitable principles have traditionally governed the substantive law of habeas corpus. Second, the court analyzed whether equitable tolling would be inconsistent with the text and structure of the statute. Textually, the court found that AEDPA's statute of limitations did not contain language that was “unusually emphatic,” nor did it reiterate its time limitation. Structurally, the fact that the statute expressly enumerated exceptions to its basic time limits did not foreclose the potential use of equitable tolling. Third, the court asked whether equitable tolling would undermine AEDPA's basic purposes. Here, the court reasoned that while the purpose of AEDPA was to eliminate delays in the federal habeas review process, it did not seek to end every possible delay at all costs. Furthermore, the statute was adopted with the knowledge that habeas petitions play a vital role in protecting constitutional rights, and thus, the court should be hesitant to conclude that Congress's omission of express reference to equitable tolling indicated an intent to "close courthouse doors that a strong equitable claim would ordinarily keep open." Because each of these factors weighed in favor of permitting equitable tolling, the court held that the AEDPA was amenable to equitable tolling in the first instance.

i. Presumption in Favor of Equitable Tolling

Applying this same framework to the federal criminal statute of limitations, § 3282, dictates a different result. First, while the Court approved a rebuttable presumption in favor of equitable tolling for federal statutes of limitations, Irwin specifically limited this mandate to civil statutes. As the Court noted there, this presumption was considered only in the context of "lawsuits between private litigants." Moreover, as noted in Section II.B above, criminal law is not an area of the law that has traditionally been governed by equitable principles. For the large part of this country's history, criminal law has for good reason been dictated by statute, and criminal proceedings do not typically import equitable doctrines or principles. The high stakes of criminal proceedings demand predictability and the maintenance of adversarial protections to safeguard defendants, which militates against the use of equitable doctrines. Again, criminal law is

134 Id. at 646.
135 Id. at 647.
136 Id.
137 Id. at 648.
138 Id. at 649.
139 Id.
140 Id.
141 Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990).
142 See supra subsection II.B.1.
not an area of the law where equity “finds a comfortable home.”\footnote{See, e.g., United States v. Brockamp, 519 U.S. 347, 352 (1997) (finding Irwin’s presumption should not apply to the limitations period on tax refund claims in part because tax law “is not normally characterized by case-specific exceptions reflecting individualized equities”).} Finally, the Court in Holland also felt use of a rebuttable presumption was proper because AEDPA was enacted after its adoption in Irwin. Thus, Congress was likely aware that a presumption in favor of equitable tolling would apply to any new statute of limitations absent an express mandate otherwise.\footnote{Holland, 560 U.S. at 646.} The same cannot be said of § 3282, which was adopted well before the Court’s decision in Irwin. For these reasons, a rebuttable presumption in favor of equitable tolling should not prevail with respect to § 3282.

ii. Textual and Structural Considerations

The text and structure of § 3282 also militate against the use of equitable tolling to extend the prescribed limitations period. In United States v. Brockamp the Court held that the statutory limitations period on tax refund claims could not be equitably tolled.\footnote{Brockamp, 519 U.S. at 348.} The Court found that Irwin’s presumption had been overcome, in part, because the statute at issue, 42 U.S.C. § 6511(a), “set[] forth its time limitations in unusually emphatic form.”\footnote{Id. at 350.} The same can be said of § 3282, which states that the limitations period provided should be adhered to “[e]xcept as otherwise expressly provided by law.”\footnote{18 U.S.C. § 3282 (2018) (emphasis added).} This contrasts with the AEDPA statute at issue in Holland, provides a much stronger mandate than that expressed in § 6511, and conclusively forecloses the existence of any implied equitable tolling exception. The Court in Brockamp also considered the general subject matter of the statute at issue, and reasoned that the administrative problems that would result through the creation of an equitable tolling exception weighed against reading it into the statute, saying these problems “tell[] us that Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute’s limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires.”\footnote{Brockamp, 519 U.S. at 353.} This same rationale applies with more force to criminal cases implicating § 3282. If prosecutors were given free rein to argue for equitable tolling whenever a case was otherwise time barred, one can expect they would use it whenever a defendant was otherwise “saved by the bell.” This would require criminal defendants to litigate “large numbers of late claims, accompanied by requests for ‘equitable tolling’ which, upon close inspection,
might turn out to lack sufficient equitable justification." Thus, an implied equitable tolling exception is inconsistent with both the text and structure of § 3282.

iii. Underlying Purpose

Finally, an implied equitable tolling exception would be inconsistent with the underlying purposes of § 3282. In United States v. Beggerly, the Court decided whether equitable tolling is available in a suit brought under the Quiet Title Act ("QTA"), which provides a 12-year limitations period to file a quiet title action against the United States, beginning at the time the plaintiff knows or should know of the government’s claim to the property. The Court held the QTA was not amenable to equitable tolling in part because “[i]t is of special importance that landowners know with certainty what their rights are, and the period during which those rights may be subject to challenge.” Again, this same reasoning applies with more force to criminal cases implicating § 3282. Certainly it is of “special importance” that criminal defendants know with certainty what their rights are, and the period during which those rights may be subject to challenge. The rights at stake for a criminal defendant—potentially the accused’s very life and liberty—are much more serious than the rights at stake for the government in a quiet title action. If the force of the government’s right to repose from a quiet title action demands the rejection of equitable tolling under the QTA, as the Court decided in Beggerly, it is fair to conclude that a defendant’s right to repose from a criminal prosecution demands the rejection of equitable tolling under § 3282. Furthermore, the Court in Holland found equitable tolling consistent with AEDPA’s purpose because the statute was enacted against the backdrop of a history of common law that approved the use of equitable principles in habeas cases. The same cannot be said of § 3282, which was enacted against the backdrop of a history of statutory superiority in criminal law, wherein the import of equitable principles was largely rejected. Based on the foregoing analysis, a court called to determine whether equitable tolling is available under § 3282 should find that it is not.

b. Would the President’s Temporary Immunity Constitute An “Extraordinary Circumstance”?

Even if equitable tolling could be applied to § 3282, it is not clear that the President’s temporary immunity from criminal process would itself be

149 Id. at 352.
151 Beggerly, 524 U.S. at 49.
enough for the prosecution to successfully invoke the doctrine against him or her at trial. Once a party successfully demonstrates that the limitations statute it faces is subject to equitable tolling, it then must show that (1) it has been pursuing its rights diligently throughout the limitations period, and (2) some extraordinary circumstance stood in its way and prevented timely filing.\textsuperscript{152} As an initial matter, I assume that prosecutors diligently pursued any case sought against the President, and were only blocked from indicting him or her because of the current Department of Justice policy against indicting a sitting President.\textsuperscript{153} Thus, the question that needs to be addressed is whether the President’s temporary immunity constitutes an “extraordinary circumstance” that would entitle prosecutors to equitable tolling in a case against him or her. To be sure, the hypothetical case I posit here would be in one sense extraordinary. It would involve the indictment of a President immediately when he or she leaves office after the abeyance of prosecution for some extended period because of an agency policy against presidential indictment. Certainly no court has faced such a situation before, and no prosecutor has been estopped from indicting a public official because the Constitution grants him or her temporary immunity. In this sense, there are rather extraordinary circumstances at play that prevent prosecutors from complying with the statutory deadline. However, the question is how this situation fits into the legal definition of “extraordinary circumstance” within the context of equitable tolling. A review of the caselaw on this doctrine reveals that presidential immunity would unlikely be considered an “extraordinary circumstance” automatically.

Consistent with the tradition that “flexibility is a hallmark of equity jurisdiction,”\textsuperscript{154} courts invoking equitable tolling have relied on a variety of circumstances to justify its use, including the abandonment of a party's

\textsuperscript{152} Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); see also Boos v. Runyon, 201 F.3d 178, 185 (2d Cir. 2000) (“The burden of demonstrating the appropriateness of equitable tolling . . . lies with the [party who seeks it].”).

\textsuperscript{153} But note that a defendant President could argue that the DOJ’s failure to prosecute because of its own policy against Presidential prosecution was a lack of diligence. I consider this argument in my analysis of the extraordinary circumstance prong of the equitable tolling analysis below. See infra notes 193–95 and accompanying text.

\textsuperscript{154} Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting); see also Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (“The essence of equity jurisdiction has been the power . . . to mould each decree to the necessities of the particular case.”); Rosario-Torres v. Hernandez-Colon, 889 F.3d 314, 321 (1st Cir. 1989) ("[T]he hallmark of equity is the ability to assess all relevant facts and circumstances and tailor appropriate relief on a case by case basis.".).
some error on the part of the court or court personnel, or misconduct by the opposing party. Despite their differences, these circumstances reveal a common thread. In each case, the plaintiff was granted equitable tolling relief because of some wrongful or erroneous conduct by his or her adversary or a third party. As one court stated, an extraordinary circumstance is something that "derives from some 'external obstacle to timely filing . . . beyond [the plaintiff's] control,' not from self-inflicted delay." This concept is important when considering our hypothetical case against the President after he or she leaves office as, in some sense, the circumstances causing delay are self-inflicted by the prosecutorial body. To the extent that federal prosecutors are forbidden from indicting the President because of a standing DOJ policy against such a practice, the President could credibly claim that the Department's failure to indict him was self-inflicted. After all, the policy was established years ago and was not adopted by the President's administration; he or she did not ask for it, immunity will have

155 See, e.g., Maples v. Thomas, 566 U.S. 266, 289 (2012) (excusing "the procedural default into which the [petitioner] was trapped when counsel of record abandoned him without a word of warning"); Holland v. Florida, 560 U.S. 631, 650-52 (2010) (explaining that attorney misconduct can warrant equitable tolling if it is more than "garden variety" or "excusable neglect"); Dillon v. Conway, 642 F.3d 358, 363-64 (2d Cir. 2011) (finding that "affirmatively and knowingly misleading [a client] by promising him that he would file the petition" before the deadline can trigger equitable tolling).

156 See, e.g., Diaz v. Kelly, 515 F.3d 149, 155-56 (2d Cir. 2008) (finding an extraordinary circumstance when the state court failed to send the plaintiff notice of a decision within a reasonable time after entry of the order); Urcinoli v. Cathel, 546 F.3d 269, 275 (3d Cir. 2008) (finding an extraordinary circumstance when the district court failed to provide habeas petitioner the option of deleting unexhausted claims rather than returning with those claims to state court); Spottsville v. Terry, 476 F.3d 1241, 1245-46 (11th Cir. 2007) (finding an extraordinary circumstance when the court provided misleading instructions to habeas petitioner on how to file his appeal); Corjasso v. Ayers, 278 F.3d 874, 878 (9th Cir. 2002) (finding an extraordinary circumstance when the district court improperly dismissed the plaintiff's charges).


158 See, e.g., Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1991) (noting equitable tolling may be available when "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"); In re Milby, 875 F.3d 1229, 1232-33 (9th Cir. 2017) (finding an extraordinary circumstance when the debtor in a bankruptcy proceeding made false statements on his petition and at creditors' meetings, and failed to turn over documents and cooperate with the trustee); Jackson v. Astrue, 506 F.3d 1349, 1353-55 (11th Cir. 2007) (stating that "[t]he extraordinary circumstances standard . . . may be met 'where the defendant misleads the plaintiff' such as through fraud, misinformation, or deliberate concealment.

159 Sandoz v. Cingular Wireless, L.L.C., 700 F. App’x 317, 320 (5th Cir. 2017) (quoting Menominee Indian Tribe of Wis. v. United States, 136 S. Ct. 750, 756 (2016)).

160 The counterargument here would be that the President either knew or should have known that the DOJ maintained a policy of not indicting a sitting President, and therefore the President was on notice, even before being elected, that he or she could be spared from criminal process while in office.
been invoked for him by the Attorney General. Moreover, the existence of the policy, which is the supposed roadblock to bringing charges, is well within prosecutors’ control—presumably, the Department is free to change its policy on presidential indictability at any time. This is especially true given that presidential immunity is not a matter of settled precedent. When viewed this way, the circumstance that prevented timely filing was not all that extraordinary. While prosecutors may have a legitimate reason for choosing not to indict the President, “more than a showing of good cause is required” to demonstrate a circumstance justifies the use of equitable tolling. Therefore, even assuming that equitable tolling (1) can theoretically be used in a criminal case, and (2) would be applicable to the federal criminal statute of limitations, it is not clear that an analysis of the issue under current precedent would yield a favorable result for prosecutors in a case against the (former) President.

C. Tolling to Implement the Policies and Procedures of Other Federal Law

In addition to equitable considerations, courts can adopt tolling rules to implement “the provisions of, or policies underlying, other federal law,” so long as tolling is consistent with the statutory limitations provision at issue. In this Section, I discuss instances where courts have adopted tolling rules for these reasons, and analyze whether a court could use its judicial power under this logic to craft a tolling rule that solves the statute of limitations problem this Comment addresses.

1. American Pipe & Constr. Co. v. Utah

The judicial power to adopt tolling rules to implement the policies and procedures of other federal law was most notably demonstrated in American Pipe & Const. Co. v. Utah, an antitrust class action case brought under the Clayton Act. There, the Court faced the question of whether members of a putative class could intervene after class certification was denied when the statute of limitations period had expired. Here, the statute of limitation

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161 Shugerman, supra note 94.
162 See supra note 26 and accompanying text. This argument is largely focused on federal prosecution but could also apply to a delayed state prosecution to the extent that state prosecutors chose to follow the DOJ policy against indicting a sitting President. In addition, if a state prosecutor forewent indictment merely to avoid having to confront the constitutional question regarding presidential indictability, the President may have an argument for a lack of diligence under the first prong of the equitable tolling analysis.
163 Collier-Fluellen v. Comm’r of Soc. Sec., 408 F. App’x 330, 330 (11th Cir. 2011).
164 Burbank & Wolff, supra note 85, at 38.
166 Id.
confronted was § 48 of the Clayton Act, and the policies intimating the potential need for a tolling rule were those embodied in Rule 23 of the Federal Rules of Civil Procedure, namely the interest of federal courts in the economy and efficiency of class litigation.

In the first part of its opinion, the American Pipe Court recounted the history of Rule 23, and explained that “[a] federal class action is no longer an ‘invitation to joinder’ but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions.” The Court went on to hold that:

[†]he claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue. Thus, the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs. To hold to the contrary would frustrate the principal function of a class suit . . . . [encouraging] precisely the multiplicity of activity which Rule 23 was designed to avoid . . . .

Here, the court justified its adoption of a tolling rule for putative class members by pointing to the policies of Rule 23, specifically its function to eliminate the unnecessary filing of repetitious papers and motions. The Court continued this logic in the next section of its opinion, noting that “[a] contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure.” Again, the Court here noted that failure to adopt a tolling rule to allow participation by putative class members who were otherwise time-barred would undercut the important policies furthered by Rule 23.

Having explained the federal law interests in favor of adopting a novel tolling rule, the Court then addressed whether such a rule was consistent with the statutory limitations provision at issue. On this point, the Court concluded that the class action-tolling rule it adopted was consistent with the policies that inform limitations law. While it left open the ability of future courts to “deny tolling where limitations policies would be subverted,” the Court found that such policies were supported in American Pipe because the named plaintiff notified the defendant of its substantive claims and the number and generic identities of the potential plaintiffs. The defendant had “the essential information necessary to determine both the subject matter and size of the prospective litigation,” thus

167 Id. at 550.
168 Id. at 551.
169 Id. at 553.
170 Id. at 554; Burbank & Wolff, supra note 85, at 12.
satisfying “[t]he policies of ensuring essential fairness to defendants and of barring a plaintiff who ‘has slept on his rights.’”

2. Implementing the Policies and Procedures of Other Federal Law

In the balance of this Section, I apply the framework outlined above from American Pipe to the hypothetical case against a former President to determine whether a court could, in a similar fashion, adopt a novel tolling rule to solve the statute of limitations problem addressed herein. In the hypothetical case, the limitations provision at issue would be § 3282 (or a similar criminal statute of limitations provision from Title 18 of the U.S. Code), and the provisions and policies sought to be implemented would be those embodied in Article II of the Constitution, and federal courts’ interest in upholding the rule of law.

a. Article II

First, a court could adopt a tolling rule to solve the statute of limitations problem as a means for implementing the policies embodied in Article II of the Constitution, specifically those that demand presidential immunity from criminal process. Certainly these constitutional interests would form a strong basis for a novel tolling rule when compared to the litigation efficiency interests that produced American Pipe tolling, as constitutional interpretation is the Supreme Court’s “central and most important function.”

As discussed in Section I.B, there are strong policies emanating from Article II that arguably demand the President be immune from criminal process while he or she is in office, namely: (1) criminal prosecution is not an adequately accountable process for removing a sitting President; (2) the President “occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties;” rather than a defense against criminal charges; and (3) permitting criminal prosecution of the President could lead to frivolous and politically motivated charges from federal and state prosecutors. In the same way that the American Pipe court held that the provisions of Rule 23 required judicial tolling for putative class members

171 Am. Pipe, 414 U.S. at 554-55.
173 See supra notes 80–86 and accompanying text.
175 Id.
176 See Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000).
to preserve the litigation efficiency mechanisms embodied therein, a court could find that these practical considerations necessarily flow from the provisions of Article II that grant the President the “executive Power”\(^\text{177}\) and require him or her to “faithfully execute the Office” and “preserve, protect and defend the Constitution.”\(^\text{178}\) In order for the President to properly wield the executive power, faithfully execute the office, and uphold the Constitution, he or she must be free of the substantial practical difficulties created by potential criminal process against the Executive.\(^\text{179}\) And further, assuming that this immunity exists, a court could adopt a tolling rule that solves the statute of limitations problem in order to properly effectuate the doctrine and maintain its consistency with other important principles, such as our courts’ interest in upholding and enforcing the rule of law. Closing the proverbial loophole created by the intersection of criminal presidential immunity and limitations law through a tolling rule may be a proper way for a court to implement this important doctrine.

Viewed another way, a tolling rule would be a way for a court to properly set the bounds of criminal presidential immunity, as the Supreme Court has done through its holdings in other immunity contexts. In *Nixon v. Fitzgerald*, the Supreme Court held that the President “is entitled to absolute immunity from damages liability predicated on his official acts.”\(^\text{180}\) As with those that support immunity from criminal process, the arguments relied on by the Court in this holding were not grounded in textual considerations, but in the policies establishing “the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.”\(^\text{181}\) President Clinton later sought to extend the Executive’s civil immunity to postpone civil actions against the President related to liability for unofficial acts.\(^\text{182}\) However, the Supreme Court declined to sanction this extension, finding that the interests that dictated the holding in *Fitzgerald*—chiefly, the President’s inability to act freely in his official decisionmaking—provided no support for a claim of immunity based on unofficial conduct.\(^\text{183}\) Adopting a tolling rule to solve the statute of limitations problem addressed

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\(^\text{177}\) U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

\(^\text{178}\) U.S. CONST. art. II, § 1, cl. 8 (“Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—‘I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.’”).

\(^\text{179}\) Alternatively, a court could, if convinced, rely on the textual arguments for presidential immunity grounded in the Impeachment Judgment Clause. See *supra* Section I.A.

\(^\text{180}\) 457 U.S. 731, 749 (1982).

\(^\text{181}\) Id.


\(^\text{183}\) Id. at 693–94.
here could likewise be a way for a court to set the boundaries of criminal presidential immunity. Here, a court could find that while presidential immunity should obtain for the reasons outlined in Section II.B, it should not functionally extend past a president’s term by allowing him or her to escape prosecution through a subsequent statute of limitations defense. A tolling rule eliminating this possibility could ensure that the practical consequences of presidential immunity do not extend the protection past its point of legal justification, just as a grant of temporary immunity from civil actions based on unofficial conduct would have done for President Clinton.

b. The Rule of Law

Second, a court could justify a new tolling rule as a means for upholding the rule of law, a responsibility commonly self-attributed to federal courts. While these interests, in addition to those outlined in Section II.B, have never served as the basis for adoption of a judicial tolling rule, they again would seem to weigh much heavier in a court’s decisionmaking than the litigation efficiency interests that produced American Pipe tolling.

Although the “rule of law” is a doctrine often cited by courts, its precise definition is unclear. Courts and commentators “view it as anything from a set of formal-procedural requirements, such as generality, clarity, and stability, to a more substantive set of values . . . such as autonomy, fairness, liberty, dignity, and democracy.” Most commonly, the doctrine refers to the belief “that every person is subject to the ordinary law within the jurisdiction;” that is, no person is “above the law.” The courts’ commitment to ensuring outcomes consistent with this principle is what gives the people under their jurisdiction confidence in their rulings.

The hypothetical case against a former President charged with criminal conduct certainly raises strong rule of law considerations to the extent the

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184 United States v. Alvarez-Machain, 504 U.S. 655, 686 (1992) (Stevens, J., dissenting) (noting that the Supreme Court has a “duty to uphold” the “Rule of Law”); Adam Shinar, Enabling Resistance: How Courts Facilitate Departures from the Law, and Why This May Not Be a Bad Thing, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 989, 996 (2014) (“It is the [Supreme] Court that is entrusted with maintaining America’s commitment to the rule of law . . . .”).

185 Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 1 (1997) (“The Rule of Law is a much celebrated, historical ideal, the precise meaning of which may be less clear today than ever before.”).

186 Shinar, supra note 184, at 1045.


188 See, e.g., Margaret Jane Radin, Reconsidering the Rule of Law, 69 B.U. L. REV. 781, 781 (1989) (“The ideal of the rule of law, not of men,’ calls upon us to strive to ensure that our law itself will rule (govern) us, not the wishes of powerful individuals.”).

189 See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992) (stating that a holding consistent with the rule of law was needed to prevent “unnecessary damage to the Court’s legitimacy”).
President attempts to evade prosecution for a criminal offense through the dual benefit of presidential immunity and the statute of limitations. If a President were to successfully avoid criminal punishment merely by ascension to the office, this outcome would directly contradict the concept of “law as king.” Indeed, it would effectively place the President “above the law,” given the right set of circumstances. In this case, the courts’ mandate to uphold the rule of law by ensuring its universal and consistent application would certainly form a strong basis for invoking judicial tolling.

3. Consistency with Criminal Statutes of Limitations

As the prior two Sections make clear, a court would have strong federal law interests to rely on in dictating the need for a new tolling rule that solves the statute of limitations problem I address here. However, in order for a court to employ such a remedy, in addition to identifying policies of other federal law that are implemented through tolling, it also must find that tolling is consistent with the statutory limitations provision at issue; here, the criminal statutes of limitations of Title 18. The below analysis demonstrates that, with respect to this question, there are similarly strong reasons for denying a tolling remedy.

In American Pipe, the Supreme Court held that the new tolling rule it dictated there was consistent with the limitations provision of the Clayton Act because it did not relieve plaintiffs of the need to notify defendants of the subject matter of their suit and the number and generic identities of the potential plaintiffs. Moreover, it was consistent with “[t]he policies of ensuring essential fairness to defendants and of barring a plaintiff who ‘has slept on his rights.’” While criminal limitations statutes likewise embody interests in notice and fairness, the need for courts to protect these interests by adhering to the specified limitations period is much stronger in criminal cases. On this point, much of the discussion in subsection II.B.1 bears repeating. Summarizing here, criminal statutes of limitations should be more strictly adhered to than their civil counterparts because (1) criminal prosecutions import higher stakes for defendants, (2) criminal law must more clearly define what actions are criminal and when and how they can be prosecuted, and (3) the history of statutory superiority in criminal law suggests courts should be more wary of modifying procedural protections in the criminal, versus the civil, context. In addition, criminal statutes of

191 Id. at 554.
192 See supra subsection II.B.1.
193 See id.
194 See id.
limitations serve interests separate from those embodied in civil limitations statutes that are likewise inconsistent with judicial tolling. Among them, society’s justification for punishing criminal offenders\footnote{See supra subsection II.B.2.} and its interest in the proper allocation of scarce prosecutorial resources. Given the interests at stake, criminal statutes of limitations should be viewed more akin to a statute of repose, which the Supreme Court has stated “may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff’s control.”\footnote{CTS Corp. v. Waldburger, 573 U.S. 1, 9 (2014).}

Besides conflicting with the general policies of criminal statutes of limitations, judicial tolling is also inconsistent with the text and structure of § 3282. Much of the analysis above concluding that § 3282 should not be tolled for equitable reasons also applies here. As discussed in Section II.C., § 3282 “sets forth its time limitations in unusually emphatic form,”\footnote{United States v. Brockamp, 519 U.S. 347, 350 (1997).} stating that the prescribed period should be adhered to “[e]xcept as otherwise expressly provided by law.”\footnote{18 U.S.C. § 3282 (2018).} The use of specific language in the statute makes sense, as Congress has been directed by the Supreme Court to carefully define what actions are criminal and how and when they can be prosecuted.\footnote{See supra subsection II.C.2.} The firm language of § 3282 further suggests that Congress has already made clear the circumstances that should allow for suspension or extension of the limitations period,\footnote{See DOJLE, supra note 70, at 3-4 (“[A]n otherwise applicable limitation period may be suspended or extended in cases involving child abuse, the concealment of the assets of an estate in bankruptcy, wartime fraud against the government, dismissal of original charges, fugitives, foreign evidence, or DNA evidence.”).} and courts should not be free to add to the list on an ad hoc basis. In addition, the litany of different limitations periods enumerated in Title 18 demonstrates that Congress has already performed a careful analysis of the appropriate limitations period for each offense in the criminal code,\footnote{See id. at 22-25 (listing the various statutes of limitations in Title 18).} likely considering the seriousness of the offense and the defendant’s ability to preserve exculpatory evidence, and this legislative balancing should not be upset through judicial tolling. Finally, permitting judicial tolling in one instance may open the door for prosecutors to seek its application in a host of other circumstances where they believe a criminal defendant has benefited from the limitations period to escape prosecution, a prospect that would upend the careful balance struck by Congress in crafting the criminal limitations periods in Title 18.

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\footnote{195 See supra subsection II.B.2.}
\footnote{196 CTS Corp. v. Waldburger, 573 U.S. 1, 9 (2014).}
\footnote{197 United States v. Brockamp, 519 U.S. 347, 350 (1997).}
\footnote{198 18 U.S.C. § 3282 (2018).}
\footnote{199 See supra subsection II.C.2.}
\footnote{200 See DOJLE, supra note 70, at 3-4 (“[A]n otherwise applicable limitation period may be suspended or extended in cases involving child abuse, the concealment of the assets of an estate in bankruptcy, wartime fraud against the government, dismissal of original charges, fugitives, foreign evidence, or DNA evidence.”).}
\footnote{201 See id. at 22-25 (listing the various statutes of limitations in Title 18).}
Whether a court would adopt a novel tolling rule to address the statute of limitations problem discussed herein would depend on the relative weight it places on the federal law policies implemented by, and the statute of limitations interests harmed by, its use of judicial tolling in the circumstances of our hypothetical case. In addition to the historical and precedential considerations described above, this weighing would likely also depend on certain practical considerations such as the crimes charged and the President’s response to the preceding investigation and indictment. Ultimately, the outcome of this weighing is uncertain, and should not be relied on to hold the President accountable when he or she engages in criminal behavior. Thus, prosecutors should seek alternative solutions to the statute of limitations problem to ensure that the President’s temporary relief from criminal process does not place him or her above the law.

III. POTENTIAL SOLUTIONS

Having concluded that a tolling rule may not be available to extend the statute of limitations for a crime committed by a President immune from criminal prosecution, I next discuss two potential solutions to this problem for prosecutors: (1) filing an indictment against the President under seal, and (2) creating a statutory tolling rule that would cover this scenario.

A. Sealed Indictment

One solution to the statute of limitations problem discussed herein is for prosecutors to issue an indictment against the President within the limitations period—which, for our purposes, we assume lies wholly within the President’s elected term or terms—but request that the indictment be sealed until the President leaves office. Some commentators have proposed this solution, concluding that the issuing and sealing of the indictment would toll the applicable statute of limitations period. Three questions must be answered to determine the viability of this solution: (1) under what circumstances may an indictment be sealed?; (2) does filing an indictment under seal toll the applicable statute of limitations?; and (3) does implementation of this solution violate any of the policies militating against presidential indictability? I take up each of these questions in turn.

202 See, e.g., Corey Bretschneider, How Mueller Can Protect the Investigation—Even if He is Fired, POLITICO (Apr. 21, 2018), https://www.politico.com/magazine/story/2018/04/21/robert-mueller-russia-probe-protection-218065 (A sealed indictment would also ensure that the statute of limitations for crimes Trump might be charged with would not expire.); Callan, supra note 52 (suggesting that Special Counsel Mueller, if unable to indict President Trump while in office, could seek to file an indictment under seal, “[t]he issuance and sealing [of which] would ‘toll’ the [applicable] statute from expiring”).
1. When Can an Indictment be Sealed?

Rule 6 of the Federal Rules of Criminal Procedure vests the authority to seal an indictment with the magistrate judge to whom an indictment is returned:

SEALED INDICTMENT. The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment’s existence except as necessary to issue or execute a warrant or summons.203

However, the Rule itself provides little direction on how and when a magistrate judge may exercise this authority. Thus, it was left up to the courts to determine its scope. In United States v. Michael, one of the first cases interpreting Rule 6(e)(4), the defendant was charged with violating certain provisions of the Bankruptcy Act in an indictment returned by the grand jury and sealed four days before the statute of limitations was set to expire.204 The defendant argued that the indictment should be dismissed because it was not lawfully sealed.205 The Third Circuit rejected this argument, reasoning that

Criminal Procedure Rule 6(e) authorizes indictment to be kept secret during the time required to take the defendant into custody. If such secrecy may lawfully be imposed in that situation we see nothing unlawful in the court imposing secrecy in other circumstances which in the exercise of a sound discretion it finds call for such action.206

Thus, while the Rule could fairly be read to limit sealing to situations requiring secrecy before apprehension of the accused person, the court found that it could be extended to other circumstances requiring secrecy “in the exercise of a sound discretion.”207

This holding was adopted and refined by the Second Circuit in two seminal cases in this area of the law: United States v. Southland Corp.208 and United States v. Srulowitz.209 In Southland, the government charged a bribery and tax evasion scheme among executives of Southland Corporation and the company’s attorney.210 The charging indictment was returned by the grand jury two days before expiration of the limitations period, and was sealed

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203 FED. R. CRIM. P. 6(e)(4).
204 180 F.2d 55, 56-57 (3d Cir. 1949).
205 Id. at 57.
206 Id. (footnote omitted).
207 Id.
208 760 F.2d 1366, 1379-80 (2d Cir. 1985).
209 819 F.2d 37, 40-41 (2d Cir. 1987).
210 Southland, 760 F.2d at 1369.
pursuant to the government’s need for additional time to obtain testimony from a cooperating witness.\textsuperscript{211} Similar to the defendant in \textit{Michael}, here, the defendant charged that the indictment was invalid because it could not be sealed except when necessary to maintain secrecy until apprehension of the accused.\textsuperscript{212} The Second Circuit, citing \textit{Michael} with approval, adopted a broad view of when an indictment may be sealed, concluding that such a request may be granted when “the public interest requires it,” or “for sound reasons of policy.”\textsuperscript{213} Moreover, the court adopted a highly deferential standard of review of the magistrate’s decision to seal:

This is a point on which great deference should be accorded to the discretion of the magistrate, at least in the absence of any evidence of substantial prejudice to the defendant. The Government should be able, except in the most extraordinary cases, to rely on that decision rather than risk dismissal of an indictment, the sealing of which it might have been willing to forego, because an appellate court sees things differently, after the expenditure of vast resources at a trial and at a time when reinvention is by hypothesis impossible.\textsuperscript{214}

In \textit{Srulowitz}, the defendant was charged with RICO violations and mail fraud in an indictment returned and sealed about a month before the statute of limitations ran on the charges.\textsuperscript{215} The government’s articulated reason for sealing the indictment was to maintain secrecy of the allegations while it attempted to locate the defendant and secure the cooperation of a crucial witness.\textsuperscript{216} The indictment was unsealed two months later, and the defendant asserted that it should be dismissed because it was not “found” within the five-year statute of limitations period.\textsuperscript{217} The Second Circuit held that the magistrate’s decision to seal would be upheld so long as “the prosecution can demonstrate that the decision to keep an indictment secret [was] informed by the exercise of sound discretion in the public interest.”\textsuperscript{218} The court further reasoned that an indictment was properly sealed so long as it is supported by “proper prosecutorial purposes,” which need not be articulated to the magistrate on the record when the indictment is sealed.\textsuperscript{219} The court also held that the defendant’s right to challenge the propriety of the sealing ex post was sufficient protection

\begin{thebibliography}{99}
\bibitem{211} \textit{Id.} at 1378.
\bibitem{212} \textit{Id.} at 1379.
\bibitem{213} \textit{Id.} at 1379-80 (emphasis omitted).
\bibitem{214} \textit{Id.} at 1380.
\bibitem{215} United States v. Srulowitz, 819 F.2d 37, 39 (2d Cir. 1987).
\bibitem{216} \textit{Id.}
\bibitem{217} \textit{Id.} at 39-40.
\bibitem{218} \textit{Id.} at 40.
\bibitem{219} \textit{Id.} at 41.
\end{thebibliography}
from abuse, and thus the government only must dictate the prosecutorial purposes for secrecy when the sealing is challenged by the defendant.\textsuperscript{220}

The standard adopted in \textit{Southland} and \textit{Srulowitz}, allowing a magistrate judge to seal an indictment for any proper prosecutorial purpose or where the public interest requires it, has been universally adopted by Circuit Courts throughout the country.\textsuperscript{221} Courts adopting this standard have identified a wide range of justifications for sealing that qualify under this broad rule, including the need to protect potential witnesses,\textsuperscript{222} the desire to avoid compromising an ongoing investigation\textsuperscript{223} or unrelated trial,\textsuperscript{224} out of concern

\textsuperscript{220} Id.

\textsuperscript{221} See, e.g., United States v. Ellis, 622 F.3d 784, 792 (7th Cir. 2010) ("Under Federal Rule of Criminal Procedure 6(e)(4), a district court’s power to seal an indictment is broad; sealing an indictment is generally permitted when it is in the public interest or serves a legitimate law-enforcement purpose."); United States v. Wright, 343 F.3d 849, 858 (6th Cir. 2003) ("[W]e look to the Government’s request to seal the indictment and evaluate that request to determine whether any legitimate prosecutorial purpose or public interest supports the sealing of the indictment."); United States v. Thompson, 287 F.3d 1244, 1252 (10th Cir. 2002) ("When the government fails to articulate a legitimate prosecutorial purpose . . . it violates Rule 6(e)(4).”); United States v. Bracy, 67 F.3d 1421, 1426 (9th Cir. 1995) (stating that an indictment is found when returned by the grand jury so long as it is "properly sealed for legitimate prosecutorial objectives."); United States v. DiSalvo, 34 F.3d 1204, 1218 (3d Cir. 1994) ("An indictment may be sealed for any legitimate law enforcement reason or where the public interest requires it.") (citing \textit{Michael}, 180 F.2d at 57)); United States v. Sharpe, 995 F.2d 49, 52 (5th Cir. 1993) ("An indictment is properly sealed when the government requests that the magistrate judge seal the indictment for any legitimate prosecutorial objective or where the public interest otherwise requires it."); United States v. Richard, 943 F.2d 115, 118 (1st Cir. 1991) ("We agree with the other courts that have considered the question that, in keeping with the practice in effect at the time Rule 6(e)(4) was adopted, a magistrate may grant the government’s request to seal an indictment for any legitimate prosecutorial objective or where the public interest otherwise requires it."); United States v. Lakin, 875 F.2d 168, 171 (8th Cir. 1989) ("[W]e hold that a judicial officer may grant the government’s request to seal an indictment for any legitimate prosecutorial objective or where the public interest otherwise requires it."); United States v. Ramey, 791 F.2d 317, 321 (4th Cir. 1986) ("[T]he judicial officer may grant the Government’s motion to seal for any legitimate prosecutorial need . . ."); United States v. Edwards, 777 F.2d 644, 647-48 (1st Cir. 1985) (approving of \textit{Southland}’s finding that an indictment may be sealed when the public interest requires it or for sound reasons of policy).

\textsuperscript{222} See, e.g., \textit{Ellis}, 622 F.3d at 793 ("Sealing the indictment was a reasonable measure to protect the identity, security, and testimony of the witness in the Indiana case."); \textit{Wright}, 343 F.3d at 858 ("The protection of [the witness] . . . falls within the range of permissible reasons for sealing an indictment."); United States v. Balsam, 203 F.3d 72, 81 (1st Cir. 2000) ("The protection of a key prosecution witness undoubtedly qualifies as a legitimate prosecutorial objective."); \textit{Bracy}, 67 F.3d at 1426 (stating that the violent nature of a criminal organization justified sealing the indictment due to safety concerns of potential witnesses); United States v. Upton, 339 F. Supp. 2d 190, 194-95 (D. Mass. 2004) (stating that the threat to a potential witness in a homicide investigation justified sealing of the indictment).

\textsuperscript{223} See \textit{Wright}, 343 F.3d at 858 ("[T]he need to avoid compromising an ongoing investigation falls within the range of permissible reasons for sealing an indictment.").

\textsuperscript{224} See \textit{DiSalvo}, 34 F.3d at 1219 (holding that concerns of adverse publicity towards an unrelated ongoing trial justify sealing an indictment).
for pre-trial publicity before all of the named defendants are located, or to prevent the defendant from obstructing justice.

Returning to the hypothetical presented at the beginning of this Section—where a prosecutor seeking to indict the President first files the indictment under seal, and then publicizes it when the President leaves office—should the President seek to dismiss the indictment because it was not properly sealed, he or she would likely frame the prosecutorial purpose for sealing as merely to toll the statute of limitations for the charged offense. Courts are conflicted on whether a bare desire to toll the statute of limitations is a legitimate purpose for sealing an indictment. However, the prosecutor in such a case could likely frame his or her justification more broadly as the need to preserve prosecution against a person entitled to temporary immunity. This would allow the prosecutor to lean on policy arguments on both sides of the presidential immunity debate. On one hand, sealing the indictment is necessary to prevent the practical problems (identified in Section I.C, supra) that arise when a President is indicted—most importantly, the diversion of the President’s time and energy from performance of his or her official duties. On the other hand, preserving charges against the President is necessary for upholding the rule of law and preventing the President from evading criminal charges solely through election to the office. Given the low bar that has been set regarding for

225 See Sharpe, 995 F.2d at 52 (citing the concern for pre-trial publicity as a valid reason to seal an indictment); Richard, 943 F.2d at 119 (noting that one of the defendants could receive excess publicity and potentially jeopardize taking the other defendants into custody).

226 See United States v. Szilvagyi, 417 Fed. App’x 472, 477-78 (6th Cir. 2011) (“In this case, the district court determined that the government articulated a legitimate prosecutorial purpose—namely, a concern that [the defendant] would once again attempt to obstruct justice—in its request to seal the naturalization fraud indictment.”).

227 Compare United States v. Edwards, 777 F.2d 644, 648-49 (11th Cir. 1985) (“Tolling the statute of limitations on charges of conspiracy to import with intent to distribute thousands of pounds of marijuana is arguably required by the public interest and supported by sound reasons of policy.”), with United States v. Gigante, 436 F. Supp. 2d 647, 659-60 (S.D.N.Y. 2006) (rejecting the government’s need for more time to investigate the charges as a legitimate purpose for sealing because “[t]o hold otherwise would be to render the statute of limitations in criminal cases meaningless.”), and United States v. Rogers, 781 F. Supp. 1181, 1191 (S.D. Miss. 1991) (holding that “a unilateral extension by the government of the limitations period under the guise of ‘gathering prosecutorial evidence’ was not a ‘legitimate prosecutorial objective.’”).

228 Commentators arguing in favor of presidential immunity from indictment often stress that their position has no impact on upholding the rule of law because the President can always be indicted the minute he or she leaves office—through impeachment or otherwise. See, e.g., 2000 OLC Memo, supra note 11, at 257 (“[R]ecognizing a temporary immunity would not subvert the important interest in maintaining the ‘rule of law.’ . . . [T]he immunity from indictment and criminal prosecution for a sitting President would generally result in the delay, but not the forbearance, of any criminal trial.”); Amar & Kalt, supra note 24, at 11 (“[T]he immunity from indictment and criminal prosecution for a sitting President would generally result in the delay, but not the forbearance, of any criminal trial.”); Howe, supra note 36, at 86 (“[B]ecause the [President’s] immunity [from indictment]
what reasons an indictment may be sealed, and the strong public interest in
upholding the rule of law, filing a sealed indictment against the President to
preserve prosecution until after he or she leaves office should be permitted
under Rule 6(e)(4).

2. Does Sealing an Indictment Toll the Statute of Limitations?

18 U.S.C. § 3282 provides that “no person shall be prosecuted, tried, or
punished for any offense, not capital, unless the indictment is found . . . within
five years next after such offense shall have been committed.”229 This
provision stipulates a five-year limitations period for most federal offenses,
although some offenses call for different periods or none at all.230 Most other
limitations provisions in the federal criminal code likewise contain the
requirement that an indictment be “found” within the prescribed
timeframe.231 Thus, the question arises as to when a sealed indictment is

229 See generally DOYLE, supra note 70 (detailing exceptions to the statute of limitations for
federal crimes).
unless the indictment is found or the information is instituted not later than 7 years after the date
on which the offense was committed.”); 18 U.S.C. § 249(d)(1) (2018) (“[N]o person shall be
prosecuted, tried, or punished . . . unless the indictment for such offense is found, or the
information for such offense is instituted, not later than 7 years after the date on which the offense
was committed”); 18 U.S.C. § 3286(a) (2018) (“[N]o person shall be prosecuted, tried, or
punished . . . unless the indictment is found or the information is instituted within 8 years after the
offense was committed.”); 18 U.S.C. § 3291 (Westlaw through Pub. L. No. 103-322) (“No person
shall be prosecuted, tried, or punished . . . unless the indictment is found or the information is
instituted within ten years after the commission of the offense.”); 18 U.S.C. § 3295 (2018) (“No person
shall be prosecuted, tried, or punished . . . unless the indictment is found or the information is
instituted not later than 10 years after the date on which the offense was committed.”); 18 U.S.C. § 3301(b)
(2018) (“No person shall be prosecuted, tried, or punished for a securities fraud offense, unless the
indictment is found or the information is instituted within 6 years after the commission of the
offense.”); 26 U.S.C. § 6531 (2018) (“No person shall be prosecuted, tried, or punished . . . unless the
indictment is found or the information instituted within 3 years next after the commission of the
offense . . . .”); 31 U.S.C. § 333(d)(2) (2018) (“No person may be prosecuted, tried, or
punished . . . unless the indictment is found or the information instituted during the 3-year period
beginning on the date of the violation.”); 42 U.S.C. § 2278 (2018) (“[N]o individual or person shall
be prosecuted, tried, or punished for any offense . . . unless the indictment is found or the
information is instituted within ten years next after such offense shall have been committed.”).

Some other statute of limitations provisions require an indictment to be “returned.” See, e.g., 18 U.S.C.
§ 3293 (2018) (“No person shall be prosecuted, tried, or punished . . . unless the indictment is
returned or the information is filed within 10 years after the commission of the offense.”); 18 U.S.C.
§ 3294 (2018) (“No person shall be prosecuted, tried, or punished . . . unless the indictment is
returned or the information is filed within 20 years after the commission of the offense.”). Others
require it be “filed” within the limitations period. See, e.g., 18 U.S.C. § 3300 (2018) (“No person
can be prosecuted, tried, or punished . . . unless the indictment or the information is filed not later than
10 years after the commission of the offense.”).
“found”—(1) when it is returned to the magistrate and sealed, or (2) when it is unsealed? As seen in the cases cited above, most challenges to the sealing of an indictment are raised by defendants as part of a statute of limitations defense, where the indictment at issue is unsealed after expiration of the limitations period.\(^232\) Here, defendants often argue that an indictment is time barred because it is not “found” within the meaning of § 3282 et al. until it is unsealed. As with the issue addressed above, the answer to this question has largely produced agreement among the Courts of Appeal stemming from the Second Circuit’s opinions in *Southland* and *Srulowitz*.

As noted above, prosecutors in *Southland* charged the defendants in an indictment that was returned by the grand jury two days before expiration of the statute of limitations.\(^233\) The indictment was sealed on the same day, before being unsealed forty-one days later when the government declined to pursue additional testimony from a cooperating witness.\(^234\) The defendants subsequently argued that the indictment should be dismissed as time barred because it was not “found” until it was unsealed—thirty-nine days after the limitations period expired.\(^235\) While failing to expand on the issue, the court rejected this argument, finding that the applicable statute of limitations provisions did not require that the indictment be made public.\(^236\)

In *Srulowitz*, the charging indictment was handed up and ordered sealed twenty-six days before the limitations period expired.\(^237\) It was kept sealed for two months, and the defendants likewise challenged the indictment as time barred.\(^238\) The District Court held that the indictment was not found within the five-year limitations period fixed by § 3282 because it was “found” on the date it was unsealed rather than the date it was filed.\(^239\) The Second Circuit reversed on appeal, holding that an indictment is "found" when it is returned by the grand jury and filed, unless the defendant can demonstrate substantial actual prejudice occurring between the date of sealing and the date of unsealing.\(^240\) Thus, “when a sealed indictment is not opened until after the expiration of the time allowed by the statute of limitations for the prosecution
of an offense, the statute ordinarily is not a bar to prosecution.”

Again, the Second Circuit’s standard received widespread acceptance among sister circuits, who similarly concluded that filing an indictment under seal tolled the statute of limitations unless the defendant could demonstrate actual prejudice resulting from the delay. At the same time, courts have recognized that a defendant’s right to repose may be implicated when the government keeps an indictment under seal for an unreasonable time, even in the absence of a showing of actual prejudice, and thus, “the government’s ability to toll the statute of limitations by sealing and [sic] indictment is not unlimited.”

Courts faced with statute of limitations challenges by defendants who are the subject of indictments kept under seal for lengthy periods have been willing to dismiss the indictment when the government fails to comply with the terms of the sealing order or keeps an indictment

241 Id.
242 See, e.g., United States v. Wright, 543 F.3d 849, 857 (6th Cir. 2008) (declaring that “[w]e follow the rule in our decision in Burnett and the majority of our sister circuits in finding that a timely filed and properly sealed indictment tolls the statute of limitations” unless the defendant shows actual prejudice); United States v. DiSalvo, 34 F.3d 1204, 1218-19 (3d Cir. 1994) (“[A] defendant is required to demonstrate substantial prejudice in order to be entitled to the dismissal of an indictment sealed beyond the statute of limitations . . . .”); United States v. Sharpe, 995 F.2d 49, 50 (5th Cir. 1993) (“We conclude that a properly sealed indictment does indeed toll the statute of limitations, absent a showing of substantive and actual prejudice.”); United States v. Richard, 943 F.2d 115, 119 (1st Cir. 1991) (concluding that “a defendant may justify dismissal of an indictment sealed beyond the limitation period” upon “a showing of substantial, irreparable, actual prejudice” (internal quotation marks and citations omitted)); United States v. Lakin, 875 F.2d 168, 170 (8th Cir. 1989) (“When an indictment is properly sealed, the date of return, rather than the date of unsealing, ordinarily is the time that the indictment is found for purposes of section 3182.”); United States v. Ramey, 791 F.2d 317, 320-23 (4th Cir. 1986) (holding that an indictment was timely filed when unsealed after the statutory limitations period expired because the defendants failed to show actual prejudice); United States v. Edwards, 777 F.2d 644, 647-49 (11th Cir. 1985) (stating that “[a]n indictment sealed pursuant to Fed.R.Cr.P. 78(e)(4) is timely even though the defendant is not arrested and the indictment is not made public until after the end of the statutory limitations period” and rejecting the defendant’s time bar claim because they failed to show actual prejudice (footnote omitted)). The Tenth Circuit has held that an indictment is found whenever it is returned by the grand jury, regardless of any actual prejudice realized by the defendant; “[w]hether the indictment is then sealed is thus irrelevant for statute of limitations purposes.” United States v. Thompson, 287 F.3d 1244, 1251 (10th Cir. 2002). The Seventh Circuit noted the split between the Tenth and other circuits but declined to take a position on the issue. United States v. Ellis, 622 F.3d 784, 792 (7th Cir. 2010).

243 Sharpe, 995 F.2d at 51 n.5.
244 The court in Upton stated,

[T]his Court allowed the Government’s motion to continue seal of the indictment, but restricted that allowance to thirty days. The Court specified that if the Government wanted to file for a further continuance, it would have to provide a detailed status report. When the Government failed either to file a status report or to request a continuance long after the thirty days had passed, the authority to seal the indictment expired, and the statute of limitations again began to run.

sealed beyond the period justified by legitimate prosecutorial needs. In such a case, the statute of limitations period may be deemed to begin running again once the period needed to satisfy the government’s legitimate prosecutorial purpose has expired.

We once again return to the hypothetical case presented at the beginning of this Section—wherein a prosecutor files a sealed indictment against the President—and ask whether this would suffice to toll the applicable statute of limitations under current doctrine. Here, it is unlikely the President would be able to show actual prejudice as a result of keeping the indictment under seal absent exigent circumstances. Indeed, the whole purpose of sealing the indictment in this case would be out of consideration for the importance of the President’s position and the desire not to distract him or her from the performance of official duties. If any party is prejudiced it is the prosecutor, who is forced to delay prosecution of the President, thereby risking, inter alia, the spoliation of evidence or the death of a key witness. Furthermore, assuming the prosecutor promptly unseals the indictment after the President leaves office, the President would be unable to show an unreasonable delay by the prosecutor that may justify dismissal in the absence of actual prejudice. The prosecutorial purpose in sealing the indictment is to preserve prosecution against a person who is entitled to temporary immunity. This purpose remains legitimate so long as immunity obtains, and thus, even if an indictment against the President is sealed months or years before he or she leaves office, prosecutors cannot be charged with an unreasonable delay in unsealing it until the immunity is extinguished; that is, when the President’s term expires. Under current doctrine, filing a sealed indictment should toll the statute of limitations for a charge that prosecutors seek to bring against the President once he or she leaves office.

As one court noted,

Given the strong policy of notifying criminal defendants of the charges against them so that they may prepare a defense, the Second Circuit held that the limitations period may be extended by sealing the indictment only within reasonable limits. This standard permits an extension only to the degree necessary to accommodate the prosecutorial interests that the sealing of the indictment legitimately furthers.

United States v. Deglomini, 111 F. Supp. 2d 198, 200 (E.D.N.Y. 2000) (internal quotation marks and citations omitted); see also United States v. Sherwood, 38 F.R.D. 14, 20 (D. Conn. 1964) (“Inasmuch as the sealing of this indictment was extended by action initiated by the Government and continued for a period of thirteen (13) months and four (4) days from the date of the grand jury’s return, the Court presumes prejudice . . .”).

Many of the same risks identified in Section II.A, supra, as impairing a person’s ability to successfully defend against old charges would also apply to a prosecutor who is unable to bring such charges until long after an offense is committed, as we hypothesize here.
3. Is Filing a Sealed Indictment Consistent with the Reasons Supporting Presidential Immunity?

Finally, I consider whether this solution would violate the principles and considerations that require presidential immunity, discussed in Part I. This analysis is necessary to prevent the assertion that sealing an indictment is an unsatisfactory solution because it does not alleviate the problems with publicly indicting a President. I conclude that sealing an indictment against the President successfully responds to commentators’ concerns with Presidential indictment, and, when considered together with the analysis in the two preceding Sections, is therefore a viable solution to the statute of limitations problem.

The chief practical concern with presidential indictment stressed by commentators is its potential to distract the President from the performance of his or her official duties. Given the importance of the President in our constitutional structure and the nondelegable nature of certain critical decisions entrusted to the office, it is argued that permitting the President to be indicted and subject to criminal sanctions is both impractical and unworkable.

The source of this distraction would be on multiple fronts. First, facing criminal charges would certainly cause the President some degree of internal strife. The possibility of being subject to criminal sanctions, not to mention imprisonment, would weigh heavily on anyone’s mind, no less the President. In addition, it is fair to assume that the President would be preoccupied, at least in part, by the looming threat of embarrassment and political ridicule that would inevitably follow a conviction. Second, the President would need to set aside time to prepare and execute his defense with his attorneys and appear at the trial and any hearings where his presence is thereafter required. While the amount of time needed to prepare and carry out his or her defense may vary with the seriousness of the charges, it is fair to assume these activities would impact the performance of official duties to some degree. Third, the mere accusation of criminal behavior in an indictment may delegitimize the President in the eyes of foreign and domestic leaders, thereby impairing his or her ability to operate effectively.248 Fourth, media attention on the President’s

248 While the United States prides itself on the existence of a presumption of innocence for criminal defendants, there are legitimate questions of whether this principle obtains in practice. See, e.g., Brandon L. Garrett, The Myth of the Presumption of Innocence, 94 TEX. L. REV. See also 178, 179 (2016) (“The American presumption of innocence is more of an ideal than real.”); Nicholas Scurich & Richard S. John, Jurors’ Presumption of Innocence, 46 J. LEGAL STUD. 187, 187 (2017) (finding empirically that “compared to when a suspect had been merely named, jurors thought that the individual was significantly more likely to be guilty after a detective referred the case to the district attorney and when he was formally charged and thus a criminal defendant”).
prosecution would be overwhelming,249 and the President would likely face questions about his or her case in every interaction with the press. This swarm of attention could further undermine the President’s authority.250 All of these realities would combine to create a significant diversion from official duties when the President is charged with a crime. However, the use of a sealed indictment responds well to these concerns.

When an indictment is sealed, “no person may disclose the indictment’s existence except as necessary to issue or execute a warrant or summons.”251 The existence and contents of a sealed indictment are thus kept secret, and the government does no further prosecution of the accused, until it is unsealed. The secrecy of an indictment filed against the President would alleviate the concerns about distraction discussed in the preceding paragraph. First, the President would not be internally burdened given he or she would be unaware of the pending charges. Second, the President and his lawyers would not be taking time to prepare a defense as they would have no knowledge of the accusations in the indictment until it is unsealed. Third, none of the President’s contemporaries would have reason to assume disfavor of the President given the charges in the indictment are not public. And fourth, assuming existence of the indictment is also hidden from the media, there would be no story to cover. Of course, all of the above contentions depend on the sealed indictment in fact remaining a secret until the President leaves office, which may be a difficult task given the enormous value of this information and the many actors that could be aware of it.252 But assuming

249 See, e.g., Stefano L. Molea, Opinion: Media Coverage Can Undermine the Presumption of Innocence, TIMES OF SAN DIEGO (Mar. 2, 2018), https://timesofsandiego.com/opinion/2018/03/02/opinion-media-coverage-can-undermine-the-presumption-of-innocence/ [https://perma.cc/8NUN-3KHF] (“Whether it’s a coach, a professional athlete, actor, law enforcement officer, or politician, a high-profile arrest triggers a flurry of reports and news coverage that capitalize on the sensational.”).

250 Pretrial media coverage of criminal cases may also contribute to the practical failure of the presumption of innocence. See Richard V. Ericson, The Decline of Innocence, 28 U. BRIT. COLUM. L. REV. 367, 373 (1994) (“[I]t now seems evident that the mass media join with the criminal justice institution in making little pretense about the presumption of innocence.”); Ariana Tanoos, Shielding the Presumption of Innocence from Pretrial Media Coverage, 50 IND. L. REV. 997, 997 (2017) (“[P]retrial publicity of criminal cases is eroding the presumption [of innocence] . . . .”).

251 FED. R. CRIM. P. 6(e)(4).

the procedures mandated by Rule 6(e)(4) are followed, the indictment should be kept secret until it is unsealed, thus preventing the president from being distracted for the duration of his or her term.

Filing an indictment under seal also responds well to other theoretical and practical considerations favoring presidential immunity. Because permitting a sealed indictment does not go so far as to authorize criminal process against the President while he or she remains in office, prosecutors will not be motivated to bring forth politically-influenced charges, which largely become useless once the President is no longer serving. Filing a sealed indictment also does not act as de facto removal and improperly encroach on the impeachment process. Congress could still choose to impeach and remove the President while an indictment is under seal, or prosecution for the charges in the indictment will remain dormant until the President voluntarily leaves office. Moreover, preserving prosecution against the President by filing a sealed indictment would prevent the President from escaping justice and further the view that the President is not above the law, increasing the legitimacy of the office at home and abroad.

Because filing a sealed indictment against the President (1) offers a proper purpose for sealing an indictment under the courts’ interpretation of Rule 6(e)(4), (2) would toll the statute of limitations for the offense charged, and (3) is consistent with the theoretical and practical considerations demanding presidential immunity, it is a viable solution to the statute of limitations problem.253

B. Congressional Action

Another solution to the statute of limitations problem discussed herein is for Congress to pass a statutory tolling rule that prosecutors could invoke in a hypothetical case against the former President. Some commentators have called for this solution to be implemented by Congress now in order to prevent the statute of limitations problem before it arises.254 This “could be

253 An additional issue noted by Professor Sunstein is that the ability of prosecutors to criminally pursue the President for acts committed while in office may depend on whether the acts are considered “official” within the meaning prescribed by Nixon v. Fitzgerald. As Sunstein argues, this opinion may dictate that prosecutors are unable to indict the president on the basis of official acts that violate the law even when he or she leaves office. See SUNSTEIN, supra note 32, at 166 (“Nixon v. Fitzgerald creates a rule of absolute immunity from civil lawsuits for actions undertaken as part of a president’s official duties, and it may follow that if official duties really are involved, a former president enjoys absolute immunity from criminal prosecution as well.”). I don’t expand on this potential issue here, but note that a criminal act and an “official” could be considered mutually exclusive.

254 See 2000 OLC Memo, supra note 11, at 256 & n.34 (arguing that Congress could overcome any problem posed by the applicable statute of limitations by imposing its own tolling rule); Freedman, supra note 21, at 682 & 716 (1999) (“If, on the other hand, the President does have immunity, it would certainly be wise to provide by explicit legislation for the tolling of the otherwise
done without pre-judging the constitutional issue by a statute providing in
general terms for tolling with respect to any officer of the government whose
official position rendered him or her immune from indictment.”

In some ways, this proposal is both a simple and complex solution to the
statute of limitations problem. On one hand, Congress has already
established various rules that suspend or toll the running of limitations
periods in a number of circumstances, such as “when the accused is a fugitive
or when the case involves charges of child abuse, bankruptcy, wartime fraud
against the government, or DNA evidence.” For example, 18 U.S.C. § 3292
allows the government to suspend the running of the statute of limitations
for an offense if evidence of the offense is located in a foreign country. To be
entitled to tolling under this rule, the government must file an application
with the court requesting suspension of the limitations period and
demonstrating by a preponderance of the evidence that evidence of the
offense is located in a foreign country. If the application is approved by the
court, the limitations period can then be suspended for up to three years.
Congress could pass a similar statute allowing for suspension of the
limitations period whenever the government seeks to indict a public official
who is otherwise entitled to temporary immunity, until the official’s elected
term expires. This would be a straightforward solution to the statute of
limitations problem and prevent prosecutors from having to keep a sealed
indictment under wraps for an extended period, as the prior proposal would
require. On the other hand, political polarization has made it difficult for
Congress to agree on anything, which presents a practical issue whenever any
legal problem demands a legislative solution. A congressional stalemate may
be even more likely to prevail in response to the tolling rule I have suggested
here, given it would most likely be raised at a time when the President is
already under investigation, sparking backlash from his or her party in the
face of their leader being indicted. Thus, while this solution is the simplest
one to the statute of limitations problem, whether it can realistically be
implemented likely depends on the existing political climate and
Congressional makeup at any given time.

Nevertheless, to the extent lawmakers successfully adopted the statutory
tolling rule suggested here, it would be consistent with the theoretical and
practical considerations that demand the President be immune from indictment.
While the President may be distracted knowing that prosecutors invoking such

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255 Freedman, supra note 21, at 726.
256 DOYLE, supra note 70, at i.
258 Id. § 3292(c)(1).
a rule may be waiting to indict him or her as soon as he or she steps out of office, any prosecution would not begin until the President leaves office.259 In addition, the President would not have to dedicate time to the preparation of a defense until after his or her term expires. Any media craze over the trial would also be postponed, and given that prosecution cannot be commenced until the President leaves office, it is unlikely that prosecutors would be motivated to bring politically motivated charges. Finally, because the President would not be subject to compulsory criminal process while serving, implementing a statutory tolling rule would not encroach on the role of impeachment.

CONCLUSION

Commitment to the rule of law has been a fundamental tenet of this country since the founding. According to this doctrine, the criminal law must be equally applied to all people, including the President. However, this principle risks being violated when we assume that the President is immune from indictment while in office. That being the case, the President may be able to run out the limitations period for an offense if his or her term ends after its expiration and Congress refuses to impeach. While many commentators in favor of presidential immunity have argued that a court could toll the applicable statute of limitations to solve this problem, an analysis of caselaw on judicial tolling dictates that this remedy may not be available. With respect to equitable tolling, the history and principles of criminal law dictate that the doctrine is unavailable in a criminal case. And even if it could be applied, precedent on equitable tolling dictates that it may not be available merely as a result of the President’s temporary criminal immunity. With respect to tolling invoked to implement the policies and procedures of other federal law, while a court would have strong interests to point to in adopting a novel tolling rule to solve the statute of limitations problem addressed here, the fundamental principles of criminal statutes of limitation may likewise dictate that this remedy is unavailable. Because of the uncertainty regarding a court’s ability to toll the applicable limitations period in a hypothetical case against a former President raising a statute of limitations defense, it would be prudent to implement alternative solutions to solve the statute of limitations problem. Two solutions that effectively address this problem are filing an indictment against the President

259 One worry here is that if the President knows that he or she will be indicted the minute he or she leaves office, the President may attempt to issue a self-pardon. However, most commentators opining on the issue of self-pardons have concluded that the President may not pardon himself or herself. See generally Brian C. Kalt, Pardon Me?: The Constitutional Case Against Presidential Self-Pardons, 106 YALE L.J. 779 (1996) (arguing against the self-pardon power); see also SUNSTEIN, supra note 33, at 166-67 (reasoning that the Founders, deeply skeptical of monarch-like powers, did not intend to allow the President to be “judge in his own cause”).
under seal, and the creation by Congress of a statutory tolling rule that would allow for suspension of the limitations period while the President benefits from temporary criminal immunity.