Department of Justice
Washington, D.C. 20530

September 24, 1973

MEMORANDUM

Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office.

The question whether a civil officer 1/ of the federal government can be the subject of criminal proceedings while he is still in office has been debated ever since the earliest days of the Republic. This inquiry raises the following separate although to some extent interrelated issues. First, whether the constitutional provisions governing impeachment, viewed in general terms, prohibit the institution of federal criminal proceedings prior to the exhaustion of the impeachment process. Second, if the first question is answered in the negative, whether and to what extent the President as head of the Executive branch of the Government is amenable to the jurisdiction of the federal courts as a potential criminal defendant. Third, if it be determined that the President is immune from criminal prosecution because of the special nature of his office, whether and to what extent such immunity is shared by the Vice President.

I.

Must the Impeachment Process be Completed Before Criminal Proceedings May be Instituted Against a Person Who is Liable to Impeachment?

A. Textual and Historical Support for Proposition that Impeachment Need Not Precede Indictment.

1/ For a discussion of the definition of "civil officer" as that term is used in Article II, section 4 of the Constitution, see pp. 8-9 infra.

1. Views of early commentators. Article II, section 4 of the Constitution provides:

> "The President, the Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other high crimes and Misdemeanors."

Article I, section 3, clause 7 provides:

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

The suggestion has been made that Article I, section 3, clause 7 prohibits the institution of criminal proceedings against a person subject to impeachment prior to the termination of impeachment proceedings.2/ Support for this argument has been sought in Alexander Hamilton's description of the pertinent constitutional provision in the Federalist Nos. 65, 69 and 77, which explain that after removal by way of impeachment the offender is still liable to criminal prosecution in the ordinary course of law.

2/ We are using the term "termination of the impeachment proceedings" rather than "removal by way of impeachment" in view of the statement in Story, Commentaries on the Constitution of the United States, Vol. I, sec. 782, quoted below, that criminal proceedings may be instituted, either after an acquittal or conviction in the court of impeachment. The conclusion that acquittal by the Senate does not bar criminal prosecution follows from the consideration that such an acquittal may be based, as discussed infra, on jurisdictional grounds, e.g., that the defendant is not an officer of the United States in the constitutional sense, or on discretionary grounds, e.g., that the defendant no longer is an officer of the United States and unlikely to be reappointed or reelected, or on grounds which are partly jurisdictional and partly substantive, e.g., that the offense was not of an impeachable nature.

Article I, section 3, clause 7, however, does not say that a person subject to impeachment may be tried only after the completion of that process. Instead the constitutional provision uses the term "nevertheless." 3/ The purpose of this clause thus is to permit criminal prosecution in spite of the prior adjudication by the Senate, i.e., to forestall a double jeopardy argument.

A speech made by Luther Martin--who had been a member of the Constitutional Convention--during the impeachment proceedings of Justice Chase shows that Article I, section 3, clause 7 was designed to overcome a claim of double jeopardy rather than to require that impeachment must precede any criminal proceedings. Annals of Congress, 8th Cong., 2d Sess., col. 432. Similarly Mr. Justice Story teaches in his Commentaries on the Constitution:

> "If the court of impeachments is merely to pronounce a sentence of removal from office and the other disabilities, then it is indispensable that provision should be made that the common tribunals of justice should be at liberty to entertain jurisdiction of the offence for the purpose of inflicting the common punishment applicable to unofficial offenders. Otherwise, it might be matter of extreme doubt whether, consistently with the great maxim above mentioned, established for the security of the life and limbs and liberty of the citizen, a second trial for the same offence could be had, either after an acquittal or a conviction, in the court of impeachments." Vol. I, sec. 782.

Rawle, another early commentator, states in his View on the Constitution of the United States of America (1829) at p. 215:

3/ This provision was rendered necessary because the Constitution limits the judgment of impeachment to removal and disqualification, while under English law the House of Lords did also impose severe criminal sanctions including the death penalty, in cases of conviction on impeachment. Story, op. cit., Vol. I, §§ 784, 785; Rawle, A View of the Constitution, p. 217.

"But the ordinary tribunals, as we shall see, are not precluded, either before or after an impeachment, from taking cognizance of the public and official delinquency." (Emphasis added.)

2. Interpretations of the impeachment clause by official bodies. The practical interpretation of the Constitution has been to the same effect. During the life of the Republic impeachment proceedings have been instituted only against 12 officers of the United States. Congressional Directory, 93 Cong., 1st Sess., p. 402. In the same time, presumably scores, if not hundreds, of officers of the United States have been subject to criminal proceedings for offenses for which they could have been impeached.

It may be suggested that it is no answer to say that in most instances the officer presumably had resigned or been removed by the time he had been tried. If it really is the import of Article I, section 3, clause 7, that an officer of the United States may be subjected to criminal proceedings only after the conclusion of the impeachment procedure, the question of whether he is still in office at the time of the criminal trial can be viewed as immaterial. The constitutional text does not contain any express exception to that effect. Moreover, resignation or removal arguably does not terminate the impeachment power as a matter of law. 4/ It is true that as a practical matter, the House of Representatives and the Senate are reluctant to exercise their time-consuming impeachment functions after a case has become of less moment, because the offender is no longer in office, especially after he had renounced all monetary claims against the United States. 5/ However, because the sanctions for impeachment include disqualification to hold a federal office,

4/ The Constitution of the United States, Analysis and Interpretation, S. Doc. No. 39, 86th Cong., 1st Sess., p. 556; H. Rept. 1639, 79th Cong., 2d Sess., pp. 38-39.

5/ See the dismissal of the proceedings against Senator Blount and former Secretary of War Belknap, and H. Rept. 1639, supra, pp. 1-2.

as well as removal, an impeachment proceeding instituted subsequent to completion of the term, resignation, or dismissal would not be a bootless act. And yet it would seem to be an unreasonable interpretation of the Constitution to move from the latter proposition to the conclusion--necessary under the argument that impeachment must precede indictment--that an offending federal officer acquires a lifetime immunity against indictment unless the Congress takes time to impeach him.

There have been several instances of legislative actions envisaging the criminal prosecution of persons while still in office, and of the actual institution of criminal proceedings against federal officers while in office.

i. Section 21 of the Act of April 30, 1790, 1 Stat. 117, provided that a judge convicted of having accepted a bribe "shall forever be disqualified to hold any office of honour, trust or profit under the United States." The disqualification provision of this section thus indicates that Congress anticipated criminal trials for bribery--an impeachable offense--prior to a judgment of the Senate providing for the removal and disqualification of the offender. It should be remembered that this statute was enacted by the First Congress many members of which had been members of the Constitutional Convention. Obviously they, and President Washington who approved the legislation, did not feel that it violated the Constitution. The disqualification clause is now a part of the general bribery statute and applies to every officer of the United States. 18 U.S.C. § 201(e).

ii. In 1796, Attorney General Lee advised the House of Representatives that if a judge is convicted of a serious crime his "removal from office may and ought to be a part of the punishment." He continued that, since the judicial tenure is during good behavior, a judge could not be removed unless lawfully convicted of some official misconduct by way of "information, or by an indictment before an ordinary court, or by impeachment before the Senate of the United States." The Attorney General concluded that while impeachment "seems, in general cases, to be best suited to the trial of so high and important an officer" it was not the only method, and in the particular circumstances he recommended trial of the judge by information or indictment. 3 Hinds, Precedents of

the House of Representatives 982-983, American State Papers (Misc.) Vol. I, p. 151. The House Committee, to which the matter had been referred, concurred in that recommendation. Hinds, ibid., Annals of Congress, 4th Cong., 2d Sess., col. 2320. Here again it was felt at that early stage of our constitutional life that, at least in regard to judges, impeachment did not have to precede the institution of criminal proceedings. Hence, Congress could provide for removal of a judge for bad behavior, evidenced by a criminal conviction, although it has not done so, except in the instance of a bribery conviction. 6/

iii. Circuit Judge Davis retired in 1939 under the provisions of what is now 28 U.S.C. 371(b). 7/ Borkin, The Corrupt Judge, 116. In 1941 he was indicted for obstructing justice and tried twice. In both cases the jury was unable to agree and the indictment was ultimately dismissed. Id., p. 119. Only then did the Attorney General request Congress to impeach Judge Davis. The latter thereupon resigned from office waiving all retirement and pension rights. Id., at p. 120. This in effect mooted the need for impeachment, but arguably not the power of impeachment. See supra.

iv. Judge Albert W. Johnson was investigated by a grand jury and testified before it prior to his resignation from office. See Finding of Fact #3 in Johnson v. United States, 122 C. Cl. 100, 101 (1952).

v. The Department of Justice concluded in 1970 on the strength of precedents ## i and ii, supra, that criminal proceedings could be instituted against a sitting Justice of the Supreme Court. Shogan, A Question of Judgment, 230-233.

6/ Commerce Judge Archbald was investigated by the Department of Justice prior to his impeachment in 1912. It is, however, not apparent whether this was a formal grand jury investigation. Carpenter, Judicial Tenure in the United States, 145; Shogan, A Question of Judgment, 232.

7/ A retired judge remains in office; he possesses the right to receive the salary of his office and retains the capacity to perform judicial functions upon designation and assignment. 28 U.S.C. 294.

vi. Circuit Judge Kerner was recently subjected to a grand jury investigation, indicted, and convicted while still in office. The question whether criminal proceedings can precede impeachment has been raised for the first time on appeal.

In sum, the analysis of the text of the Constitution and its practical interpretation indicate that the Constitution does not require the termination of impeachment proceedings before an officer of the United States may be subjected to criminal proceedings. The caveat is that all of the above instances concerned judges, who possess tenure under Article III only during "good behavior," a provision not relevant to other officers. However, although this clause may be the basis for a congressional power to remove judges by processes other than impeachment, it is not directly responsive to the question whether impeachment must precede criminal indictment, nor was the clause the basis for the actions in the historic instances noted above.

B. Troublesome Implications of a Proposition that Impeachment Must Precede Indictment.

The opposite conclusion, viz., that a person who is subject to impeachment is not subject to criminal prosecution prior to the termination of the impeachment proceedings would create serious practical difficulties in the administration of the criminal law. As shall be documented, infra, every criminal investigation and prosecution of persons employed by the United States would give rise to complex preliminary questions. These include, first, whether the suspect is or was an officer of the United States within the meaning of Article II, section 4 of the Constitution, and second, whether the offense is one for which he could be impeached. Third, there would arise troublesome corollary issues and questions in the field of conspiracies and with respect to the limitations of criminal proceedings. An interpretation of the Constitution which injects such complications into criminal proceedings is not likely to be a correct one. Indeed, impractical or self-defeating interpretations of constitutional texts must be avoided. The Framers were experienced and practical men. This fact, coupled with the purposive spirit of constitutional interpretation set by Chief Justice Marshall,

has been the foundation for the endurance of our constitutional system for 186 years.

1. Definition of "civil officer." If liability to impeachment is a preliminary bar to criminal prosecution the question necessarily arises as to who is a "Civil Officer of the United States" within the meaning of Article II, section 4, of the Constitution. An officer of the United States has been defined as a person appointed by one of the methods provided for in Article II, section 2, clause 2 of the Constitution, i.e., by the President by and with the advice of Senate, or, on the basis of a statutory authorization, by the President alone, the Courts of Law, or a Head of a Department. United States v. Mouat, 124 U.S. 303, 307 (1886).

But as Chief Justice Marshall, while sitting as a Circuit Justice, pointed out in United States v. Maurice, 2 Brock. 96, 103, 26 Fed. Cas. 1211, 1214 (No. 15747)(C.C. Va., 1823) not every public employment is an "office." The latter term "embraces the ideas of tenure, duration, emolument, and duties. United States v. Hartwell, 6 Wall. 385, 393 (1867); United States v. Germaine, 99 U.S. 508, 511-512 (1878); Auffmordt v. Hedden, 137 U.S. 310, 326-328 (1890). The notion of "office" in the constitutional sense thus presupposes a certain degree of continuity, a specification of duties, and of compensation. The most important aspect of this definition appears to be the requirement of tenure and duration. An assignment which envisages the performance of a single specific task, or of occasional and intermittent duties, the ad hoc position, is normally not considered to be an office. United States v. Germaine, supra; Auffmordt v. Hedden, supra; United States v. Maurice, supra; 37 Op. A.G. 204; The Constitution of the United States of America, Analysis and Interpretations, S. Doc. 39, 88th Cong., 1st Sess., pp. 497, 500. 8/

8/ It is questionable whether the usual exception of the ad hoc position from the term "office" is applicable to the impeachment power; this raises the question whether, for instance, a Presidential agent appointed to perform a single diplomatic mission (S. Doc. 39, supra, pp. 499-501) could be impeached for bribery.

The decisions of the Supreme Court defining the term "officer" in the constitutional sense did not involve a further important element, presumably because it was not relevant to the issues raised in them, viz., that an officer in the constitutional sense must also be invested with some portion of the sovereign functions of the government. Mechem, A Treatise on the Law of Public Offices and Public Officers, secs. 1, 2, and 4, and the authorities therein cited, H. Rept. 2205, 55th Cong., 3d Sess., pp. 48-54; Cain v. United States, 73 F. Supp. 1019, 1021 (N.D., Ill., 1947); 22 Op. A.G. 187; 26 id. 24, 249 (1907). In the words of H. Rept. 2205, at p. 52, a person employed in the Executive branch is an officer only if he enforces the law in a manner so as to affect the rights of the people. A person employed by the United States who merely performs the duties of an expert, or advises or negotiates without being able to put into effect the result of his advice or suggestions therefore is not an officer in the constitutional sense. The requirement that an officer must be vested with some element of the sovereign power of the United States, necessarily exempts the vast majority of federal employees from the scope of the impeachment jurisdiction. There are only relatively few persons in the federal establishment who actually have the power to make decisions which concern the public, but case-by-case determination could be difficult.

The questions whether the position of a person employed by the Federal Government satisfies the requirements of tenure, duration, emolument, and duties, and whether any elements of the sovereignty of the United States are vested in it, frequently give rise to complex questions of law and fact. Hence, if an officer of the United States cannot be proceeded against criminally prior to the termination of the impeachment proceedings, those difficult issues would be injected into the criminal prosecution of any sitting or former federal employee in order to determine whether or not he is an officer immune from criminal prosecution until trial by the Senate. We seriously question that this is the true import of the Constitution.

2. Offenses subject to impeachment. If it were assumed arguendo, despite our own conclusion to the contrary, that an officer of the United States is not subject to criminal proceedings prior to the conclusion of impeachment proceedings, the scope of that immunity necessarily would be limited to offenses subject to impeachment. Such an asserted rule automatically would create another difficult-to-administer jurisdictional defense, viz., whether the offense in question is non-impeachable and therefore, subject immediately to criminal proceedings.

According to Article II, section 4 of the Constitution, officers of the United States can be impeached for "Treason, Bribery and other high Crimes and Misdemeanors." There is no need to define treason and bribery. But "[a]s there is no enumeration of offenses comprised under the last two categories, no little difficulty has been experienced in defining offenses in such a way that they fall within the meaning of the constitutional provisions." The Constitution of the United States, Analysis and Interpretation, S. Doc. No. 39, 86th Cong., 1st Sess., p. 556.

Early commentators indicated that "high Crimes and Misdemeanors" is a term of art intended to reach wrongs of a political or of a judicial character, neither limited to, nor encompassing all, indictable offenses. See, e.g., Story, Commentaries, op. cit., Vol. I, §§ 749, 764. Some writers stressed the political nature of offenses over which a tribunal for the trial of impeachments would have jurisdiction.

In The Federalist, No. 65, Alexander Hamilton explained:

> "A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words,

from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."

The following year during the Great Debate on the Removal Power of the President, James Madison submitted that, if the President improperly removed--

"from office a man whose merits require that he should be continued in it * * * he [the President] will be impeachable by this House before the Senate for such an act of maladministration; for I contend that the wanton removal of a meritorious officer would subject him to impeachment and removal from his own high trust." Annals of Congress, 1st Cong., col. 498.

In 1790 and 1791 James Wilson, a signer to the Declaration of Independence and Associate Justice of the Supreme Court, in his law lectures, defined the term "high misdemeanors" as malversation in office 9/ and he asserted:

"In the United States and in Pennsylvania, impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments." The Works of James Wilson, Vol. 2, pp. 165, 166.

9/ Malversation has been defined as misbehavior in office. Jowitt, Dictionary of English Law.

Story's detailed discussion of the rules governing impeachment, op. cit. (Vol. I, secs. 742-813), also stresses the political nature of impeachable offenses, and assigns this as the reason why they are to be tried before a tribunal more familiar with political practices than the courts of law. See, e.g., secs. 749, 764-765, 800. He also points out that offenses subject to impeachment necessarily cannot be limited to statutory crimes.10/ He explained that if--

> "the silence of the statute-book [is] to be deemed conclusive in favor of the party until Congress have made a legislative declaration and enumeration of the offences which shall be deemed high crimes and misdemeanors * * * the power of impeachment, except as to the two expressed cases, is a complete nullity, and the party is wholly dispunishable, however, enormous may be his corruption or criminality.

10/ Section 800 contains a recapitulation of the numerous offenses which in English history had been subject to impeachment. They included: Misleading the King with unconstitutional opinions; attempts to subvert the fundamental laws, and introduce arbitrary powers; attaching the great seal to an ignominious treaty; neglect to safeguard the sea by a lord admiral; betrayal of his trust by an ambassador, propounding and supporting pernicious and dishonorable measures by a privy counsellor; the receipt of exorbitant grants and incompatible employments by a confidential adviser to the King. While Story felt that certain impeachments were unduly harsh and understandable only in the light of their age, such as giving bad counsel to the king, advising a prejudicial peace, enticing the king to act against the advice of Parliament purchasing offices, giving medicine to the king without advice of physicians, preventing other persons from giving counsel to the king except in their presence, and procuring exorbitant personal grants from the king, he suggested that others were founded in the most salutary public justice; such as impeachments for malversations and neglects in office, for encouraging pirates, for official oppression, extortions, and deceits, and especially for putting good magistrates out of office and advancing bad ones.

> It will not be sufficient to say that, in the cases where any offence is punished by any statute of the United States, it may and ought to be deemed an impeachable offence. It is not every offence that by the Constitution is so impeachable. It must not only be an offence, but a high crime and misdemeanor." Section 796. (Underscoring supplied).

Yet to cite these commentators and say that impeachments are thought by some to be confined to wrongs of a political character more aptly characterizes the process than defines the offense. In short, it begs the question for a "private" offense, of the sort that a non-officer may also commit, may have gross political ramifications if the perpetrator is a public officer. Is an offense that brings an office into disrepute and renders it dysfunctional a "political" offense?

Disregarding a functional analysis of the impeachment clause suggested by the above question, William Rawle, another early commentator, took a narrow view of the term "impeachable offenses." He would restrict it to offenses committed while performing the duties of the office?

> "The legitimate causes of impeachment have been already briefly noticed. They can only have reference to public character and official duty. The words of the text are treason, bribery, and other high crimes and misdemeanors. The treason contemplated must be against the United States. In general those offences which may be committed equally by a private person as a public officer, are not the subjects of impeachment. Murder, burglary, robbery, and indeed all offences not immediately connected with office, except the two expressly mentioned, are left to the ordinary course of judicial proceeding, and neither house can regularly inquire into them, except for the purpose of expelling the member." View on the Constitution of the United States of America (1829) at 215.

Certainly, a case can be made that if impeachment is a process by which the faith in and integrity and effectiveness of the office of an offending incumbent can be restored,11/ offenses which tend to bring the office into disrepute or render it dysfunctional should be impeachable whether or not committed in an official capacity. The constitutional remedy must be commensurate with the constitutional need. Extortion or forgery committed in private transactions seemingly has just as enormous an impact on the office as does bribery. As the Supreme Court of Louisiana recently said in a case involving a state impeachment, because there is "a deep and vital interest" in the office of Judge . . . the official conduct of judges, as well as their private conduct, is closely observed. When a judge, either in his official capacity or as a private citizen, is guilty of such conduct as to cause others to question his character and morals, the people not only lose respect for him as a man but lose respect for the court over which he presides as well." In re Haggerty, 241 So. 2d 469 (La. 1970). See also A. Simpson, Federal Impeachments 50-53.

In confronting this issue, Justice Story in his Commentaries chose the safest course and presented the arguments without resolving the issue whether impeachment should be confined to official acts:

> In the argument upon Blount's impeachment, it was pressed with great earnestness that there is not a syllable in the Constitution which confines impeachments to official acts, and it is against the plainest dictates of common-sense

---

11/ Congressman Summers, Chairman of the House Judiciary Committee, who was the Manager of the impeachment of district judge Halsted Ritter in 1936 viewed the impeachment function as depending on the effect of the offense on the office: "We do not assume the responsibility . . . of proving that the respondent is guilty of a crime as that term is known to crimi jurisprudence. We do assume the responsibility of bringing before you a case, proven facts, the reasonable and probable consequences of which are to cause people to doubt the integri of the respondent presiding as a judge." 80 Cong. Rec. 5469, 5602-06 (74th Cong. 2d Sess. 1936).

that such restraint should be imposed upon it. Suppose a judge should countenance or aid insurgents in a meditated conspiracy or insurrection against the government. This is not a judicial act, and yet it ought certainly to be impeachable. He may be called upon to try the very persons whom he has aided. Suppose a judge or other officer to receive a bribe not connected with his judicial office, could he be entitled to any public confidence? Would not these reasons for his removal be just as strong as if it were a case of an official bribe? The argument on the other side was, that the power of impeachment was strictly confined to civil officers of the United States, and this necessarily implied that it must be limited to malconduct in office.

§805. It is not intended to express any opinion in these commentaries as to which is the true exposition of the Constitution on the points above stated. They are brought before the learned reader as matters still sub judice, the final decision of which may be reasonably left to the high tribunal constituting the court of impeachment when the occasion shall arise. Commentaries, op. cit. §§ 804, 805 (1833).

One hundred and forty years later, the question concerning what criminal statutory offenses can be made the subject of impeachment proceedings remains open. For the offenses not falling within the impeachment jurisdiction, the offender/officer could be prosecuted even if the Constitution precluded the criminal prosecution of impeachable offenses prior to the conclusion of impeachment. However, if impeachment were indeed a condition precedent to criminal prosecution, a person accused of a common offense committed while in the employment of the United States could plead that the offense was of a political nature and that he could not be prosecuted prior to the conclusion of impeachment proceedings. This would inject into the trial of a criminal case the delicate issue of what is a political or impeachable offense, and what constitutes a common non-impeachable crime.

Further, this delicate issue seemingly would be before the wrong forum (see Story quotation above). The actual power to impeach vel non in every instance rests with the House of Representatives and not with the courts. And this congressional power -- laying aside the possible outcome in some future instance of alleged gross abuse -- subsumes within it the threshhold issue of determining whether an offense is impeachable. In a criminal proceeding a judicial conclusion in favor of the impeachable nature of the offense would of course, not require the House of Representatives to impeach or the Senate to convict. Indeed, a number of considerations might induce nonaction by the Congress even if an "offense" were held by a court to be impeachable (and therefore a jurisdictional bar to indictment), e.g., (1) higher legislative priorities for other business -- legislation, treaty approvals, confirmations of appointments, investigations, (2) political pressures not to act, (3) inappropriatness of a political trial for the given offense, (4) an estimate of ultimate failure to garner the necessary simple majority in the House and two-thirds vote in the Senate, thereby precluding the attempt, (5) a desire not to exacerbate political relations because of the adverse effect on governmental concerns.

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

3. Problems presented by corollary issues. There are also reasons of a corollary nature which counsel against the conclusion that impeachment proceedings must be completed before a civil officer may be subjected to criminal proceedings.

(a) During a grand jury investigation, it may appear for instance, that one of several co-conspirators is an officer of the United States

as was the case in Johnson v. United States, supra. It would seriously interfere with the investigation if it had to be suspended in respect to that officer, or indeed as to the other co-conspirators, until the termination of impeachment proceedings. The alternative is equally unappealing. If evidence were nonetheless presented in respect to the other co-conspirators, serious charges would inevitably be levied against the civil officer who would not have the opportunity in a judicial tribunal to clear himself. Further, if the civil officer actually is involved in the conspiracy, his nonparticipation at trial could impede prosecution of the co-conspirators.

(b) A similar consideration is presented by the statute of limitations. If an officer cannot be prosecuted prior to impeachment, the criminal statute of limitations could easily run in his favor. If his immunity blocked effective prosecution of co-conspirators, the statue of limitations might run in their favor too. The Criminal Code does not contain and, to our knowledge, never has contained a section providing for the suspension of the statute of limitations in the case of an officeholder until the termination of impeachment proceedings. The absence of such provision suggests Congress has considered such a rule to be unnecessary. Such practical interpretation of the Constitution is entitled to great consideration. Stuart v. Laird, 1 Cranch 299, 309 (1803); Field v. Clark, 143 U.S. 649, 691 (1892); United States v. Midwest Oil Co., 236 U.S. 459, 472-473 (1915); United States v. Curtiss-Wright Corp., 299 U.S. 304, 328-329 (1936).

In sum, an interpretation of the Constitution which requires the completion of impeachment proceedings before a criminal prosecution can be instituted would enable persons who are or were employed by the Government to raise a number of extremely technical and complex defenses. It also would pressure Congress to conduct a large number of impeachment proceedings which would weigh heavily on its limited time. Such an interpretation of the Constitution is prima facie erroneous.

II.

Is the President Amenable to Criminal Prosecution while in Office?

This part of the memorandum deals with the question whether and to what extent the President is immune from criminal prosecution while he is in office. It has been suggested in the preceding part that Article I, sec. 3, clause 7 of the Constitution does not require the exhaustion of the impeachment process before an officer of the United States can be subjected to criminal proceedings. The question therefore arises whether an immunity of the President from criminal proceedings can be justified on other grounds, in particular the consideration that the President's subjection to the jurisdiction of the courts would be inconsistent with his position as head of the Executive branch.

It has been indicated above that there is no express provision in the Constitution which confers such immunity upon the President. Inasmuch as Article I, sec. 6, clause 1 expressly provides for a limited immunity of the members of the legislative branch, it could be argued that, *e contrario*, the President is not entitled to any immunity at all. 12/ This proposition, however, is not necessarily conclusive; it could be said with equal validity that Article I, sec. 6, clause 1 does not confer any immunity upon the members of Congress, but rather limits the complete immunity from judicial proceedings which they otherwise would enjoy as members of a branch co-equal with the judiciary.

12/ In his speech of March 5, 1800 on the floor of the Senate, Senator Pickney, a former member of the Constitutional Convention, suggested that the failure to provide for a Presidential immunity was deliberate. Annals of Congress, 6th Cong., col. 74; Farrand, Records of the Federal Convention Vol. III, pp. 384, 385.

Further, as indicated by statements of Alexander Hamilton in The Federalist, No. 69, 13/ it could be said that the immunity of the President to criminal indictment and trial during his office may have been too well accepted to need constitutional mention (by analogy to the English Crown), and that the innovative provision was the specified process of impeachment extending even to the President.

Hamilton's comments were made in the context of calming fears about Executive power and distinguishing the President from the English king. Regarding criminal liability, his strongest statement would have been to suggest that the President was subject to criminal liability before or after impeachment, yet on the occasion when he made the comparison he spoke only of criminal liability after impeachment. To be sure, there are strong statements by others to the point that the Convention did not wish to confer privileges on the

---

13/ The Federalist, No. 69:

> "The President [unlike the King] would be liable to be impeached, tried, and upon conviction * * * removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law."

See also the following from Hamilton. The Federalist, No. 65:

> "The punishment, which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to perpetual ostracism * * *; he will still be liable to prosecution and punishment in the ordinary course of law."

The Federalist, No. 77:

> "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."

President, but these were made in most general terms, and did not refer to the question now in issue. 14/ Further, despite these statements an early Congress did recognize one form of privilege in the Executive in at least one instance. 15/ The historical evidence on the precise point is not conclusive.

A. Ambiguities in a Doctrinal Separation of Powers Argument.

Any argument based on the position or independence of one of the three branches of the Government is subject to the qualification that the Constitution is not based on a theory of an airtight separation of powers, but rather on a system of checks and balances, or of blending the three powers. The Federalist, Nos. 47, 48 (James Madison). We must therefore proceed case-by-case and look to underlying purposes. This facet of any reasoning based on the doctrine of the separation of powers is necessarily overlooked by those who oppose independence or immunity in a given instance. Examples include two dissenting opinions of Mr. Justice Holmes.

14/ The framers of the Constitution made it abundantly clear that the President was intended to be a Chief Executive, responsible, subject to the law, and lacking the prerogatives and privileges of the King of England. See, e.g., James Wilson's statements that the prerogatives of the British monarch were not to be a proper guide in defining Executive powers (Farrand, Records of the Federal Convention Vol. I, p. 65) and that the President would not be above the law, nor have a single privilege annexed to his character. 2 Elliot's Debates 480. In the North Carolina Convention, James Iredell contrasted the position of the King of England who holds his authority by birthright, has great powers and prerogatives, and can do no wrong, with that of the President who is no better than his fellow citizens and can pretend no superiority over the meanest man in the country. 4 Elliot's Debates 109.

15/ See, e.g., President Washington's refusal in 1794 to submit to the Senate those parts of a diplomatic correspondence which in his "judgment for public considerations, ought not to be communicated." 1 Richardson, Messages and Papers of the Presidents 152; 1 Senate Executive Journal 147. See Attorney General Randolph's note to President Washington that the message "appears to have given general satisfaction. Mr. H--d--n, in particular thinks it will have good effect." The Writings of George Washington (Bicentennial Edition) Vol. 33 p. 282 in 8.

In Springer v. Philippine Islands, 277 U.S. 189, 209-210 (1928), he gave graphic expression to the extent which the blending element in the Constitution has blunted the principle of the separation of powers:

> "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. * * * When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on."

And again in Myers v. United States, 272 U.S. 52, 177 (1926), he wrote that any legal arguments drawn merely from the Executive power of the President, his duties to appoint officers of the United States and to commission them, and to take care that the laws be carefully executed seem to him "spider's webs inadequate to control dominant facts."

Whether or not one agrees with Holmes or the full thrust of his rhetoric, most scholars would concede that there are few areas under the Constitution to which a single branch of the Government can claim a monopoly. An argument based on the separation of powers must be illuminated therefore by constitutional practice.

The difficulty of developing clear rules regarding the various possible facets of Presidential immunity is demonstrated by the limited and ambivalent case law developed in the fields of the amenability vel non of the President to civil litigation and to the judicial subpoena power. Much of this precedent has been discussed in our memorandum dated June 25, 1973, regarding Presidential Amenability to Judicial Subpoena.

In the Burr treason trial, Chief Justice Marshall at first concluded that since the President is the first magistrate of the United States, and not a King who can do no wrong, he was subject to the judicial subpoena power. United States v. Burr, 25 Fed. Cas. 30, 34, No. 14,692 (C.C.D. Va., 1807). In the Burr misdemeanor trial, however, which took

place only a few months later, the Chief Justice had to qualify significantly his claim of the subpoena power over the President by conceding that the courts are not required

> "to proceed against the President as against an ordinary individual." United States v. Burr, 25 Fed. Cas. 187, 190, No. 14,694 (C.C.D. Va., 1807). 16/

And by acquiescing in the privileges claimed by President Jefferson of not attending court in person and of withholding certain evidence for reasons of State, Chief Justice Marshall recognized that the power of the judiciary to subpoena the President is subject to limitations based on the needs of the Presidential office.

Marshall's recognition of the special character of the Presidential office was expanded in Kendall v. United States ex rel. Stokes, 12 Pet. 524, 610 (1838), where the Court seemed to deny that it had any jurisdiction over the President:

> "The executive power is vested in a president; and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeachment."

It is significant that this apparent total disclaimer of any judicial authority over the President also was qualified by adding the clause "so far as his powers are derived from the constitution."

16/ See also Chief Justice Marshall's statement in the Burr treason trial "to issue a subpoena to a person filling the exalted position of the chief magistrate is a duty which would be dispensed with more cheerfully than it would be performed." Id. at p. 34.

There have been countless examples in which courts have assumed jurisdiction to scrutinize the validity of Presidential action, such as proclamations, Executive orders, 17/ and even direct instructions by the President to his subordinates. 18/ It is true that, as a matter of convention the party asserting the validity of the Presidential action (whether plaintiff or defendant) is usually a party other than the President, such as his subordinate, or the custodian of the res. 19/ Nevertheless there have been recent dicta that when this convention is inadequate to protect the citizen, i.e., where the President alone can give the requested relief, the courts may assume jurisdiction over the litigation. See the June 25, 1973 memorandum, Appendix iii-iv.

Again, Attorney General Stanbery's famous oral argument in Mississippi v. Johnson, 4 Wall. 475; 481-491(1867), on which the Brief in Opposition by the Attorneys for the President in In re Grand Jury Subpoena Duces Tecum, etc., D.C. Misc. 47-73, relies so heavily, 20/ is prefaced by the statement that the case made against President Johnson "is not made against him as an individual, as a natural person, for any acts he intends to do as Andrew Johnson the man, but altogether in his official capacity as President of the United States." Hence, Attorney General Stanbery's reasoning is presumably limited to the power of the courts to review official action of the President, 21/ and does not pertain to the question whether or not the courts lack the authority to deal with the President "the man" with respect to matters

---

17/ See, e.g., United States v. Curtiss-Wright, 299 U.S. 304 (1936) (Embargo Proclamation); United States v. Bush, 310 U.S. 371 (1940) (Customs Proclamation).

18/ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Steel Seizure).

19/ It may well be that under the normally operative procedural rules the President would be considered the real party in interest or a necessary party.

20/ 9 Weekly Compilation of Presidential Documents 961, 963, 970

21/ In the eyes of the Court, the dismissal of the proceedings was based on the ground that it lacked jurisdiction over the subject matter rather than over the person of the President. This is shown by its dismissal of similar proceedings brought by the State of Georgia against Secretary of War Stanton and General Grant. 6 Wall. 50 and 451 (1867).

which have no relation to his official responsibility.

Thus it appears that under our constitutional plan it cannot be said either that the courts have the same jurisdiction over the President as if he were an ordinary citizen or that the President is absolutely immune from the jurisdiction of the courts in regard to any kind of claim. The proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and functions of the Presidency.

b. Competing Interests.

An assessment designed to determine the extent to which the status of the Presidency is inconsistent with giving the courts plenary criminal jurisdiction over the President may be divided into two parts. First, the applicability vel non to the Presidency of any of the considerations which in Part I of this memorandum led to rejection of the proposition that impeachment must precede criminal proceedings, and, second, whether criminal proceedings and execution of potential sentences would improperly interfere with the President's constitutional duties and be inconsistent with his status.

1. Is court trial of a President too political for the judicial branch? Part I of this memorandum, for a variety of reasons, concluded that the considerations which led to the establishment of the congressional impeachment jurisdiction, *i.e.*, that the courts were not well equipped to handle (a) political offenses and (b) crimes committed by high office-holders, were insufficient to exempt every officer of the United States from criminal prosecution for statutory offenses prior to the termination of the impeachment proceedings. The question to be examined here is whether these reasons are so much stronger in the case of the President as to preclude his prosecution while in office.

a. Political offenses. Political offenses subject to indictment are either statutory or nonstatutory offenses. The courts, of course, cannot adjudicate nonstatutory offenses. With respect to statutory political offenses their very inclusion in the Penal Code is an indication of a congressional determination that they can be adjudicated by a judge and jury,

and there appears to be no weighty reason to differentiate between the President and other officeholders, unless special separation of powers based interests can be articulated with clarity.

It should be noted that it has been well established in civil matters that the courts lack jurisdiction to reexamine the exercise of discretion by an officer of the Executive branch Marbury v. Madison, 1 Cranch 137, 166 (1803); Decatur v. Paulding 14 Pet. 497, 514-517 (1840); Panama Canal Co. v. Grace Line, Inc. 356 U.S. 309, 318 (1958). By the same token it would appear that the courts lack jurisdiction in criminal proceedings which have the effect of questioning the proper exercise of the President's discretion. This conclusion, of course, would involve a lack of jurisdiction over the subject matter and not over the person.

b. Intrinsically political crimes. The second reason for the institution of impeachment, viz., the trial of political men, presents more difficulties. The considerations here involved are that the ordinary courts may not be able to cope with powerful men, and second, that it will be difficult to assure a fair trial in criminal prosecutions of this type.

i. The consideration that the ordinary courts of law are unable to cope with powerful men arose in England where it presumably was valid in feudal time. In the conditions now prevailing in the United States, little weight is to be given to it as far as most officeholders are concerned. (See Rawle, on. cit., supra, at 211).

ii. We also note Alexander Hamilton's point that in well-publicized cases involving high officers, it is virtually impossible to insure a fair trial. 22/ In Part I we assumed without discussion that this point was not of sufficient importance to require impeachment prior to indictment with respect to every officeholder. Undoubtedly, the consideration of assuring a fair criminal trial for a President while in office would be extremely difficult. It might be impossible to impanel a neutral jury. To be sure there is a serious

22/ "The prosecution of them [i.e., political crimes committed by political men] for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In (continued)

"fairness" problem whether the criminal trial precedes or follows impeachment. However, the latter unfairness is contemplated and resolved in the impeachment clause itself, thus suggesting that the difficulty in impaneling a neutral jury should not be viewed, in itself, an absolute bar to indictment of a public figure.

2. Would criminal proceedings against a President be ineffective and inappropriate because of his powers regarding (a) the conduct of foreign affairs, and (b) pardons? The Presidency, however, creates a special situation in view of the control of all criminal proceedings by the Attorney General who serves at the pleasure and normally subject to the direction of the President and the pardoning power vested in the President. See Reply Brief filed by Attorneys for the President in In Re Grand Jury Subpoena, etc. (see supra), 9 Weekly Compilation of Presidential Documents 1629-1630, and the authorities there cited. Hence, it could be argued that a President's status as defendant in a criminal case would be repugnant to his office of Chief Executive, which includes the power to oversee prosecutions. In other words, just as a person cannot be judge in his own case, he cannot be prosecutor and defendant at the same time. This objection would lose some of its persuasiveness where, as in the Watergate case, the President delegates his prosecutorial functions to the Attorney General, who in turn delegates them to a Special Prosecutor. Reply Brief, supra, at 1630, fn. 1. However, none of these delegations is, or legally can be, absolute or irrevocable.

Further, the problem of Executive privilege may create the appearance of so serious a conflict of interest as to make it appear improper that the President should be a defendant in a criminal case. If the President claims the privilege he would be accused of suppressing evidence unfavorable to him. If he fails to do so the charge would be that by making available evidence favorable to him he is prejudicing the ability of future Presidents to claim privilege. And even if all other hurdles are surmounted, he would still possess the pardoning power

---

22/ (Continued)
many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt." The Federalist No. 65 (Hamilton).

3. Would criminal proceedings unduly interfere in a direct or normal sense with the conduct of the Presidency?

a. Personal attendance. It has been indicated above that in the Burr case, President Jefferson claimed the privilege of not having to attend court in person. And it is generally recognized that high government officials are excepted from the duty to attend court in person in order to testify. See our memorandum of June 25, 1973, supra, pp. 7-8. This privilege would appear to be inconsistent with a criminal prosecution which necessarily requires the appearance of the defendant for pleas and trial, as a practical matter.

It should be noted that the exemption of high government officials from personal appearance is only the general rule. In Peoples v. United States Department of Agriculture, 427 F.2d 561, 567 (D.C. Cir. 1970) the court cautioned that "subjecting a cabinet officer to oral deposition is not normally countenanced * * *." (Underscoring supplied). The quashing of a subpoena addressed to the NASA Administrator in Capital Vending Co. v. Baker, 36 F.R.D. 45, 46 (D.C. D.C., 1964), was predicated on the circumstance that the Administrato had no personal knowledge of the event. Personal attendance of high officials has been required in several exceptional cases where the official was directly and personally involved in the events underlying the litigation. Union Savings Bank of Patchogue v. Saxon, 209 F. Supp. 317 (D.C. D.C. 1962), (Comptroller of the Currency); Virgin Corporation v. Paiewonsky, 39 F.R.D. 9, (D.C. V.I., 1965) (Territorial Governor); D.C. Federation of Civic Association v. Volpe, 316 F. Supp. 754, 756 fn. 12 (D.C. D.C., 1970), reversed on other grounds 459 F. 2d 1231 (C.A. D.C., 1972) certiorari denied 405 U.S. 1031 (1973) (Secretary of Transportation).

Because a defendant is already personally involved in a criminal case (if total immunity be laid aside), it may be questioned whether the normal privilege of high officials not to attend court in person applies to criminal proceedings in which the official is a defendant.

b. Direct interference with official duties. A necessity to defend a criminal trial and to attend court in connection with it, however, would interfere with the President's unique official duties, most of which cannot be performed by anyone else. It might be suggested that the same is true with the defense of impeachment proceedings; but this is a risk expressly contemplated by the Constitution, and is a necessary incident of the impeachment process. The Constitutional Convention was aware of this problem but rejected a proposal that the President should be suspended upon impeachment by the House until acquitted by the Senate. 23/

During the past century the duties of the Presidency, however, have become so onerous that a President may not be able fully to discharge the powers and duties of his office if he had to defend a criminal prosecution. This might constitute an incapacitation so that under the provisions of the Twenty-fifth Amendment, Sections 3 or 4, the Vice President becomes Acting President. The same would be true, if a conviction on a criminal charge would result in incarceration. However, under our constitutional plan as outlined in Article I, sec. 3, only the Congress by the formal process of impeachment, and not a court by any process should be accorded the power to interrupt the Presidency or oust an incumbent. 24/

23/ That decision was based in part on the consideration that a simple majority of the House should not be able to suspend the President. 2 Farrand, Records of the Federal Convention 612. Tucker's Blackstone, Vol. I, App., pp. 347-348, which, having been published in 1803, did not have the benefit of the Madison papers, presumed that a President would be instantly incapacitated when actually impeached.

24/ See Story, op. cit., sec. 786.

This would suggest strongly that, in view of the unique aspects of the Office of the President, criminal proceedings against a President in office should not go beyond a point where they could result in so serious a physical interference with the President's performance of his official duties that it would amount to an incapacitation. [The non-physical yet practical interferences, in terms of capacity to govern, are discussed infra as the "fourth question."] The physical interference consideration, of course, would not be quite as serious regarding minor offenses leading to a short trial and a fine. It has been shown in the June 25, 1973 Memorandum, supra, Appendix, p. 1, fn., that Presidents have submitted to the jurisdiction of the courts in connection with traffic offenses. However, in more serious matters, i.e., those which could require the protracted personal involvement of the President in trial proceedings, the Presidency would be derailed if the President were tried prior to removal.

A possibility not yet mentioned is to indict a sitting President but defer further proceedings until he is no longer in office. From the standpoint of minimizing direct interruption of official duties--and setting aside the question of the power to govern--this procedure might be a course to be considered. One consideration would be that this procedure would stop the running of the statute of limitations. (For details see pp. 13-14 of Part I of this Memorandum.) It is uncertain whether a constitutional conclusion that the President could not be indicted while in office would be viewed as tolling the federal statutes of limitations. While this approach may have a claim to be considered as a solution to the problem from a legislative point of view, it would overlook the political realities. As will be shown presently, an indictment hanging over the President while he remains in office would damage the institution of the Presidency virtually to the same extent as an actual conviction. To be sure, there could also be damage flowing from unrefuted charges. It also may be noted that the possibility that a President may escape all prosecution by the running of the statute of limitations is not a constitutional matter. The policy regarding statutes of limitation is within legislative control.

4. Would initiation or prosecution of criminal proceedings as a practical matter, unduly hamper the power to govern, and give be extraordinary, undue importance, because of the symbolic significance of the Presidency? In Mississippi v. Johnson, supra, Attorney General Stanbery made the following statement:

> "It is not upon any peculiar immunity that the individual has who happens to be President; upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President."

This may be an overstatement, but surely it contains a kernel of truth, namely that the President is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs. It is not to be forgotten that the modern Presidency, under whatever party, has had to assume a leadership role undreamed of in the eighteenth and early nineteenth centuries. The spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination.

Perhaps this thought is best tested by considering what would flow from the reverse conclusion, i.e., an attempted criminal trial of the President. A President after all is selected in a highly complex nationwide effort that involves most of the major socio-economic and political forces of our whole society. Would it not be incongruous to bring him down, before the Congress has acted, by a jury of twelve, selected by chance "off the street" as Holmes put it? Surely the House and Senate, via impeachment, are more appropriate agencies for such a crucial task, made unavoidably political by the nature of the "defendant."

The genius of the jury trial has been that it provides a forum of ordinary people to pass on matters generally within the experience or contemplation of ordinary, everyday life. Would it be fair to such an agency to give it responsibility for an unavoidably political judgment in the esoteric realm of the Nation's top Executive?

In broader context we must consider also the problems of fairness, and of acceptability of the verdict. Given the passions and exposure that surround the most important office in the world, the American Presidency, would the country in general have faith in the impartiality and sound judgment of twelve jurors selected by chance out of a population of more than 200 million? If based on "close" evidence it is unlikely a guilty verdict would be reversible on appeal (assuming no procedural error), and yet it could be tantamount to removal and probably would force a resignation. Even if there were an acquittal, would it be generally accepted and leave the President with effective power to govern?

A President who would face jury trial rather than resign could be expected to persist to the point of appealing an adverse verdict. The process could then drag out for months. By contrast the authorized process of impeachment is well-adapted to achieving a relatively speedy and final resolution by a nation-based Senate trial. The whole country is represented at the trial, there is no appeal from the verdict, and removal opens the way for placing the political system on a new and more healthy foundation.

To be sure it is arguable that despite the foregoing analysis it would be possible to indict a President, but defer trial until he was out of office, without in the meantime unduly impeding the power to govern, and the symbolism on which so much of his real authority rests. Given the realities of modern politics and mass media, and the delicacy of the political relationships which surround the Presidency both foreign and domestic, there would be a Russian roulette aspect to the course of indicting the President but postponing trial, hoping in the meantime that the power to govern could survive.

A counter-argument which could be made is that the indictment alone should force a resignation, thus avoiding the trauma either of a trial during office, or an impeachment proceeding. This counter-argument, however, rests on a prediction concerning Presidential response which has no empirical foundation. The reasons underlying the Founding Fathers' decision to reject the notion that a majority of the House of Representatives could suspend the President by impeaching him (see fn. 23, supra) apply with equal force in a scheme that would permit a majority of a grand jury to force the resignation of a President. The resultant disturbance to our constitutional system would be equally enormous. Indeed, it would be more injudicious because the grand jury, a secret body, could interrupt Presidential succession without affording the incumbent the opportunity for a hearing to voice his defense.

A further factor relevant here is the President's role as guardian and executor of the four-year popular mandate expressed in the most recent balloting for the Presidency. Under our developed constitutional order, the presidential election is the only national election, and there is no effective substitute for it. Different electorates and markedly different voting patterns produce the Senate and the House of Representatives. Because only the President can receive and continuously discharge the popular mandate expressed quadrennially in the presidential election, an interruption would be politically and constitutionally a traumatic event. The decision to terminate this mandate, therefore, is more fittingly handled by the Congress than by a jury, and such congressional power is founded in the Constitution.

In suggesting that an impeachment proceeding is the only appropriate way to deal with a President while in office, we realize that there are certain drawbacks, such as the running of a statute of limitations while the President is in office, thus preventing any trial for such offenses. 25/ In this difficult area all courses of action have costs and we recognize that a situation of the type just mentioned could cause a complete hiatus in criminal liability. We doubt, however, that this gap in the law is sufficient to overcome the arguments against subjecting a President to indictment and criminal trial while in office.

25/ As shown above, the statute of limitations problem could be obviated by a specific statutory provision suspending the running of the criminal statute of limitations in favor of the President while he is in office.

III.

Is the Vice President Amenable to Criminal Proceedings While in Office?

In the first part of this memorandum we concluded that as a general proposition the Constitution does not require that an officer of the United States be impeached before criminal proceedings may be instituted against him. In the second part we concluded that by virtue of his unique position under the Constitution the President cannot be the object of criminal proceedings while he is in office. In this third part we are concerned with the question whether there is anything in the position of the Vice President that is equally inconsistent with his amenability to criminal proceedings.

We begin by discussing the case of Aaron Burr. Eight months before the expiration of his term, he was indicted for murder in both the New Jersey and New York courts for fatally wounding Alexander Hamilton in a duel on July 11, 1804. B. Mitchell, Alexander Hamilton, 537 (1962). The proceedings in New Jersey were quashed after the Jeffersonians, who became his partisans during the impeachment trial of Judge Samuel Chase over which Burr presided, prevailed upon the New Jersey Governor Id. at 541. In New York, the grand jury changed the charge from murder to the misdemeanor of sending a challenge and Burr was tried on this charge after his term was over. 26/ These facts show one more understanding nearly contemporaneous to the making of the Constitution to the effect that impeachment need not precede indictment. Surely, had it been thought that a sitting Vice President could not be federally indicted prior to impeachment, on the ground that his duties could be so interrupted, the principle of federal supremacy would have imposed a similar restraint on the states. 27/ And yet, while the indictment was strenuously resisted, no claim was made that criminal proceedings were barred until the conclusion of impeachment proceedings.

26/ He remained a fugitive from the courts of New York during the remainder of his term as Vice-President. Mitchell, supra, at 541.

27/ In Tennessee v. Davis, 100 U.S. 257 (1879), the Supreme Court upheld the constitutionality of a statute removing to federal courts state criminal prosecutions of federal employees for acts committed under color of office.

We resort then to an analysis similar to that made with respect to the amenability of the President to criminal proceedings. We based the President's immunity from criminal proceedings essentially on two grounds. First, that the person who controls criminal prosecutions as the head of the Executive branch, controls part of the evidence as holder of the power of Executive privilege, and is vested with the pardoning power under Article II, section 2, clause 1 of the Constitution, cannot at the same time be a defendant in a criminal case. This set of considerations obviously is not applicable to the Vice President. (See II-B-2).

The second reason was the effect of a criminal prosecution on the President's office. (See II-B-3 and 4.) In that context we examined the unique nature of the President's duties and the symbolic attributes of his office. The questions now to be examined are (a) whether the Vice President in his own right is vested with constitutional and statutory duties so unique and important that they may not be disturbed by a criminal prosecution and (b) whether such prosecution would do irreparable harm to the institution of the Presidency because the Vice President may at any time become President, i.e., a theory of Vice Presidential immunity derivative from Presidential immunity. In making that evaluation we start out from the premise that immunity from prosecution is basically contrary to the spirit of the Constitution and it may be resorted to only if the considerations leading to it are irrefutable.

A. Duties of the Vice President pursuant to Statute, Reorganization Plan, or Executive Order.

The Vice President serves on a number of Boards and Commissions pursuant to statute, Reorganization Plan or Executive order. He is a member of the Establishment of the Smithsonian Institution, a Regent thereof, and presides over certain meetings of the members of the Institution in the absence of the President. 20 U.S.C. 41, 42, 45. He is the Chairman of the National Council on Marine Resources and Engineering Development (33 U.S.C. 1102), 28/ and a member

---

28/ 33 U.S.C. 1102(c) authorizes the President to designate one of the members of the Council to preside over its meetings during the absence, disability, or unavailability of the Chairman.

of the National Security Council (50 U.S.C. 402). In addition, he is a member of the Cabinet Committee on Economic Policy (Executive Order No. 11453); Chairman of the National Council on Indian Opportunity (Executive Order No. 11399, as amended by Executive Order No. 11551); and Chairman of the President's Council on Youth Opportunity (Executive Order No. 11330, as amended by Executive Order No. 11547). He has "immediate supervision" over the Office of Intergovernmental Relations (Executive Order No. 11455), and is a member of the Domestic Council (Reorganization Plan No. 2 of 1970, sec. 201).

The operations of none of those governmental entities would be jeopardized if the Vice President could not attend them. Regarding such functions the role of the Vice President can be analogized to that of a cabinet officer.

B. Duties of the Vice President under the Constitution.

Under the Constitution the Vice President has the following duties:

i. He shall be President of the Senate. Article I, section 3, clause 4. The Senate, however, shall elect a President pro tempore to act as President of the Senate in the event the Vice President is absent or exercises the Office of the President. (Article I, section 3, clause 5).

ii. Break a tie if the Senate is evenly divided. (Article I, section 3, clause 4).

iii. Become President in the case of the removal, death or resignation of the President (Twenty-fifth Amendment, section 1).

iv. Become Acting President in the event that the President is unable to discharge the powers and duties of his office (Twenty-fifth Amendment, secs. 3 and 4).

The Vice President's functions as President of the Senate clearly are not unique. The Constitution specifically provides

for a substitute in the person of the President pro tempore of the Senate. With respect to his responsibility as tie breaker his immunity from criminal prosecution should be analogized to that of Members of Congress under Article I, section 6, clause 1 of the Constitution. That congressional immunity from arrest does not extend to treason, felony, and breach of the peace, i.e., virtually the entire spectrum of criminal proceedings. The mere possibility that the Vice President may have to cast a tie-breaking vote would therefore not justify his immunity from criminal proceedings.

This leaves the question whether the responsibilities and the position of the Vice President as potential President or Acting President are inconsistent with his amenability to criminal proceedings, so that on a derivative basis he would share the President's immunity. As in the case of the Presidenc this issue will be analyzed (a) in terms of the direct interference with the performance of his duties and functions, and (b) with the symbolic impact on the dignity of the Presidency.

1. Direct or formal interference with the conduct of the Vice Presidency. The issue here is whether immediate availability of the Vice President to assume the duties of the President or Acting President is so important that he should not be even temporarily incapacitated by trial or possibl incarceration. (The Vice President would become President in event of death, resignation or removal of the President, and would become Acting President in the event the President were found under the Twenty-fifth Amendment to be incapacitated.) The principal responsibility of the Vice President is to be ready to serve as President or Acting President should the occasion arise, thereby avoiding any interruption in the continuity of the office of the President. This duty "to stand and wait" is of the highest constitutional and institutional importance. Judicial proceedings which could interfere with readiness to serve therefore require careful scrutiny.

At the same time we must note the highly contingent nature of the possibility that the Vice President would be called to assume the office of President or Acting President.

Moreover, it has not been the custom to sequester the Vice President to make certain that he is always available to assume his potential Presidential duties at a moment's notice. The Vice President is frequently absent from the capital, possibly in remote and inaccessible parts of the country,29/ or even abroad on ceremonial functions. Nothing, of course, can prevent him from being sick or otherwise temporarily incapacitated.

Under such a practical interpretation of the extent of the Vice President's immediate availability, it appears as a general proposition that his duty to stand and wait does not necessarily require his total immunity from criminal prosecution. If the Office of the Presidency was vacated while a criminal proceeding was being conducted against the Vice President, the process could be halted at once. Whether or not impeachment proceedings would then ensue against the former Vice President, now President, would depend on the will of Congress. The situation then would be exactly the same as if the Vice President had been President when the allegations of criminality first surfaced -- no better, no worse. Thus, a criminal indictment against a Vice President need not abrogate in any way his constitutional duty to stand and wait. This duty, therefore, does not afford a basis for granting to a Vice President immunity from criminal prosecution.

As a further practical observation, it may be noted that if a trial of the Vice President proceeded to a sentence of imprisonment, and were sustained in what might be expected to be an expeditious appeal, the Vice President might well resign. He could be replaced under the Twenty-fifth Amendment's procedure for filling a "vacancy" in the office of Vice President. Thus, the uninterruptibility of the Presidency would be preserved. There is, of course, no provision in the Constitution (other than impeachment and removal) for determining that a Vice President is incapacitated. The Constitution contains such incapacity-determination process only for the Presidency.

29/ Note the delay in reaching Vice President Coolidge on his father's farm after President Harding's death.

Institution of criminal proceedings against the Vice President could, however, inject uncertainties into the Presidential succession. If a Vice President is under indictment or sentence of imprisonment, it could be claimed that he is incapacitated to succeed to the Presidency, and that the Speaker of the House of Representatives is next in line of succession. In that event the political stability of the nation could be seriously disrupted as the result of the failure of the Constitution to provide a procedure to resolve that question. The matter would come to a head if an actual vacancy in the Presidency should then occur. No one can foresee all of the contingencies which might arise in this situation. It might be reasonable to speculate that the Congress might claim an authoritative power in itself to resolve the matter, but if it did so by any vote falling short of the two-thirds Senate vote required to remove by the impeachment process, further uncertainties could ensue. Alternatively, the situation might give rise to a modern analogy to the Electoral Commission which was set up to resolve the Hayes-Tilden dispute.

To be sure, any action which could cast a doubt on the Vice President's capacity to succeed to the Presidency poses a serious question. Nevertheless, there are hazards also in having unresolved criminal charges hanging over the head of a Vice President, and the foregoing set of difficult scenarios is highly contingent. We suggest, therefore, that the rather remote possibility that the Vice President's capacity might be questioned would not justify a conclusion that the Vice President is immune from criminal prosecution.

2. Practical interference with the power to govern and the symbolic significance of the Vice Presidency.--Turning now from the question of direct and formal interferences to the issue of symbolic and other practical interferences with the power to govern (as discussed in Part II-B-4), it may be observed that if it is felt these latter considerations are germane for the President, they are also germane for the Vice President, although possibly to a lesser degree. Clearly the authority of the Presidency would suffer immeasurably were it to pass to a Vice President under indictment or to one "taken from criminal custody by a set of curious chances," to paraphrase the Mikado. But the damage could be similar--or even more serious--if the Presidency passed to a Vice President against whom serious charges were in everyone's mouth and who could neither be brought to justice nor given an opportunity to clear himself.

Again, because of the contingent nature of Vice Presidential succession to the Presidency, we feel that the potential problems in this area too should be faced and solved by political [or other] means as they occur, rather than be ignored under a theory of total immunity from criminal prosecution. If, for example, actual or threatened criminal prosecution should result in a resignation, the Vice Presidential office could be refilled by the procedures of the Twenty-fifth Amendment.

3. Evaluation.--There is one fundamental recurring problem in the above discussion. Should the Vice President be treated as if he were the President himself or his alter ego, because he is only one heart beat away from taking that position? Alternatively, should the stress be placed on the contingent nature of his assumption of the Presidential office? A reasonable approach toward the solution of this dilemma would be the consideration that the criminal prosecution would not directly and immediately interfere with the performance of the Presidential duties and with the Presidential office itself, but rather with the Vice President's ability to succeed to the Presidency and the effect thereof on that institution.

As indicated above, the prosecution of a Vice President would not legally or actually preclude his assumption of the Presidential duties because the proceedings could always be interrupted in that event. The problem therefore is basically of a political nature, viz., whether a Vice President against whom criminal charges have been made, who perhaps has been indicted, and who perhaps has been convicted can effectively perform the duties of the President. This political question is not solved by providing for immunity from criminal prosecution. Even if there were no indictment and trial, the very existence of those charges would hamper the Vice President in the performance of his Presidential duties almost as much as if he were tried and convicted. Indeed, he might be in a better position if he were able to vindicate himself before a court while he is Vice President.30/

In sum, although one cannot entirely be free from doubt in this unprecedented area, it is, nevertheless, concluded that the case for granting the Vice President immunity from criminal prosecution has not been made.

Having established the proposition that the Vice President does not share the immunity suggested for the President, because the various considerations which support such immunity do not relate directly to the Vice President, the public interest in going forward with investigation and possible indictment of the Vice President is supported strongly by two additional factors.

a. The alleged presence of co-conspirators

We understand that there are allegations to the effect that the Vice President was a member of a conspiracy. If true, there is a substantial public interest in including the Vice President in the on-going investigation and possible indictment proceedings. Failure to do so might not only preclude the opportunity to bring co-conspirators to justice, but also

30/ To recapitulate we conclude that the President must be denied that opportunity to vindicate himself because that would interfere with the performance of his official duties, and inevitably be inconsistent with his control of the prosecution and the pardoning power.

prejudice the Vice President.

The prosecution also would be severely hampered by the withholding from the grand jury of those elements of the alleged conspiracy linked to the Vice President. As a result the activities of the alleged co-conspirators could not be fully disclosed and evaluated, which might redound unfairly to their benefit. At the same time, the Vice President might be unfairly linked by innuendo or incomplete disclosure of facts to the alleged conspiracy. In short any resultant delay in the proceedings would benefit the co-conspirators, hamper the prosecution, and postpone a possible exoneration of the Vice President.

b. The statute of limitations problem

Another circumstance counseling prompt presentation of evidence to the grand jury is that the statute of limitations is about to bar the prosecution of the alleged offenders with respect to some or all of the offenses. The problem presented by the statute of limitations would be avoided by an indictment within the statutorily specified period.

After indictment, the question whether the Government should press for immediate trial or delay prosecution until the expiration of the Vice President's duties involves questions of trial strategy (e.g., relation to possible co-conspirators as just discussed) and criminal procedure (e.g., right to a speedy trial) which other Divisions may be more competent to evaluate in the light of all of the facts.

Robert G. Dixon, Jr.
Assistant Attorney General
Office of Legal Counsel

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

F

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

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

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

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

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

F

10/5/73

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

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

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

---

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

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

STATEMENT

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

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

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

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

I

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

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

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

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

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

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

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

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

Article I, Section 3, Clause 7 provides:

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

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

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

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

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

---

*/ As a recent commentator has observed:

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

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

C. The Meaning of Article II, Section 4.

Article II, Section 4 provides:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high crimes and Misdemeanors.

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

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

---

*/ We do not here address the question of whether 18 U.S.C. §2071(a) constitutionally operates to remove a civil officer

(footnote con't on next page)

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

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

---

*/ (footnote from previous page)

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

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

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

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

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

D. The Twelfth Amendment

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

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

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

---

*/ Counsel for the Vice President additionally argue that since

(footnote con't on next page)

II

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

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

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

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

---

*/ (footnote con't from previous page)

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Respectfully submitted.

ROBERT H. BORK,
Solicitor General,

KEITH A. JONES,
EDMUND W. KITCH,
Assistants to the
Solicitor General.

OCTOBER 5, 1973.

WATERGATE SPECIAL PROSECUTION FORCE DEPARTMENT OF JUSTICE

Memorandum

TO : Leon Jaworski DATE: February 12, 1974

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

SUBJECT: Attached Memorandum

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

Recommendation for Action By
The Watergate Grand Jury

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

I.

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

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

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

- 3 -

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

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

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

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

- 5 -

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

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

---

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

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

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

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

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

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

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

---

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

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

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

II.

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

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

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

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

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

---

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

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

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

---

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

- 13 -

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

---

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

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

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

- 15 -

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

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

---

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

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

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

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

- 17 -

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

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

pointed out above.*

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

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

---

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

- 19 -

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

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

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

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

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

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

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

6/24/74

Nos. 73-1766, 73-1834

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., RESPONDENTS

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

LEON JAWORSKI,
Special Prosecutor,
PHILIP A. LACOVARA,
Counsel to the Special Prosecutor,
Watergate Special Prosecution Force,
Department of Justice,
1425 K Street N.W.,
Washington, D.C. 20005,
Attorneys for the United States.

INDEX

CITATIONS

Cases—Continued

Cases—Continued

Cases—Continued

Cases—Continued

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73–1766

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., RESPONDENTS

No. 73–1834

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The Special Prosecutor, on behalf of the United States, submits this Reply Brief in response to the brief submitted by counsel for the President on June 21, 1974.

ARGUMENT

I

THE GRAND JURY'S ACTION IN DESIGNATING THE PRESIDENT AS ONE OF THE UNINDICTED CO-CONSPIRATORS WAS A RESPONSIBLE EXERCISE OF ITS CONSTITUTIONAL POWERS

In the district court, counsel for the President premised his motion to expunge the grand jury's action concerning the President on the argument that an incumbent President could not be indicted. In this Court, counsel also challenges the motives that led to that action. These are false issues that should be dismissed at once so that the Court can address on the merits the question on which certiorari was granted in No. 73–1834.

A. THE GRAND JURY'S ACTION WAS TAKEN AND DISCLOSED IN GOOD FAITH AND WAS UNRELATED TO THE IMPEACHMENT INQUIRY BEFORE THE HOUSE OF REPRESENTATIVES

One of the contentions that is repeated throughout the President's brief in this Court is that "court process is being used as a discovery tool for the impeachment proceedings" now pending before the Committee on the Judiciary of the House of Representatives (P. Br. 13[1]). The argument is advanced that the courts are being used "as a back-door route to circumvent the constitutional procedures of an impeachment inquiry, and thus [being] intruded into the political

[1] "P. Br." refers to the printed brief submitted by counsel for the President on June 25 in substitution for the brief filed on June 21. "Br." refers to the main brief for the United States.

thicket in this most solemn of political processes" (P. Br. 15). Later, counsel charges that our submissions, relying in part on the grand jury's finding, "base a desire for evidence on a strategem which attempts to cripple the Presidency" and constitute "a grotesque attempt to abuse the process of the judicial branch of government" (P. Br. 114). These assertions are unfounded.

The grand jury's determination that there is evidence that the President was one of the conspirators involved in the conspiracy alleged in the indictment in *United States* v. *Mitchell, et al.*, D.D.C. No. 74–110 (A. 5A–14A), and the government's reliance on that action in opposing the President's motion to quash the subpoena *duces tecum* were made in good faith, within the legitimate sphere of constitutional authority. We shall discuss below the reasons why the President can be identified constitutionally as an unindicted co-conspirator by a federal grand jury (see pp. 16–23, *infra*), but we consider it important to set the record straight on the reasons for its action and the context of the disclosure of that action. The record shows that both the grand jury and the Special Prosecutor have been sensitive to the President's position and have endeavored to avoid unnecessary interference with the constitutional processes being pursued simultaneously by the House Judiciary Committee.

By the time it returned the conspiracy indictment in this case on March 1, 1974, the grand jury had been in session since June 5, 1972, and had first heard Watergate-related evidence shortly after the June 17

1972 break-in.[2] It resumed its investigation in March 1973 after the trial and conviction of the seven Watergate burglars and pursued this inquiry virtually full-time until the return of the indictment. During the course of its investigation, it received a considerable amount of information concerning the President's role in the alleged conspiracy to obstruct justice and to defraud the United States charged in Count I. As we pointed out in our principal brief, out of "deference to the President's public position" (Br. 98 n. 76), the grand jury elected to take no action publicly that would cause needless embarrassment to the President at the time the Judiciary Committee was conducting its inquiry.

But as an independent constitutional institution with grave public responsibilities, the grand jury was not free to ignore the evidence it had heard. Hence, it decided to recommend to the chief judge of the district court that the material evidence concerning the President be transmitted to the Judiciary Committee. The Special Prosecutor, as the grand jury's counsel, notified the chief judge of this intended

---

[2] Counsel for the President notes (P. Br. 6 n. 3) that the validity of the indictment has been challenged by the defendants in this case on the ground that the grand jury's term had expired under Rule 6(g), Fed. R. Crim. P. However, by act of Congress (Pub. L. 93–172, 87 Stat. 691), the term of the grand jury was extended until June 4, 1974, (subject to further extension by the court) to allow it to continue and conclude this investigation. This legislation was unquestionably valid. See *United States* v. *Johnson*, 319 U.S. 503, 507–513; *Stillman* v. *United States*, 177 F. 2d 607, 611 n. 2 (9th Cir. 1949). Cf. *Government of Virgin Islands* v. *Parrott*, 476 F. 2d 1058, 1060–61 (3d Cir. 1973), cert. denied, 414 U.S. 871 (later statute prevails over rule).

action, and, at the time the indictment was received, the chief judge received and sealed the grand jury's "Report and Recommendation" together with the accompanying evidence. The "Report and Recommendation" stated that the grand jury was "deferring" to the "primary jurisdiction" of the House. Before taking any action, the court gave counsel for the President and counsel for the defendants (as well as counsel for the Judiciary Committee) an opportunity to submit written memoranda and to argue the matter orally at a hearing. Counsel for the President was allowed to inspect the "Report and Recommendation" and stated that the President had no objection to the court's granting the grand jury's request that the evidence be transmitted. See *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives*, 370 F. Supp. 1219, 1221 & nn. 1, 2 (D.D.C. 1974), narrating these developments. In fact, at the hearing before the district court, counsel stated that it was the President's own decision to make available to the House directly any evidence he had furnished to the grand jury. Transcript of Hearing, March 6, 1974, at 3 (D.D.C. Misc. No. 74–21).

In determining that he would exercise his discretion under Rule 6(e) of the Federal Rules of Criminal Procedure and would transmit the grand jury evidence to the House, the judge found that the grand jury's report "draws no accusatory conclusions. It deprives

no one of an official forum in which to respond." 370 F. Supp. at 1226.[3] The court also noted (*ibid*):

> It contains no recommendation, advice or statements that infringe on the prerogatives of other branches of government. Indeed, its only recommendation is to the Court, and rather than injuring separation of powers principles, the Jury sustains them by lending its aid to the House in the exercise of that body's constitutional jurisdiction. It renders no moral or social judgments. The Report is a simple and straightforward compilation of information gathered by the Grand Jury, and no more.

When several defendants filed petitions for writs of mandamus or prohibition to preclude the transmission of the evidence, the court of appeals called for the "Report and Recommendation" and the accompanying evidence. With the materials before the court *en banc,* the court of appeals denied the petitions, noting that "the President of the United States, who is described by all parties as the focus of the report and who presumably would have the greatest interest in its disposition, has interposed no objection to the District Court's action." *Haldeman* v. *Sirica,* —— F. 2d ——, —— (Nos. 74–1364, 74–1368) (D.C. Cir. March 27, 1974). The court did not challenge the district court's finding that the grand jury's proposed submission to the House was not accusatory and involved merely a compilation of evidence. When no further review was

---

[3] The President's motion and exhibits before this Court concerning the grand jury evidence show that the House Judiciary Committee is giving counsel for the President access to the grand jury materials placed on the record before the Committee.

sought, the evidence thereafter was transmitted to the House.

The grand jury's action identifying the President as a co-conspirator, now at issue before this Court, is entirely unrelated. This determination was made as an integral part of the grand jury's performance of its own constitutional functions. In making its determination, the grand jury was not focusing on the President *qua* President. Rather, it was discharging its sworn duty to determine "whether a crime has been committed and who has committed it." *United States* v. *Dionisio*, 410 U.S. 1, 15. It decided to indict seven persons and to state in the indictment simply its belief that there were other co-conspirators "to the Grand Jury known and unknown" (A. 7A), but without publicly identifying those who were known. At the same time, however, the grand jury recorded for later disclosure in connection with the criminal trial its determination of the identity of each of the known co-conspirators, including "Richard M. Nixon". It takes no extended discussion to show that this action, while unquestionably painful for all parties concerned, was in furtherance of legitimate and, indeed, compelling purposes.

Counsel for the President is simply wrong in alleging that the naming of the President was a "stratagem" or "device" to "nullify the President's claim of executive privilege" (P. Br. 113, 114). This claim ignores the basic principle that the grand jury's function is to return a "true bill" that fully and fairly alleges what it believes the evidence shows. Moreover, in light of the apparent thrust of the evidence here,

the naming of the President at some stage prior to trial was virtually inevitable. While it is not mandatory that unindicted conspirators be named in the indictment, see *Rogers* v. *United States*, 340 U.S. 367, 375, such information commonly must be furnished by the prosecution in its bill of particulars. See, *e.g.*, *United States* v. *Pilnick*, 267 F. Supp. 791, 801 (S.D. N.Y. 1967); cf. *United States* v. *Debrow*, 346 U.S. 374, 378.

A specific finding by the grand jury on the identity of the known but unindicted co-conspirators was especially important here to furnish additional protection against the possibility of unfounded accusations, particularly when one of the persons seemingly involved was the President. This course makes it clear that the grand jury—the "conscience of the community"—and not merely the prosecutor, made this important determination in the first instance.

Furthermore, the identification of each co-conspirator—regardless of his station—is a prerequisite to making his declarations in furtherance of the conspiracy admissible against the other conspirators. See *Lutwak* v. *United States*, 344 U.S. 604, 617–19; *Anderson* v. *United States*, — U.S. — (42 U.S.L.W. 4815, June 3, 1974). This will be an essential consideration in assuring a trial upon all material and important evidence. It is well within a prosecutor's proper discharge of his duties to pursue a case to trial by relying on the grand jury's *prima facie* determination of the membership in the alleged conspiracy, and unless good reason exists to the contrary, he is obligated to do so. It is for these reasons that the grand jury properly made its judgments on the question, and that the Special Prosecutor was authorized to disclose its action

to the court and the parties to this case in connection with the post-indictment proceedings.

Nor is there any foundation for the insinuation that the grand jury's determination regarding President Nixon was intended to prejudice the President's position before the country or before the Judiciary Committee. As noted above, when the grand jury transmitted the material evidence concerning the President to the Judiciary Committee, it carefully disavowed any assessment of its significance insofar as the President's official status was concerned, and, as the district court and court of appeals agreed, the grand jury abstained from offering the House its views on the thrust of the evidence. In discharging its own constitutional functions and in appraising the involvement of "Richard M. Nixon" (and other unindicted co-conspirators) in the offenses for which it returned an indictment, it also endeavored to respect the President's official position by maintaining its determination as to *all* unindicted co-conspirators in secret. That vote was taken on February 25, 1974. It was anticipated that disclosure of the identity of the co-conspirators, including Richard M. Nixon, would be deferred many months, at least until pre-trial discovery proceedings were under way and a bill of particulars filed, by which time the impeachment proceedings might have been concluded.

When, however, the President refused to comply with the instant subpoena for evidence to be used at the trial on the indictment and on May 1, 1974, moved to quash it, claiming "executive privilege", it became appropriate, if not obligatory, to invoke the grand jury's finding in order to permit the court to make an

informed determination whether the President could lawfully invoke that public privilege to withhold the evidence sought. As the record before the Court reflects, counsel for the President was advised of the grand jury's action before any answering papers were filed by the Special Prosecutor and, again out of regard for the President's position, the Special Prosecutor suggested to the President's counsel that the matter should be handled *in camera.*[4] The President's counsel then joined in the Special Prosecutor's motion to seal all pleadings reflecting the grand jury's action and to hold oral argument *in camera.* The district court, after an *in camera* hearing with defense counsel present, accepted this suggestion, and further proceedings were conducted in this extraordinary way—to avoid, insofar as possible, having the proceedings in this important criminal prosecution affect the concurrent proceedings before the House.

In denying the President's motion to quash, the district court's opinion was carefully guarded in referring to the significance of the sealed material (Pet. App. 22–23). Because of the number of persons who were necessarily privy to this information, however, news media were able to piece together the essentials of what had been disclosed and litigated *in camera,* and on June 6, 1974, counsel for the President publicly confirmed the reports about the grand jury's action. But the record shows that the grand jury, the district court and the Special Prosecutor successfully maintained the grand jury's determination in strict

[4] Counsel for the President commended the Special Prosecutor for suggesting this procedure. Transcript of *In Camera* Hearing on May 8, 1974, at 4.

confidence for several months in order to avoid unnecessary impact upon the Judiciary Committee's inquiry. It is hardly fair to say, therefore, as counsel for the President does, that the grand jury and Special Prosecutor were attempting "to subvert and prejudice the legitimate constitutional procedure of impeachment" (P. Br. 108).

B. A FEDERAL GRAND JURY HAS THE CONSTITUTIONAL POWER TO IDENTIFY AN INCUMBENT PRESIDENT AS AN UNINDICTED CO-CONSPIRATOR IN CONNECTION WITH ITS RETURN OF AN INDICTMENT AGAINST OTHER PERSONS

Upon analysis of the merits, the Court will conclude, we believe, that counsel's assertions that an incumbent President cannot be named an unindicted co-conspirator are unpersuasive. The federal grand jury's constitutional powers and responsibilities are sweeping. Although it is by no means clear that a President is immune from indictment prior to impeachment, conviction, and removal from office, the practical arguments in favor of that proposition cannot fairly be stretched to confer immunity on the President from being identified as an *unindicted* co-conspirator, when it is necessary to do so in connection with criminal proceedings against persons unquestionably liable to indictment. Since the naming of unindicted co-conspirators is a fair and common practice and was required here to outline the full range of the alleged conspiracy, the district court's refusal to expunge its determination was fully justified.[5]

---

[5] Even assuming, for some legal reason, that the grand jury's naming of the President as an unindicted co-conspirator is ineffective, it does not follow that the court below abused its discretion in denying the motion to expunge. Expunction of a formal finding by a grand jury, whose existence and powers are

(Continued)

1. The grand jury has broad and important powers as an independent institution of our government

Only a brief discussion is required to establish the unique and important role of the grand jury in the American judicial system. Though an arm of the court,

(Continued)
constitutionally established, is a drastic remedy, to be granted only after a careful weighing of the legitimacy of the grand jury's action, the strength of the public interest in an accurate public record of proceedings, and the degree of prejudice to those persons affected by full disclosure. See *Application of Johnson*, 484 F. 2d 791, 797 (7th Cir. 1973); *In re Grand Jury Proceedings*, 479 F. 2d 458, 460 n. 2 (5th Cir. 1973).

The President's principal argument below was that expunction was necessary because of the damage which disclosure would cause to the fairness of the impeachment inquiry being conducted by the House of Representatives. *Reply to Memorandum in Opposition to the Motion to Quash Subpoena Duces Tecum* 25–27 (D.D.C. May 13, 1974) (Crim. No. 74–110). That concern has now become academic because of the public disclosure of the grand jury's action. Any resulting harm to him before the House or in the eyes of the public is now unfortunately an "accomplished fact." *Application of Johnson, supra*, 484 F. 2d at 797. See also *United States* v. *Connelly*, 129 F. Supp. 786, 787 (D. Minn. 1955) (refusal to expunge grand jury report that had already been widely publicized).

The listing of specific co-conspirators pursuant to the finding and return of an indictment was clearly within the traditional confines of grand jury power. The grand jury here did not go beyond this function by making merely gratuitous expressions of views about a general societal condition; or concerning matters outside its area of expertise. Compare *Application of United Electrical, Radio & Machine Workers*, 111 F. Supp. 858 (S.D.N.Y. 1953). Cf. *Hammond* v. *Brown*, 323 F. Supp. 326, 337 (N.D. Ohio), affirmed, 450 F. 2d 480 (6th Cir. 1971). Certainly the grand jury's action here is not clearly *ultra vires*. There is, in addition, a legitimate public purpose in reporting the fact that serious criminal charges against a government official have been made. *In re Presentment of Special Grand Jury, January 1969*, 315 F. Supp. 662, 678 (D. Md. 1970).

The district judge, therefore, did not abuse his discretion in refusing to expunge the finding.

Levine v. *United States*, 362 U.S. 610, 617, the grand jury has an independent constitutional basis in the Fifth Amendment and has functions and prerogatives which are "rooted in long centuries of Anglo-American history." *Hannah* v. *Larche*, 363 U.S. 420, 490 (Frankfurter, J., concurring). The adoption of the grand jury "in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice." *Costello* v. *United States*, 350 U.S. 359, 362. See also *Branzburg* v. *Hayes*, 408 U.S. 665, 687.

Like its English progenitor, the American grand jury is designed to reflect the conscience of the community. 2 Pollock & Maitland, *History of the English Law* 642 (2d ed. 1909). Its members are "selected from the body of the people"[6] and are "pledged to indict no one because of prejudice and to free no one because of special favor." *Costello* v. *United States*, *supra*, 350 U.S. at 362.[7] Its first and only obligation is to the truth—to determine, unhindered by external influence or supervision, "whether a crime has been committed and who has committed it." *United States* v. *Dionisio*, *supra*, 410 U.S. at 15. See also *Wood* v. *Georgia*, 370 U.S. 375, 390; *Ex parte Bain*, 121 U.S. 1, 11.

---

[6] See the Jury Selection and Service Act of 1968, 28 U.S.C. 1861–1871.

[7] Immediately after the President procured the dismissal of Special Prosecutor Cox when he refused to obey the President's instruction not to seek enforcement of the grand jury subpoena *duces tecum* that had been upheld by the court of appeals in *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), Chief Judge Sirica summoned the two grand juries that were

(Continued)

Reflecting this "special role in insuring fair and effective law enforcement," *United States* v. *Calandra*, 414 U.S. 338, 343 (1974), the grand jury's powers of inquiry are extremely broad. It has a right to every man's evidence, and proceeds unhindered by the var-

---

(Continued)
then conducting investigations with the assistance of the Special Prosecutor, including the grand jury that took the action now being challenged by the President. In open court on October 23, 1973, the chief judge instructed them:

"You are advised first, that the grand juries on which you serve remain operative and intact. You are still grand jurors, and the grand juries you constitute still function. In this regard you should be aware that the oath you took upon entering this service remains binding. You must all be especially careful at this time to fully and strictly adhere to that oath which states:

"You and each of you as a member of the grand jury for the District of Columbia, do solemnly swear that you will diligently, fully, and impartially inquire into and true presentment make of all offenses which shall come to your knowledge and of which the United States District Court for the District of Columbia has cognizance; that you will present no one from hatred or malice nor leave anyone unpresented from fear, favor, affection, reward, or hope of reward; that the counsel of the Attorney of the United States, your fellows and your own, you will keep secret and that you will to the best of your ability perform all the duties enjoined upon you as a grand juror, so help you God.

* * * * * * *

"This brings me to my second point; these two grand juries *will* continue to function and pursue their work. You are not dismissed and will not be dismissed except as provided by law upon the completion of your work or the conclusion of your term. Your service to date, I realize, has occasioned personal sacrifices for many of you and inconvenience for all of you. You did not choose this assignment; it is an obligation of citizenship which it fell your lot to bear at this time, and you have borne it well. The Court and the country are grateful to you. Nevertheless, you must be prepared to press forward. We rely on your continued integrity and perseverance." (Emphasis in original.)

ious evidentiary and exclusionary rules which apply at trial. *Branzburg* v. *Hayes, supra; Lawn* v. *United States,* 355 U.S. 339; *Costello* v. *United States, supra; Holt* v. *United States,* 218 U.S. 245. See also *Gravel* v. *United States,* 408 U.S. 606, 628, where this Court allowed wide scope to a grand jury's investigation involving a United States Senator, despite claims that such matters were immune from inquiry under the Speech or Debate Clause. As the courts have frequently noted, society's interests are best served by a grand jury investigation which is "thorough and extensive." *Wood* v. *Georgia, supra,* 370 U.S. at 392.

The grand jury has the unreviewable independence to refuse to return an indictment requested by the prosecution. *Gaither* v. *United States,* 413 F. 2d 1061, 1066 (D.C. Cir. 1969). Conversely, even direct instructions from the President cannot prevent the grand jury "from making the fullest investigation into the matter" and "from returning an indictment against the accused if the evidence should warrant it * * *." *In re Miller,* 17 Fed. Cas. 295 (No. 9,552) (C.C.D. Ind. 1879). For as the court instructed the grand jury in that case, it was free to disregard the instructions from President Hayes to the prosecutor to restrict its inquiry: "The moment the executive is allowed to control the action of the courts in the administration of criminal justice their independence is gone." See also *United States* v. *Cox,* 342 F. 2d 167, 174–80 (5th Cir. 1965), cert. denied, 381 U.S. 935 (opinion of Rives, Gewin, and Bell, JJ.); *United States* v. *Smyth,* 104 F. Supp. 283, 293–295 (N.D. Calif. 1952).

Thus, in our jurisprudence this body of citizens, randomly selected, beholden neither to court nor prosecutor, trusted historically to protect the individual against unwarranted governmental charges, but sworn to ferret out criminality by the exalted and powerful as well as by the humble and weak, must be able to take cognizance of *all* possible violators of the laws of the United States.

2. An incumbent President may be named as an unindicted co-conspirator

Although we shall indicate below why it is not at all clear that an incumbent President may not be named as a *defendant* in a criminal indictment, this case does not turn on that issue and the Court need not decide it. Even assuming *arguendo* that an incumbent President has some implicit constitutional immunity that prevents a federal grand jury from indicting him, he nevertheless may be named as an *unindicted* co-conspirator under the traditional grand jury power to investigate and charge conspiracies that include co-conspirators who are not legally indictable. This power is part of the constitutional power to return indictments in the form and scope the grand jury determines is proper.[8] It includes the authority to indict a person and charge him with conspiring with a person who, for one reason or another, is immune from prosecution.

---

[8] *Gaither* v. *United States*, *supra*, 413 F. 2d at 1069; *United States* v. *Cox*, *supra*, 342 F. 2d at 181, 182.

It is not disputed, of course, that a grand jury has the power to name persons other than a President as unindicted co-conspirators. While no case in this Court has directly considered the existence of such power, it has long been commonplace for persons to be identified in this way in a conspiracy indictment. See, *e.g.*, *Kotteakos* v. *United States*, 328 U.S. 750, 752 n. 1; *United States* v. *Agueci*, 310 F. 2d 817, 820 (2d Cir. 1962), cert. denied, 372 U.S. 959; *United States* v. *Edwards*, 366 F. 2d 853, 858 (2d Cir. 1966). Indeed, it has been held proper to refuse to strike the names of 37 unindicted co-conspirators from an indictment. *United States* v. *Penney*, 416 F. 2d 850, 852 (6th Cir. 1969), cert. denied, 398 U.S. 932.

The grand jury has the right to decide whether to indict or not to indict particular persons and to decide what charge or charges such person or persons shall face. It may decline to indict a person in the face of sufficient evidence because of mitigating circumstances. In addition, some persons believed to be criminally involved may be immune from prosecution, legally or practically, for any one of numerous reasons: transactional or use immunity; prior acquittal or conviction; diplomatic immunity; incompetence; flight to a foreign sanctuary; pardon; expiration of a statute of limitations; or death. Accordingly, the grand jury has the right to charge some of the participants as defendants and to name others as unindicted co-conspirators. Even where some of the participants enjoy constitutional, legal, or practical immunity from being criminally prosecuted, neither the

grand jury nor the prosecution at trial is obliged to suppress all evidence of their complicity.

For example, in *Farnsworth* v. *Zerbst*, 98 F. 2d 541 (5th Cir. 1938), cert. denied, 307 U.S. 642, and *Farnsworth* v. *Sanford*, 115 F. 2d 375 (5th Cir. 1940), cert. denied, 313 U.S. 586, the court of appeals ruled that a person may be convicted and punished for a conspiracy even though his fellow conspirators were immune from prosecution because of the immunity attaching to representatives of foreign governments. There, the defendant, a naval officer, was charged with conspiring with two *named* Japanese diplomats to transmit defense secrets to a foreign government. He argued that the indictment was defective because he was charged with conspiring with persons who had diplomatic immunity from prosecution. In rejecting this argument, the court said (98 F. 2d at 544):

> If such persons in the United States join with a citizen of the United States in a conspiracy to commit a crime, though it be conceded that the foreign diplomat would not be indicted in the District Court, or even that he could not be, his immunity will not excuse the local citizen. At least two persons must join in an unlawful enterprise to constitute it a conspiracy. The statute expressly so says. But both need not be prosecuted, or prosecutable. One may die, may escape, or obtain a pardon; but the other remains guilty.

Later the court held that the case had not "affected" the diplomats in such a way as to deprive the lower

federal courts of jurisdiction over the matter, reasoning (115 F. 2d at 379):

> [W]e think that when the Japanese defendants were not arrested and Farnsworth was arraigned alone there was as complete a severance of the case against him as though he alone had been indicted. The case to be tried then in no substantial way affected the ex-attachés in Japan, or the Japanese Ambassador. Each of course would be concerned as the trial might involve reflections on the character and conduct of the ex-attachés, but the case in its results would not touch the person or goods or servants of any of them. * * * The ambassador's feelings, his integrity as a witness, and his standing as a man might all be involved, but he is held not affected.

In *United States* v. *Johnson*, 337 F. 2d 180 (4th Cir. 1964), aff'd and remanded, 383 U.S. 169, the court of appeals expressly held that the government could prosecute private individuals for conspiring to defraud the United States by bribing a Congressman to make a speech on the floor of the House, even though the prosecution required exploration of the Congressman's motivation for the speech and even though the Congressman himself was immune under the Speech or Debate Clause from prosecution on that theory. This Court also has implied that third-party witnesses may be questioned about the legislative acts of congressmen, despite the Speech or Debate Clause, where third-party crimes are the "proper concern of the grand jury or the Executive Branch" in its prosecutive capacity. *Gravel* v. *United States*, 408

U.S. 606, 629, n. 18. Thus, the mere fact that an official has a personal immunity from prosecution does not bar the prosecution from alleging and proving his complicity as part of a case against persons who have no such immunity.

In short, the jurisdiction of the grand jury to name unindicted co-conspirators is a necessary part of the power to charge defendants in a conspiracy case and is not restricted by any immunity a co-conspirator may enjoy not to be brought personally before the bar of justice to answer for the offense.

There is, we submit, no reason to make an exception for an incumbent President. We realize that the President is entrusted with awesome powers and responsibilities requiring his full attention. While indictment would require the President to spend time preparing a defense and, thus, would interfere to some extent with his attention to his public duties, the course the grand jury has followed here in naming the President as an unindicted co-conspirator cannot be regarded as equally burdensome. It is regrettable that the thrust of the evidence in the grand jury's view encompasses an incumbent President, but it would not be fair to our legal system or to the defendants and other unindicted co-conspirators to blunt the sweep of the evidence artificially by excluding one person, however prominent and important, while identifying all others.

We concede that any person—President or "ordinary" citizen— may suffer adverse consequences if he is named as an unindicted co-conspirator, whether in an indictment, in a bill of particulars or in testimony at a trial. But such consequences are an inevitable part

of the judicial process and do not justify prior judicial screening or complete silence. As Justice Douglas observed for the Court in *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599:

> The impact of the initiation of judicial proceedings is often serious. Take the case of the grand jury. It returns an indictment against a man without a hearing. * * * As a result the defendant can be arrested and held for trial. See *Beavers* v. *Henkel,* 194 U.S. 73, 85; *Ex parte United States,* 287 U.S. 241, 250. The impact of an indictment is on the reputation or liberty of a man. The same is true where a prosecutor files an information charging violations of the law. The harm to property and business can also be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts.

Similar considerations apply to the interests of persons who are brought into criminal proceedings collaterally, as unindicted co-conspirators. For example, in *United States* v. *General Motors Corp.*, 352 F. Supp. 1071 (S.D. Mich. 1973), the court denied a motion of the defendants in a conspiracy case under the Sherman Act to suppress a bill of particulars on the ground that numerous unindicted prominent persons named in the bill would be subjected to adverse publicity and embarrassment.[9]

---

[9] Unindicted co-conspirators have sometimes been afforded relief from being named in an indictment *after* a trial where the evidence showed that they were *not* in fact involved in the

(Continued)

This does not mean that a person has no protection against being named unfairly as a co-conspirator. His primary protection is in the finding of the grand jury that there is sufficient evidence to believe that the conspiracy as charged in the indictment existed. It also lies in the conscience of each member of a grand jury, the same protection that is applicable to an indicted defendant. As this Court stated in *Wood* v. *Georgia, supra,* 370 U.S. at 390:

> Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society for standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an

(Continued)
conspiracy charged. See *Application of American Society for Testing and Materials*, 231 F. Supp. 686 (E.D. Pa. 1964); *Application of Turner & Newall, Ltd.*, 231 F. Supp. 728 (E.D. Pa. 1964). See also *Beverly* v. *United States*, 5th Cir., No. 73–2027, pending on appeal, where persons named as unindicted co-conspirators are contending that their names should be expunged from a conspiracy indictment.

It is not unusual for persons tangentially involved in criminal proceedings to suffer adverse consequences. In many instances, an innocent witness may suffer some injury as a result of his testimony. As this Court explained in *United States* v. *Calandra*, *supra*, 414 U.S. at 345:

"The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as 'so necessary to the administration of justice' that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure."

intimidating power or by malice and personal ill will.

The scope of the indictment itself as returned by the grand jury and the duty of the United States Attorney to refrain from improper methods also afford protection to an individual from being wrongfully accused as a co-conspirator in the bill of particulars or the evidence. See *Berger* v. *United States*, 295 U.S. 78, 88.

While we readily concede that the naming of an incumbent President as an unindicted co-conspirator is a grave and solemn step and may cause public as well as private anguish, we submit that such action is not constitutionally proscribed. The answer to the constitutional question must be shaped by two postulates of our free society: that grand juries are ordinarily responsible [10] and that, in the public market place of ideas, the people can be trusted to assess the worth of charges and counter-charges, particularly where the acts of a public official are in dispute.[11] There is little reason to fear either that grand juries will accuse an incumbent President maliciously, or that, if they do, their charges will receive credit they do not deserve.

In light of the foregoing principles, we submit that the grand jury's action here was constitutionally legitimate.

---

[10] See, *e.g.*, *Wood* v. *Georgia*, *supra*.

[11] See, *e.g.*, *Garrison* v. *Louisiana*, 379 U.S. 64, 76–77; *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 273–277.

3. It is an open and substantial question whether an incumbent President is subject to indictment

Counsel for the President bases his argument against the constitutionality of the grand jury's action here on the premise that an incumbent President cannot be indicted (P. Br. 107–108). We believe we have just shown that the Court's consideration of the issue actually before the Court—whether a President can be named as an *unindicted* co-conspirator—does not require consideration of the assertion by counsel for the President that it cannot be "seriously disputed" that "a President may not be indicted while he is an incumbent" (P. Br. 95). Nevertheless, we cannot allow the assertion to stand uncontroverted. Thus, we outline the reasons why the President's major premise may be unsound, even though the Court need not decide the issue in order to reject the contention that the district court erred in refusing to expunge the grand jury's finding.

Resort to constitutional interpretation, history, and policy does not provide a definitive answer to the question of whether a sitting President enjoys absolute immunity from the ordinary processes of the criminal law. What we believe is clear is that nothing in the text of the Constitution or in its history—including close scrutiny of the background of relevant constitutional provisions and of the intent of the Framers—imposes any bar to indictment of an incumbent President. Primary support for such a prohibition must be found, if at all, in considerations of constitutional and public policy including competing factors such as the nature and role of the Presidency

in our constitutional system, the importance of the administration of criminal justice, and the principle that under our system no person, no matter what his station, is above the law. Whether these factors compel a conclusion that as a matter of constitutional interpretation a sitting President cannot be indicted for violations of federal criminal laws is an issue about which, at best, there is presently considerable doubt.

The President rests his textual argument primarily on Article I, Section 3, clause 7, of the Constitution, which provides that "the Party convicted [after impeachment] shall *nevertheless* be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law" (emphasis added). It is argued that the Framers thereby contemplated that criminal indictment must *follow* impeachment by the House and conviction and removal by the Senate. A contemporary student of the subject of impeachment suggests, on the basis of his study of the relevant materials, that the purpose of the "nevertheless" clause was only to preclude the expelled civil officer from avoiding later criminal prosecution by claiming "double jeopardy." Berger, *The President, Congress, and the Courts,* 83 Yale L.J. 1111, 1124 (1974).[12]

---

[12] Berger in this article surveys the historical material relevant to the indictability of an incumbent President and finds that the Framers did not intend to clothe a President with immunity from criminal process. Berger, *supra*, at 1123–1136.

Luther Martin, a delegate to the Constitutional Convention, stated during the impeachment proceedings against Justice Chase that the "nevertheless" clause was designed to eliminate any double jeopardy argument. 14 Annals of Congress 431 (8th

(Continued)

Significantly, the clause in question applies to all civil officers who are subject to impeachment, and not solely to the President. Yet, from the earliest days of the Republic, civil officers liable to impeachment have been dealt with in the criminal courts without first being impeached, convicted, and removed. Recently, as this Court is well aware, a panel of the Seventh Circuit composed of three distinguished Senior Circuit Judges specially designated to review the appeal of United States Circuit Judge Otto Kerner rejected the textual argument relied on by counsel for the President and observed that "[t]he purpose of the phrase may be to assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy, or it may be to differentiate the provisions of the Constitution from the English practice of impeachment." *United States* v. *Isaacs and Kerner*,

---

(Continued)

Cong., 2d Sess., 1805). Our research has failed to locate any other statement by a delegate to the Constitutional Convention explicitly stating that the purpose of the "nevertheless" clause was either to avoid the double jeopardy problem or to immunize a President or civil officers from criminal prosecution.

Delegates during the North Carolina debates spoke at length about whether impeachment was the exclusive remedy against miscreant federal officials. 4 Elliot, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution* 32–50 (2d ed. 1836) [hereinafter cited as Elliot's Debates]. At one point Iredell stated that "[h]e [the government official] may be tried in such a court for common-law offenses, whether impeached or not." 4 Elliot's Debates 37. But Governor Johnston was seemingly of the view "that men who were in very high offices could not be come at by the ordinary course of justice; but when called before this high tribunal and convicted, they would be stripped of their dignity, and reduced to the rank of their fellow citizens, and then the courts of common law might proceed against them." *Ibid.*

493 F. 2d 1124, 1142 (7th Cir.), cert. denied, — U.S. — (June 17, 1974). In accordance with the plain thrust of the language of this clause, the court expressly refused to construe it to imply that a sitting federal judge, who is liable to impeachment under the same clause that is applicable to the President, may not be indicted and tried prior to removal from office.[13] In language equally applicable to a federal judge or a President, the court wrote (493 F. 2d at 1144):

> We conclude that whatever immunities or privileges the Constitution confers for the purpose of assuring the independence of the co-equal branches of government they do not exempt the members of those branches "from the operation of the ordinary criminal laws." Criminal conduct is not part of the necessary functions performed by public officials. Punishment for that conduct will not interfere with the legitimate operations of a branch of government. Historically, the impeachment process has proven to be cumbersome and fraught with political overtones.

The panel made no effort to distinguish the President from the sweep and force of this statement.

The President also refers to the views expressed by the Framers as evidencing at least a clear *intent* to immunize the President from criminal prosecution. While there are some statements cited in the

---

[13] The same clause in the Constitution provides for the impeachment of the "President, the Vice President and all civil Officers of the United States" (Article II, Section 4), and Article I, Section 3, clause 7, relied on so heavily by the President, does not distinguish among the President, Vice President and other civil officers.

President's brief indicating that criminal indictment was expected to follow impeachment, these few statements cannot support the conclusion that the Framers *unambiguously* intended to immunize an incumbent President from criminal prosecution. They were made by the delegates to the Convention while discussing the issues of executive power, checks on Presidential prerogatives, and the relationship between the impeachment remedy and the President's independence. The precise issue of Presidential immunity was not confronted by those who wrote and debated the Constitution.[14]

The President relies heavily on Gouverneur Morris' opinion articulated at the federal Convention:

> A conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachment, was that the latter was to try the President after the trial of the impeachment. 2 Farrand, *Records of the Federal Convention of 1787* at 550 (1911) [hereinafter cited as Farrand].

All this view contemplates is that a President may commit an act which constitutes *both* an impeachable offense and an indictable crime, and it would be anomalous for the same people who try his impeachment to participate later in the adjudication of his guilt or innocence in a different proceeding but in-

---

[14] When the Framers were debating what privileges should be accorded the legislators, James Madison suggested that the Convention consider "what privileges ought to be allowed to the Executive." The Convention adjourned at that point, however, and did not return to the topic in its later proceedings. 2 Farrand at 502–03. See also statement of Charles Pinckney in the Senate on March 5, 1800 (Br. 77–78).

volving the same basic activity. The statement does not imply that Morris considered it mandatory that impeachment precede indictment. Moreover, there was some concern about the possible partiality of judges who had been appointed by the President. Madison, *Debates in the Federal Convention* 536 (1920 ed.). One commentator has suggested that this was the prime reason for having the Senate rather than this Court serve as the tribunal for an impeachment trial. 1 Curtis, *Constitutional History* 482 (1889).

We do not claim that any of the actual debates provide any definitive insight into the Framers' intention on the question of the President's amenability to criminal indictment. While counsel for the President states that "there is literally nothing in all of the records of the Convention to suggest that any delegate had any contrary view" (P. Br. 100), the simple fact is that the Framers never confronted the issue at all.

It is significant in this context that unlike congressmen, who were afforded an explicit, limited immunity in the Constitution with respect to their legislative duties, see *Gravel* v. *United States, supra; United States* v. *Brewster,* 408 U.S. 501; *United States* v. *Johnson,* 383 U.S. 169, the President was provided none.[15] And, as we show in our main brief (pp. 67–80),

---

[15] We do not believe that the failure to provide explicitly for executive immunity was a mere oversight. The debates indicate that much time was spent debating the specifics of the impeachment clause, the powers of the President, and the checks on executive power. A desire to place the Chief Executive above the ordinary processes of law until his term is completed most surely would have been expressly enunciated in the text of the Constitution or at least explicitly recognized during the de-

(Continued)

the separation of powers doctrine does not result in an absolute immunity.

The President offers the additional argument that "[s]ince the President's powers include control over all federal prosecutions, it is hardly reasonable or sensible to consider the President subject to such prosecution" (P. Br. 97).[16] As we have explained in the introduction to our main brief (pp. 27–44), however, the Special Prosecutor, under applicable regulations, has final control over the position the United States, as sovereign, asserts in cases under his defined jurisdiction. Indeed, as we discussed in our main brief (pp. 20–33), the President personally agreed here to

---

(Continued)

bates. In our main brief, moreover, we have cited the passages showing that the Framers were careful *not* to give the Executive any sweeping privileges or immunity (Br. 76–79).

There is a dearth of scholarly treatment of the question whether an incumbent President can be indicted. One nineteenth century commentator believed that "the ordinary tribunals, as we shall see, are not precluded, either before or after an impeachment, from taking cognizance of the public and official delinquency." Rawle, *A View of the Constitution of the United States of America* 215 (2d ed. 1929). See also 1 Curtis, *Constitutional History* 481 (1889). A contemporary scholar is of the view that an incumbent President can be indicted and he has concluded that "[i]t was because the Founders had learned this lesson from history that presidential powers were enumerated and limited, and that immunity from arrest was altogether withheld." Berger, *The President, Congress and the Courts*, 83 Yale L.J. 1111, 1136 (1974).

[16] The force of the President's argument here could lead to the conclusion that the Attorney General who under 28 U.S.C. 516 and 519 is authorized to conduct and supervise all litigation in which the United States is a party would likewise be immune from federal indictment, as would the United States Attorney for crimes committed in his district. 28 U.S.C. 547. The Constitution could not intend such a result.

the Attorney General's promulgation of regulations (a) giving the Special Prosecutor "full authority for investigating and prosecuting * * * allegations involving the President," (b) specifying that "the Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions," and (c) pledging that "the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor," or to "limit the independence that he is hereby given" or to limit "the jurisdiction of the Special Prosecutor" unless the consensus of eight Legislative leaders approves the President's "proposed action." (See pp. 148, 149, 151–153 of the Appendix to our main brief.) Evidently, therefore, neither the President nor the Attorney General considered *prosecution of a President by an independent* Special Prosecutor constitutionally inconceivable. It is hardly inevitable, therefore, that future Presidents must be left with personal control over the decision whether they—or their friends and associates—should be prosecuted.

Counsel for the President suggests that the President may have a unique immunity because the "Presidency is the only branch of government that is vested exclusively in one person by the Constitution" (P. Br. 96). Thus, it is argued: "The functioning of the executive branch ultimately depends on the President's personal capacity: legal, mental and physical. If the President cannot function freely, there is a critical gap in the whole constitutional system established by the Framers." (*Ibid.*) This is a weighty argument and it is entitled to great respect. But

whether it is conclusive is uncertain and need not be decided here. It is fair to note, however, that our constitutional system has shown itself to be remarkably resilient. Our country has endured through periods of great crises, including several when our Presidents have been personally disabled for long periods of time. Furthermore, although the executive power is constitutionally vested in the President, it cannot escape notice that, in practical terms, the governmental system that has evolved since 1789 depends for the day-to-day management of the Nation's affairs upon the operation of the several cabinet departments and independent regulatory agencies, without direct Presidential guidance. In addition, the Twenty-fifth Amendment to the Constitution now expressly provides for interim leadership whenever a President is temporarily disabled or incapable of discharging the responsibilities of his office. And it is by no means inevitable, in any event, that the lodging of an indictment against an incumbent President would "cripple an entire branch of the national government and hence the whole system" (P. Br. 97).

Finally, there are very serious implications to the President's position that he has absolute immunity from criminal indictment and to his insistence that under "our system of government only the House of Representatives may determine that evidence of sufficient quantity and quality exists to try the President" (P. Br. 114–15). It is conceded that while the King can do no wrong, a President, in the eyes of the law, is not impeccable. But while there is currently a great debate about whether "impeachable offenses" under

the Constitution include *non-criminal* abuses of official power,[17] it appears that not *every* crime would justify impeachment. As both the House Judiciary Committee staff and the attorneys for the President seem to agree, there must be some nexus between the impeachable misconduct and the office held. As one early commentator explained about the phrase "high Crimes and Misdemeanors":

> They can only have reference to public character and official duty. * * * In general those offences which may be committed equally by a private person as a public officer are not the subjects of impeachment. Murder, burglary, robbery and indeed all offences not immediately connected with office, except the two expressly mentioned [treason and bribery], are left to the ordinary course of judicial proceeding * * *. Rawle, *A View of the Constitution of the United States of America* 215 (2d ed. 1829).

In his submission to the House Judiciary Committee, counsel for the President therefore argued that he is impeachable only for "great crimes against the state." 10 Weekly Compilation of Presidential Documents 271 (March 4, 1974). If counsel for the President is correct that a President is amenable to impeachment only for certain grave public offenses

---

[17] Compare *Constitutional Grounds for Presidential Impeachment: Report by the Staff of the Impeachment Inquiry*, House Judiciary Committee, 93d Cong., 2d Sess. (Comm. Print February 1974), with *An Analysis of the Constitutional Standard for Presidential Impeachment: Analysis Submitted to the House Committee on the Judiciary by Attorneys for the President*, 10 Weekly Compilation of Presidential Documents 270 (March 4, 1974).

and that he is absolutely immune from criminal prosecution, then indeed the Constitution has left a *lacuna* of potentially serious dimensions.[18]

Because of this purported gap and because of the virtually universal application of statutes of limitations, a President who shared complicity in such "private" crimes as burglary or assault might well be beyond the reach of the law, partaking at least in part of the royal immunities associated with a King. Perhaps this is the design of the Constitution, or a regrettable corollary of it, but we urge caution before such a proposition is accepted as inevitable.

II

THIS DISPUTE BETWEEN THE UNITED STATES, REPRESENTED BY THE SPECIAL PROSECUTOR, AND THE PRESIDENT—TWO DISTINCT PARTIES—PRESENTS A JUSTICIABLE CONTROVERSY

Principles of "separation of powers," frequently quoted in the President's brief, show why on the facts of the present case there are *no* obstacles to the

---

[18] It is not surprising, therefore, that James Wilson, in the Pennsylvania ratification debates, observed that "far from being above the laws, he [the President] is amenable to them in his private character as a citizen, and in his public character by *impeachment*." 2 Elliot's Debates 480 (emphasis in original). James Iredell, during the North Carolina debates stated:

"If he [the President] commits any misdemeanor in office, he is impeachable, removable from office, and incapacitated to hold any office of honor, trust, or profit. If he commits any crime, he is punishable by the laws of his country, and in capital cases may be deprived of his life." 4 Elliot's Debates 109.

See also *Langford* v. *United States*, 101 U.S. 341, 343, suggesting in dictum that indictment of a President is an alternative to impeachment "if the wrong amounts to a crime."

Court's authority to entertain and decide this controversy. This Court's jurisdiction to consider and resolve this dispute on the merits stems from the fundamental role of the courts in our tri-partite constitutional system—the courts, as the "neutral" branch of government, have been allocated the responsibility to resolve all issues in a controversy properly before them, even though this requires them to determine authoritatively the powers and responsibilities of the other branches (Br. 25–27, 48–52).

This is true even when the dispute presented for resolution implicates intra-branch relationships. Thus, this Court has entertained cases challenging the right of Congress to exclude a duly-elected representative, see *Powell* v. *McCormack*, 395 U.S. 486, and cases brought by an executive officer challenging the propriety of his dismissal by his executive superiors, see, *e.g.*, *Sampson* v. *Murray*, — U.S. — (42 U.S.L.W. 4221, February 19, 1974); *Service* v. *Dulles*, 354 U.S. 363. Indeed, in *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, Chief Justice Marshall recognized that a federal court could determine whether the Secretary of State improperly withheld Marbury's commission. Contrary to the implications of the argument by counsel for the President (P. Br. 74–76), the case was not dismissed because it involved the "political" powers of the President. Rather, it was dismissed because the statute conferring original jurisdiction on this Court in that case was not consonant with the provisions of Article III narrowly circumscribing the Court's original jurisdiction.

The present controversy arises in the midst of a criminal prosecution pending in the federal courts.

At issue is the enforceability of a subpoena for allegedly privileged evidence. The questions for this Court, then, are whether the judicial process is validly invoked by the Special Prosecutor on behalf of the United States and whether the issue presented for review—the validity of the claim of executive privilege—is justiciable.

A. THE SPECIAL PROSECUTOR HAS INDEPENDENT AUTHORITY TO MAINTAIN THE PROSECUTION IN UNITED STATES V. MITCHELL, ET AL.

There is no need here to review again the history that led to the regulations establishing the Office of the Watergate Special Prosecution Force or the exclusive authority that the Special Prosecutor has to maintain prosecutions within his jurisdiction (Br. 5–6, 9–11, 27–33). What is important to note here, however, is that counsel for the President, by accepting the proposition that the President and Attorney General can delegate certain Executive functions to subordinate officers (P. Br. 10, 41, 106), implicitly has conceded the validity of the regulations, promulgated with the President's consent, delegating specific prosecutorial duties and powers to the Special Prosecutor.[19]

---

[19] The delegation of specific and limited powers by the President or by cabinet officers is constitutional. See generally *Jay* v. *Boyd*, 351 U.S. 345, 351 n. 8; *Rose* v. *McNamara*, 375 F. 2d 924, 925 n. 2 (D.C. Cir. 1967), cert. denied, 389 U.S. 856; *Sardino* v. *Federal Reserve Bank*, 361 F. 2d 106, 110 (2d Cir. 1966), cert. denied, 385 U.S. 898.

As we establish in our main brief (32–33), the regulations delegating authority to the Special Prosecutor have the force and effect of law.

There can be no question that the Attorney General, with the concurrence of the President, has delegated to the Special Prosecutor "full authority" to prosecute the present criminal case and "full authority" to contest claims of executive privilege made during that prosecution. In exercising this authority, the Special Prosecutor has the "greatest degree of independence that is consistent with the Attorney General's statutory accountability." More specifically, the regulations provide that the "Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions." The only control the Attorney General retains is to dismiss the Special Prosecutor for "extraordinary improprieties." (Br. 146–49.)

Thus, it wholly misses the point for counsel to the President to say that the separation of powers precludes the courts from entertaining this action because "it is the exclusive prerogative of the executive branch, not the Judiciary, to determine whom to prosecute, on what charges, and with what evidence" (P. Br. 39).[20] To the extent this prerogative is exclu-

[20] The implication that this "prerogative" resides ultimately with the President in this case directly contradicts the position of former counsel for the President at oral argument before the court of appeals in *Nixon* v. *Sirica*, *supra*, on September 11, 1973 (p. 15):

"Now, in this instance we have a division of function within the Executive in that my friend, Mr. Cox, has been given absolute independence. It is for him to decide whom he will seek to indict. It is for him to decide to whom he will give immunity—decision[s] that ordinarily would be made at the level of the Attorney General, or in an important enough case at the level of the President."

sively Executive, it now lies with the Special Prosecutor with respect to the prosecution of *United States* v. *Mitchell, et al.*, and not with the Attorney General or the President. In a very real sense, therefore, the Office of the Watergate Special Prosecution Force is a quasi-independent agency. It is an agency intended and designed to be "independent of executive authority, *except in its selection,* and free to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Humphrey's Executor* v. *United States,* 295 U.S. 602, 625–26 (emphasis in original).[21]

This case, therefore, is wholly unlike the case of a subordinate executive officer, subject to the direct con-

---

[21] Indeed, even absent the specific delegation to the Special Prosecutor, the President may not have the same unbridled discretion over the Department of Justice, which enforces the law through the courts and whose officers have duties and responsibilities owed to the courts, as he does, for example, over the State Department or the Department of Defense. Cf. *Myers* v. *United States*, 272 U.S. 52, 135. In *Berger* v. *United States*, *supra*, this court noted (295 U.S. at 88):

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

It should be emphasized that the Special Prosecutor's independence flows from an arrangement established *by the Executive.* Compare *Humphrey's Executor* v. *United States*, *supra*, 295 U.S. at 629; *Myers* v. *United States*, 272 U.S. 52. Thus, although the Congress was about to enact legislation to provide for an independent Special Prosecutor and has implicitly ratified the current status of the Special Prosecutor's Office under the Department of Justice regulations by special funding, the

trol of his superior, suing that superior. Rather, it is analogous to independent governmental agencies or departments, each pursuing its respective responsibilities, on opposite sides of a case within the courts' jurisdiction. Thus, for example, as this Court noted in its recent decision in *United States* v. *Marine Bancorporation, Inc.*, — U.S. — (June 26, 1974), the Comptroller of the Currency, an officer of the Treasury Department, "intervened in support of the merger as a party defendant" (slip op. at 10) in opposing a suit brought by the Department of Justice in the name of "the United States," challenging a merger the Comptroller had approved under his official powers. The Comptroller was heard in this Court in opposition to the Solicitor General. See also *Secretary of Agriculture* v. *United States*, 350 U.S. 162; *United States* v. *ICC*, 337 U.S. 426. The Special Prosecutor in accordance with his independent responsibilities signed the indictment and initiated the prosecution in the present case. In connection with that prosecution, now properly before the courts, the Special Prosecutor, as attorney for the United States and an officer of the court, is seeking evidence from the President that is relevant and material to the prosecution. The President, acting pursuant to what he views as his responsibilities, has interposed a claim of executive privilege. Fully consistent with the regulations empowering him to contest such a claim, as well as with the expectations of all those who were parties to the establish-

---

Court is not faced with the "separation of powers" issue that would be presented if the Special Prosecutor derived his authority from a regime designed solely by Congress.

ment of the Office of the Watergate Special Prosecution Force (Br. 29–32), the Special Prosecutor challenged that claim by subpoena, as he is authorized to do without restriction by the President or the Attorney General.

Counsel for the President repeatedly stresses that the President has not delegated to the Special Prosecutor his "*duty*" to claim executive privilege when he sees fit, suggesting that his retention of that power somehow deprives the courts of jurisdiction (*e.g.*, P. Br. 28–29, 43). We fully agree that the President's power to assert a claim of privilege for presidential papers has not been delegated to the Special Prosecutor. Indeed, it is precisely that power, when it comes into conflict with the independent power of the Special Prosecutor in the context of a pending criminal prosecution to contest the claim of privilege, that creates the live, concrete controversy before the courts.[22]

---

[22] Even if the Special Prosecutor were to be dismissed, the Office of the Watergate Special Prosecution Force abolished, and the prosecution of *United States* v. *Mitchell, et al.* placed under the control of the Criminal Division of the Department of Justice, such action would not render moot a decision by this Court upholding enforcement of the subpoena or deprive the Court's ruling of finality.

First, several defendants are asserting rights under *Brady* v. *Maryland*, 373 U.S. 83, and its progeny, to obtain access to the subpoenaed material, and they could pursue independently any decision enforcing the subpoena.

Second, although prosecution is generally considered an executive function, even the Attorney General—still assuming hypothetically that the Special Prosecutor is legally ousted from this case—would not have *carte blanche* to dismiss the prosecution here except by leave of court. See Rule 48(a), Federal Rules of Criminal Procedure. And as we pointed out in our main brief, the Attorney General and Solicitor General would be obliged to see to the enforcement of the Court's mandate.

Third, as long as the prosecution remains pending, the district

(Continued)

B. THE ASSERTION OF EXECUTIVE PRIVILEGE AS A GROUND FOR REFUSING TO PRODUCE EVIDENCE IN A CRIMINAL PROSECUTION DOES NOT PRESENT A POLITICAL QUESTION AND THE VALIDITY OF SUCH A CLAIM MUST BE RESOLVED BY THE COURTS

In arguing that the Judiciary, and not the Executive, ultimately must determine the validity of a claim of executive privilege when it is asserted in a judicial proceeding, we rely on the fundamental principle that the courts have the power and the duty to resolve all issues necessary to a lawful resolution of controversies properly before them (Br. 48–52). Although counsel for the President virtually has ignored all the relevant cases, this principle has been applied squarely to cases involving claims of executive privilege. See *Environmental Protection Agency* v. *Mink*, 410 U.S. 73; *Roviaro* v. *United States*, 353 U.S. 53; *United States* v. *Reynolds*, 345 U.S. 1. As those cases demonstrate, the validity *vel non* of a claim of executive privilege presents a justiciable issue. The duty to produce relevant and material evidence for a criminal prosecution, a duty that reaches all citizens, is a duty that "can be judicially identified," and "its breach judicially deter-

(Continued)
court itself, under its established power to summon "court witnesses," could insist on compliance with the subpoena. See, *e.g.*, Rule 614(a), Proposed Federal Rules of Evidence; *United States* v. *Lutwak*, 195 F. 2d 748 (7th Cir. 1952), affirmed, 344 U.S. 604; *Troublefield* v. *United States*, 372 F. 2d 912, 916 n. 8 (D.C. Cir. 1966); *Estrella-Ortega* v. *United States*, 423 F. 2d 509 (9th Cir. 1970). As Justice Frankfurter explained in *Johnson* v. *United States*, 333 U.S. 46, 54 (dissenting opinion): "A trial is not a game of blind man's buff; and the trial judge * * * need not blindfold himself by failing to call an available vital witness simply because the parties, for reasons of trial tactics, choose to withhold his testimony"—"Federal judges are not referees at prize-fights but functionaries of justice."

mined," and the remedy for any breach "can be judicially molded." *Baker* v. *Carr*, 369 U.S. 186, 198.

Counsel for the President nevertheless asserts that this controversy presents a non-justiciable "political question" (P. Br. 44). It was long ago established, however, that the mere fact that a case has "political overtones" (P. Br. 48) does not mean it involves a "political question." See, *e.g.*, *Nixon* v. *Herndon*, 273 U.S. 536. This case involves no "political question" as that concept is correctly understood under the criteria articulated in *Baker* v. *Carr*, *supra*, 369 U.S. at 217. See also *Powell* v. *McCormack*, *supra*, 395 U.S. at 518–19.

Perhaps the principal hallmark of a "political question" beyond the power of the federal courts to decide is its commitment by the text of the Constitution to another branch of government for final resolution. Counsel for the President concedes, with considerable understatement, that "[u]nlike its companion privilege attendant upon the Congress by virtue of the Speech and Debate Clause, executive privilege was *not meticulously delineated* by the Framers of our Constitution" (P. Br. 50 n. 34) (emphasis added). Such a privilege is not "delineated" at all in the text of the Constitution and it is still a matter of dispute whether "executive privilege" is a true constitutional privilege at all or simply a common law evidentiary privilege (Br. 57 n. 43). At the very least it is evident that it has been the courts that have fashioned "executive privilege" to promote unfettered and robust debate on matters of policy and they have done so without reliance on any specific clause in the text of the Constitution. Certainly there is nothing in the

text of the Constitution that commits the final determination of the privilege to the Executive. On the contrary, in recognizing this privilege in the context of litigation, the courts from the outset have assumed and asserted that it is for them and not the Executive to determine the validity of a particular claim in the context of the pending case (Br. 54–56).

Moreover, the decisions of this Court, including *Clark* v. *United States*, 289 U.S. 1, as well as *Mink*, *Reynolds* and *Roviaro*, demonstrate that there are "judicially discoverable and manageable standards" for resolving claims of privilege. And thus, there is no basis for invoking the "political question" doctrine on that ground. Indeed, the common law development of evidentiary privileges generally, even those now embodied explicitly in the Constitution, belies any claim that the courts are not suited for such determinations. While in cases where military secrets or foreign affairs are involved, the courts may not be able to make the delicate judgment whether the national interest requires continued secrecy, the generalized executive privilege for confidential deliberations does not implicate any such sensitive matters properly entrusted to the discretion of the Executive. Compare *Gilligan* v. *Morgan*, 413 U.S. 1, 10–11.

Finally, this Court's decision in *Powell* v. *McCormack*, *supra*, 395 U.S. at 549, dispels any notion that the courts are precluded by the political question doctrine from overriding a determination by the President:

> Our system of government requires that federal courts on occasion interpret the Constitu-

tion in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.

Nothing about the present litigation over a subpoena for allegedly privileged evidence, issued in a pending criminal prosecution, renders it a "political question" beyond the jurisdiction of the federal courts.

III

THE EXECUTIVE BRANCH DOES NOT HAVE AN ABSOLUTE PRIVILEGE TO WITHHOLD EVIDENCE OF CONFIDENTIAL COMMUNICATIONS FROM A CRIMINAL PROSECUTION

A. THE VALID INTERESTS OF THE EXECUTIVE BRANCH IN PROMOTING CANDID INTRA-AGENCY DELIBERATIONS ARE FULLY PROTECTED BY THE QUALIFIED EXECUTIVE PRIVILEGE REGULARLY RECOGNIZED AND APPLIED BY THE COURTS

We share the desire of counsel for the President to maintain a strong and viable Executive. And we do not deny that wholesale access to evidence of confidential governmental deliberations by every congressional committee and by every private litigant, no matter what the context of the request for information or the need for information, might "chill" the interchange of ideas necessary for the successful administration of the Executive Branch. But this Court is not confronted with the alternatives seemingly posed by counsel for the President: this case does not present a choice between recognizing an absolute privilege on the one hand, or exposing the Executive to repeated unwarranted intrusions on its confidentiality on the other hand. The narrow issue before the Court

is whether the President, in a pending prosecution against his former aides and associates, may withhold material evidence from the court merely on his assertion that the evidence involves confidential communications.

We emphasize at this point that we are not concerned in this case with the "sovereign prerogative" of the Executive "to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense." *New York Times Co.* v *United States*, 403 U.S. 713, 729–30 (Stewart, J., concurring). There has been no claim that any of the subpoenaed conversations involves "state secrets" or that disclosure of any of them will "result in direct, immediate, and irreparable damage to our Nation or its people." 403 U.S. at 730.[23] We deal instead solely with deliberations regarding a domestic crime. Thus, the concerns of Justice Stewart and Justice White do not have "particular force here" (P.Br. 66), and there can be no question that in the context of this case, the qualified executive

---

[23] In oral argument before the district court on the enforceability of the grand jury's subpoena, counsel representing the President stated that "the President has told me that in one of the tapes that is the subject of the present subpoena there is national security material so highly sensitive that he does not feel free even to hint to me what the nature of it is." Transcript of Hearing on August 22, 1973, at 56, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, 360 F. Supp. 1. (D.D.C. 1973). Nevertheless, when the recordings were submitted to the district court in compliance with later orders of that court and the court of appeals, counsel for the President no longer asserted that any of the subpoenaed conversations included matters relating to the national security and no such information was found.

privilege long recognized and applied by the courts fully protects the Executive's legitimate interests in secrecy.

Neither Presidents nor their aides ever have been assured that their communications will be maintained absolutely confidential, and they certainly cannot confer with that expectation.[24] More often than not, Presidents and their aides voluntarily disclose communications when it serves their purposes. There is no better example than the extensive disclosures by President Nixon with respect to Watergate.

Counsel for the President points to the alleged "crippling effect" of the decision in *Nixon* v. *Sirica*, relying solely on the fact that the President "has received more than two dozen subpoenas emanating from various courts throughout the country, calling for the production of voluminous amounts of privileged materials" (P. Br. 68 n. 51). Significantly, counsel for the President does not tell the Court how many of these subpoenas have been quashed. Nor does

---

[24] Counsel for the President states that "Presidents have always acted on the assumption that it is discretionary with them, and with them alone, to determine whether the public interest permits production of presidential papers, and the other branches of Government have until recently accepted this position" (P. Br. 55–56). He relies solely on examples, set forth in a table on pp. 55–58 of his brief, where Presidents have refused to submit evidence to *Congress or congressional committees*. Those examples are wholly inapposite to the case at hand. Congressional oversight responsibilities continually place the Congress and Executive in conflict. On many occasions, probing into the mental processes of Executive decision-making results from essentially political considerations. It is in this context, where executive officers are held up to public ridicule, that

he indicate in how many instances courts have ordered compliance with the subpoena.[25]

As counsel for the President himself notes (P. Br. 77–78), however, Chief Justice Marshall held in *United States* v. *Burr,* 25 Fed. Cas. 30, 34 (No. 14,692d) (C.C.D. Va. 1807), that subpoenas may issue to the President and that the "guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued." While counsel for the President apparently rejects the notion that the courts are equipped to protect the Executive Branch against burdensome and oppressive subpoenas, there is no evidence that the courts have failed in this duty. Indeed, the expectation that the courts are incapable of protecting the legitimate interests of the Executive strikes at the very core of the concept of principled adjudication which is reflected in *Reynolds, Roviaro* and the lower court cases which hold that executive privilege is not absolute and is subject to determination by the courts (see our main brief at 52–60). The

---

there is the greatest danger to the policies underlying executive privilege. We emphasize, as we did in our main brief (53–54, n. 38), that determining the validity of a claim of privilege in a pending criminal prosecution in no way requires this Court to determine whether a claim of privilege asserted against Congress presents a justiciable issue. Thus, a decision in this case will not affect the relationship between the President and Congress that until now has depended largely on political factors.

[25] A number of these have been issued at the request of defendants seeking purportedly exculpatory materials in the President's possession. As counsel for the President concedes (P. Br. 29 n. 15): "We do not challenge the jurisdiction of a court to entertain a properly documented request by a defendant for exculpatory materials."

plain fact is that, as far as we are aware, with the exception of a few subpoenas issued to the President at the request of his former aides who are now awaiting criminal trial, all of the other subpoenas to which counsel refers have been quashed by the courts, including several quashed at the Special Prosecutor's urging. Thus, just as with subpoenas to cabinet officers, the courts should be solicitous to avoid *unwarranted* interference with the performance of executive functions, but it is for the courts to decide whether enforcement of process is necessary in each particular case. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 420.

It is true that in the past it has been rare for subpoenas to be issued against the President. This is hardly surprising, because there have been few occasions on which there has been reason to believe that the President has had in his *personal* possession evidence directly material to a criminal prosecution. Counsel for the President cites (P. Br. 80 n. 59) Justice Chase's refusal to issue a subpoena *ad testificandum* to President Adams during the criminal trial of Thomas Cooper for seditious libel against the President, *United States* v. *Cooper,* 25 Fed. Cas. 631, 633 (No. 14,865) (C.C.D. Pa. 1800). But, despite the implication of counsel's assertion, Justice Chase did *not* refuse the subpoena because he viewed the President as immune from process or as having an absolute privilege not to testify. Rather, the court apparently considered it irrelevant and improper on a charge of criminal libel to call the alleged victim to ask him whether he had done the acts he was mali-

ciously accused of. See Cooper, *Account of the Trial of Thomas Cooper of Northumberland* 10 (1800). Indeed, Cooper at first understood that the subpoena had been refused on grounds of privilege, but Justice Chase was categorical in disabusing him of that notion (*ibid.*):

> [Y]ou have totally mistaken the whole business. It is not upon the objection of privilege that we have refused this subpoena: This court will do its duty against any man however elevated his situation may be.—You have mistaken the ground.

It was in that context, when Cooper, who was appearing *pro se*, sought to argue the matter further that Justice Chase interjected: "The Court will not hear you after they have given their decision: It was a very improper and a very indecent request." *Ibid.* That case hardly advances the President's claim here.[26]

---

[26] In fact, William Rawle, who was the United States Attorney for the District of Pennsylvania who personally handled the Cooper prosecution, later wrote in his treatise that the President *is* subject to process, explaining:

"* * * The law makes no distinction of persons, and the maxim that the king can do no wrong, so much admired in England, exists by no analogy in a republican government.

"It may not be improper to consider why such a rule is admitted in monarchies, and why it cannot take place in a well constituted republic. In every monarchy, a quality termed prerogative, is attached to the monarch. * * * But the principle which thus shields and protects the monarch; the sovereignty resident in himself, creates the distinction between him and the elected, though supreme, magistrate of a republic, where the sovereignty resides in the people. All its officers, whether high or low, are but agents, to whom a temporary power is imparted, and on whom no immunity is conferred. An exemption from the power of the law, even in a small particular, except upon

(Continued)

The two most notable instances where subpoenas have been issued to the President include the *Burr* cases and the court martial of Dr. William Barton. As we discussed at length in our main brief, Chief Justice Marshall was unequivocal in upholding the judicial power to issue a subpoena to the President. While there has been dispute over whether President Jefferson complied with the subpoenas, Raoul Berger, after a thorough study of the original reports of the *Burr* trial, has concluded that Jefferson fully intended to comply with the first subpoena, including that part which called for the Wilkinson letter of October 21, 1806. Moreover, after some delay in locating the letter, a copy apparently was submitted to the clerk. See Berger, *The President, Congress, and the Courts,* 83 Yale L.J. 1111, 1115 (1974). As to the second Wilkinson letter, which was in the possession of United States Attorney Hay, the record remains unclear. President Jefferson had claimed privilege with respect to specific portions, asserting that they were irrelevant to the issues at trial. There is no indication whether Chief Justice Marshall ever ruled whether the requirements of Burr's defense to the misdemeanor charge were sufficient to overcome the assertion of privilege. Nor does it appear whether, as the trial developed,

---

(Continued)
special occasions, would break in upon this important principle, and the freedom of the people, the great and sacred object of republican government, would be put in jeopardy. The exception adverted to, is that already noticed, of members of the legislature * * * but no other officer of government is entitled to the same immunity in any respect."
Rawle, *A View of the Constitution of the United States of America* 168–170 (2d ed. 1829).

Burr's counsel had any occasion to offer the letter into evidence. *Id.*, at 1118–20.

In the Barton court martial, President Monroe was subpoenaed by the defendant.[27] Heeding the advice of his Attorney General that under the *Burr* case such a subpoena may "be properly awarded to the President of the U.S.," [28] President Monroe indicated on the return that although his official duties precluded a personal appearance at the time, he was prepared to testify by deposition.[29] President Monroe subsequently submitted answers to the interrogatories forwarded him by the court martial.[30]

In support of an absolute executive privilege, counsel for the President analogizes to the secrecy of internal court deliberations and refusals by Congress to afford evidence for criminal prosecutions. Certainly, we do not question the views of either the Chief Justice or Justice Brennan, quoted in the President's brief at pp. 59–60, that as a general rule the deliberations of judges, either among themselves or with their law clerks, must be kept secret. But nowhere has there been the suggestion that the secrecy is impenetrable, regardless of the reasons mandating

---

[27] See Attorney General's Papers: Letters received from the State Department, January 12, 1818, Record Group 60, National Archives.

[28] Letter from Attorney General William Wirt to Secretary of State John Quincy Adams, January 13, 1818, in Attorney General's Opinions, Book A, at 21, Record Group 60, National Archives.

[29] Records of General Courts Martial and Courts of Inquiry of the Navy Department, Record Group 125, National Archives, Microfilm Publication M273, roll 10, frame 0834.

[30] *Id.*, at frames 0799–0806.

in favor of disclosure. For example, consider the *Manton* case, where Circuit Judge Manton was convicted of a conspiracy to obstruct justice and defraud the United States arising out of bribes Manton accepted to influence his decision of cases. See *United States* v. *Manton*, 107 F. 2d 834 (2d Cir. 1939), cert. denied, 309 U.S. 664. We cannot believe that if judicial colleagues of Judge Manton or his law clerk had been in a position to give material testimony on the elements of the crimes charged that they would have been excused because of general notions of confidentiality. Indeed, such a decision would fly in the face of this Court's decision in *Clark* v. *United States, supra.*[31]

Moreover, congressional refusals to supply evidence offer no aid at all to the President's position. On each occasion when Congressmen have refused to testify or when committees have refused to supply documents for use at a trial, there has been an explicit constitutional privilege at issue. These privileges include: (1) the Speech or Debate Clause (Art. I, Sec. 6, cl. 1), which prohibits inquiry "into those things generally said or done in the House or Senate in the performance of official duties and into the motivation for those acts," *United States* v. *Brewster, supra,* 408 U.S. at 512; (2) the Freedom from Arrest Clause (Art. I,

---

[31] In fact, Circuit Judges Learned Hand, Augustus Hand, and Thomas Swann did testify at the trial (for the defense) about their participation in court conferences with Judge Manton concerning the cases at issue. They stated they had observed nothing unusual about Manton's behavior. Trial Transcript pp. 792–93.

Sec. 6, cl. 1);[32] and (3) Article I, Section 5, clause 3, which empowers each House to maintain Journals which must be published, "excepting such Parts as may *in their Judgment* require Secrecy" (emphasis added).[33]

If there is anything to be learned from the congressional refusals to produce evidence, it is that they are justified from the explicit privileges accorded Congress—privileges that are noticeably absent from Article II. Unlike Congress, the President has no explicit privileges, and if any inference is to be drawn, it is that the Framers intended that he have none. See *Anderson* v. *Dunn*, 6 Wheat. (19 U.S.) 204, 223. Accordingly, examples of congressional refusals to provide evidence in no way imply that the "separation of powers" doctrine would otherwise have justified an absolute congressional privilege and certainly do not support the creation of an absolute executive privilege in the face of the silence of the Constitution on the subject.

---

[32] Even that clause does not provide absolute immunity from service of process in a criminal proceeding. See *Gravel* v. *United States*, *supra*; *United States* v. *Cooper*, 4 Dall. (4 U.S.) 341.

[33] This clause was discussed in the recent decision in *United States* v. *Richardson*, —— U.S. —— (June 25, 1974), where Mr. Justice Douglas observed in his dissenting opinion: "Secrecy has of course some constitutional sanction" (pp. 2–3).

In the Calley court martial, cited by counsel for the President (P. Br. 61 n. 49), Calley attempted to subpoena secret testimony which had been given before a subcommittee of the House Armed Services Committee. When the subcommittee chairman refused to supply the testimony, the military court recognized that this was proper under Article I, Section 5. See 116 Cong. Rec. 37,652 (1970).

551–892—74——5

B. THE FIRST AMENDMENT ERECTS NO ABSOLUTE PRIVILEGE FOR THE PRESIDENT TO WITHHOLD RELEVANT EVIDENCE

For the first time, in this Court, counsel for the President advances the novel argument that the President's rights as an ordinary citizen to privacy and freedom of expression support his claim of an absolute privilege to withhold physical evidence determined to be relevant to the trial of criminal prosecutions.[34]

Viewing this argument as a claim of the President's right as a citizen to free speech, we have an initial difficulty in identifying precisely how the President's freedom of expression would be violated by compliance. There can be no suggestion that enforcement of the subpoena would burden or chill his ability to communicate with the public. This is particularly true

---

[34] While the President's chief reliance is on the First Amendment, he also invokes Article II, Section 2, clause 1 of the Constitution:

"[The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."

Unfortunately, this provision is cited without elaboration or explanation and its relevance to the claim of privilege in this case is not otherwise readily apparent. With the single exception of one meeting on April 17, 1973, at which then-Secretary of State Rogers was present for part of the time, the subpoenaed tape recordings do not relate to meetings between the President and members of his Cabinet concerning their official duties, but rather to conversations between the President and members of his personal staff concerning the Watergate cover-up. To the extent the meeting of April 17 may have included discussions of Secretary Rogers' official responsibilities, not related to Watergate, the possibility of excising such portions can most appropriately be considered when the full tapes are presented to the district judge for his *in camera* examination.

in light of the fact that the White House recording system was established in the first place at government expense by government personnel expressly to create an accurate "historical" record of the President's conduct of his office—to create "a complete, accurate record of conversations held by the President." See Transcript of Hearing on November 6, 1973, at 906, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon,* D.D.C. Misc. No. 47–73 (testimony of witness Haldeman). As shown by his unilateral action of April 30, 1974, in releasing a great quantity of edited transcripts of Watergate-related conversations, he is free at any time to disclose as much of the recorded material in his possession as he chooses. The thrust of the President's position, however, is to *prevent* any dissemination of the subpoenaed material. Consequently, the interests asserted cannot realistically be those of freedom of expression, but rather solely the converse—the right to refuse to disclose what has been expressed.

But any claim that a constitutional right to privacy bars disclosure here will not withstand analysis. Of course, we do not quarrel with the proposition that the Constitution protects the rights of privacy and freedom of association. These are values at the center not only of the First Amendment, *e.g. Griswold* v. *Connecticut,* 381 U.S. 479, 483; *NAACP* v. *Alabama,* 357 U.S. 449, but also of the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment, *Couch* v. *United States,* 409 U.S. 322; *Katz* v. *United States,* 389 U.S. 347; *Hale* v. *Henkel,* 201 U.S. 43; *Boyd* v. *United States,* 116 U.S. 616. The President

at no time has claimed to rely on either the Fourth or Fifth Amendment. The subpoena is narrowly and specifically framed, and the President has not resisted disclosure on the ground that the tape recordings in his possession would tend to incriminate him; on the contrary, the President has consistently maintained his innocence of any wrongdoing. Indeed, the edited transcripts were released publicly on April 30 in an effort to demonstrate "that the President has nothing to hide in this matter." 10 Weekly Compilation of Presidential Documents 452 (May 6, 1974).

Nor does the First Amendment shield the President or any other citizen from "the longstanding principle that 'the public . . . has a right to every man's evidence,'"—that was the precise holding in *Branzburg* v. *Hayes*, 408 U.S. 665, 688, where the Court made perfectly clear that even reliance upon the explicit First Amendment freedom of the press creates no absolute privilege to withhold evidence in criminal prosecutions. In *Branzburg*, which involved a grand jury subpoena for testimony by reporters concerning information received from confidential informants, the claim of the newsmen was virtually identical to that of the President here—that "the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation," 408 U.S. at 693. This Court considered and decisively rejected the claim of privilege in a setting where the reporter was asked to provide information concerning possible criminal activities by his informants. The parallel between that situation and this case is obvious, for the subpoenaed conversations here all involve persons (in-

cluding the President) charged by the grand jury to have been members of a conspiracy to obstruct justice. Entirely aside from the issue of the President's own alleged complicity,[35] the fact that there is reason to believe that these conversations record or reflect criminal conduct by the other participants is sufficient to override any claim of First Amendment privilege that might otherwise apply. As this Court stated in *Branzburg* (408 U.S. at 692):

> Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.

This analysis applies equally to the Executive Office of the President.

The Court also considered the case of a reporter subpoenaed to provide information received from confidential sources about third-party crime. Although it recognized that it was "not irrational" to fear that

---

[35] While dissenting from the majority opinion in *Branzburg*, Justice Douglas agreed that even a reporter would have no First Amendment privilege to refuse to testify if he were himself implicated in a crime (although of course he could invoke the Fifth Amendment). 408 U.S. at 712.

compelling such testimony would burden freedom of the press, 408 U.S. at 693, it held that such a burden is justifiable when the government's purpose is the vindication of the "compelling" and "paramount" public interest in the enforcement of the criminal laws. That test was satisfied as to the reporters' testimony since, on the record,

> it was likely that they could supply information to help the government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment. 408 U.S. at 701.

[*A fortiori*, the evidence sought from the President in this case is producible, since the grand jury has already found reason to believe that crimes—involving the President—have been committed, and the tape recordings have been found to be material to the guilt or innocence of defendants already indicted.

First Amendment concepts, therefore, cannot bolster the President's refusal to honor this subpoena for important evidence, whether or not he is regarded as personally implicated in the conspiracy.

IV

THE SUBPOENAED CONVERSATIONS ARE UNPRIVILEGED BECAUSE A PRIMA FACIE SHOWING HAS BEEN MADE THAT THEY OCCURRED IN THE COURSE OF A CRIMINAL CONSPIRACY INVOLVING THE PRESIDENT

We have argued that under cases like *Clark* v. *United States*, *supra*, the qualified privilege accorded to executive deliberations is inapplicable in this case because of the *prima facie* showing made by the Spe-

cial Prosecutor below that the subpoenaed conversations were part of a continuing criminal conspiracy involving the President himself (Br. 90–102). Indeed, former counsel for the President conceded in *Nixon* v. *Sirica, supra,* that "[e]xecutive privilege cannot be claimed to shield executive officials from prosecution for crime" (Brief of Petitioner 69). Counsel for the President now responds by challenging the sufficiency of our *prima facie* showing, claiming that the grand jury's naming of the President as an unindicted co-conspirator is proof only of probable cause, which is alleged to be something less than the *prima facie* showing of criminality necessary to overcome the privilege.[36] The President's position, however, not only misconceives the meaning of the grand jury's action, but also ignores the weighty evidentiary presentation, based upon statements supplied by the President himself or by others under oath, which was submitted to the district court.

---

[36] The President also contends that a claim of executive privilege, unlike claims of other privileges concerning confidential communications, cannot be defeated by a showing that the discussions were in furtherance of a conspiracy because the privilege exists for the benefit of the public rather than the individual asserting it. We freely concede, indeed we emphasize, that executive privilege is not a personal or "individual" privilege. But the recognition that the privilege exists to promote the legitimate functioning of government in no way warrants the conclusion that it must stand as a shield in the face of evidence that it has been abused by the officeholder. Indeed, *Clark* v. *United States*, *supra*, unmentioned by the President's brief, conclusively rebuts any such notion. The "public" rather than "individual" nature of the privilege demonstrates that it cannot be maintained to conceal the criminal activity of a miscreant officeholder. See our main brief at 90–97.

Relying upon cases which hold that there is a distinction between a *prima facie* showing of guilt beyond a reasonable doubt and a determination of "probable cause," the President suggests that the grand jury's decision that the evidence before it warranted the return of an indictment represents only a determination that a crime "might" have been committed (P. Br. 115). This suggestion, however, fundamentally misconstrues the standard applied by a grand jury in determining whether an indictment should issue. A grand jury indictment may not rest on mere suspicion. Thus, as long ago as 1836, Chief Justice Roger B. Taney, sitting as circuit justice in the District of Maryland, instructed a grand jury that it could not indict unless "the evidence before you is sufficient, in the absence of any other proof, to justify the conviction of the party accused." *Charge to Grand Jury,* 30 Fed. Cas. 998, 999 (No. 18, 257) (C.C.D. Md. 1836). This is the settled standard. Sufficient evidence to indict exists "only when there is competent evidence, direct or circumstantial, before you which leads you, as reasonable persons, to believe that the defendant is guilty of the offense charged." Yankwich, *Charge to Grand Jury,* 16 F.R.D. 93, 94 (1955). Indeed, Chief Judge Sirica specifically instructed the grand jury which voted the indictment in *this* case and which alleged that President Nixon was a co-conspirator:

> you ought not to find an indictment unless in your judgment the evidence before you, unexplained and uncontradicted, would warrant a

conviction by a petit jury. (Transcript of June 5, 1972).

Thus, the grand jury's naming of the President and others as participants in a conspiracy to obstruct justice constitutes a determination by an independent body, based upon more than eighteen months of evidence, that substantial evidence exists of sufficient strength "to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt," *Coleman* v. *Burnett*, 477 F. 2d 1187, 1202 (D.C. Cir. 1973), and was not an expression of a mere suspicion of possible criminality.

To the extent that the President suggests that the *prima facie* showing which the government must make to overcome the privilege is equivalent to proof of the conspiracy and its participants beyond a reasonable doubt (P. Br. 120), his position is clearly erroneous. The absurdity of requiring the government to prove an individual's guilt beyond a reasonable doubt in order to obtain evidence relevant to a conclusive jury determination of that guilt is obvious. See *United States* v. *Matlock*, —— U.S. —— (42 U.S.L.W. 4252, February 20, 1974); *Lego* v. *Twomey*, 404 U.S. 477, 489. Such a rule would put the government to its proof twice, in an enormous expenditure of time and energy, particularly in a case as complex as the present. Indeed, that very rule has been rejected in the analogous context of the co-conspirator-admissions exception to the hearsay rule. See, *e.g.*, *United States* v. *Geaney*, 417 F. 2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028; *Carbo* v. *United States*, 314 F. 2d 718, 736 (9th Cir. 1963), cert. denied, 377 U.S. 953.

The type of showing which must be made to negate the attorney-client privilege on the ground the relationship was used to further crime is discussed in McCormick, *Evidence,* § 95, at 200 (2d ed. 1972), in terms which are patently relevant here:

> Must the judge, before denying the claim of privilege on [the ground that the communication was made in furtherance of a crime or fraud] find as a fact, after a preliminary hearing if contested, that the consultation was in furtherance of crime or fraud? This would be the normal procedure in passing on a preliminary fact, on which the admissibility of evidence depends, *but here this procedure would facilitate too far the use of the privilege as a cloak for crime.* (Emphasis added.)

Faced with this consideration, McCormick notes that many courts, including this Court in *Clark* v. *United States, supra,*

> have cast the balance in favor of disclosure by requiring only that the one who seeks to avoid the privilege bring forward evidence from which the existence of an unlawful purpose could reasonably be found.

In maintaining that we have made a sufficient showing that the subpoenaed conversations were in furtherance of a continuing criminal conspiracy so as to overcome the presumptive privilege, we have not relied, as the President's brief appears to suggest, solely upon the fact that the grand jury has named all of the principal participants in those conversations as con-

spirators in a conspiracy to obstruct justice. We do maintain that the grand jury's findings as to the existence of the conspiracy and as to its members are conclusive at this stage of the proceedings, and represent a *prima facie* determination that the conspiracy did exist and that the participants in the subpoenaed conversations were among its members. The credit given to grand jury determinations in such similarly important settings, see *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599; *Ex parte United States*, 287 U.S. 241, 250; *Beavers* v. *Henkel*, 194 U.S. 73, 85; justifies acceptance of its considered judgment as an adequate *prima facie* showing here for rejecting a claim of executive privilege.

In addition to these findings, however, we presented to the court below a detailed factual submission which demonstrated at least *prima facie* that each of the 64 subpoenaed conversations was in furtherance of the conspiracy charged in the indictment. See *Appendix to Memorandum for the United States in Opposition to the Motion to Quash Subpoena Duces Tecum*. The district judge expressly held that these submissions, when viewed in light of the grand jury's findings, "constitute a *prima facie* showing adequate to rebut the presumption [of privilege] in each instance" (Pet. App. 20).

In sum, the indictment, the grand jury's finding concerning the President and the evidence presented to the district judge regarding each specific subpoenaed conversation were clearly sufficient to warrant the conclusion that the claim of executive privilege

must give way and that "the light should be let in." *Clark* v. *United States, supra,* 289 U.S. at 14.

V

THERE IS A COMPELLING PUBLIC INTEREST IN TRYING THE CONSPIRACY CHARGED IN UNITED STATES V. MITCHELL, *ET AL. UPON ALL RELEVANT AND MATERIAL EVIDENCE*

In our main brief, in addition to showing that the subpoenaed recordings no longer remain presumptively privileged because they were part of a continuing criminal conspiracy (Br. 90–102) and because any privilege has been waived as a matter of law (Br. 116–123), we demonstrated that, in any event, any qualified privilege must yield in the face of the compelling public interest in trying the conspiracy charged in *United States* v. *Mitchell, et al.,* upon all relevant and material evidence.[37] Counsel for the President now

[37] Respondents Ehrlichman and Strachan, defendants in *United States* v. *Mitchell, et al.,* have filed briefs in this Court asserting that they are entitled to the subpoenaed material under *Brady* v. *Maryland, supra,* the Jencks Act, 18 U.S.C. 3500, and Rules 16 and 17(c) of the Federal Rules of Criminal Procedure. The district court withheld ruling on these contentions, stating that defendants' request for access will be more appropriately considered in conjunction with their pre-trial discovery motions (Pet. App. 21–22).

There is no question that the prosecution will make available to defendants any material within its control to which they are entitled under *Brady* or relevant statutes and rules. Beyond that, despite the question raised in the President's mandamus petition, it is clear that the government's obligations under *Brady* extend even to "privileged" evidence. See, *e.g.*, *Roviaro* v. *United States, supra; United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir. 1944). Moreover, *Brady* in all likelihood is applicable to materials within the possession of the President, even though the prosecution has no direct access to them. See *United States* v. *Deutsch,* 475 F. 2d 55, 57 (5th Cir. 1973);

asserts that we have not shown sufficient need to overcome the privilege.

The simple answer to that contention, however, is that after analyzing our submission below in light of *Nixon* v. *Sirica* and the relevant decisions of this Court, the district court found that the submissions "constitute a *prima facie* showing adequate to rebut the presumption in each instance, and a demonstration of need sufficiently compelling to warrant judicial examination in chambers incident to weighing claims of privilege where the privilege has not been relinquished" (Pet. App. 20).[38] This finding of the district

---

United States v. *Ehrlichman*, Crim. No. 74–116 (D.D.C. June 14, 1974).

Nevertheless, although *Brady* imposes an affirmative obligation on the government not to suppress exculpatory evidence and to make available to defendants any such evidence of which it is aware, it does not obligate the government to undertake a fishing expedition without any reason to believe exculpatory evidence will be uncovered. See, *e.g.*, *Ross* v. *Texas*, 474 F. 2d 1150, 1153 (5th Cir. 1973), cert. denied, 414 U.S. 850. Here, no defendant has specifically identified any of the subpoenaed material he believes to be exculpatory, and the Special Prosecutor has no reason to believe that the subpoenaed conversations will exculpate any of the defendants.

[38] Counsel for the President asserts that because of executive privilege, "the subpoena should have been quashed in all respects by the court below" (P. Br. 95). So that the record is perfectly clear, we emphasize that the President in his Formal Claim of Privilege expressly stated that he was *not* advancing any "claim of privilege" with respect to the portions of twenty of the subpoenaed conversations for which transcripts have been made public (A. 48A). Nowhere in his brief before this Court does counsel advance any reason why the tapes of those portions of the conversations for which the President himself expressly disclaims privilege can be lawfully withheld.

court, arising from a mixed question of law and fact, is amply supported by the record.

The integrity of the administration of justice demands that all persons—no matter what their station or official status—be answerable to the law. In the context of the indictment in *United States* v. *Mitchell, et al.*, which charges former high government officials with a conspiracy to obstruct justice and defraud the United States, the demands of public justice require a trial based on all relevant and material evidence, particularly where, as here, evidence within the personal possession of the President demonstrably bears on the scope, membership and duration of the conspiracy.

CONCLUSION

For the reasons stated above and in our main brief, the order of the district court should be affirmed in all respects.

Respectfully submitted.

LEON JAWORSKI,
Special Prosecutor.
PHILIP A. LACOVARA,
Counsel to the Special Prosecutor.

Attorneys for the United States.

JULY 1974.

U S. GOVERNMENT PRINTING OFFICE, 1974

RONALD D. ROTUNDA
THE ALBERT E. JENNER, JR. PROFESSOR OF LAW
PHONE: (217) 333-3459
FAX: (217) 244-1478
EMAIL: rrotunda@law.uiuc.edu

UNIVERSITY OF ILLINOIS
COLLEGE OF LAW
504 E. PENNSYLVANIA AVE.
CHAMPAIGN, IL 61820-6996
HOME PAGE: http://www.uiuc.edu/ph/www/rrotunda

May 13, 1998

The Honorable Kenneth W. Starr
Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Ave., N.W.
Suite 490 North
Washington, D.C. 20004

Re: INDICTABILITY OF THE PRESIDENT

Dear Judge Starr:

SUMMARY AND INTRODUCTION.

You have asked my legal opinion as to whether a sitting President is subject to indictment.[1] Does the Constitution immunize a President from being indicted for criminal activities while serving in the office of President? For example, if the President committed a crime before assuming office, does his election to the Presidency immunize his criminal activities? If the President in his private capacity commits one or more crimes while in office, does his election serve to immunize him? In short, is a sitting President above the criminal law?

As this opinion letter makes clear, I conclude that, in the circumstances of this case, President Clinton is subject to indictment and criminal prosecution, although it may be the case that he could not be imprisoned (assuming that he is convicted and that imprisonment is the appropriate punishment) until after he leaves that office. A criminal prosecution and conviction (with imprisonment delayed) does not, in the

[1] For your information, I am attaching a resume listing my publications.

words of *Nixon v. Sirica*,[2] "compete with the impeachment device by working a constructive removal of the President from office."

In addition, I express no opinion as to whether a prosecution by state authorities may be proper (a state prosecution may violate the Supremacy Clause). Nor do I consider whether the President could be indicted if there were no Independent Counsel statute. In the circumstances of this case, there is such a statute, and it was enacted as the specific request of President Clinton, who knew — at the time he lobbied for and signed the legislation — that a specific purpose of the statute was to investigate criminal allegations involving him. He welcomed the independent investigation so that it could clear the air.

In addition, as discussed below, I express no opinion as to whether the Federal Government could indict a President for allegations that involve his *official* duties as President. The Office of Independent Counsel is investigating allegations that do not involve any official duties of President Clinton. The counts of an indictment against President Clinton would include serious allegations involving witness tampering, document destruction, perjury, subornation of perjury, obstruction of justice, conspiracy, and illegal pay-offs; these counts in no way relate to the President Clinton's official duties, even though some of the alleged violations occurred after he became President. The allegations involved here do not involve any sort of policy dispute between the President and Congress. The allegations, in short, do not relate to the President's official duties; they are not "within the outer perimeter of his official responsibility."[3] Indeed, the alleged acts involved here are not only outside the outer perimeter of the President's official responsibility, they are contrary to the President's official responsibility to take care that the law be faithfully executed.

Also, as discussed below, a grand jury indictment is not inconsistent in present circumstances with the conclusion reached by the Watergate Special Prosecutor.[4] For example, in the present case (and unlike the Watergate situation) a criminal prosecution would not duplicate any impeachment proceeding already begun in the

---

[2] 487 F.2d 700, 711(D.C. Cir. 1973) (per curiam) (en banc). President Nixon chose not to seek U.S. Supreme Court review of this decision. Instead he fired Watergate Special Prosecutor Archibald Cox.

[3] *Nixon v. Fitzgerald*, 457 U.S. 731, 756, 102 S.Ct. 2690, 2704, 73 L.Ed.2d 349 (1982).

[4] I should disclose that I was Assistant Majority Counsel to the Senate Watergate Committee.

House of Representatives.[5] In the Watergate era, the House of Representatives had — *prior* to the time that Special Prosecutor Leon Jaworski turned over any information to the House Impeachment Inquiry — already made the *independent* decision to begin, and, in fact, had begun impeachment proceedings. In the present case, no House Impeachment Inquiry has begun, and, if one were to begin, it would only be because the House of Representatives would be responding to information that the Office of Independent Counsel would transfer to the House of Representatives. Watergate Prosecutor Jaworski, in short, did not want to preempt the House inquiry that had independently begun. Now, there is no House inquiry, and the OIC would not be preempting any House inquiry. While the Independent Counsel statute authorizes the OIC to transmit relevant information to the House, the statute does even suggest that the OIC must postpone any indictment until the House and Senate shave have concluded any impeachment inquiry.

In this country, the U.S. Supreme Court has repeatedly reaffirmed the state that no one is "above the law."[6] The Constitution grants no one immunity from the

---

[5] *See* LEON JAWORSKI, THE RIGHT AND THE POWER 100 (1976). Watergate Prosecutor Jaworski's views are discussed below. One should also note that, in the present case, the House might not see fit to begin an impeachment, or it might decide that the alleged violations of law do not merit removal from office, either because some acts occurred prior to the time of President Clinton's assumption of office or because they do not rise to the level of impeachable offences.

As Justice Joseph Story has noted: "There is also much force in the remark that an impeachment is a proceeding purely of a political nature. It touches neither his person, nor his property; but simply divests him of his political capacity." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, §§ 406, at p. 289 (RONALD D. ROTUNDA & JOHN E. NOWAK, eds., Carolina Academic Press, 1987, originally published, 1833).

[6] *E.g., United States v. Lee,* 106 U.S. 196, 220, 1 S.Ct. 240, 260, 27 L.Ed. 171 (1882); *United States v. United Mine Workers of America,* 330 U.S. 258, 343, 67 S.Ct. 677, 720, 91 L.Ed. 884 (1947); *Malone v. Bowdoin,* 369 U.S. 643, 651, 82 S.Ct. 980, 986, 8 L.Ed.2d 168 (1962) (Douglas, J., dissenting); *Malone v. Bowdoin,* 369 U.S. 643, 651, 82 S.Ct. 980, 986, 8 L.Ed.2d 168 (1962) (Douglas, J., dissenting);*Johnson v. Powell,* 393 U.S. 920, 89 S.Ct. 250, 251, 21 L.Ed.2d 255 (1968)(Memorandum Opinion of Douglas, J., regarding application for a stay); *Branzburg v. Hayes,* 408 U.S. 665, 699, 92 S.Ct. 2646, 2665, 33 L.Ed.2d 626 (1972); *Gravel v. United States.,* 408 U.S. 606, 615, 92 S.Ct. 2614, 2622, 33 L.Ed.2d 583 (1972); *United States v. Nixon,* 418 U.S. 683, 715, 94 S.Ct. 3090, 3111, 41 L.Ed.2d 1039 (1974); *Butz v. Economou,* 438 U.S. 478, 506, 98 S.Ct. 2894,2910, 57 L.Ed.2d 895 (1978); *Davis v. Passman,* 442 U.S. 228, 246, 99 S.Ct. 2264, 2277, 60 L.Ed.2d 846 (1979); *Nixon v. Fitzgerald,* 457 U.S. 731, 758 & n. 41, 102 S.Ct. 2690, 2705 & n.41, 73 L.Ed.2d 349 (1982); *Briscoe v. LaHue,* 460 U.S. 325, 358, 103 S.Ct. 1108, 1127, 75 L.Ed.2d 96 (1983); *United States v.*
(continued...)

criminal laws. Congress enacted the present law governing the appointment of Independent Counsel, at the specific request of President Clinton and Attorney General Janet Reno. All of the parties — the President, the Attorney General, Congress — knew that the specific and immediate purpose of this statute would result in the appointment of an Independent Counsel to investigate certain allegations of criminal activities that appeared to implicate the President of the United States and the First Lady. Since that time, the Attorney General has, on several occasions, successfully urged the Court to expand the jurisdiction of this particular Office of Independent Counsel (hereinafter, "OIC") to include other allegations involving the President and Mrs. Clinton.

As the judiciary has noted in the past, the President "does not embody the nation's sovereignty. He is not above the law's commands . . .."[7] The people "do not forfeit through elections the right to have the law construed against and applied to every citizen. *Nor does the Impeachment Clause imply immunity from routine court process.*"[8]

In the remainder of this opinion letter I examine the case law, the legal commentators, the history and language of the relevant Constitutional provisions, the legislative history of the Independent Counsel law, the logic and structure of our Constitution, and the laws governing the Grand Jury's power to investigate and indict. As discussed in detail below, if the Constitution really provides that the President must be impeached before he can be prosecuted for breaking the criminal law — even if the President commits a crime prior to the time he became President, or if he commits a crime in his personal capacity, not in his official capacity as President —, the our Constitution has created serious anomalies.

First, it is quite clear that a President may be impeached for actions that do

---

[6] (...continued)
Stanley, 483 U.S. 669, 706, 107 S.Ct. 3054, 3076, 97 L.Ed.2d 550 (1987)Brennan, J., joined by Marshall, J., concurring in part & dissenting in part); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 103 n. 2, 116 S.Ct. 1114, 1146 n. 2, 134 L.Ed.2d 252 (1996)(Souter, J., joined by Ginsburg & Breyer, JJ.); *Clinton v. Jones*, — U.S. —, —, 117 S.Ct. 1636, 1645, 137 L.Ed.2d 945 (1997).

[7] *Nixon v. Sirica*, 487 F.2d 700 at 711 (footnote omitted).

[8] *Nixon v. Sirica*, 487 F.2d at 711 (per curiam) (en banc) (footnote omitted)(emphasis added).

not violate any criminal statute.[9] Acts that (a) constitute impeachable offenses and (b) are violations of a crime created by statute (our Constitution recognizes no common law crimes) are two different categories of acts. Moreover, if the President does commit a crime, that does not necessarily mean that he must be impeached, because some crimes do not merit impeachment and removal from office.

For example, if the President in a moment of passion slugs an irritating heckler, he has committed a criminal battery. But no one would suggest that the President should be removed from office simply because of that assault. Yet, the President has no right to assault hecklers.[10] If there is no recourse against the President, if he cannot be prosecuted for violating the criminal laws, he will be above the law. *Clinton v. Jones* rejected such an immunity; instead, it emphatically agreed with the Eight Circuit that: "the President, like other officials, is subject to the same laws that apply to all citizens."[11] The "rationale for official immunity 'is inapposite where only *personal, private conduct* by a President is at issue.'"[12] The President has no immunity in such a case. If the Constitution prevents the President from being indicted for violations of one or more federal criminal statutes, even if those statutory violations are not impeachable offences, then the Constitution authorizes the President to be above the law. But the Constitution creates an Executive Branch with the President under a sworn obligation to faithfully executive the law. The Constitution does not create an absolute Monarch above the law.

In addition, as also discussed below, if the President must be impeached prior to being prosecuted for serious violations of the criminal law, then Congress would have the final determination of when a criminal prosecution must begin. But it violates the Doctrine of the Separation of Powers for the legislative branch of government to control when (or if) a criminal prosecution may occur. It would even violate the Separation of Powers if Congress were to make the decision of the

---

[9] *See, e.g.,* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, §§ 405, at p. 288 (RONALD D. ROTUNDA & JOHN E. NOWAK, eds., Carolina Academic Press, 1987, originally published, 1833): "Congress have unhesitatingly adopted the conclusion that no previous statute is necessary to authorize any impeachment of any official misconduct . . .."

[10] *Cf.* Gary Borg, *Chretien is Charged Briefly with Assault,* CHI. TRIB., May 7, 1996, at A10, *available in* 1996 WESTLAW 2669290 (reporting that the Canadian Prime Minister — the first time this century that a sitting Canadian Prime Minister was faced with criminal charges — was charged with assault for grabbing a protester by the throat; the charge was later quashed).

[11] — U.S. —, 117 S.Ct. 1636, 1638. (1997).

[12] 117 S.Ct. 1636, 1641 (quoting Eight Circuit)(emphasis added).

Attorney General to refuse to seek (or to seek) the appointment of an independent counsel subject to judicial review.[13]

Moreover, as the case law discussed below indicates, if the Grand Jury cannot indict the President, it cannot constitutionally investigate him. But, in *Morrison v. Olson*[14] the Supreme Court upheld the constitutionality of the Independent Counsel Act and the constitutionality of grand jury investigations under the direction of an Independent Counsel appointed by the court. *Morrison* implicitly decided the issue analyzed in this opinion letter.

The Constitution does grant limited immunity to federal legislators in certain limited contexts, as discussed below, but those immunities do not exempt Senators or Representatives from the application of the criminal laws. One looks in vain to find any textual support in the Constitution for any Presidential immunity (either

---

[13] *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988). The Court made it quite clear that it was necessary, in order to save the constitutionality of the Independent Counsel statute, for the Court to conclude that it gave neither Congress nor the Special Division any power to force the Attorney General to appoint an Independent Counsel nor any power to direct or supervise the Independent Counsel once the appointment took place. For example. the Court in *Morrison* also said: "[T]he Special Division has *no power to appoint* an independent counsel *sua sponte*; it may do so upon the specific request of the Attorney General, and the courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment." 487 U.S. at 695, 108 S.Ct. at 2621. As to Congress, the Court said: "The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General *has no duty* to comply with the request, although he must respond within a certain time limit." 487 U.S. at 694, 108 S.Ct. at 2621. The Attorney General's decision not to appoint an Independent Counsel is "committed to his unreviewable discretion," even though the Act purports to require the Attorney General to appoint unless "he finds 'no reasonable grounds to believe that further investigation is warranted.'" 487 U.S. at 696, 108 S.Ct. at 2622.

Morrison also made clear that Congress could not remove or prevent the removal of the Independent Counsel, and the Special Division could not remove the Independent Counsel. In order to save the statute's constitutionality, the Court interpreted the statutory provision relating to termination to mean virtually nothing: "It is basically a device for removing from the public payroll an independent counsel who has served her purpose, but is unwilling to acknowledge the fact. So construed, the Special Division's power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive's authority to require that the Act be invalidated as inconsistent with Article III." *Morrison*, 487 U.S. at 683, 108 S.Ct. at 2615. *See*, Ronald D. Rotunda, *The Case Against Special Prosecutors*, WALL STREET JOURNAL, Jan. 15, 1990, at p. A8.

[14] 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

absolute or temporary) from the commands of the criminal laws. If the framers of our Constitution wanted to create a special immunity for the President, they could have written the relevant clause. They certainly knew how to write immunity clauses, for they wrote two immunity clauses that apply to Congress.[15] But they wrote nothing to immunize the President. Instead, they wrote an Impeachment Clause treating the President and all other civil officers the same way. Other civil officers, like judges, have been criminally prosecuted without being impeached. Sitting Vice Presidents have been indicted even though they were not impeached.

As *Nixon v. Sirica*[16] carefully noted: "Because impeachment is available against all 'civil officers of the Untied Sates,' not merely against the President, it is difficult to understand how any immunities peculiar to the President can emanate by implication from the fact of impeachability." Moreover, it would be anomalous and aberrant to interpret the Impeachment Clause to immunize the President for alleged criminal acts, some of which occurred prior to the time he assumed the Presidency and all far removed from any of the President's enumerated duties: witness tampering, destruction of documents, subornation of perjury, perjury, illegal pay-offs.

BACKGROUND.

The Office of Independent Counsel has investigated and continues to investigate various matters that are loosely grouped under the name of "Whitewater," which is a particular real estate deal that involves land developed in Arkansas. The "Whitewater" label is often used in the popular press. However, the investigative mandate to this Office of Independent Counsel is broader than this title implies. There are land deals other than Whitewater that are part of this investigation as well as other matters, such as the scandal involving the White House Travel Office and the misuse of FBI files by political operatives working in the White House. More recently, the Attorney General petitioned the Court to expand OIC's mandate and jurisdiction to include various allegations surrounding Ms. Monica Lewinsky and involving obstruction of justice, witness tampering, perjury, and suborning of perjury.[17]

---

[15] U.S. Const., art. I, § 6, cl. 1 [limited privilege from arrest; speech or debate privilege]. Both of these immunities are *very limited* in scope, as discussed below.

[16] 487 F.2d at 700, 711 n.50 (D.C. Cir. 1973) (en banc)(per curiam) (internal citation omitted, citing the Impeachment Clause, Art. II, § 4)..

[17] In that case, when the OIC came upon the initial information, the OIC referred the matter to the Attorney General and suggested various alternatives: the Department of

(continued...)

Attorney General Janet Reno and the Department of Justice have rejected the claims of those who seek to narrow the jurisdiction of this OIC.[18] In addition, the Attorney General has, at various times, *expanded* the original jurisdiction of the OIC to include matters beyond those originally within the OIC mandate.[19] Indeed, the Attorney General has even gone to court in order to submit these matters to you and to expand the OIC's jurisdiction over your objection.[20] While she has expanded the

---

[17] (...continued)
Justice could take over the investigation, or the DOJ could investigate together with the OIC, or the DOJ could turn over the entire matter to the OIC, or the DOJ could seek the appointment of a new Independent Counsel. The Attorney General chose the third alternative and promptly asked the Special Division to expand the jurisdiction of the OIC.

The Special Division granted this special request of the Attorney General. The OIC did investigate after it had received oral authorization to do so. This oral authorization was followed by written authorization.

[18] When others have claimed that the OIC is acting outside of its jurisdiction (a claim, for example, that Governor Jim Guy Tucker advanced in court), the Attorney General has also *supported* the OIC's jurisdiction and the Eight Circuit agreed with this position.

[19] The scandal and charges that have been collectively referred to as "Travel-gate" (involving the White House Travel Office) or the "FBI Files" (referring to FBI files sent to the White House and then used for partisan purposes) fit in this category.

The Attorney General's efforts to expand your jurisdiction are also significant because recent events show that she is often reluctant to seek the appointment of a Independent Counsel. She has *refused* to appoint an Independent Counsel in various matters relating to campaign finance, even when the Director of the FBI has supported the appointment of an Independent Counsel. And, in matters involving other Independent Counsel, she has *objected to* any expansion of jurisdiction, even when the courts have eventually ruled that her position was legally in error. *E.g.*, Terry Eastland, *How Justice Tried to Stop Smaltz,* Wall Street Journal, Dec. 22, 1997, at A19, col. 3-6 (Midwest ed.).

[20] It is unusual for the subject of an investigation by an Independent Counsel to attack the *bona fides* of the Independent Counsel. For example, neither Attorney General Meese nor his personal attorney ever personally attacked the people investigating him, even though the Independent Counsel was a member of the other political party. In fact, it has been typical for the Independent Counsel to be a member of the opposing political party.

I am aware that some supporters of President Clinton (including his wife and occasionally the President himself) have engaged in public attacks on the OIC and personal attacks on the *bona fides* of its attorneys. They accuse the OIC of partisanship and abuse of the prosecutorial powers. However, the fact that Attorney General Reno — who serves at the (continued...)

jurisdiction of the OIC, President Clinton has refused on several occasions to testify before the Grand Jury, had pled executive privilege to block his aides from testifying, and has urged the creation of a new type of privilege to prevent Secret Service Agents from testifying.

Notwithstanding these roadblocks, the investigation is proceeding to the point that there is significant, credible, persuasive evidence that the President has been involved in various illegal activities in a conspiracy with others (in particular his wife), to tamper with witnesses, suborn perjury, commit perjury, hide or destroy incriminating documents, and obstruct justice.

If the President were any other official of the United States, for example, a Cabinet Officer or a Congressperson, I understand that the two Deputy Independent Counsel (one, a former U.S. Attorney and the other, a former member of the Public Integrity Section of the Department of Justice) have concluded that an indictment would be proper and would issue given the evidence before the Grand Jury. The Office of Independent Counsel is, in general, required to follow the Department of Justice regulations governing other federal prosecutors. To refuse to indict the President when the crimes are serious enough and the evidence strong enough that

---

[20] (...continued)
pleasure of President Clinton and is the highest law enforcement official in the Department of Justice — has gone to court to *expand* your jurisdiction (even over your objection) is inconsistent with these attacks. If she thought that the OIC or any of its attorneys were acting improperly in investigating President Clinton, she would make no sense for her to be fighting to *expand* the OIC's jurisdiction. *Morrison v. Olson,* 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), discussed below, made it quite clear that the Attorney General's decision not to seek the appointment of an Independent Counsel is *not* reviewable in any court.

Recently, a bipartisan group of former Attorneys General of the United States have joined together to rebut the attacks on the integrity of the Independent Counsel. Their statement of March, 1998, was extraordinary. It said, in part:

> "As former attorneys general, we are concerned that the severity of the attacks on Independent Counsel Kenneth Starr and his office by high-level government officials and attorneys representing their particular interests, among others, appear to have the improper purpose of influencing and impeding an ongoing criminal investigation and intimidating possible jurors, witnesses and even investigators."

a Senator or Cabinet Secretary would be indicted would be inconsistent with the OIC's obligations to exercise its prosecutorial discretion the same way that the Department of Justice attorneys exercise their discretion to refuse to indict.

Moreover, there is the apparent injustice that would result if the Grand Jury would seek to indict the various members of this conspiracy (*e.g.*, Hillary Rodham Clinton) while refusing to indict the center of the conspiracy.[21]

If the Grand Jury simply issues a report of the facts that it has found, but does not indict even though it concludes that there is substantial evidence that the President has committed serious crimes, then the President has no judicial forum to present his side of the story and seek vindication in the judicial system. As then Solicitor General Robert Bork said, in arguing that a sitting Vice President can be indicted:

"An officer may have co-conspirators and even if the officer

---

[21]

> were immune [from indictment], his co-conspirators would not be. The result would be that the grand and petit juries would receive evidence about the illegal transactions and that evidence would inevitably name the officer. The trial might end up in the conviction of the co-conspirators for their dealings with the officer, yet the officer would not be on trial, would not have the opportunity to cross-examine and present testimony on his own behalf. The man and his office would be slandered and demeaned without a trial in which he was heard. The individual might prefer that to the risk of punishment, but *the courts should not adopt a rule that opens the office to such a damaging procedure.*"[22]

Consequently, you have asked my legal opinion as to whether it is constitutional to indict a sitting President for actions that occurred both before he became President and while he was under investigation.

In order to answer the question, it is important to understand the constitutional issue in context. The question is not, as an abstract matter, whether any sitting President is immune from the criminal laws of the state or federal governments as long as he is in office. Rather, the question is whether — given the enactment of the Independent Counsel law under which the OIC operates, given the historical background that led to that law, and given the constitutionality of that law as determined by *Morrison v. Olson*[23] — it is constitutional for a grand jury to indict this President if the evidence demonstrates beyond a reasonable doubt that the President is part of an extensive and continuing conspiracy, stretching over many years, involving witness tampering, document destruction, perjury, subornation of perjury, obstruction of justice, and illegal pay-offs — all serious allegations that in no way relate to the President Clinton's official duties, even though some of the

---

[22] *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States,* Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 21 (emphasis added). Judge Bork concluded that a sitting Vice President could be indicted prior to impeachment but he also said (in dictum) that the President would be immune from indictment prior to impeachment. While Judge Bork argued that the President should be immune from indictment, his reasoning at this point supports the opposite conclusion. His point is well-taken: the Office of Independent Counsel should not cast a charge against the President without giving him a judicial forum within which to vindicate himself.

[23] 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

alleged violations occurred after he became President.

Before turning to this particular question, it is useful to consider some background matters.

CRIMINAL PROSECUTIONS OF CHIEF EXECUTIVES OF OTHER COUNTRIES.

First, it is interesting that democracies in other countries do not recognize a principle that an individual would be above the law and privileged to engage in criminal activities simply because he or she is the President, Premier, Prime Minister, Chief Executive, or Head of State. In fact, heads of state are not immune from criminal prosecution even if we only look at countries with a tradition of living under the rule of law that is much weaker than the tradition that exists in the United States. I have been unable to find any instances where a democracy — even a democracy that also recognizes a King or Queen — has immunized its Chief Executive Officer from criminal conduct simply because he or she is the Chief Executive Officer.

On the other hand, it is quite easy to find examples of foreign heads of state subject to prosecution for allegedly criminal activities. Even if one confines a search to the relatively short time period since 1980, it is not difficult to find various examples of heads of state who have been subject to the possibility of criminal prosecution (what we call "indictment" in this country) in a wide variety of countries.[24]

Other countries are governed by their own Constitutions, and the fact that their chief executives (like their other citizens) are subject to the criminal law does not, of course, mean that the chief executive officer of the United States is subject to its federal criminal laws. Each of these instances is, in a sense, unique and one can therefore distinguish them from the present circumstance.

Consequently, I do not rely on the examples discussed below in reaching the conclusions of the opinion letter. I simply present these examples as suggesting that the claim that the chief executive officer of the United States is immune from criminal prosecution and above the law as long as he holds the chief executive office is a claim that other countries (at least those who are not governed by a dictatorship) would find curious if not peculiar.

▸ In VENEZUELA, in 1993, President Carlos Andres Perez was ordered to stand trial on

[24] In this case, I used a computerized search of WESTLAW for the period since 1980.

embezzlement charges. Perez has the dubious distinction of being the first incumbent Venezuelan president charged with a crime since the country shed a military dictatorship and became a democracy in 1958. The provisional government of Octavio Lepage was sworn in to replace Mr. Perez.[25]

- In PAKISTAN, in 1997, Prime Minister Nawaz Sharif was charged with contempt of court after criticizing the judiciary, which is a crime in Pakistan. Sharif pleaded innocent. A conviction could lead to his removal from office.[26] The fact that he held the office of Prime Minister did not immunize him from the rule of law.
- In ITALY, prosecutors requested the indictment of Prime Minister Romano Prodi on charges of corrupt management of the country's state industries. The charges arose from the transfer of a food production company from state to private hands in 1993. Prodi was accused of fixing the sale of a large package of shares in the company by offering it to a politically well-connected private concern at a cut-price rate. The fact that he was Prime Minister did not immunize him from the rule of law. A preliminary magistrate was in charge of deciding whether to order Prodi to stand trial.[27]
- In CANADA, Prime Minister Jean Chretien was charged with assault for manhandling a protester. His office of Prime Minister did not immunize him from the rule of law. Of course, the fact that he could be charged does not mean that he would be convicted, and, in fact, the charges were quashed. This was the first time this century that a sitting Canadian prime minister faced criminal assault charges. Kenneth Russell, brought the charge against the prime minister for grabbing a demonstrator by the throat during a Flag Day ceremony.[28]
- In FRANCE, traders said that "one of the major reasons for the enactment of emergency money market measures has been removed with Wednesday's decision not to pursue criminal charges against the Prime Minister for illegally acquiring cheap apartments for himself and his son." However, if the evidence warranted, Prime Minister Alain Juppe would not be immunized from the rule of law and could have been prosecuted.[29]
- In ISRAEL, in 1995, Shekem workers asked Attorney General Michael Ben-Yair to open a

---

[25] *Venezuela Ponders Next Move as President Ordered to Stand Trial*, ATLANTA JOURNAL & CONSTITUTION, May 23, 1993, A 10, available in 1993 WESTLAW 3364034.

[26] *Sharif Warns Crisis Taking Pakistan Near Destruction*, DOW JONES INT'L NEWS SERV., Nov. 19, 1997. Raymond Bonner, *Pakistan's Army May Settle Political Feud*, N.Y. TIMES, Dec. 1, 1997, at A4.

[27] *Italian PM Faces Accusations*, VANCOUVER SUN, Nov. 26, 1996, A7, *available in* 1996 WestLaw 5031681; Andrew Gumbel, *Prosecutors Turn Sights on Italian PM*, THE INDEP. (London), Nov. 26, 1996, at 15, International Section.

[28] Gary Borg, *Chretien is Charged Briefly with Assault*, CHI. TRIB., May 7, 1996, at A10, *available in* 1996 WESTLAW 2669290.

[29] Capital Markets Report, Oct. 12, 1995; Reuters World Service, Oct. 11, 1995.

criminal investigation against Prime Minister Yitzhak Rabin for allegedly violating sub judice laws. Rabin charged that "Shekem's fired workers are parasites." Israel's laws forbid publishing information on an issue negotiated in court if it could influence the court's ruling.[30] Rabin's office of Prime Minister did not serve to immunize him from the rule of law.

- In JAPAN, prosecutors ultimately refused to press charges against Prime Minister Noboru Takeshita or any other major political leader being investigated for criminal activity in connection with an influence-peddling scandal. Former prime minister Yasuhiro Nakasone and at least three cabinet members in Takeshita's government also escaped indictment. The scandal, however, forced Takeshita to announce on April 25, 1989, that he would resign.[31] Once again, the Prime Minister was subject to the rule of law, and if the evidence had warranted could have been criminally prosecuted.

- In PAPUA NEW GUINEA, a judge recommended that Prime Minister Bill Skate face criminal charges if evidence that he failed to stop a mutiny was confirmed.[32] The fact that he was Prime Minister did not immunize him from the rule of law.

- In SLOVAKIA, in 1996, President Michael Kovac filed criminal slander charges against Prime Minister Vladimir Meciar.[33] The fact that Meciar held the office of Prime Minister

---

[30] Galit Lipkis Beck, *Shekem Workers: Investigate Rabin*, JERUSALEM POST, Feb. 21, 1995, A8, *available in* 1995 WESTLAW 7552690; Galit Lipkis Beck, *Shekem Workers Protest Rabin's Insults*, JERUSALEM POST, Feb. 24, 1995, at p. 15, in Economics Section.

In another instance, ISRAEL, the Prime Minister, Benjamin Netanyahu, faced a parliamentary no confidence vote after an inquiry found "insufficient evidence to link him to an alleged plot to subvert the investigation of a right-wing coalition ally on corruption charges by appointing a loyal but unqualified attorney general, Mr. Roni Bar On." Julian Borger, *Confidence Vote Can Only Be Bad News for Netanyahu*, IRISH TIMES, Jun. 24, 1997, A10, *available in* 1997 WESTLAW 12011461; Anton La Guardia, *Netanyahu Vows to Battle on After Escaping Charges*, DAILY TELEGRAPH, Apr. 21, 1997, at 13, International Section. If the inquiry had found sufficient evidence, he would have been subject to indictment. His office of Prime Minister did not immunize him from the rule of law.

[31] *Probe Ends, Japan's PM Not Charged in Scandal*, MONTREAL GAZETTE, May 30, 1989, B6, *available in* 1989 WESTLAW 5664899; Steven R. Weisman, *Japanese Prosecutors End Scandal Inquiry Without Indicting Major Figures*, N.Y. TIMES, May 30, 1989, at A3.

[32] *Papua New Guinea's PM Could Face Criminal Charges in Mutiny*, DOW JONES INT'L NEWS SERV., Dec. 15, 1997. *Around the World*, SEATTLE TIMES, Dec. 15, 1997.

[33] *Slovakia President Files Charges Against Prime Minister*, DOW JONES INT'L NEWS SERV., May 30, 1996.

did not serve to immunize him from the rule of law.[34]

These examples should not be surprising. As Chief Justice Marshall stated nearly two centuries ago, in *Marbury v. Madison*,[35] the case that has become the fountainhead of American constitutional law: "The government of the United States has emphatically termed a government of laws, and not of men."[36] And, he added, "In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."[37]

Let us now turn specifically to American law. The first item to consider is the language and structure of our Constitution.

THE STRUCTURE AND LANGUAGE OF THE UNITED STATES CONSTITUTION.

Chief Justice Marshall explained that the Constitution "assigns to different

---

[34] *Cf.* THAILAND, in 1992, where Prime Minister Suchinda Kraprayoon resigned after "accepting responsibility for the deaths of at least 40 people and the wounding of more than 600 when army troops opened fire on unarmed pro-democracy demonstrators." Demonstrators demanded that trials be held for Suchinda and top military officers who were responsible for ordering troops to fire on unarmed demonstrators. A decree granted the Prime Minister amnesty from criminal charges arising from the repression of the protests. If there were no decree, the Prime Minister would be subject to the rule of law, and the fact that he was Prime Minister would not serve to immunize him. Even after the pardon, an effort was under way to have the amnesty decree declared illegal by a constitutional tribunal. Charles P. Wallace, *Long-Awaited Constitutional Reforms Made in Thailand*, COURIER-JOURNAL (Louisville, Ky.), May 26, 1992, A3, *available in* 1992 WESTLAW 7837659; William Branigin, *Amnesty Opposition Building in Thailand*, HOUSTON CHRONICLE, May 25, 1992, A24.

Also in THAILAND, in 1996, criminal fraud charges were leveled against Prime Minister Banharn Silpa-archa. His office of Prime Minister did not immunize him from the rule of law. The *Bangkok Post* said that "the charges involved allegations about the sale of land by Mr. Banharn's daughter, Ms. Kanchana, to the state and the diversion of a seven-billion-baht ($393-million) fund from the environment to the Interior Ministry, which Mr. Banharn heads as minister." *Banharn Faces Criminal Charges: Opposition*, STRAITS TIMES (Sing.), Sept. 4, 1996, *available in* 1996 WESTLAW 11723429; *PM Faces Criminal Charges: Move to Show Banharn's Zero Credibility*, THE BANGKOK POST, June 3, 1997, at p. 1.

[35] 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

[36] 5 U.S. (1 Cranch) at 163.

[37] 5 U.S. (1 Cranch) at 163. *Cf.* Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 1975 U. OF ILL. L. FORUM 1 (1975), cited, *e.g.* in *Clinton v. Jones*, — U.S. —, —, 117 S.Ct. 1636, —, 137 L.Ed.2d 945 (1997).

departments their respective powers."[38] So that —

> "those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation."[39]

Because we live under a *written* constitution, and the Constitution was written so that we would be governed by the written words, it is useful to look at what that writing says about immunities from prosecution. Let us look at the language of the Constitution.

Our written Constitution has two specific sections that refer to what may be categorized as some type of "immunity" from the ordinary reach of the laws.

THE PRIVILEGE FROM ARREST.

First, Senators and Representatives are "privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same . . .," except in cases of "Treason, Felony and Breach of the Peace . . .."[40]

This section illustrates several important factors. First, the Framers of our Constitution thought about immunity, and when they did, they gave a limited immunity to the Senators and Representatives. No similar clause applies to any member of the Executive Branch nor any member of the Judicial Branch. Second, the immunity granted is really quite narrow. It only applies during a legislative session. Moreover, it is limited to arrest in *civil* cases, an obsolete form of arrest that no longer exists.[41]

The Privilege from Arrest Clause does *not* apply at all to criminal cases. It does not protect the Senator or Representative from service of process in a criminal

---

[38] 5 U.S. (1 Cranch) at 176.

[39] 5 U.S. (1 Cranch) at 176-77.

[40] U.S. CONST., ART. I, § 6, cl. 1.

[41] See discussion in, 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 8.9, "Privilege from Arrest" (West Pub. Co., 2d ed. 1992). *See also, Williamson v. United States*, 207 U.S. 425, 435-46, 28 S.Ct. 163, 166, 52 L.Ed. 278 (1908).

case.[42] It does not even protect the Senator or Representative from service of process in a civil case.[43] In other words, this clause immunizes a Senator or Representative against a procedure that no longer exists — arrest in a *civil* case.

As Justice Brandeis, speaking for the Supreme Court, has warned us, this narrow privilege should be narrowly construed:

> "Clause 1 [the privilege from arrest clause] defines the extent of the immunity. Its language is exact and leaves no room for a construction which would extend the privilege beyond the terms of the grant."[44]

THE SPEECH OR DEBATE CLAUSE.

The same clause of the Constitution contains the only other reference to a privilege or immunity from the criminal law. It provides that, "for any Speech or Debate in either House, they shall not be questioned in any other Place."[45]

The Supreme Court has interpreted this "Speech or Debate" Clause, like the Privilege from Arrest Clause, quite narrowly. For example, if the Executive Branch seeks to prosecute a Member of Congress for taking a bribe to vote a certain way, the prosecution cannot introduce into the trial the vote of the Representative, but the prosecution can introduce into evidence the "[p]romises by a Member to perform an act in the future," because "a *promise* to introduce a bill is not a legislative act."[46] In other words, Members of Congress can be criminally prosecuted for taking a bribe to introduce legislation into Congress, notwithstanding the supposed protections of the Speech or Debate Clause.

In addition, the Speech or Debate Privilege, like the Arrest Privilege, only applies to the legislative branch, not the executive branch. The Constitutional language makes that quite clear. The existence of these two privileges and the absence of any similarly clear language creating any sort of Presidential privilege is

---

[42] *United States v. Cooper,* 25 Fed. Cases 626, (4 Dall.) 341, 1 L.Ed. 859 (C.C.Pa. 1800).

[43] *Long v. Ansell,* 293 U.S. 76, 82, 55 S.Ct. 21, 22, 79 L.Ed. 208 (1934).

[44] *Long v. Ansell,* 293 U.S. 76, 82, 55 S.Ct. 21, 22, 79 L.Ed. 208 (1934).

[45] U.S. CONST. ART. I, § 6, cl. 1.

[46] *United States v. Helstoski,* 442 U.S. 477, 489-90, 99 S.Ct. 2432, 2439-40, 61 L.Ed.2d 12 (1979)(emphasis in original).

significant. If the Framers of our Constitution had wanted to create some constitutional privilege to shield the President or any other member of the Executive Branch from criminal indictment (or to prevent certain officials from being indicted before they were impeached), they could have drafted such a privilege. They certainly know how to draft immunity language, for they drafted a very limited immunity for the federal legislature.

Yet, even in the case of federal legislators, the Constitution gives no immunity from indictment. As then Solicitor General Robert Bork concluded, in rejecting the argument that the United States could not indict a sitting Vice President:

> "The Constitution provides no explicit immunity from criminal sanctions for any civil officer. The only express immunity in the entire document is found in Article I, Section 6, which provides [here he quotes the "arrest clause"].
>
> "Since the Framers knew how to, and did, spell out an immunity, the natural inference is that no immunity exists where none is mentioned. Indeed, any other reading would turn the constitutional text on its head: the construction advanced by counsel for the Vice President requires that the explicit grant of immunity to legislators be read as in fact a partial withdrawal of a complete immunity legislators would otherwise have possessed in common with other government officers. The intent of the Framers was to the contrary."[47]

THE IMPEACHMENT CLAUSE.

The Language. There is only one impeachment clause in the Constitution. It does not purport to distinguish the impeachment of a federal judge from the Vice President, nor does it distinguish the impeachment of the Vice President from the President. The clause provides:

> "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and

---

[47] *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States,* Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 5.

> subject to Indictment, Trial, Judgment, and Punishment, according to Law."[48]

This clause indicates that Congress should not be entrusted with the power to impose any penalty on an impeached official other than (or no greater than) removal from office and disqualification from further office. Criminal penalties would be left to the judiciary. In addition, the clause makes clear that double jeopardy would not bar a criminal prosecution. The clause does not state that criminal prosecution must come after an impeachment, nor does it state that the refusal of the House to impeach (or the Senate to remove from office) would bar a subsequent criminal prosecution.

The Commentators and the Case Law. The available historical evidence as to the meaning of this clause is sparse. One can find various historical references that *assume* that impeachment would precede indictment, but these references, as Professor John Hart Ely concluded, "did not argue that the Constitution *required* that order."[49] Professor Ely, at the time, was a consultant to Archibald Cox, then the Watergate Special Prosecutor, when he made these comments and concluded that the Constitution does not require that impeachment and removal precede a criminal indictment, even of the President. In 1996, in the midst of the Whitewater investigation, he reaffirmed his analysis.[50]

Judge Robert Bork agrees with Professor Ely, his former colleague at the Yale Law School. While Solicitor General, Judge Bork concluded, when "the Constitution provides that the 'Party convicted' is nonetheless subject to criminal punishment," that language does "not establish the sequence of the two processes, but [exists] *solely* to establish that conviction upon impeachment does not raise a double jeopardy defense in a criminal trial."[51]

---

[48] U.S. Const., art. I, § 3, cl. 7. Clause 6 provides that if the President is subject to impeachment, the Chief Justice of the United States shall preside. The framers evidently thought that the person who normally presides over the Senate [*i.e.* the Vice President of the United States] should not preside in the case of a Presidential impeachment because he would be in a conflict of interest.

[49] JOHN HART ELY, ON CONSTITUTIONAL GROUND 138 (Princeton University Press 1996) (emphasis added).

[50] JOHN HART ELY, ON CONSTITUTIONAL GROUND 138-39 (Princeton University Press 1996).

[51] *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, (continued...)

Of course, impeachment by the House and conviction by the Senate is the only constitutional way to *remove* the President or Vice President or federal judges from office. A criminal conviction in an Article III federal court of a federal official does not remove this official from office, even if the criminal act would also constitute "high crimes or misdemeanors."

The debates surrounding the drafting of the Constitution are "rife with assertions that the president is not a monarch above the law. and so the argument must proceed along the line that the president must be impeached before he can be criminally prosecuted."[52] Let us consider some of these historical sources.

For example, in one of the FEDERALIST PAPERS, Alexander Hamilton says, "The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender."[53] Another FEDERALIST PAPER (also penned by Hamilton) states the President can be impeached for "treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law."[54] Perhaps this language only means that if the President is being charged with actions that are peculiarly and uniquely contrary to Presidential responsibility (like treason committed while President, or acceptance of bribes while President), then impeachment must precede indictment. But that interpretation would mean that other crimes (assault and battery, witness tampering, obstruction of justice, perjury, suborning perjury in a civil case, etc.) can be prosecuted prior to impeachment and removal from office.

Against this sparse language (which nowhere asserts that impeachment and

---

[51] (...continued)
Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 10 (emphasis added). Solicitor General Bork, in this Memorandum ,by way of dictum, also concluded, based on the case law that existed at the time, that the President was immune from criminal prosecution prior to indictment.

[52] JOHN HART ELY, ON CONSTITUTIONAL GROUND 138 (Princeton University Press 1996).

[53] THE FEDERALIST PAPERS, No. 65, 8th paragraph (Alexander Hamilton). In No. 69.

[54] THE FEDERALIST PAPERS, No. 69, 4th paragraph (Alexander Hamilton).

removal *must* precede criminal indictment in *all* cases)[55] is other specific historical language that goes the other way and indicates that the Framers of our Constitution concluded that, unlike federal legislators, no special constitutional immunity should attach to the President.[56]

Consider, for example, the remarks of James Wilson, in the course of the Pennsylvania debates on the Constitution. He said: "far from being above the laws, he [the President] is amenable to them in his private character as a citizen, and in his public character by impeachment."[57] That quotation implies that the President can be criminally prosecuted like any other citizen, without regard to impeachment. Similarly, Iredell, in the course of the North Carolina debates on the Constitution, said: "If he [the President] commits any misdemeanor in office, he is impeachable . . .. If he commits any crime, he is punishable by the laws of his country, and in capital cases may be deprived of his life."[58]

Wilson was hardly a solitary voice. Charles Pinckney, a contemporary observer, also stated:

> "Let us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their [*i.e.*, Congressional] privileges [Pinckney had just referred to the Congressional privilege from arrest, discussed above], and have shewn so little to the President of the United States in this respect. . . . *No privilege of this kind was intended for your*

---

[55] Professor John Hart Ely, who examined the historical references for Watergate Special Prosecutor Archibald Cox, also concluded that the historical references do not require that impeachment and removal precede a criminal indictment, even of the President. JOHN HART ELY, ON CONSTITUTIONAL GROUND 139 (Princeton University Press 1996).

[56] *See, e.g.*, MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at p. 1066 (1911)(comments of Charles Pinckney); 10 ANNALS OF CONGRESS 71 (1800)(Senator Pinckney, stating that "our Constitution supposes no man . . . to be infallible, but considers them all as mere men, and subject to all the passions, and frailties, and crimes, that men generally are, and accordingly provides for the trial of such as ought to be tried . . .."); Eric M. Freedman, *Achieving Political Adulthood*, 2 NEXUS 67, 68 (Spring, 1997), also discussing account of Charles Pinckney, a delegate to the Constitutional Convention.

[57] 2 ELLIOTT'S DEBATES 480, quoted in WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 7-8.

[58] 4 ELLIOTT'S DEBATES 109, quoted in WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 8 n.7.

> *Executive*, nor any except that which I have mentioned for your Legislature. The Convention which formed the Constitution well knew that this was an important point, and *no subject had been more abused than privilege.* They therefore determined so set the example, in merely limiting privilege to what was necessary, *and no more.*"[59]

Tench Coxe, in his *Essays on the Constitution*, published in the *Independent Gazetteer* in September, 1787, agreed. He concluded, in discussing the President:

> "*His person is not so much protected as that of a member of the House of Representatives; for he may be proceeded against like any other man in the ordinary course of law.*" (emphasis in original). [60]

When those who argue that the President is immune from the criminal law until after he has been impeached look to the historical sources, the very most that they could draw from the historical debates in support of their view is that there certainly was no agreement to create any Presidential immunity from criminal indictment (either absolute or temporary), for the easiest way to create it (temporary or otherwise) would have been to add a clause to the Constitution defining its existence and extent. In fact, the contemporary sources suggest that the Constitution provides no criminal immunity for any President who commits crimes in his personal capacity.

This analysis should not be surprising; it is the same conclusion reached in *Nixon v. Sirica,*[61] where the Court — after examining the Constitutional debates and the views of the Framers of our Constitution — said:

---

[59] 10 ANNUALS OF CONGRESS 74 (1800). Also quoted in, 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 385, also cited in JOHN HART ELY, ON CONSTITUTIONAL GROUND 415 (Princeton University Press 1996).

[60] Quoted in, 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 141 (1976), quoted with approval in *Nixon v. Sirica*, 487 F.2d 700, — (D.C. Cir. 1973)(per curiam)(en banc).

[61] *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973)(per curiam)(en banc). President Nixon chose not to appeal this ruling.

Samuel Dash (also a special consultant to the Office of Independent Counsel) and I were two of the attorneys who filed a brief in this case on behalf of the Senate Watergate Committee.

> "The Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. This silence cannot be ascribed to oversight."[62]

Later, this same Court said:

> "Lacking textual support, counsel for the President nonetheless *would have us infer immunity from the President's* political mandate, or from his *vulnerability to impeachment*, or from his broad discretionary powers. *These are invitations to refashion the Constitution and we reject them.*"[63]

Professor John Hart Ely — a distinguished Constitutional scholar, a former chaired Professor of Constitutional Law as Harvard Law School, a former chaired Professor and the Dean of Stanford Law School, a special consultant to Watergate Prosecutor Archibald Cox, and now a chaired Professor at the University of Miami School of Law — concluded, after analyzing the debates at the Constitutional Convention, that it would be "misleading" to argue that there was a special Presidential immunity from criminal indictment or prosecution until the President was first impeached. He concluded that "there was no immunity contemplated by the framers — or if they contemplated it they didn't say so . . .." As Professor Ely went on to explain:

---

[62] *Nixon v. Sirica*, 487 F.2d 700, 710-11 (D.C. Cir. 1973)(per curiam)(en banc):

> "Thus, to find the President immune from judicial process, we must read out of [*United States v.] Burr*, [25 Fed. Cases p. 30 (Case No. 14,6962d) (1807)] and *Youngstown* [*Sheet & Tube v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863 (1952)], the underlying principles that the eminent jurists in each case thought they were establishing. *The Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. This silence cannot be ascribed to oversight.* James Madison raised the question of Executive privilege during the Constitutional Convention, and Senators and Representatives enjoy an express, if limited, immunity from arrest, and an express privilege from inquiry concerning 'Speech and Debate' on the floors of Congress."

[footnotes omitted; emphasis added.]

[63] 487 F.2d at 711 [emphasis added].

> "To the extent that they [the Constitutional debates] suggest anything on the subject, the debates suggest that the immunities the Constitution explicitly granted members of Congress (which do not, incidentally, include this sort of immunity [from criminal prosecution]) were not intended for anyone else. The argument for presidential immunity from indictment is one that must be based on necessity — and perhaps, but only perhaps, the presidency *and vice presidency* are distinguished on that score — *but not* on anything the framers said either in the Constitution itself or during the debates."[64]

Consider also some remarks that Joseph Story made in his COMMENTARIES ON THE CONSTITUTION:

> "There are other incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion .. .. But he has no authority to control other officers of the government, in relation to the duties imposed on them by law, in cases not touching his political powers."[65]

Some people focus on the phrase: "The president cannot, therefore, be liable to arrest, imprisonment, or detention . . .." However, they forget to read the rest of the sentence, which gives him this immunity only when pursuing his official duties: "*while* he is in the discharge of the *duties of his office* . . .." Obstruction of justice, witness tampering, destruction of documents, accepting pay-offs — none of this is part of the President's official duties. In fact, as Justice Story states, the President: "has no authority to control *other officers of the* government, in relation to the duties

---

[64] JOHN HART ELY, ON CONSTITUTIONAL GROUND 141 (Princeton University Press 1996) (emphasis added).

[65] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, § 814, at p. 579 (RONALD D. ROTUNDA & JOHN E. NOWAK, eds., Carolina Academic Press, 1987, originally published, 1833); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, § 1563, at 418-19 (1833 ed.).

imposed on them by law, in cases not touching his political powers."

Justice Story explained that these "other officers of the government" — judges, federal prosecutors, the Independent Counsel — are supposed to do their jobs, to perform the duties imposed on them by law. The duties imposed on the Independent Counsel are duties imposed by the Independent Counsel statute and by the decision of Attorney General Janet Reno to petition the court to appoint an Independent Counsel. The statute provides that Independent Counsel must, in general, comply with the regulations of the Department of Justice.[66] If President Clinton's alleged criminal acts would be criminally prosecuted by the Department of Justice if a Cabinet Officer or Senator or Representative committed those crimes, and if the alleged crimes are serious enough and the evidence of criminality is substantial so that a federal prosecutor believes that he or she would secure a conviction beyond a reasonable doubt by a fair-minded jury, then the Independent Counsel, following his statutory duty, should allow the Grand Jury to indict.

The prosecution in this case does to relate to any political dispute between Congress and the President. It does not relate to claims that the President should, or should not have, exercised political discretion in a particular way. There is no issue as to whether the President should have deployed a new Air Force bomber, or whether the President should not have sent troops to Bosnia. The issues in this case do not relate to the President's official duties. In fact, some of the issues occurred before he became President, and all of the issues (obstruction, conspiracy, witness tampering, etc.) have nothing to do with the President's official duties to take care that the law be faithfully executed.[67]

The language that I have quoted from Justice Story is often quoted in the relevant case law. The courts have placed the same interpretation on that language that I have. In *Nixon v. Fitzgerald*,[68] for example, the Court quoted this language from Justice Story[69] and held that the President had no immunity from civil damages for matters that were outside the outer perimeter of his official duties. In fact, in that

---

[66] CITE

[67] The facts here are not like the situation in *Morrison v. Olson*, where a criminal prosecution of a high-level political appointee of the President arouse out of "a bitter power dispute between the President and the Legislative Branch . . .." 487 U.S. 654, 703, 1087 S.Ct. 2597, 2625, 101 L.Ed.2d 569 (1988)(Scalia, J., dissenting).

[68] 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

[69] 457 U.S. at 749, 102 S.Ct. at 2701.

case, Justices White, Brennan, Marshall, and Blackmun said explicitly that "there is no contention that the President is immune from criminal prosecution in the courts under the criminal laws . . . [n]or would such a claim be credible. . . . Similarly, our cases indicate that immunity from civil damage actions carries no protection from criminal prosecution."[70] By the way, Vice President Gore, while a U.S. Representative, agreed with the dissent in this case and argued that the President should not even be immune from civil damage suits for acts does in his official capacity.[71]

The majority opinion in *Fitzgerald* did not dispute this conclusion that the President is subject to criminal indictment. On the contrary, the majority appeared to agree with the dissent on this point. Justice Powell, joined by Justices Rehnquist, Stevens, O'Connor & Chief Justice Burger, responded that absolute immunity from civil damages "'does not leave the public powerless to deter misconduct or to punish that which occurs.'"[72] This is so because the judge or prosecutor — who, like the President is absolutely immune from a civil damage lawsuit brought by a private litigant in certain cases — can still be criminally prosecuted.[73]

Clinton v. Jones[74] also quotes this same passage from Justice Story. Justice Stevens, for the Court, italicizes part of this quotation. The President —

> "cannot, therefore be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and *for this purpose* his person must be deemed, in civil cases at least, to possess an official inviolability." (emphasis in original).[75]

The Court went on to say: "Story said only that '*an* official inviolability,'

---

[70] 457 U.S. at 780, 102 S.Ct. at 2717 (dissenting opinion).

[71] See discussion in, Ronald D. Rotunda, *Paula Jones Day in Court*, 17 LEGAL TIMES (OF WASHINGTON, D.C.) 24, 27 (May 30, 1994), *reprinted, e.g.*, 10 TEXAS LAWYER 24, 27 (June 13, 1994), referring to Amicus Brief that Representative Gore joined.

[72] 457 U.S. at 757 n.38, 102 S.Ct. at 2705 n. 38, quoting *Imbler v. Pachtman*, 424 U.S. at 428-29, 96 S.Ct. at 994.

[73] 457 U.S. at 757 n.38, 102 S.Ct. at 2705 n. 38, quoting *Imbler v. Pachtman*, 424 U.S. at 428-29, 96 S.Ct. at 994.

[74] — U.S. —, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997).

[75] — U.S. at — n. 23; 117 S.Ct. at 1645 n. 23 (emphasis in original).

[emphasis by the Court] was necessary to preserve the President's ability to perform the functions of his office; he did not specify the dimensions of the necessary immunity."[76] Once again the Court made clear that there is no need to give the President absolute immunity from criminal prosecution when he is charged with offenses that do not relate to the discharge of the duties of his office because criminal activities are not in the discharge of the President's *official* duties.

As the Court explicitly stated: "With respect to acts taken in his 'public character' — that is official acts — the President may be disciplined principally by impeachment, not by private lawsuits for damages. But *he is otherwise subject to the laws for his purely private acts.*"[77] For private acts, acts taken in his private capacity, the President is "otherwise subject to the laws." That has to mean "all" of the laws, including the criminal laws. If a President suborns perjury, tampers with witnesses, destroys documents, he is not acting in his official capacity as President. The fact that some of these acts occurred prior to the time he became President does not bolster his claim of immunity from the criminal laws.

If the President is indicted for acts that occurred prior to the time he became President and for acts that were not taken as part of his official constitutional duties, then, as *Clinton v. Jones* states: "the fact that a federal court's exercise of its tradition Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution."[78] The Court added:

> "it must follow that the federal courts have power to determine the legality of his [the President's] unofficial conduct."[79]

If a President were indicted for acts not taken in his official capacity as President, a federal court would only be exercising its traditional Article III jurisdiction. Article III courts have the power to determine the legality of the President's unofficial conduct, even though the exercise of that traditional jurisdiction may significantly burden the time and attention of the Chief Executive.

If public policy and the Constitution allow a private litigant to sue a sitting

---

[76] *Id.*

[77] — U.S. at —, 117 S.Ct. 1645 (emphasis added).

[78] — U.S. at —, 117 S.Ct. at 1648-49.

[79] — U.S. at —, 117 S.Ct. at 1650.

President for alleged acts that are not part of the President's official duties (and are outside the outer perimeter of those duties) — and that is what *Clinton v. Jones* squarely held — then one would think that an indictment is constitutional because the public interest in criminal cases is *greater than* the public interest in civil cases.[80]

IMPLIED PRIVILEGE?

Although the Constitution, by its own terms, does not create a privilege, that does not end the discussion, because the Supreme Court may create a common law privilege or derive such a privilege from its earlier precedent. Let us now consider this issue.

EXECUTIVE PRIVILEGE. First, one should look at the role that Executive Privilege has played in the case law. The President, over the course of two centuries, has sometimes raised a claim of Executive Privilege *when Congress* demands certain information. But that was not the fact pattern involved in *United States v. Nixon.*[81]

---

[80] *Nixon v. Fitzgerald,* the Supreme Court held that the President was *absolutely* immune for civil damages involving actions taken within his official duties, but also emphasized that this was "merely a private suit for damages" and that there is "a lesser public interest in actions for civil damages *than, for example, in criminal prosecutions.*" 457 U.S. 731, 754 & n.37, 102 S.Ct. 2690, 2703 & n.37.

[81] 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

For a discussion of prior incidences where Presidents provided personal testimony, under oath, pursuant to subpoena, *see,* Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote,* 1975 U. OF ILLINOIS LAW FORUM 1 (1975).

The earlier cases — where the President complied with a subpoena in a criminal case — did not reach the U.S. Supreme Court. *See also,* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 7-1(a)-(d) (West Pub. Co., 2d ed. 1992)(and corresponding pages in 1998 pocket part).

However, the Supreme Court, *prior* to *United States v. Nixon,* did explicitly approve of *United States v. Burr,* 25 Federal Cases 30, 34 (No. 14,6962d)(C.C.Va. 1807), the decision that required President Jefferson to comply with a subpoena issued by an Article III court. After stating that "the public has a right to every man's evidence" the Court, in *Branzberg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646 (1972), added this footnote:

> "In *United States v. Burr* Chief Justice Marshall, sitting on Circuit, opined that in proper circumstances a subpoena could be issued to the President of the United States."

(continued...)

Instead, the question was quite different: whether the President could refuse to disclose information relevant to a federal criminal prosecution brought in an Article III court. President Nixon was the first President in history to litigate the use of Executive Privilege in the court system and the U.S. Supreme Court and to refuse to turn over evidence based on this theory. President Clinton is only the second President in history to raise and litigate Executive Privilege in an effort to block evidence relevant to a criminal investigation.[82]

The main case on this question, *United States v. Nixon*, recognized a very limited form of an evidentiary privilege in the case where the President pleads Executive Privilege to a subpoena issued under the authority of an Article III court in connection with a criminal case.[83]

While the Supreme Court recognized Executive Privilege in *United States v. Nixon* it did not apply it to shield the President; it did not allow President Nixon to assert it in order to prevent disclosure of Presidential tapes regarding confidential conversations. As Judge Robert Bork recently explained: "Nixon's claim, being based only on a generalized interest in confidentiality was overcome by the need of the

---

[81] (...continued)
Branzberg v. Hayes, 408 U.S. at 688 n.26, 92 S.Ct. at 2660 n.26.

[82] Thus far, President Clinton has lost on this issue. He raised, and then abandoned, the Executive Privilege claim in his unsuccessful effort to prevent the Independent Counsel from subpoenaing notes taken by Government lawyers (various White House counsel) of conversations with Hillary Clinton. See discussion in, Ronald D. Rotunda, *Lips Unlocked: Attorney Client Privilege and Government Lawyers*, LEGAL TIMES (OF WASHINGTON, D.C.) 21-22, 28 (June 30, 1997).

President Clinton also unsuccessfully raised Executive Privilege in an effort to prevent Bruce Lindsey and Sidney Blumenthal from testifying before the Grand Jury. *In re Grand Jury Proceedings*, Misc. Action 98-095, 98-096 & 98-097 (NHJ), *filed under seal*, May 4, 1998 (D.D.C.Cir.) (Judge Norma Holloway Johnson).

[83] 418 U.S. at 712, n.19, 94 S.Ct. at 3109 n.19:

> "We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and the congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials."

courts and parties in a criminal case for relevant evidence."[84] The Court, in short, recognized Executive Privilege and then ordered the President to turn over the evidence. The Court rejected any claim of a general Executive Privilege in criminal proceedings. If the matter involved military secrets — where the missile silos are buried in Montana — or diplomatic secrets — the contents of a secret cable from the Ambassador to China — the courts are likely to recognize a privilege in the appropriate case. But the issues that surrounded President Nixon, and the issues now surrounding President Clinton, do not fall in these categories.

In addition, the Supreme Court, in its reasoning in *United States v. Nixon*, relied on the "necessary and proper" clause of Article I.[85] That clause gives Congress the power to expand on other powers — to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[86] This power is granted *to Congress*, not to the President. *United States v. Nixon* suggests that Congress may well have the power, under the necessary and proper clause, to create, explicitly, some sort of immunity from criminal prosecution for the President — assuming that this immunity (whether temporary or absolute) is not so broad that it violates other provisions of the Constitution.[87] But Congress has not done so. It has enacted no statute giving any sort of immunity from the criminal laws to the President.

---

[84] Robert H. Bork, *Indict Clinton? — How I Wish It Were Possible*, WALL STREET JOURNAL, March 18, 1998, at A22, col. 3 (Midwest ed.).

[85] 418 U.S. at 706 n.16, 94 S.Ct. at 3106 n.16, citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819).

[86] U.S. CONST. ART. I, § 8, cl. 18.

[87] Congress could, if it wished, provide for what is known as "protective jurisdiction" so that criminal actions that states bring against federal officials must be tried in federal court rather than state court.

However, it is an open question whether it would be constitutional for Congress to enact a statute that, either explicitly or in effect, immunizes the President from the application of federal criminal laws. All of the acts of Congress must comply with the limitations of the Bill of Rights. For example, could Congress provide that the President is immune from criminal law if he kills someone, or takes that person's property by theft or deception, or imprisons that person? The due process clause of the Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law." If the President (like an absolute Monarch) has immunity from the criminal law, will we really be a nation of laws and not of men? Did our predecessors revolt from one king only to install another?

RELEVANT FEDERAL STATUTE REJECTS CRIMINAL IMMUNITY. No federal statutes recognize, or purport to recognize, any Presidential immunity from criminal indictment. Indeed, Congress has done quite the opposite: it has created an Independent Counsel statute for the express purpose of investigating alleged criminal activities of the President. In fact, it enacted this statute with a specific background of criminal allegations surrounding *this particular President*. And this particular President not only signed the law, he and his Attorney General lobbied for the law so that the Special Division of the District of Columbia Circuit could appoint an Independent Counsel to investigate alleged criminal activities of this President.[88] Attorney General Janet Reno testified that "President Clinton and the Department of Justice *strongly supported* reauthorization" of the Independent Counsel Act.[89]

The legislative history of the Independent Counsel law nowhere states that the President cannot be indicted, or is above the law or is immune from the criminal law as long as he is a sitting President. The official Legislative History of the Ethics in Government Act of 1978, creating the first independent law, does not suggest that the President is immune from indictment. In fact, it takes pains to reject any such suggestion. The relevant legislative history provides the following:

> "Subsection (c) simply gives the special prosecutor, who has information which he wants to turn over to the House of Representatives because it involves potentially impeachable offenses against the individuals names in this subsection, the authority to so turn over that information.
>
> "*This section should in no way be interpreted as identifying individuals who are not subject to criminal prosecution prior to being impeached and removed from office.* In fact, a number of persons holding the positions identified in this subsection have been subject to criminal prosecution while still holding such an office."[90]

THE BORK MEMORANDUM. The distinguished constitutional scholar and then

---

[88] *See generally,* Independent Counsel Reauthorization Act of 1994, Pub. L. 103-270, 4 UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 809-1 (1994).

[89] 4 UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, at 753 (1994)(emphasis added).

[90] Legislative History of Ethics in Government Act of 1978, P.L. 95-521, 92 Stat. at Large 1824, U.S. CODE CONGRESSIONAL AND LEGISLATIVE NEWS 41216, 4287-88 (emphasis added)..

Solicitor General, Robert Bork, concluded in a Memorandum he filed in the criminal prosecution of Vice President Agnew, that the Vice President could be indicted and tried prior to impeachment but the President, in contrast, would be immune from criminal prosecution prior to impeachment. Judge Bork relied on several arguments. One of the most significant was that —

> "The Framers could not have contemplated prosecution of an incumbent President because they vested him complete power over the execution of the laws, which includes, of course, the power to control prosecutions."[91]

If President Clinton had the complete "power to control prosecutions" today, Judge Bork's analysis would be applicable. But President Clinton made sure that he does not have the "complete power" to "control prosecution." President Clinton and Attorney General Reno lobbied for the Independent Counsel Act, and President Clinton signed it.[92] This law places important limitations on the Attorney General's power to remove the Independent Counsel. The Independent Counsel can, in brief, only be removed for cause. President Clinton signed the law and decided to give up his "complete power" to "control prosecution." Under the statute, the Independent Counsel can only be removed "for cause." The Supreme Court upheld the constitutionality of limiting the removal power in *Morrison v. Olson*.[93]

Judge Bork's reasoning implies that the President is subject to indictment *if*

---

[91] *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 20.

[92] The fact that the President has signed this law is relevant in determining whether this law — and its implicit authorization of a grand jury to investigate alleged criminal acts by President Clinton "disrupts the proper balance between the coordinate branches" and "prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of General Services*, 433 U.S. 425, —, 97 S.Ct. 2777, —, 53 L.Ed.2d 867 (1977), quoting *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). In deciding that the law was constitutional, *Nixon v. Administrator* emphasized: "The Executive Branch became a party to the Act's regulation when President Ford signed the Act into law . . .." In that case, the Act was applied against a *former* President. In this case, the Executive Branch became a party to the Independent Counsel Act when the present President — President Clinton — signed a law that was written to create an Independent Counsel to investigate that *same* President — President Clinton.

[93] 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

he gives up the power to control prosecutions. And that is exactly what President Clinton did.

Judge Bork, in his Memorandum concluding that the Vice President — but not the President — can be indicted prior to impeachment, also relied on the TWENTY-FIFTH AMENDMENT in support of his conclusion.[94] Judge Bork argued that "the President is the only officer from whose temporary disability the Constitution provides procedures to qualify a replacement.." From that he concludes: "This is recognition that the President is the only officer whose temporary disability while in office incapacitates an entire branch of government."

However, the Twenty-Fifth Amendment suggests the opposite conclusion, especially after the decision in *Jones v. Clinton.* Because of this Amendment, the temporary disability of the President does *not* incapacitate an entire branch of government because the Constitution itself recognizes the problems and deals with it in a structural way, not by creating an immunity but by providing for a temporary replacement. In addition, the indictment of the President does not incapacitate either the President or entire Executive Branch. Aaron Burr was quite able to function as a Vice President although indicted. Indictment does not incapacitate the indicted individual.

In the unlikely event that the defense of a civil case (*e.g., Jones v. Clinton*) or the defense of a criminal case would prevent the President from performing his duties, the Executive Branch does not simply shut down. The Twenty Fifth Amendment, § 3, provides a procedure for the Executive Branch to continue to function "[w]henever the President transmits . . . his written declaration that is unable to discharge the powers and duties of his office . . .." This procedure is clearly not limited to cases of illness.

One should also note that it is easy to make a claim that the Executive Branch will simply "shut down," but that claim is difficult to accept. President Clinton, during the pendency of the *Jones* case, said repeatedly that the looming civil case was not affecting his duties as President. Nonetheless, while he was making those statements, the defense attorneys claimed that a delay was necessary because of the burdens on the President. The trial judge in *Jones v. Clinton* refused to change the date of the civil trial. When attorneys cry "wolf" too often, they lose their credibility. (Subsequently, the trial judge granted summary judgment to the defendant.)

---

[94] *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States,* Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 18.

TEMPORARY IMMUNITY CREATED BY STATUTE. Perhaps Congress could enact a statute creating some sort of temporary immunity, — that is, providing that there shall be no trial of a sitting President until after he has finished his term of office as President. However, enactment of such a law would raise important constitutional and policy issues.

First, in terms of the Constitution, the Sixth Amendment grants the accused a right to a "speedy and public trial." If Congress were to enact a statute that immunizes a sitting President from any criminal indictment as long as he holds office, then the delay in the indictment (and resulting delay in any trial) will run afoul of the speedy trial guarantee. Presumably the President could waive this right, in any particular case. However, if the President could waive this right, then he should be able to waive his other rights. If one of his rights is the right to temporary immunity, then he should be able to waive that right as well.

And, if the President has a right to temporary immunity, he appears that he may have waived this right by signing the Independent Counsel Act — which was enacted only *after this President* and his Attorney General advocated its passage. Janet Reno stated that President Clinton *"strongly supported* reauthorization" of this Independent Counsel Act.[95] President Clinton lobbied for, and signed,[96] the present Independent Counsel Act, with full knowledge that the Act's first court-appointed counsel would be specifically charged with investigating criminal allegations against President Clinton.

As President Clinton stated when he signed the law:

> "[This law] ensures that no matter what party controls the Congress or the executive branch, an independent, nonpartisan process will be in place to guarantee the integrity of public officials and ensure that *no one is above the law.*"[97]

---

[95] 4 UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, at 753 (1994)(emphasis added).

[96] In *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) the Court found it significant — in deciding the case involving the Presidential Recordings and Materials Preservation Act against former President Nixon — that the "Executive Branch became a party to the Act's regulation when President Ford signed the Act into law . . .." 433 U.S. at 426, 97 S.Ct. at 2781. In this case, President Clinton himself, not a subsequent President, signed the Act into law.

[97] Statement by President William J. Clinton upon Signing S.24, June 30, 1994, (continued...)

President Clinton was correct. As Lloyd Cutler, the former Counsel to President Clinton, said in supporting the concept of an Independent Counsel, President Nixon was "certainly not a fluke. The qualities that betrayed him and us are far from unique, and we will see them in future administrations again."[98]

Second, in terms of policy, if Congress were to enact temporal immunity from criminal liability for the President, it would first have to consider the costs. The old proverb, "justice delayed is justice denied," applies with special vigor in the context of a criminal prosecution. The statute of limitations may prevent prosecution. As veteran prosecutors know, if a trial is delayed, then the memories of witnesses will fade, documents may be destroyed. It is an axiom that delaying a criminal trial — especially delaying for years — may result in, or be tantamount to creating, a *de facto* immunity.

In any event, even if Congress could enact a statute immunizing the President from the federal criminal laws, it has not done so. Instead, it has enacted a statute that authorized an Independent Counsel to use the federal grand jury system to investigate alleged criminal activities of this President.

LEGAL PRECEDENT

THE CASE LAW AND LEGAL OPINIONS. No legal precedent has ever concluded that the President is immune from the federal criminal laws. In fact, the cases have suggested the contrary.

For example, in 1972, *Gravel v. United States*[99] noted: "The so-called executive privilege has never been applied to shield executive officials from prosecution for crime . . .."

In 1982, in *Nixon v. Fitzgerald,*[100] the Supreme Court held that the President was *absolutely* immune for civil damages involving actions taken within his official duties, but also emphasized that this was "merely a private suit for damages" and

---

[97] (...continued)
in, 30 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1383, July 4, 1994.

[98] Lloyd Cutler, *A Permanent "Special Prosecutor,"* WASHINGTON POST, Dec. 2, 1974, at A24, col. 4.

[99] 408 U.S. 606, 627, 92 S.Ct. 2614, 2628, 33 L.Ed.2d 583 (1972).

[100] 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

that there is "a lesser public interest in actions for civil damages *than, for example, in criminal prosecutions.*"[101] This Court also made clear that there would be no immunity from civil damage claims, for actions that were not "within the outer perimeter of his [the President's] authority."[102] There is only "absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility."[103]

In 1994, Lloyd Cutler, the White House Counsel to President Clinton, issued his official legal opinion that it was against the Clinton Administration policy to invoke Executive Privilege for cases involving "personal wrongdoing" by any government official.[104]

Later, in *Clinton v. Jones*,[105] the Court rejected any notion of Presidential immunity (even a temporary immunity) for the President who is sued by a private civil litigant for damages involving acts not within his Presidential duties. In that case, President Clinton's "strongest argument" supporting his claim for immunity on a temporary basis, the Court said, was the claim that the President occupies a "unique office" and burdening him with litigation would violate the constitutional separation of powers and unduly interfere with the President's performance of his official duties.[106]

In language of remarkable breadth, the *Jones* Court repeatedly stated that *no* amount of this kind of burden would violate the Constitution. The President, the Court held: "errs by presuming that interactions between the Judicial Branch and the Executive, *even quite burdensome interactions*, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions."[107] The opinion, which had no dissents, quoted with approval James Madison's view that separation of powers "does not mean that

---

[101] 457 U.S. 731, 754 & n.37, 102 S.Ct. 2690, 2703 & n.37 (emphasis added).

[102] 457 U.S. at 757, 102 S.Ct. at 2705.

[103] 457 U.S. at 756, 102 S.Ct. at 2704.

[104] Lloyd Cutler Legal Opinion of Sept. 28, 1994, discussed in, T.R.Goldman, *Cutler Opined Against Broad Use of Privilege*, LEGAL TIMES (OF WASHINGTON, D.C.) 14 (Feb. 9, 1998).

[105] — U.S. —, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997).

[106] — U.S. at —, 117 S.Ct. at 1645-46.

[107] — U.S. at —, 117 S.Ct. at 1648.

the branches 'ought to have no *partial agency* in, or no *controul* over the acts of each other.'"[108]

And, if that were not clear enough, Justice Stevens' opinion added this clincher:

> *"The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution."*[109]

The Court explained that it "has the authority to determine whether he has acted within the law."[110] And, "it is also settled that the President is subject to judicial process in appropriate circumstances."[111]

In the Watergate Tapes case (*United States v. Nixon*[112]), President Nixon argued that a President could not be subject to the criminal process because, "if the President were indictable while in office, any prosecutor and grand jury would have within their power the ability to cripple an entire branch of the national government and hence the whole system."[113] The Court did not reach that question, but *Clinton*

---

[108] — U.S. at —, 117 S.Ct. at 1648 (emphasis in original), quoting THE FEDERALIST PAPERS, Federalist No. 47, pp. 325-36 (J. Cooke ed. 1961), which also has emphasis in the original.

[109] — U.S. at —, 117 S.Ct. at 1648-49 (emphasis added). I tentatively explored the implications of the strong language of the *Jones* case is, Ronald D. Rotunda, *The True Significance of Clinton vs. Jones*, CHICAGO TRIBUNE, July 8, 1997, at 12, col. 1-6; Rotunda, *Can a President Be Imprisoned?*, 20 LEGAL TIMES (OF WASHINGTON, D.C.) 22-23 (July 21, 1997). However, my earlier writing mainly quoted from that case. Now I have investigated this issue fully. Based on my evaluation of the Constitutional history, the Constitutional language, legal precedent, the relevant statutes and case law, and the view of commentators, and I am reaching the conclusion of this legal opinion.

[110] — U.S. at —, 117 S.Ct. at 1649.

[111] — U.S. at —, 117 S.Ct. at 1649-50, citing and relying on, Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 1975 U. OF ILL. L. FORUM 1 (1975); 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 7.1 (West. Pub. Co., 2d ed. 1992) & 1997 Pocket Part.

[112] 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

[113] Brief for the Respondent, Richard M. Nixon, President of the United States, in (continued...)

v. Jones later rejected the argument that the uniqueness of the Presidential Office requires that the Court recognize some sort of immunity from the law. *Clinton v. Jones* held that, even if the burden of litigation is heavy, the Constitution gives the President no special redress from that burden.

If even a *private* party instituting *civil* litigation may impose special litigation burdens on a sitting President, then the President's argument for a relief from the burdens of litigation is much less when the Federal Government initiates a criminal case, where the public interest of justice is much greater[114] because the party is the United States,[115] and the action is criminal, not civil.

ARGUMENTS OF PRESIDENT NIXON AND OTHERS THAT THE PRESIDENT IS IMMUNE FROM THE CRIMINAL LAW. President Nixon's argument — that "any prosecutor and grand jury would have within their power the ability to cripple an entire branch of the national government" — is inapplicable here. Neither "any" prosecutor nor "any" grand jury cannot institute criminal charges against a sitting President. The Independent Counsel Act does not authorize anyone to institute charges; it only gives its authority to the Independent Counsel, who can only be appointed if the Attorney General (who serves at the discretion of the President) asks the Special Division for an appointment.

Nor can it be argued that an indictment would close down the entire Executive Branch of the Federal Government. The President can continue his duties, and *"a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution."*[116] If the President is indicted, the government will not shut down, any more than it shut down when the Court ruled that the President must answer a civil suit brought by Paula Jones.

---

[113] (...continued)
United States v. Nixon, Nos. 73-1766 & 73-1834 (October term, 1973), at p. 97.

[114] Recall, in *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), the Court specifically noted that, when there is "merely a private suit for damages," then there is "a lesser public interest in actions for civil damages than, for example, in criminal prosecutions." 457 U.S. 731, 754 & n.37, 102 S.Ct. 2690, 2703 & n.37.

[115] The Independent Counsel institutes its criminal litigation in the name of the United States. *E.g., United States v. Webster Hubbell, et al.*, Crim. No. 98-0151 (JRJ).

[116] — U.S. at —, 117 S.Ct. at 1648-49 (emphasis added).

President Clinton may well argue that a criminal indictment of the President would inevitably place the nation in turmoil and bring the entire government to a halt. Oddly enough, those same people argue that the solution is to impeach the President. Would not an impeachment place the nation in even more turmoil?

Moreover, this argument was rejected in *Nixon v. Sirica,*[117] which stated, over a quarter of a century ago, that the President "does not embody the nation's sovereignty. He is not above the law's commands . . .."[118] A criminal proceeding would take no more time than a civil case against the President (and we know that is Constitutional). Moreover, any sanction if there is a conviction can be postponed until after the President is no longer a sitting President.

In short, to the extent that case law discusses this issue, the cases do not conclude that the President should have any immunity, either absolute or temporary, from the law. On the contrary, they point to the conclusion that, since the birth of the Republic, our constitutional system rejected the fiction that the King can do no wrong. In fact, in the *Clinton v. Jones* case, President Clinton himself specifically did not place any reliance on the claim that the President enjoyed the prerogatives of a monarch.[119] He has not stated that he would now embrace such a claim, and, if he did, there is no reason to believe that a court would accept that claim any more than the courts accepted President Nixon's claims of immunity.

IMPEACHMENT, INDICTMENT, AND THE COMMENTATORS

---

[117] 487 F.2d 700, 711 (D.C. Cir. 1973)(per curiam)(en banc).

[118] 487 F.2d at 711:

> "Though the President is elected by nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. He is not above the law's commands: 'With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law . . ..' Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen." (footnotes omitted).

In light of this case, it should be clear that the President is subject to a grand jury subpoena to give evidence. The President can, of course, plead the Fifth Amendment and refuse to testify, as could any other witness.

[119] — U.S. at — n.24, 117 S.Ct. at 1646 n.24.

A few commentators have questioned whether the impeachment process must be completed before an indictment can issue. No case has ever ruled that any officer subject to the criminal law must be impeached before he or she is prosecuted criminally. In fact, whenever the issue has been litigated, the cases have held that impeachment need not precede criminal indictment.[120] As early as 1796, when the Constitution and the nation were less than a decade old, Attorney General Lee advised Congress that a territorial court judge could be indicted for criminal offenses while in office although he had not been impeached. Lee, by the way, gave no suggestion that the President should be treated differently.[121]

There certainly is no suggestion in the language of the Constitution that the President is otherwise to be treated any differently than other civil officers. If the Framers wanted to treat the President differently — for example, if they wanted to make sure that the President is immune from indictment until after he has been impeached — then they could have written such language. They certainly knew how to write such language. Our Constitution refers to "impeachment" several times, and creates no special rules for the President except it provides a different procedural rule in one specific instance: when the President is tried in the Senate, the Constitution provides that the Chief Justice of the United States (rather than the Vice President)

---

[120] As the Seventh Circuit noted in upholding the criminal conviction of Federal Judge Otto Kerner:

> "The Constitution does not forbid the trial of a federal judge for criminal offenses committed either before or after the assumption of judicial office. The provision of Art. I, § 3, cl. 7, that an impeached judge is 'subject to Indictment, Trial, Judgment and Punishment, according to Law' does not mean that a judge may not be indicted and tried without impeachment first. The purpose of the phrase may be to assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy, or it may be to differentiate the provisions of the Constitution from the English practice of impeachment."

United States v. Issacs, 493 F.2d 1124, 1142 (7th Cir. 1974). *Cf.* Ronald D. Rotunda, *Impeaching Federal Judges: Where Are We and Where Are We Going?*, 72 JUDICATURE: THE JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 359 (1989); Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KENTUCKY LAW REVIEW 707 (1988).

[121] 3 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 982-83 (Washington, 1907).

presides over an impeachment trial.[122] The Framers made the decision to treat the President differently on one issue only: they explicitly provided that the Chief Justice shall preside only in the case of a Presidential impeachment.[123] The Framers did not want the Vice President from presiding over the impeachment of the President because he would be in a conflict of interest: if the President were to be impeached, the Vice President would become President.[124]

It is generally recognized, as Justice Joseph Story noted, that an impeachable offense is not limited to a criminal or statutory offense.[125] Moreover, not all crimes are impeachable. To determine what are "high crimes and misdemeanors" Justice Story advised that one must look to the common law, but it is not necessary to look to the list of statutory crimes. He added:

> "Congress have unhesitatingly adopted the conclusion, that no previous [violation of] statute is necessary to authorize an impeachment for any official misconduct; and the rules of proceeding, and the rules of evidence, as well as the principles of decision, have been uniformly regulated by the known doctrines of the common law and parliamentary usage. In the few cases of

---

[122] U.S. CONST. ART. I, § 2, cl. 5 (House has "sole Power of Impeachment"); ART. I, § 3, c. 6 (Senate has "sole Power to try all Impeachments" and, in an impeachment trial of the President, the Chief Justice shall preside); ART. I, § 3, cl. 7 (impeachment sanctions cannot impose criminal penalties, but criminal sanctions may be imposed by separate criminal trials); ART. II, § 4 ("all civil Officers of the United States" are subject to impeachment).

[123] One can look at quotations by various of the Framers of the Constitution, but, in "dealing with these historical materials a serious danger exists of reading into statements made two hundred years ago a meaning not intended by the speaker." WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 4. *See also* various memoranda attached to this Memorandum and marked as "confidential."

This WATERGATE SPECIAL PROSECUTION FORCE, Memorandum — after examining the historical record — concludes that the historical sources of two centuries ago "are equivocal lending little firm support for or against the proposition that the Framers intended to immunize a sitting President from criminal liability." *Id.* at 9.

[124] See discussion in, Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KENTUCKY LAW REVIEW 707 (1988).

[125] *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, §§ 403-07, at pp. 287-90 (RONALD D. ROTUNDA & JOHN E. NOWAK, eds., Carolina Academic Press, 1987, originally published, 1833).

> impeachment, which have hitherto been tried, no one of the charges has rested upon any statutable misdemeanour. It seems, then, to be the *settled doctrine* of the high court of impeachment, that though the common law cannot be a foundation of a jurisdiction not given by the constitution, or laws, that jurisdiction, when given, attaches, and is to be exercised according to the rules of the common law; and that, *what are, and what are not high crimes and misdemeanours, is to be ascertained by a recurrence to that great basis of American jurisprudence.*"[126]

Story's judgement has stood the test of time. Impeachment charges have not been limited to violations of federal criminal statutes. Federal judges have been indicted *before* they are impeached.[127] Indeed, to emphasize the distinction and separation of impeachment and criminal indictment, one judge was impeached *after* he had been *acquitted* in a criminal trial.[128]

---

[126] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, §§ 405, at p. 288 (RONALD D. ROTUNDA & JOHN E. NOWAK, eds., Carolina Academic Press, 1987, originally published, 1833)(emphasis added).

[127] This has long been the rule. In 1796, Attorney General Lee informed Congress that a judge of a territorial court, a civil officer of the United States subject to impeachment, was indictable for criminal offenses while in office. 3 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 982-83 (Washington, 1907). The "Framers did not intend civil officers generally to be immune from criminal process." *In re* Proceedings of the Grand Jury Impaneled Dec. 9, 1972, *Memorandum for the Unites States Concerning the Vice President's Claim of Constitutional Immunity*, at p. 99, quoting 3 HINDS' PRECEDENTS, *supra*.

For example, Judge Otto Kerner was indicted and convicted *before* there was any impeachment. His resignation ended the need for a subsequent impeachment. *See United States v. Isaccs*, 493 F.2d 1124, 1142 (7th Cir. 1974), citing the 1796 Attorney General Opinion upholding the conviction of Judge Kerner even though he had not been impeached and removed by Congress. Kerner then resigned from the bench and was not impeached.

Judge Walter Nixon (who did not resign from the bench) was impeached *after* he was convicted. *See, Nixon v. United States*, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993).

[128] Judge Alcee Hastings falls in this category. *See, Hastings v. Judicial Conference of the United States*, 829 F.2d 91 (D.C. Cir. 1987). *See generally*, WILLIAM H. REHNQUIST, GRAND INQUESTS (1992). The House impeached Judge Hastings by a lopsided vote of 413 to 3; the Senate removed him in 1989. Hastings was subsequently elected to the U.S. House of Representatives. Joe Davidson, *Ex-Judge Is Likely To Join the Congress That Impeached Him*, Wall Street Journal, Nov. 2, 1992, at A1, 1992 WESTLAW-WSJ 629646.

INDICTABILITY OF THE VICE PRESIDENT. Similarly, history demonstrates that the Vice President can be indicted and criminally prosecuted before being impeached (and whether or not he has been impeached). New Jersey, for example, indicted Vice President Aaron Burr for the death of Alexander Hamilton in a duel.[129] Burr did not act as if he were immunized from indictment. Instead, he fled the jurisdiction to avoid arrest.[130] Burr continued functioning as Vice President while under indictment; in fact, Burr (as President of the Senate) even presided over the impeachment trial of Justice Chase.[131] Vice President Spiro Agnew also argued, unsuccessfully, that he was immune from indictment prior to impeachment, but he ended up being indicted on corruption charges, pleading guilty, and resigning from office.[132]

President Clinton, like President Nixon, may wish to argue that the Presidency is "unique," and that the President alone represents "the Executive Branch." Consequently, it is argued, the President alone is immune from the criminal laws while he is sitting as President.

The Court, in *Nixon v. Sirica*,[133] explicitly rejected that argument. "Because impeachment is available against all 'civil Officers of the United States,' not merely against the President, U.S. Const. art. II, § 4, it is difficult to understand how any immunities peculiar to the President can emanate by implication from the fact of impeachability."[134] A criminal indictment and even a trial do not "compete with the impeachment device by working a constructive removal of the President from office."[135] If the President is acquitted, there is no "constructive removal" from office.

---

129 1 MILTON LOMASK, AARON BURR 329, 349-55 (1979).

130 *Id.*

131 *See*, WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 29-30.

132 *E.g.*, RICHARD D. COHEN & JULES WITCOVER, A HEARTBEAT AWAY (1974).

133 487 F.2d at 700 (D.C. Cir. 1973)(per curiam)(en banc).

134 487 F.2d at 711 n.50.

135 487 F.2d at 711:

> "Nor does the Impeachment Clause imply immunity from routine court process. While the President argues that the Clause means that impeachability precludes criminal prosecution of an incumbent, we see no need to explore this question except to note its irrelevance to the case

(continued...)

If the President is convicted, the punishment may not include imprisonment, and — if it does — any imprisonment can be stayed until he no longer is a sitting President.

The test that *Nixon v. Sirica* adopted is directly applicable here. A criminal indictment and even a trial do not "compete with the impeachment device by working a constructive removal of the President from office." However, imprisonment may be a "constructive removal of the President from office," and, if it is, that sanction cannot be imposed on a sitting President. But indictment and trial are not the same as imprisonment. If there is a trial, the President may be acquitted. If he is convicted, the sanction may not include imprisonment, and if it does, that sanction can be stayed until after the Presidential term has ended.

CONGRESSIONAL POWER TO CONTROL THE DECISION TO INDICT. If an official subject to impeachment (such as the President, Vice President, or a federal judge) could not be indicted until after he or she had been impeached, then Congress would control the decision whether to prosecute. But such a power would be inconsistent with the doctrine of separation of powers, which does not give Congress a role in the execution of the laws.[136]

The decision to prosecute or not prosecute is a decision that cannot lie with the legislature. In the instant case, it lies with the Independent Counsel, who, under the statute, stands in the shoes of the Attorney General. The decision to appoint the Independent Counsel rests in the *unreviewable discretion* of the Attorney General. The U.S. Supreme Court has made clear that neither the courts nor Congress can require the appointment of an Independent Counsel.[137]

The decision to indict a sitting President lies with the Grand Jury, not with the House of Representatives or Senate. As *Nixon v. Sirica* eloquently stated: "The federal grand jury is a constitutional fixture in its own right, legally independent of

---

[135] (...continued)
before us. The order entered below, and approved here in modified form, is not a form of criminal process. *Nor does it compete with the impeachment device by working a constructive removal of the President from office."*

487 F.2d 700 at 711(emphasis added).

[136] *See Bowsher v. Synar,* 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986).

[137] *Morrison v. Olson,* 487 U.S. 654, 694-95, 108 S.Ct. 2597, 2621, 101 L.Ed.2d 569 (1988). This point is discussed in detail in note 10, *supra.*

the Executive. . . . If a grand jury were a legal appendage of the Executive, it could hardly serve its historic functions as a shield for the innocent and *a sword against corruption in high places.*"[138] The Court went on to state that, as "a *practical*, as opposed to legal matter, the Executive may, of course cripple a grand jury investigation," but even though the President may have the practical power to handicap the grand jury in various ways, "it is he who must exercise them. the court will not assume that burden by eviscerating the grand jury's independent legal authority."[139]

THE WATERGATE EXPERIENCE. The Watergate Special Prosecution Force did not indict President Nixon but named him an unindicted coconspirator. President Nixon resigned from office, was pardoned by his successor, President Ford, and the issue was never tested in court. Some modern day commentators assume that the Watergate Special Prosecutor concluded that a sitting President is immune from indictment. That assumption is simply wrong.

The Watergate Special Prosecutor only argued that, in the narrow circumstances of that case — where the House of Representatives had already made the independent judgment to begin impeachment proceedings, when the House of Representatives, prior to any turnover of Grand Jury evidence, had independently decided to consider the very matters that were before the Grand Jury — the President should not be indicted until after the impeachment process had concluded.[140]

---

[138] 487 F.2d at 712 n.54 (emphasis added)(internal citations omitted).

[139] 487 F.2d at 713 n.54 (emphasis in original).

[140] *See* LEON JAWORSKI, THE RIGHT AND THE POWER 100 (1976). Jaworski argued that his Watergate Special Prosecution Force could seek an indictment against the President for some crimes (like murder), but, Jaworski said, he questioned whether it was appropriate to indict the President for other crimes, like obstruction of justice, "especially when the House Judiciary Committee was then engaged in an inquiry into whether the President should be impeached on that very ground."

Of course, Jaworski's comments must be read in context. First, no case law reaches the conclusion that Jaworski and other lawyers working for him reached at the time. His ambivalent opinions are not legal precedent.

More importantly, Jaworski's decision was quite nuanced. The distinctions he drew argue that an indictment would be appropriate in the present case because no impeachment is under way. In addition, Jaworski conclusion that the President should not be indicted was tentative ("grave doubts," not firm conclusions), and those conclusions, he emphasized, were

(continued...)

1

[140] (...continued)
made in the specific factual and historical context within which the Watergate Special Prosecution Force operated. That factual and historical context is different today.

That factual and historical context is important. It is significant that the Watergate Special Prosecution Force was a very different animal than the present Office of Independent Counsel. Unlike the present Office of Independent Counsel, the Watergate Special Prosecution Force was not a creature of statute. It was merely a creation of executive regulation. Until the U.S. Supreme Court ruled on the issue, it was unclear if the courts could even rule on an evidentiary dispute between the Special Prosecutor and a "superior officer of the Executive Branch." *United States v. Nixon*, 94 U.S. 683, 692-93, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974). The decision of the Watergate Special Prosecutor not to seek to indict President Nixon was made in the context where even the powers of the Special Prosecutor to subpoena evidence from the President were unclear. I have examined the series of memoranda dealing with the issue of the amenability of President Nixon to indictment. The various memoranda are not of one opinion (some favored indictment), and they specifically raised concerned about the permissibility of an indictment brought by a Special Prosecutor who was appointed by, and could be fired by, the Attorney General, when the Special Prosecutor was protected only by a regulation signed by the Attorney General, and the validity of this entire arrangement had not been tested in court. *See*, WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 33-34.

Significantly, the regulations that created the Watergate Special Prosecutor provided that the "Prosecutor will not be removed from his duties . . . without the President's first consulting the Majority and Minority Leaders and the Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action." 38 FED. REG. 30739, quoted in, *United States v. Nixon*, 418 U.S. 683, 695 n.8, 94 S.Ct. 3090, 3101 n.8. The *Nixon* Court did not specifically rule on this provision. We know now that a law that gives Congress (or certain members of Congress) a role in limiting the removal of executive branch officials is *un*constitutional. As *Bowsher v. Synar*, 478 U.S. 714, 722-23, 106 S.Ct. 3181, 3186, 92 L.Ed.2d 583 (1986) held:

> "The Constitution does not contemplate an active role for Congress in the supervision of officers charged with execution of the laws its enacts. . . . Once the appointment has been made and confirmed, however, the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment . . .. A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one [of impeachment] is inconsistent with separation of powers."

One could see why the Watergate Prosecutor was hesitant to claim a power to indict, when the very existence of the Watergate Prosecutor was constitutionally in doubt (a doubt (continued...)

1

[140] (...continued)
that bore fruit in *Synar*). No such doubt applies to the present Office of Independent Counsel, for Congress has no role to play in the removal of the Independent Counsel, and the Supreme Court has upheld the constitutionality of this statute. *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

At the time that Jaworski wrote his tentative conclusions, the U.S. Supreme Court had not even decided that a President could be sued for damages in a civil case. The Court later answered yes to that question in, *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

Moreover, the Memoranda on this issue show that the attorneys in the Watergate Special Prosecution Force divided on this issue. *E.g.*, WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 43, 44:

> "*The issue is close.* Respectable arguments derived from history and contemporary policy exist on both sides of the issue. . . . [M]y conclusion is that the Constitution does not preclude indictment, and the issue is really whether the incumbent President should be indicted." [emphasis added.]

See also, JOHN HART ELY, ON CONSTITUTIONAL GROUND 133 *et seq.* (Princeton University Press 1996), reprinting his memorandum to Special Prosecutor Archibald Cox that argued that the President could be indicted.

Commentators prior to *Morrison v. Olson*. The view of legal commentators regarding the indictment of a sitting President was mixed, prior to *Morrison v. Olson*. Those commentators claiming that the President is immune from criminal prosecution have typically discussed the issue in a vacuum, not in the context of a specific investigation of a President pursuant to a statute, enacted at the President's request, authorizing a criminal investigation of the President. *See* George E. Danielson, *Presidential Immunity from Criminal Prosecution*, 63 GEORGETOWN L.J. 1065 (1975) (arguing that the President is immune from criminal prosecution); PHILIP KURLAND, WATERGATE AND THE CONSTITUTION 135 (1978) (arguing that the President is immune from criminal prosecution). Note that these commentators wrote without benefit of the Supreme Court decision in, *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

Other commentators have argued that the President and all other officials are subject to indictment prior to impeachment — in part because some acts may not be impeachable but are certainly indictable. *See*, RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 215 (2d ed. 1829):

> "the ordinary tribunals, as we shall see, *are not precluded, either before or after impeachment,* from taking cognizance of the public and official delinquency."

(continued...)

However, *prior to that situation* — in the case where the House of Representatives had not already begun impeachment process — historians forget that the Watergate Special Prosecution Force was advised that the President could be

---

[140] (...continued)
(emphasis added).

Quoted in, WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 13. *See also* other authorities cited therein. *Accord,* JOHN HART ELY, ON CONSTITUTIONAL GROUND 133 *et seq.* (Princeton University Press 1996), reprinting his 1973 memorandum to Special Prosecutor Archibald Cox arguing that President could be indicted.

Commentators after *Morrison v. Olson*. Post-*Morrison v. Olson* commentators have tended to conclude that the President is not above the law. *See,* Gary L. McDowell, *Yes, You Can Indict the President,* WALL STREET JOURNAL, March 9, 1998, at A19, col. 3-6 (Midwest ed.); Edwin B. Firmage & R.C. Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment,* 1974 DUKE L.J. 1023 (arguing that President is not immune from the criminal process); Eric Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?,* 20 HASTINGS CONST.L.Q. 7 (1992) (thorough article concluding that the President is not immune); Terry Eastland, *The Power to Control Prosecution,* 2 Nexus 43, 49 (Spring, 1997)(referring to *Morrison v. Olson* and concluding that the President is not immunized from prosecution); Eric M. Freedman, *Achieving Political Adulthood,* 2 NEXUS 67, 84 (Spring, 1997), concluding:

> "To the extent that the belief that the President should have a blanket immunity from criminal prosecutions manifests itself in legal form, legal decisionmakers should reject it. The argument is inconsistent with the history, structure, and underlying philosophy of our government, at odds with precedent, and unjustified by practical considerations."

See also, Scott W. Howe, *The Prospect of a President Incarcerated,* 2 NEXUS 86 (Spring, 1997), arguing that the President has no constitutional immunity from criminal prosecution, but Congress may wish to create some limited immunity by statute.

Jay S. Bybee, *Who Executes the Executioner?,* 2 NEXUS 53 (Spring, 1997) argues that before the President, or federal judges, can be tried, they first must be impeached, an argument that is more in the nature of a polemic, because it uproots two centuries of practice regarding the prosecution of federal judges. *See also* Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution,* 2 NEXUS 11 (Spring, 1997), which presents such a broad argument for Presidential immunity that it is inconsistent with *Clinton v. Jones,* — U.S. —, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997).

indicted.[141]

USE OF GRAND JURY TO COLLECT EVIDENCE FOR AN IMPEACHMENT.

INTRODUCTION. If it is unconstitutional for a federal grand jury, acting pursuant to the Independent Counsel statute to indict a President for engaging, in his private capacity, in serious violations of federal law, then it would be a gross abuse of the grand jury powers and a violation of federal statutory and constitutional law for that grand jury to investigate whether the President has committed any criminal law violations. But we know, after *Morrison v. Olson*,[142] that it is constitutional for the Independent Counsel to use the grand jury to investigate the President. That conclusion was implicit in the holding of *Morrison*. Hence it should be constitutional to indict a sitting President because it would not be constitutional to use the grand jury to investigate if it could not constitutionally indict.

Let us analyze this argument in more detail. First, as all the legal commentators acknowledge:

> "The grand jury is authorized only to conduct criminal investigations. Accordingly, it is *universally acknowledged* that the grand jury cannot be used to conduct an investigation — or *even explore a particular line of inquiry* — solely in order to collect evidence for civil purposes."[143]

Thus, as the U.S. Supreme Court has stated, the federal government may not "start or continue a grand jury inquiry where no criminal prosecution seem[s] likely."[144] If the grand jury investigation "is merely a pretext for a civil evidence-gathering

---

[141] JOHN HART ELY, ON CONSTITUTIONAL GROUND 133 *et seq.* (Princeton University Press 1996), reprinting his: *Memorandum to Special Prosecutor Archibald Cox on the Legality of Calling President Nixon before a Grand Jury* (1973). Professor Ely explains that "prosecution of a sitting (non-impeached) president must be possible, or else there would be no way to reach" crimes that do not rise to the level of impeachment. *Id.* at 139. Ely expanded on those arguments in *id.* at 140-41.

[142] 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

[143] 2 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 8.01 at 2 (Callaghan & Co., 1986)(emphasis added).

[144] *United States v. Sells Engineering Inc.*, 463 U.S. 418, 432, 103 S.Ct. 3133, 3142, 77 L.Ed.2d 743 (1983). *See also*, 2 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 10.14 at 51 (Callaghan & Co., 1986)

mission, the grand jury process is clearly being abused under any standard."[145]

There are few cases where the courts have found that the Government has abused the grand jury system in order to gain evidence that would or could not be used in a criminal prosecution. But, where the courts find a bad motive, they do not allow an illegal use of the grand jury system.

In the present case, it is quite clear that one of the purposes of the grand jury investigation conducted by the Office of Independent Counsel is to investigate President Clinton. Of course, the OIC and the grand jury have other persons whom it is investigating and whom it may indict (or already have indicted). And, to that extent, the actions of the several Grand Juries in this investigation are proper. Morever, to the extent that it is conducting a valid criminal investigation, it may disclose the fruits of its investigation for civil purposes to the extent that statutes or rules governing such disclosure so authorize.[146]

However, in this case it is clear that *some* of the grand jury's subpoenas, some of the energy of the OIC, and a portion of the mandate of the OIC are intended *solely to investigate criminal allegations against the President* in connection with issues such as Whitewater, Castle Grande, the FBI White House files, the alleged illegal abuses involving the Travel Office of the White House, and — most recently — allegations involving possible Presidential perjury, subordination of perjury, tampering of witnesses, and obstruction of justice in the litigation captioned as *Jones v. Clinton.*

The purpose of the OIC investigation and the grand jury investigation is to determine whether the President has, or has not, engaged in serious crimes. If the grand jury cannot indict the President for such crimes, then it has no business investigating the President's role in such crimes. Impeachment, after all, is an

---

[145] 2 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 8.03 at 9 (Callaghan & Co., 1986).

See also United States v. Proctor & Gamble Co., 187 F. Supp. 55, 57-58 (D. N.J. 1960). This case was on remand from, *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958), and it applied the test adopted in that case.

[146] *E.g., United States v. Baggot*, 463 U.S. 476, 103 S.Ct. 3164, 77 L.Ed.2d 785 (1983); RULE 6(E), FEDERAL RULES OF CRIMINAL PROCEDURE.

admittedly *non*criminal proceeding.[147] If the purpose of the grand jury investigation of President Clinton is not to indict even if the evidence commands indictment (or if its purpose is simply to investigate possible impeachable offenses on behalf of the House of Representatives and then turn over this information to the House), then, in either case, the grand jury is being misused.[148]

WHEN THE GRAND JURY IS USED TO TURN OVER INFORMATION TO ANOTHER UNIT OF GOVERNMENT. It would be wrong, for example, to use the grand jury solely to gather information to be used by another governmental unit. If the grand jury is investigating in good faith to determine if the President has engaged in any criminal conduct, it may turn over, to the House of Representatives, information that it has gathered in its investigation of alleged criminality that also is relevant to the House even if the grand jury ultimately concludes that it is not relevant to a criminal inquiry.

The important point is that the grand jury must act in good faith and not as the agent of another entity of the government. "It is sufficient if the agencies are engaged in good faith investigations within their respective jurisdictions, and that one agency is not simply serving as a cat's paw for another, under the pretext of conducting its own investigation."[149] Grand Juries cannot be used as a short cut for the House of Representatives to collect information that otherwise would be more difficult to secure.[150] The OIC cannot use the grand jury to investigate alleged criminal activity by the President if an indictment (assuming that the evidence warranted it) is "merely an unexpected bare possibility."[151] The OIC (which sits in the shoes of the Attorney General) must have an open mind whether to seek an indictment, but it cannot have an open mind about this issue if it would be illegal or

---

[147] *E.g.*,the sanction cannot result in imprisonment or fine. The standard of proof is not beyond a reasonable doubt. There is no jury of twelve people drawn from the general public. An impeachment and removal do not prevent a criminal prosecution.

[148] On the other hand, it would be proper to turn over information secured in good faith for purposes of securing an indictment but that is also relevant to impeachment.

[149] 2 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 8.02 at 6 (Callaghan & Co., 1986), citing, *United States v. Proctor & Gamble Co.*, 187 F. Supp. 55, 58 (D. N.J. 1960).

[150] *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683-84, 78 S.Ct. 983, 987, 2 L.Ed.2d (1957).

[151] *United States v. Proctor & Gamble Co.*, 187 F. Supp. 55, 58 (D. N.J. 1960).

unconstitutional to indict the President.[152]

In other words, if the statute creating the OIC and authorizing it to investigate the President and turn over relevant information to the House of Representatives does not authorize or permit the OIC to seek an indictment of the President, the statute is authorizing an abuse of the grand jury powers, an unconstitutional perversion of the Fifth Amendment, which created the grand jury. It is clearly improper to use the grand jury, a creature of the criminal process, to collect evidence for noncriminal purposes. It is unconstitutional to use the grand jury solely as a tool of a House impeachment inquiry to investigate in an area where it could not indict even if the evidence warranted an indictment.

WHEN THE GRAND JURY IS USED TO INVESTIGATE A CRIMINAL DEFENDANT WHO CANNOT BE INDICTED FOR A CRIME BECAUSE HE ALREADY HAS BEEN INDICTED. It is improper for the Government to use the grand jury to investigate a target's role in a matter after the grand jury has indicted the target. If the grand jury has already indicted a target, it is an abuse of the grand jury system to use the grand jury to investigate further on that matter. Because the grand jury cannot indict the target on the matter in question — the target, after all, has already been indicted — it cannot use its investigatory powers to further investigate the target.[153]

That logic applies here too. If the grand jury cannot indict the target (because he is President) then it cannot use its investigatory powers to further investigate the target.

---

[152] **Grand Jury Presentments.** In some instances, a Grand Jury can issue a report, a "presentment" without issuing any indictments. But such a Grand Jury is investigating alleged criminal activities and could indict. Even in these circumstances, civil libertarians have raised serious objections to such presentments.

No Grand Jury should be the alter ego of the House Judiciary Committee or any other House entity investigating possible impeachment. The House of Representatives has the "sole" power to impeach [U.S. CONST., ART. I, § 2, cl. 5 (House has "sole Power of Impeachment")] and should not treat the Office of Independent Counsel as its alter ego or tool.

[153] *E.g., United States v. Dardi*, 330 F.2d 316, 336 (2d Cir. 1964), *cert. denied*, 379 U.S. 845, 85 S.Ct. 50, 13 L.Ed.2d 50 (1964); *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels)*, 767 F.2d 26, 29-30 (2d Cir. 1985)(To protect the grand jury from being "abused," where defendant makes a "strong showing that the government's dominant purpose [in issuing a subpoena] was pretrial preparation," for an already pending indictment the court will quash the subpoena. In this case, the Court of Appeals reversed the trial court and quashed the subpoena.) *See also In re National Window Glass Workers*, 287 F. 219 (N.D. Ohio 1922).

WHEN THE GRAND JURY IS USED TO INVESTIGATE A MATTER WHERE IT WOULD BE UNCONSTITUTIONAL TO INDICT. As discussed above, the Speech or Debate Clause gives an absolute constitutional privilege that will protect a Member of Congress from being questioned about his or her vote on a legislative matter. Assume that a grand jury was investigating a matter where it could not constitutionally indict, given the narrow, but absolute protections of the Speech or Debate Clause. It would be unconstitutional for the grand jury to inquire into matters where it could not constitutionally indict.[154] If the grand jury cannot constitutionally indict for particular actions because of the Speech or Debate Clause, then it cannot constitutionally ask questions regarding this matter.[155] Courts should "not hesitate to limit the grand jury's investigative power in deference to this congressional privilege."[156]

If the grand jury cannot indict the President (because it would be unconstitutional to do so), then the Independent Counsel certainly cannot use the grand jury to investigate President Clinton. If the President is somehow immune from indictment and above the law, then the grand jury (whether in Arkansas or in Washington, D.C. or elsewhere) would be acting unconstitutionally, as would the federal trial judges who supervise these Grand Juries. If it is unconstitutional to indict the President, it is unconstitutional for the grand jury to investigate him.

But, we know that it is constitutional for the Independent Counsel to investigate the President to determine if he should be indicted for criminal acts. That was what *Morrison v. Olson*[157] was all about.

Morrison upheld the constitutionality of the Independent Counsel Act. That case decided, implicitly, that it must be constitutional to indict the President if the evidence warrants and demands such an indictment. That conclusion was implied in the holding of *Morrison v. Olson*, and it explains why the Court later issued its strong language in *Clinton v. Jones*, rejecting the notion that the federal judiciary's exercise of jurisdiction over the President creates a problem of separation of powers.

---

[154] *Gravel v. United States*, 408 U.S. 606, 628-29, 92 S.Ct. 2614, 2628-29, 33 L.Ed.2d 583 (1972).

[155] *Gravel v. United States*, 408 U.S. 606, 629 n.18, 92 S.Ct. 2614, 2629 n.18, 33 L.Ed.2d 583 (1972).

[156] PAUL S. DIAMOND, FEDERAL GRAND JURY PRACTICE AND PROCEDURE § 6.04 at 6-31 (Aspen Publishers, Inc. 1995). *See also id.* at § 4.01[D].

[157] 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

> *"The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution."*[158]

As discussed above, distinguished Constitutional scholar, former Federal Judge, and former Yale Law Professor Robert Bork concluded, in a famous Memorandum he filed when he was Solicitor General of the United States, that Federal prosecutors could investigate and indict a sitting Vice President. It is noteworthy to recall the first sentence of that Memorandum:

> "The motion by the Vice President [Spiro T. Agnew] poses a grave and unresolved constitutional issue: whether the Vice President of the United States is subject to federal grand jury investigation and possible indictment and trial while still in office."[159]

Solicitor General Bork properly concluded that, if the Vice President could not be indicted, the grand jury could not subject him to an investigation. Because, he concluded, the grand jury could constitutionally indict the Vice President, therefore it could constitutionally investigate the Vice President.

CONCLUSION

We must keep in mind the following:

- the decision of the U.S. Supreme Court in *Morrison v. Olson* upholding the constitutionality of the Independent Counsel Act and the authority it bestows on a grand jury to investigate criminal charges involving the President of the United States;
- the decision of President Clinton to lobby for and sign this legislation with full knowledge that a prime focus of that Act would be allegations surrounding his own conduct;
- the decision of Congress not to enact any legislation conferring

---

[158] — U.S. at —, 117 S.Ct. at 1648-49 (emphasis added).

[159] *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 1.

immunity from criminal prosecution but, on the contrary, to enact legislation to create the Office of Independent Counsel to investigate allegations of criminal conduct involving President Clinton;

- the legislative history of the law creating an Independent Counsel indicating specifically that Congress did not intend to bestow any criminal immunity to any person covered by that Act;
- President Clinton's full knowledge that the Act's first court-appointed counsel would be specifically charged with investigating President Clinton;
- the decision of President Clinton's Attorney General to petition the Special Division to appoint such an Independent Counsel;
- the subsequent decision of President Clinton's Attorney General on several occasions to petition the Special Division to expand the jurisdiction of the Independent Counsel to include other allegations of criminal conduct involving President Clinton.
- the counts of an indictment against President Clinton would include serious allegations involving witness tampering, document destruction, perjury, subornation of perjury, obstruction of justice, conspiracy, and illegal pay-offs — counts that in no way relate to the President Clinton's official duties, even though some of the alleged violations occurred after he became President.

These factors all buttress and lead to the same conclusion: it is proper, constitutional, and legal for a federal grand jury to indict a sitting President for serious criminal acts that are not part of, and are contrary to, the President's official duties. In this country, no one, even President Clinton, is above the law.

This conclusion does not imply that a President must be required to serve an actual prison term before he leaves office. The defendant President could remain free pending his trial,[160] and the trial court could defer any prison sentence until he leaves office.[161] The defendant-President may petition the courts to exercise its discretion in appropriate cases. It is one thing for the President to petition the court to exercise its discretion; it is quite another for the President to announce that he is above the law and immune from criminal prosecution.

---

[160] There is, after all, no risk of flight to avoid prosecution.

[161] *See* Ronald D. Rotunda, *When Duty Calls, Courts Can Be Flexible*, WASHINGTON POST, January 29, 1997, at p. A21, col. 2-3.

Before or after indictment, Congress could exercise its independent judgment as to whether to begin impeachment proceedings or await the conclusion of the criminal proceedings.[162] Or, if Congress did not wish to postpone the impeachment proceedings, Congress if it wished (and if the President agreed), could ask the Independent Counsel to delay the criminal trial. The President could also petition the court to stay or postpone the criminal trial until the impeachment proceedings were concluded.

Neither the criminal proceeding nor the impeachment proceeding will control the other. As Solicitor General Bork pointed out a quarter of a century ago:

> "Because the two processes have different objects, the considerations relevant to one may not be relevant to the other."

For that reason, neither conviction nor acquittal in one trial, though it may be persuasive, need automatically determine the result in the other trial."[163]

And, the House or Senate may conclude that "a particular offense, though properly punishable in the courts, did not warrant" either impeachment or removal from office.[164]

Sincerely,

Ronald D. Rotunda
ALBERT E. JENNER, JR. PROFESSOR OF LAW

---

[162] Of course, if Congress decides to institute impeachment proceedings, it will decide whether a penalty is to be imposed, and, if so, what penalty is appropriate (*e.g.*, removal from office, or a lesser penalty, such as a public censure).

[163] *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 9 (Robert Bork, Solicitor General).

[164] *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 9 (Robert Bork, Solicitor General).

A Sitting President's Amenability to Indictment and Criminal Prosecution

The indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions

October 16, 2000

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

In 1973, the Department concluded that the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions. We have been asked to summarize and review the analysis provided in support of that conclusion, and to consider whether any subsequent developments in the law lead us today to reconsider and modify or disavow that determination.[1] We believe that the conclusion reached by the Department in 1973 still represents the best interpretation of the Constitution.

The Department's consideration of this issue in 1973 arose in two distinct legal contexts. First, the Office of Legal Counsel ("OLC") prepared a comprehensive memorandum in the fall of 1973 that analyzed whether all federal civil officers are immune from indictment or criminal prosecution while in office, and, if not, whether the President and Vice President in particular are immune from indictment or criminal prosecution while in office. *See* Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office* (Sept. 24, 1973) ("OLC Memo"). The OLC memorandum concluded that all federal civil officers except the President are subject to indictment and criminal prosecution while still in office; the President is uniquely immune from such process. Second, the Department addressed the question later that same year in connection with the grand jury investigation of then-Vice President Spiro Agnew. In response to a motion by the Vice President to enjoin grand jury proceedings against him, then-Solicitor General Robert Bork filed a brief arguing that, consistent with the Constitution, the Vice President could be subject to indictment and criminal prosecution. *See* Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity (filed Oct. 5, 1973), *In re Proceedings of the Grand Jury Impaneled December 5, 1972:*

[1] Since that time, the Department has touched on this and related questions in the course of resolving other questions, *see, e.g., The President—Interpretation of 18 U.S.C. § 603 as Applicable to Activities in the White House*, 3 Op. O.L.C. 31, 32 (1979); Brief for the United States as Amicus Curiae in Support of Petitioner at 15 n.8, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95-1853), but it has not undertaken a comprehensive reexamination of the matter. We note that various lawyers and legal scholars have recently espoused a range of views of the matter. *See, e.g., Impeachment or Indictment: Is a Sitting President Subject to the Compulsory Criminal Process: Hearings Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 105th Cong. (1998).

Application of Spiro T. Agnew, Vice President of the United States (D. Md. 1973) (No. 73–965) ("SG Brief"). In so arguing, however, Solicitor General Bork was careful to explain that the President, unlike the Vice President, could not constitutionally be subject to such criminal process while in office.

In this memorandum, we conclude that the determinations made by the Department in 1973, both in the OLC memorandum and in the Solicitor General's brief, remain sound and that subsequent developments in the law validate both the analytical framework applied and the conclusions reached at that time. In Part I, we describe in some detail the Department's 1973 analysis and conclusions. In Part II, we examine more recent Supreme Court case law and conclude that it comports with the Department's 1973 conclusions.[2]

I.

A.

The 1973 OLC memorandum comprehensively reviewed various arguments both for and against the recognition of a sitting President's immunity from indictment and criminal prosecution. What follows is a synopsis of the memorandum's analysis leading to its conclusion that the indictment or criminal prosecution of a sitting President would be unconstitutional because it would impermissibly interfere with the President's ability to carry out his constitutionally assigned functions and thus would be inconsistent with the constitutional structure.

1.

The OLC memorandum began by considering whether the plain terms of the Impeachment Judgment Clause prohibit the institution of criminal proceedings against any officer subject to that Clause prior to that officer's conviction upon impeachment. OLC Memo at 2. The memorandum concluded that the plain terms of the Clause do not impose such a general bar to indictment or criminal trial prior to impeachment and therefore do not, by themselves, preclude the criminal prosecution of a sitting President. *Id.* at 7.[3]

---

[2] Implicit in the Department's constitutional analysis of this question in 1973 was the assumption that the President would oppose an attempt to subject him to indictment or prosecution. We proceed on the same assumption today and therefore do not inquire whether it would be constitutional to indict or try the President with his consent.

The Department's previous analysis also focused exclusively on federal rather than state prosecution of a sitting President. We proceed on this assumption as well, and thus we do not consider any additional constitutional concerns that may be implicated by state criminal prosecution of a sitting President. *See Clinton v Jones*, 520 U S 681, 691 (1997) (noting that a state criminal prosecution of a sitting President would raise "federalism and comity" concerns rather than separation of powers concerns)

[3] In a memorandum prepared earlier this year, we concluded that neither the Impeachment Judgment Clause nor any other provision of the Constitution precludes the prosecution of a former President who, while still in office, was impeached by the House of Representatives but acquitted by the Senate *See Whether a Former President May*

Continued

The Impeachment Judgment Clause provides:

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

U.S. Const. art. I, § 3, cl. 7. 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." This textual argument draws support from Alexander Hamilton's discussion of this Clause in *The Federalist Nos.* 65, 69, and 77, in which he explained that an offender would still be liable to criminal prosecution in the ordinary course of the law after removal by way of impeachment. OLC Memo at 2.[4]

The OLC memorandum explained, however, that the use of the term "nevertheless" cast doubt on the argument that the Impeachment Judgment Clause constitutes a bar to the prosecution of a person subject to impeachment prior to the termination of impeachment proceedings. *Id.* at 3. "Nevertheless" indicates that the Framers intended the Clause to signify only that prior conviction in the Senate would not constitute a bar to subsequent prosecution, not that prosecution of a person subject to impeachment could occur only after conviction in the Senate. *Id.* "The purpose of this clause thus is to permit criminal prosecution in spite of the prior adjudication by the Senate, *i.e.*, to forestall a double jeopardy argument." *Id.*[5]

Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op O.L.C. 111 (2000)

[4] In *The Federalist No 69*, Hamilton explained:

> 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 person of the King of Great Britain is sacred and inviolable: there is no constitutional tribunal to which he is amenable, no punishment to which he can be subjected without involving the crisis of a national revolution

The Federalist No. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). Similarly, in *The Federalist No 65*, he stated

> the punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender. *After* having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law.

Id. at 398–99 (emphasis added). Moreover, in *The Federalist No. 77*, he maintained 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." *Id.* at 464 (emphasis added) In addition, Gouverneur Morris stated at the Convention that "[a] conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President after the trial of the impeachment." 2 *Records of the Federal Convention of 1787*, at 500 (Max Farrand ed., 1974).

[5] In our recent memorandum exploring in detail the meaning of the Impeachment Judgment Clause, we concluded that the relationship between this clause and double jeopardy principles is somewhat more complicated than the 1973 OLC Memo suggests *See Whether a Former President May Be Indicted and Tried for the Same Offenses*

The OLC memorandum further explained that if the text of the Impeachment Judgment Clause barred the criminal prosecution of a sitting President, then the same text would necessarily bar the prosecution of all other "civil officers" during their tenure in office. The constitutional practice since the Founding, however, has been to prosecute and even imprison civil officers other than the President while they were still in office and prior to their impeachment. *See, e.g., id.* at 4–7 (cataloguing cases). In addition, the conclusion that the Impeachment Judgment Clause constituted a textual bar to the prosecution of a civil officer prior to the termination of impeachment proceedings "would create serious practical difficulties in the administration of the criminal law." *Id.* at 7. Under such an interpretation, a prosecution of a government official could not proceed until a court had resolved a variety of complicated threshold constitutional questions:

> These include, *first*, whether the suspect is or was an officer of the United States within the meaning of Article II, section 4 of the Constitution, and *second*, whether the offense is one for which he could be impeached. *Third*, there would arise troublesome corollary issues and questions in the field of conspiracies and with respect to the limitations of criminal proceedings.

Id. The memorandum concluded that "[a]n interpretation of the Constitution which injects such complications into criminal proceedings is not likely to be a correct one." *Id.* As a result, the Impeachment Judgment Clause could not itself be said to be the basis for a presidential immunity from indictment or criminal trial.

2.

The OLC memorandum next considered "whether an immunity of the President from criminal proceedings can be justified on other grounds, in particular the consideration that the President's subjection to the jurisdiction of the courts would be inconsistent with his position as head of the Executive branch." OLC Memo at 18. In examining this question, the memorandum first considered the contention that the express, limited immunity conferred upon members of Congress by the Arrest and Speech or Debate Clauses of Article I, Section 6 of the Constitution necessarily precludes the conclusion that the President enjoys a broader, implicit immunity from criminal process.[6] One might contend that the Constitution's grant

for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O L C at 128–30. Nothing in our more recent analysis, however, calls into question the 1973 OLC Memo's conclusions.

[6] Article I, Section 6, Clause 1 provides

> The Senators and Representatives shall . . . in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going

Continued

of a limited immunity to members of Congress reflects a determination that federal officials enjoy no immunity absent a specific textual grant.

The OLC memorandum determined that this contention was not "necessarily conclusive." OLC Memo at 18. "[I]t could be said with equal validity that Article I, sec. 6, clause 1 does not confer any immunity upon the members of Congress, but rather limits the complete immunity from judicial proceedings which they otherwise would enjoy as members of a branch co-equal with the judiciary." *Id.* Thus, in the absence of a specific textual provision withdrawing it, the President would enjoy absolute immunity. In addition, the textual silence regarding the existence of a presidential immunity from criminal proceedings may merely reflect the fact that it "may have been too well accepted to need constitutional mention (by analogy to the English Crown), and that the innovative provision was the specified process of impeachment extending even to the President." *Id.* at 19. Finally, the historical evidence bearing on whether or not an implicit presidential immunity from judicial process was thought to exist at the time of the Founding was ultimately "not conclusive." *Id.* at 20.

3.

The OLC memorandum next proceeded to consider whether an immunity from indictment or criminal prosecution was implicit in the doctrine of separation of powers as it then stood. OLC Memo at 20. After reviewing judicial precedents and an earlier OLC opinion,[7] *id.* at 21–24, the OLC memorandum concluded that "under our constitutional plan it cannot be said either that the courts have the same jurisdiction over the President as if he were an ordinary citizen or that the President is absolutely immune from the jurisdiction of the courts in regard to any kind of claim." *Id.* at 24. As a consequence, "[t]he proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and functions of the Presidency." *Id.*

The OLC memorandum separated into two parts the determination of the proper constitutional balance with regard to the indictment or criminal prosecution of a sitting President. First, the memorandum discussed whether any of the considerations that had lead to the rejection of the contention that impeachment must precede criminal proceedings for ordinary civil officers applied differently with respect to the President in light of his position as the sole head of an entire branch of government. *Id.*[8] Second, the memorandum considered "whether criminal pro-

to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place

[7] *See* Memorandum from Robert G Dixon, Jr , Assistant Attorney General, Office of Legal Counsel, *Re Presidential Amenability to Judicial Subpoenas* (June 25, 1973).

[8] We note that the statements quoted in footnote 4 above from *The Federalist Papers* and Gouverneur Morris, which provide that the President may be prosecuted *after* having been tried by the Senate, are consistent with the conclusion that the President may enjoy an immunity from criminal prosecution while in office that other civil officers do not The quoted statements are not dispositive of this question, however, as the OLC memorandum

ceedings and execution of potential sentences would improperly interfere with the President's constitutional duties and be inconsistent with his status." *Id.*

a.

The OLC memorandum's analysis of the first of these questions began with a consideration of whether the nature of the defendant's high office would render such a trial "too political for the judicial process." OLC Memo at 24. The memorandum concluded that the argument was, as a general matter, unpersuasive. Nothing about the criminal offenses for which a sitting President would be tried would appear to render the criminal proceedings "too political." The only kind of offenses that could lead to criminal proceedings against the President would be statutory offenses, and "their very inclusion in the Penal Code is an indication of a congressional determination that they can be adjudicated by a judge and jury." *Id.* In addition, there would not appear to be any "weighty reason to differentiate between the President and other officeholders" in regard to the "political" nature of such a proceeding "unless special separation of powers based interests can be articulated with clarity." *Id.* at 25.

The memorandum also considered but downplayed the potential concern that criminal proceedings against the President would be "too political" either because "the ordinary courts may not be able to cope with powerful men" or because no fair trial could be provided to the President. *Id.* Although the fear that courts would be unable to subject powerful officials to criminal process "arose in England where it presumably was valid in feudal time," "[i]n the conditions now prevailing in the United States, little weight is to be given to it as far as most officeholders are concerned." *Id.* Nor did the memorandum find great weight in the contention that the President, by virtue of his position, could not be assured a fair criminal proceeding. To be sure, the memorandum continued, it would be "extremely difficult" to assure a sitting President a fair trial, *id.*, noting that it "might be impossible to impanel a neutral jury." *Id.* However, "there is a serious 'fairness' problem whether the criminal trial precedes or follows impeachment." *Id.* at 26. And "the latter unfairness is contemplated and accepted in the impeachment clause itself, thus suggesting that the difficulty in impaneling a neutral jury should not be viewed, in itself, an absolute bar to indictment of a public figure." *Id.*

The OLC memorandum next considered whether, in light of the President's unique powers to supervise executive branch prosecutions and assert executive

---

recognized. Some statements by subsequent commentators may be read to contemplate criminal prosecution of incumbent civil officers, including the President. *See, e.g.*, William Rawle, *A View of the Constitution of the United States of America* 215 (2d ed. 1829) ("But the ordinary tribunals, as we shall see, are not precluded, either before or after an impeachment, from taking cognizance of the public and official delinquency."). There is also James Wilson's statement in the Pennsylvania ratification debates that "far from being above the laws, he [the President] is amenable to them in his private character as a citizen, and in his public character by *impeachment*." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (Jonathan Elliot ed., 2d ed. 1836).

privilege, the constitutional balance generally should favor the conclusion that a sitting President may not be subjected to indictment or criminal prosecution. *Id.* at 26. According to this argument, the possession of these powers by the President renders the criminal prosecution of a sitting President inconsistent with the constitutional structure. It was suggested that such powers, which relate so directly to the President's status as a law enforcement officer, are simply incompatible with the notion that the President could be made a defendant in a criminal case. The memorandum did not reach a definitive conclusion on the weight to be accorded the President's capacity to exercise such powers in calculating the constitutional balance, although it did suggest that the President's possession of such powers pointed somewhat against the conclusion that the chief executive could be subject to indictment or criminal prosecution during his tenure in office.

In setting forth the competing considerations, the memorandum explained that, on the one hand, "it could be argued that a President's status as defendant in a criminal case would be repugnant to his office of Chief Executive, which includes the power to oversee prosecutions. In other words, just as a person cannot be judge in his own case, he cannot be prosecutor and defendant at the same time." *Id.* This contention "would lose some of its persuasiveness where, as in the *Watergate* case, the President delegates his prosecutorial functions to the Attorney General, who in turn delegates them [by regulation] to a Special Prosecutor." *Id.* At the same time, the status of the Watergate Special Prosecutor was somewhat uncertain, as "none of these delegations is, or legally can be, absolute or irrevocable." *Id.* The memorandum suggested, therefore, that even in the Watergate matter there remained the structural anomaly of the President serving as the chief executive and the defendant in a federal prosecution brought by the executive branch.[9]

The OLC memorandum also considered the degree to which a criminal prosecution of a sitting President is incompatible with the notion that the President possesses the power to assert executive privilege in criminal cases. The memorandum suggested that "the problem of Executive privilege may create the appearance of so serious a conflict of interest as to make it appear improper that the President should be a defendant in a criminal case." *Id.* "If the President claims the privilege he would be accused of suppressing evidence unfavorable to him. If he fails to do so the charge would be that by making available evidence favorable to him he is prejudicing the ability of future Presidents to claim privilege." *Id.* Ulti-

[9] This particular concern might also "lose some of its persuasiveness" with respect to a prosecution by an independent counsel appointed pursuant to the later-enacted Ethics in Government Act of 1978, 28 U.S.C §§ 49, 591 *et seq.*, whose status is defined by statute rather than by regulation. In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court rejected the argument that the independent counsel's statutory protection from removal absent "good cause" or some condition substantially impairing the performance of his duties, *id.* at 663, violates the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, or separation of powers principles more generally, 487 U.S. at 685–96. But since the 1973 OLC memorandum did not place appreciable weight on this argument in determining a sitting President's amenability to criminal prosecution, and since we place no reliance on this argument at all in our reconsideration and reaffirmation of the 1973 memorandum's conclusion, *see infra* part IIB, we need not further explore *Morrison*'s relevance to this argument.

mately, however, the memorandum did not conclude that the identification of the possible incompatibility between the exercise of certain executive powers and the criminal prosecution of a sitting President sufficed to resolve the constitutional question whether a sitting President may be indicted or tried.

b.

The OLC memorandum then proceeded to the second part of its constitutional analysis, examining whether criminal proceedings against a sitting President should be barred by the doctrine of separation of powers because such proceedings would "unduly interfere in a direct or formal sense with the conduct of the Presidency." OLC Memo at 27. It was on this ground that the memorandum ultimately concluded that the indictment or criminal prosecution of a sitting President would be unconstitutional.

As an initial matter, the memorandum noted that in the *Burr* case, *see United States v. Burr*, 25 F. Cas. 187 (C.C. D. Va. 1807) (No. 14,694), President Jefferson claimed a privilege to be free from attending court in person. OLC Memo at 27. Moreover, "it is generally recognized that high government officials are excepted from the duty to attend court in person in order to testify," and "[t]his privilege would appear to be inconsistent with a criminal prosecution which necessarily requires the appearance of the defendant for pleas and trial, as a practical matter." *Id.* The memorandum noted, however, that the privilege against personal appearance was "only the general rule." *Id.* The memorandum then suggested that the existence of such a general privilege was not, by itself, determinative of the question whether a sitting President could be made a defendant in a criminal proceeding. "Because a defendant is already personally involved in a criminal case (if total immunity be laid aside), it may be questioned whether the normal privilege of high officials not to attend court in person applies to criminal proceedings in which the official is a defendant." *Id.*

Even though the OLC memorandum suggested that the existence of a general privilege against personal appearance was not determinative, the memorandum did conclude that the necessity of the defendant's appearance in a criminal trial was of great relevance in determining how the proper constitutional balance should be struck. By virtue of the necessity of the defendant's appearance, 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." *Id.* at 28. Moreover, "[d]uring 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." *Id.* Finally, "under our constitutional plan as outlined in Article I, sec. 3, only the Congress by the formal process of impeachment, and not a court by any process should be accorded the power to interrupt the Presidency or oust an incumbent."

Id. The memorandum rejected the argument that such burdens should not be thought conclusive because even an impeachment proceeding that did not result in conviction might preclude a President from performing his constitutionally assigned duties in the course of defending against impeachment. In contrast to the risks that would attend a criminal proceeding against a sitting President, "this is a risk expressly contemplated by the Constitution, and is a necessary incident of the impeachment process." *Id.*

As a consequence of the personal attention that a defendant must, as a practical matter, give in defending against a criminal proceeding, the memorandum concluded that there were particular reasons rooted in separation of powers concerns that supported the recognition of an immunity for the President while in office. With respect to the physical disabilities alone imposed by criminal prosecution, "in view of the unique aspects of the Office of the President, criminal proceedings against a President in office should not go beyond a point where they could result in so serious a physical interference with the President's performance of his official duties that it would amount to an incapacitation." *Id.* at 29. To be sure, the concern that criminal proceedings would render a President physically incapable of performing constitutionally assigned functions would not be "quite as serious regarding minor offenses leading to a short trial and a fine." *Id.* But "in more serious matters, *i.e.*, those which could require the protracted personal involvement of the President in trial proceedings, the Presidency would be derailed if the President were tried prior to removal." *Id.*

The OLC memorandum also explained that the "non-physical yet practical interferences, in terms of capacity to govern" that would attend criminal proceedings against a sitting President must also be considered in the constitutional balance of competing institutional interests. *Id.* In this regard, the memorandum explained that "the President is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs." *Id.* at 30. In light of the conclusion that an adjudication of the President's criminal culpability would be uniquely destabilizing to an entire branch of government, the memorandum suggested that "special separation of powers based interests can be articulated with clarity" against permitting the ordinary criminal process to proceed. *Id.* at 25. By virtue of the impact that an adjudication of criminal culpability might have, a criminal proceeding against the President is, in some respects, necessarily political in a way that criminal proceedings against other civil officers would not be. In this respect, it would be "incongruous" for a "jury of twelve" to undertake the "unavoidably political" task of rendering judgment in a criminal proceeding against the President. *Id.* at 30. "Surely, the House and Senate, via impeachment, are more appropriate agencies for such a crucial task, made unavoidably political by the nature of the 'defendant.'" *Id.* The memorandum noted further that "[t]he genius of the jury trial" was to provide a forum for ordinary people to pass on

"matters generally within the experience or contemplation of ordinary, everyday life." *Id.* at 31. The memorandum therefore asked whether it would "be fair to such an agency to give it responsibility for an unavoidably political judgment in the esoteric realm of the Nation's top Executive." *Id.*

In accord with this conclusion about the propriety of leaving such matters to the impeachment process, the memorandum noted that "[u]nder our developed constitutional order, the presidential election is the only national election, and there is no effective substitute for it." *Id.* at 32. A criminal trial of a sitting President, however, would confer upon a jury of twelve the power, in effect, to overturn this national election. "The decision to terminate this mandate . . . is more fittingly handled by the Congress than by a jury, and such congressional power is founded in the Constitution." *Id.* In addition, the impeachment process is better suited to the task than is a criminal proceeding because appeals from a criminal trial could "drag out for months." *Id.* at 31. By contrast, "[t]he whole country is represented at the [impeachment] trial, there is no appeal from the verdict, and removal opens the way for placing the political system on a new and more healthy foundation." *Id.*

4.

The OLC memorandum concluded its analysis by addressing "[a] possibility not yet mentioned," which would be "to indict a sitting President but defer further proceedings until he is no longer in office." OLC Memo at 29. The memorandum stated that "[f]rom the standpoint of minimizing direct interruption of official duties — and setting aside the question of the power to govern — this procedure might be a course to be considered." *Id.* The memorandum suggested, however, that "an indictment hanging over the President while he remains in office would damage the institution of the Presidency virtually to the same extent as an actual conviction." *Id.* In addition, there would be damage to the executive branch "flowing from unrefuted charges." *Id.* Noting that "the modern Presidency, under whatever party, has had to assume a leadership role undreamed of in the eighteenth and early nineteenth centuries," the memorandum stated that "[t]he spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination." *Id.* at 30.

The memorandum acknowledged that, "it is arguable that . . . it would be possible to indict a President, but defer trial until he was out of office, without in the meantime unduly impeding the power to govern, and the symbolism on which so much of his real authority rest." *Id.* at 31. But the memorandum nevertheless concluded that

> [g]iven the realities of modern politics and mass media, and the delicacy of the political relationships which surround the Presidency

> both foreign and domestic, there would be a Russian roulette aspect to the course of indicting the President but postponing trial, hoping in the meantime that the power to govern could survive.

Id. In light of the effect that an indictment would have on the operations of the executive branch, "an impeachment proceeding is the only appropriate way to deal with a President while in office." *Id.* at 32.

In reaching this conclusion regarding indictment, the memorandum noted that there are "certain drawbacks," such as the possibility that the statute of limitations might run, thereby resulting in "a complete hiatus in criminal liability." *Id.* As the statute of limitations is ultimately within the control of Congress, however, the memorandum's analysis concluded as follows: "We doubt . . . that this gap in the law is sufficient to overcome the arguments against subjecting a President to indictment and criminal trial while in office." *Id.*

B.

On October 5, 1973, less than two weeks after OLC issued its memorandum, Solicitor General Robert Bork filed a brief in the United States District Court for the District of Maryland that addressed the question whether it would be constitutional to indict or criminally try a sitting President. Then-Vice President Agnew had moved to enjoin, principally on constitutional grounds, grand jury proceeding against him. *See* SG Brief at 3. In response to this motion, Solicitor General Bork provided the court with a brief that set forth "considerations based upon the Constitution's text, history, and rationale which indicate that all civil officers of the United States other than the President are amenable to the federal criminal process either before or after the conclusion of impeachment proceedings." *Id.*[10]

1.

As had the OLC memorandum, the Solicitor General's brief began by noting that "[t]he Constitution provides no explicit immunity from criminal sanctions for any civil officer." SG Brief at 4. Indeed, the brief noted that the only textual grant of immunity for federal officials appears in the Arrest and Speech or Debate Clauses of Article I, Section 6. In referring to these clauses, the brief rejected the suggestion that the immunities set forth there could be understood to be a partial withdrawal from members of Congress of a broader implicit immunity that all civil officers, including the President, generally enjoyed; indeed, "[t]he intent

[10] Unlike the OLC memorandum, the Solicitor General's brief did not specifically distinguish between indictment and other phases of the "criminal process." While explaining that "the President is immune from indictment and trial prior to removal from office," SG Brief at 20, the brief did not specifically opine as to whether the President could be indicted as long as further process was postponed until he left office.

of the Framers was to the contrary." SG Brief at 5.[11] In light of the textual omission of any express grant of immunity from criminal process for civil officers generally, "it would require a compelling constitutional argument to erect such an immunity for a Vice President." *Id.*

In considering whether such a compelling argument could be advanced, the brief distinguished the case of the President from that of the Vice President. Although the Vice President had suggested that the Impeachment Judgment Clause itself demonstrated that "impeachment must precede indictment" for all civil officers, the records of the debates of the constitutional convention did not support that conclusion. *Id.* The Solicitor General argued, in accord with the OLC memorandum, that the "principal operative effect" of the Impeachment Judgment Clause "is solely the preclusion of pleas of double jeopardy in criminal prosecutions following convictions upon impeachments." *Id.* at 7. In any event, the discussion of the Impeachment Judgment Clause in the convention focused almost exclusively on the Office of the President, and "the Framers did not debate the question whether impeachment generally must precede indictment." *Id.* at 6.

To the extent that the convention did debate the timing of impeachment relative to indictment, the brief explained, the convention records "show that the Framers contemplated that this sequence should be mandatory only as to the President." *Id.* Moreover, the remarks contained in those records "strongly suggest an understanding that the President, as Chief Executive, would not be subject to the ordinary criminal process." *Id.* The Framers' "assumption that the President would not be subject to criminal process" did not, however, rest on a general principle applicable to all civil officers. *Id.* Instead, the assumption was "based upon the crucial nature of his executive powers." *Id.* As the brief stated:

> The President's immunity rests not only upon the matters just discussed but also upon his unique constitutional position and powers . . . . There are substantial reasons, embedded not only in the constitutional framework but in the exigencies of government, for distinguishing in this regard between the President and all lesser officers including the Vice President.

Id. at 7.

2.

In explaining why, as an initial matter, the Vice President could be indicted and tried while still in office, the brief argued that indictment would not effect the de facto removal of that officer. SG Brief at 11. "[I]t is clear from history

[11] In this respect, the Solicitor General's brief more forcefully rejected this suggestion than did the OLC memorandum, which reasoned that the clauses gave rise "with equal validity" to competing inferences on this point *See* OLC Memo at 18

that a criminal indictment, or even trial and conviction, does not, standing alone, effect the removal of an impeachable federal officer." *Id.* at 11–12. The brief noted the past constitutional practice of indicting and even convicting federal judges during their tenure, as well as the fact that Vice President Aaron Burr "was subject to simultaneous indictment in two states while in office, yet he continued to exercise his constitutional responsibilities until the expiration of his term." *Id.* at 12. "Apparently, neither Burr nor his contemporaries considered him constitutionally immune from indictment. Although counsel for the Vice President asserted that Burr's indictments were 'allowed to die,' that was merely because 'Burr thought it best not to visit either New York or New Jersey.'" *Id.* at 12 n* (citations omitted). The brief therefore determined that "[c]ertainly it is clear that criminal indictment, trial, and even conviction of a Vice President would not, *ipso facto*, cause his removal; subjection of a Vice President to the criminal process therefore does not violate the exclusivity of the impeachment power as the means of his removal from office." *Id.* at 13.

The brief did conclude, however, that the "structure of the Constitution" precluded the indictment of the President. *Id.* at 15. In framing the inquiry into whether considerations of constitutional structure supported the recognition of an immunity from criminal process for certain civil officers, the brief explained that the "Constitution is an intensely practical document and judicial derivation of powers and immunities is necessarily based upon consideration of the document's structure and of the practical results of alternative interpretations." *Id.* As a consequence,

> [t]he real question underlying the issue of whether indictment of any particular civil officer can precede conviction upon impeachment — and it is constitutional in every sense because it goes to the heart of the operation of government — is whether a governmental function would be seriously impaired if a particular civil officer were liable to indictment before being tried on impeachment.

Id. at 15–16. Given that the constitutional basis for the recognition of a civil officer's immunity from criminal process turned on the resolution of this question, the answer "must necessarily vary with the nature and functions of the office involved." *Id.* at 16.

The brief then proceeded to consider the consequences that criminal prosecutions would have on the performance of the constitutional functions that are the responsibility of various civil officers. As a matter of constitutional structure, Article III judges should enjoy no constitutional immunity from the criminal process because while a "judge may be hampered in the performance of his duty when he is on trial for a felony . . . his personal incapacity in no way threatens the ability of the judicial branch to continue to function effectively." *Id.* at 16.

Similarly, no such immunity should be recognized for members of Congress. The limited immunity in the Arrest and Speech or Debate Clauses reflected

> a recognition that, although the functions of the legislature are not lightly to be interfered with, the public interest in the expeditious and even-handed administration of the criminal law outweighs the cost imposed by the incapacity of a single legislator. Such incapacity does not seriously impair the functioning of Congress.

Id. at 16–17.

The brief argued that the same structural considerations that counseled against the recognition of an immunity from criminal process for individual judges or legislators also counseled against the recognition of such an immunity for the Vice President:

> Although the office of the Vice Presidency is of course a high one, it is not indispensable to the orderly operation of government. There have been many occasions in our history when the nation lacked a Vice President, and yet suffered no ill consequences. And, as has been discussed above, at least one Vice President successfully fulfilled the responsibilities of his office while under indictment in two states.

Id. at 18 (citation omitted). The brief noted that the Vice President had only three constitutional functions: to replace the President in certain extraordinary circumstances; to make, in certain extraordinary circumstances, a written declaration of the President's inability to discharge the powers and duties of his office; and to preside over the Senate and cast the deciding vote in the case of a tie in that body. *Id.* at 19. None of these "constitutional functions is substantially impaired by [the Vice President's] liability to the criminal process." *Id.*

3.

The Solicitor General's brief explained that recognition of presidential immunity from criminal process, in contrast to the vice presidential immunity, was compelled by a consideration of the constitutional structure. After noting that "[a]lmost all legal commentators agree . . . that an incumbent President must be removed from office through conviction upon an impeachment before being subject to the criminal process," SG Brief at 17, the brief repeated its determination that the Framers assumed "that the nation's Chief Executive, responsible as no other single officer is for the affairs of the United States, would not be taken from duties that only he can perform unless and until it is determined that he

is to be shorn of those duties by the Senate." *Id.* A proper understanding of the constitutional structure reflects this shared assumption; in this regard it is "noteworthy that the President is the only officer of government for whose temporary disability the Constitution provides procedure to qualify a replacement." *Id.* at 18. This provision constituted a textual recognition "that the President is the only officer of government for whose temporary disability while in office incapacitates an entire branch of government." *Id.*

Finally, the brief noted that the conclusion that the Framers assumed that the President would enjoy an immunity from criminal process was supported by other considerations of constitutional structure beyond the serious interference with the capacity of the executive branch to perform its constitutional functions. The "Framers could not have contemplated prosecution of an incumbent President because they vested in him complete power over the execution of the laws, which includes, of course, the power to control prosecutions." *Id.* at 20.

C.

The foregoing review demonstrates that, in 1973, the Department applied a consistent approach in analyzing the constitutional question whether a sitting President may be subject to indictment and criminal prosecution. Both the OLC memorandum and the Solicitor General's brief recognized that the President is not above the law, and that he is ultimately accountable for his misconduct that occurs before, during, and after his service to the country. Each also recognized, however, that the President occupies a unique position within our constitutional order.

The Department concluded that neither the text nor the history of the Constitution ultimately provided dispositive guidance in determining whether a President is amenable to indictment or criminal prosecution while in office. It therefore based its analysis on more general considerations of constitutional structure. Because of the unique duties and demands of the Presidency, the Department concluded, a President cannot be called upon to answer the demands of another branch of the government in the same manner as can all other individuals. The OLC memorandum in particular concluded that the ordinary workings of the criminal process would impose burdens upon a sitting President that would directly and substantially impede the executive branch from performing its constitutionally assigned functions, and the accusation or adjudication of the criminal culpability of the nation's chief executive by either a grand jury returning an indictment or a petit jury returning a verdict would have a dramatically destabilizing effect upon the ability of a coordinate branch of government to function. The Department therefore concluded in both the OLC memorandum and the Solicitor General's brief that, while civil officers generally may be indicted and criminally prosecuted during their tenure in office, the constitutional structure permits a sitting President

to be subject to criminal process only after he leaves office or is removed therefrom through the impeachment process.

II.

Since the Department set forth its constitutional analysis in 1973, the Supreme Court has decided three cases that are relevant to whether a sitting President may be subject to indictment or criminal prosecution.[12] *United States v. Nixon*, 418 U.S. 683 (1974), addressed whether the President may assert a claim of executive privilege in response to a subpoena in a criminal case that seeks records of communications between the President and his advisors. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), and *Clinton v. Jones*, 520 U.S. 681 (1997), both addressed the extent to which the President enjoys a constitutional immunity from defending against certain types of civil litigation, with *Fitzgerald* focusing on official misconduct and *Jones* focusing primarily on misconduct "unrelated to any of his official duties as President of the United States and, indeed, occurr[ing] before he was elected to that office." *Id.* at 686.[13]

None of these cases directly addresses the questions whether a sitting President may be indicted, prosecuted, or imprisoned.[14] We would therefore hesitate before

[12] We do not consider either *Nixon v Administrator of General Services*, 433 U S. 425 (1977), or *Morrison v. Olson*, 487 U.S 654 (1988), to be directly relevant to this question, and thus we do not discuss either of them extensively. *Nixon v Administrator of General Services* involved a suit brought by former President Nixon to enjoin enforcement of a federal statute taking custody of and regulating access to his Presidential papers and various tape recordings, in part on the ground that the statute violated the separation of powers While the case did analyze the separation of powers claim under a balancing test of the sort we embrace here, *see infra* text accompanying note 17, the holding and reasoning do not shed appreciable light on the question before us

Morrison v Olson considered and rejected various separation of powers challenges to the independent counsel provisions of the Ethics in Government Act of 1978, which authorized a court-appointed independent counsel to investigate and prosecute the President and certain other high-ranking executive branch officials for violations of federal criminal laws *Morrison* focused on whether a particular *type* of prosecutor could pursue criminal investigations and prosecutions of executive branch officials, in a case involving the criminal investigation of an inferior federal officer The Court accordingly had no occasion to and did not consider whether the Act could constitutionally be invoked to support an independent counsel's indictment of a sitting President.

[13] The Court noted that Jones's state law claim for defamation based on statements by "various persons authorized to speak for the President," 520 U S. at 685, "arguably may involve conduct within the outer perimeter of the President's official responsibilities" *Id.* at 686 For purposes of this memorandum, we use the phrase "unofficial conduct," as did the Court, *see id.* at 693, to refer to conduct unrelated to the President's official duties. *Compare Nixon v. Fitzgerald*, 457 U S. at 756 (recognizing "absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility").

[14] *See United States v. Nixon*, 418 U S. at 687 n 2 (expressly reserving the question whether the President can constitutionally be named an unindicted co-conspirator). *See also Jones v. Clinton*, 36 F Supp 2d 1118, 1134 n.22 (E D Ark 1999) ("[T]he question of whether a President can be held in criminal contempt of court and subjected to criminal penalties raises constitutional issues not addressed by the Supreme Court in the *Jones* case.") As a matter of constitutional practice, it remains the case today that no President has ever so much as testified, or been ordered to testify, in open court, let alone been subject to criminal proceedings as a defendant. *Clinton v. Jones*, 520 U.S at 692 n 14.

In the reply brief for the United States in *United States v Nixon*, in response to President Nixon's argument that a sitting President was constitutionally immune from indictment and therefore immune from being named an unindicted co-conspirator by a grand jury, Watergate Special Prosecutor Leon Jaworski argued that it was not settled as a matter of constitutional law whether a sitting President could be subject to indictment. *See* Reply Brief for the United States, *United States v. Nixon*, 418 U S. 683 (1974) (No 73-1766). He therefore argued that the Court

Continued

concluding that judicial statements made in the context of these distinct constitutional disputes would suffice to undermine the Department's previous resolution of the precise constitutional question addressed here. In any event, however, we conclude that these precedents are largely consistent with the Department's 1973 determinations that (1) the proper doctrinal analysis requires a balancing between the responsibilities of the President as the sole head of the executive branch against the important governmental purposes supporting the indictment and criminal prosecution of a sitting President; and (2) the proper balance supports recognition of a temporary immunity from such criminal process while the President remains in office. Indeed, *United States v. Nixon* and *Nixon v. Fitzgerald* recognized and embraced the same type of constitutional balancing test anticipated in this Office's 1973 memorandum. *Clinton v. Jones*, which held that the President is not immune from at least certain judicial proceedings while in office, even if those proceedings may prove somewhat burdensome, does not change our conclusion in 1973 and again today that a sitting President cannot constitutionally be indicted or tried.

A.

1.

In *United States v. Nixon*, the Court considered a motion by President Nixon to quash a third-party subpoena duces tecum directing the President to produce certain tape recordings and documents concerning his conversations with aides and advisers. 418 U.S. at 686. The Court concluded that the subpoena, which had been issued upon motion by the Watergate Special Prosecutor in connection

---

should not rely on the assumption that a sitting President is immune from indictment in resolving the distinct question whether the President could be named an unindicted co-conspirator In so arguing, the Special Prosecutor rejected the President's contention that either the historical evidence of the intent of the Framers or the plain terms of the Impeachment Judgment Clause foreclosed the indictment of a sitting President as a constitutional matter *See id.* at 24 ("nothing in the text of the Constitution or in its history . imposes any bar to indictment of an incumbent President"), *id* at 29 ("[T]he simple fact is that the Framers never confronted the issue at all ") The Special Prosecutor then argued, as the Department itself had concluded, that "[p]rimary support for such a prohibition must be found, if at all, in considerations of constitutional and public policy including competing factors such as the nature and role of the Presidency in our constitutional system, the importance of the administration of criminal justice, and the principle that under our system no person, no matter what his station, is above the law." *Id.* at 24–25. The Special Prosecutor explained that the contention that the President should be immune from indictment because the functioning of the executive branch depends upon a President unburdened by defending against criminal charges "is a weighty argument and it is entitled to great respect." *Id.* at 31. He noted, however, that "our constitutional system has shown itself to be remarkably resilient" and that "there are very serious implications to the President's position that he has absolute immunity from criminal indictment." *Id* at 32 In particular, the Special Prosecutor argued that to the extent some criminal offenses are not impeachable, the recognition of an absolute immunity from indictment would mean that "the Constitution has left a *lacuna* of potentially serious dimensions " *Id.* at 34. The Special Prosecutor ultimately concluded that "[w]hether these factors compel a conclusion that as a matter of constitutional interpretation a sitting President cannot be indicted for violations of federal criminal laws is an issue about which, at best, there is presently considerable doubt." *Id.* at 25. He explained further that the resolution of this question was not necessary to the decision in *Nixon*, because the Court confronted only the question whether the President could be named an unindicted co-conspirator—an event that "cannot be regarded as equally burdensome." *Id* at 20.

with the criminal prosecution of persons other than the President, satisfied the standards of Rule 17(c) of Federal Rules of Criminal Procedure.[15] The Court therefore proceeded to consider the claim "that the subpoena should be quashed because it demands 'confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce.'" *Id.* at 703 (citation omitted).

In assessing the President's constitutional claim of privilege, the Court first considered the relevant evidence of the Framers' intent and found that it supported the President's assertion of a constitutional interest in confidentiality. *Id.* at 705 n.15. The Court also rejected the suggestion that the textual omission of a presidential privilege akin to the congressional privilege set forth in the Arrest and Speech or Debate Clauses was "dispositive" of the President's claim. *Id.* at 705 n.16. Considering the privilege claim in light of the constitutional structure as a whole, the Court concluded that,

> [w]hatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

Id. at 705–06 (footnote omitted). Such a privilege must be recognized, the Court said, in light of "the importance of . . . confidentiality of Presidential communications in performance of the President's responsibilities." *Id.* at 711. The interest in the confidentiality of Presidential communications was "weighty indeed and entitled to great respect." *Id.* at 712.

The Court next considered the extent to which that interest would be impaired by presidential compliance with a subpoena. The Court concluded that it was quite unlikely that the failure to recognize an absolute privilege for confidential presidential communications against criminal trial subpoenas would, in practical consequence, undermine the constitutional interest in the confidentiality of such communications. "[W]e cannot conclude that advisers will be moved to temper

[15] In response to an earlier subpoena, President Nixon had asserted that, as a constitutional matter, he was absolutely immune from judicial process while in office The United States Court of Appeals for the District of Columbia Circuit rejected that contention. *See Nixon v Sirica*, 487 F 2d 700 (D C. Cir. 1973). The D C. Circuit explained that the President's constitutional position could not be maintained in light of *United States v Burr*, 25 F Cas 187 (C.C.D Va 1807) (No 14,694), and it rejected the contention that the Supreme Court's decision in *Mississippi v Johnson*, 71 U.S. (4 Wall.) 475 (1866), was to the contrary 487 F.2d at 708–12 We note that the Department's 1973 analysis did not depend upon a broad contention that the President is immune from all judicial process while in office Indeed, the OLC memorandum specifically cast doubt upon such a contention and explained that even Attorney General Stanbery had not made such a broad argument in *Mississippi v Johnson See* OLC Memo at 23 ("Attorney General Stanbery's reasoning is presumably limited to the power of the courts to review official action of the President")

the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." *Id.* Finally, the Court balanced against the President's interest in maintaining the confidentiality of his communications "[t]he impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *Id.* at 707. The Court predicated its conclusion on the determination that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *Id.* at 709.

The assessment of these competing interests led the Court to conclude that "the legitimate needs of the judicial process may outweigh Presidential privilege," *id.* at 707, and it therefore determined that it was "necessary to resolve those competing interests in a manner that preserves the essential functions of each branch." *Id.* Here, the Court weighed the President's constitutional interest in confidentiality, *see id.* at 707–08, against the nation's "historic commitment to the rule of law," *id.* at 708, and the requirement of "the fair administration of criminal justice." *Id.* at 713. The Court ultimately concluded that the President's generalized interest in confidentiality did not suffice to justify a privilege from all criminal subpoenas, although it noted that a different analysis might apply to a privilege based on national security interests. *Id.* at 706.

2.

In *Nixon v. Fitzgerald*, the Supreme Court considered a claim by former President Nixon that he enjoyed an absolute immunity from a former government employee's suit for damages for President Nixon's allegedly unlawful official conduct while in office. The Court endorsed a rule of absolute immunity, concluding that such immunity is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." 457 U.S. at 749.

The Court reviewed various statements by the Framers and early commentators, finding them consistent with the conclusion that the Constitution was adopted on the assumption that the President would enjoy an immunity from damages liability for his official actions. *Id.* at 749, 751 n.31. The Court once again rejected the contention that the textual grant of a privilege to members of Congress in Article I, Section 6 precluded the recognition of an implicit privilege on behalf of the President. *See id.* at 750 n.31.

But as in *United States v. Nixon*, the Court found that "the most compelling arguments arise from the Constitution's separation of powers and the Judiciary's historic understanding of that doctrine," *Id.* at 752 n.31. It emphasized that "[t]he

President occupies a unique position in the constitutional scheme . . . as the chief constitutional officer of the Executive Branch." *Id.* at 749–50. Although other government officials enjoy only qualified immunity from civil liability for their official actions, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. Such lawsuits would be likely to occur in considerable numbers since the "President must concern himself with matters likely to 'arouse the most intense feelings.'" *Id.* at 752. Yet, the Court noted, "it is in precisely such cases that there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially' with the duties of his office." *Id.* (citations omitted). The Court emphasized that the "visibility" of the President's office would make him "an easily identifiable target for suits for civil damages," and that "[c]ognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.* at 753.

The Court next examined whether the constitutional interest in presidential immunity from civil damages arising from the performance of official duties was outweighed by the governmental interest in providing a forum for the resolution of damages actions generally, and actions challenging the legality of official presidential conduct in particular. The Court concluded that it was appropriate to consider the "President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Id.* at 753. As the Court explained,

> [i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States. But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch.

Id. at 753–54 (citations omitted). In performing this balancing, the Court noted that recognition of a presidential immunity from such suits "will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive," in light of other mechanisms creating "incentives to avoid misconduct" (including impeachment). *Id.* at 757. The Court concluded that the constitutional interest in ensuring the President's ability to perform his constitutional functions outweighed the competing interest in permitting civil actions for unlawful official conduct to proceed.

3.

In *Clinton v. Jones*, the Court declined to extend the immunity recognized in *Fitzgerald* to civil suits challenging the legality of a President's unofficial conduct. In that case, the plaintiff sought to recover compensatory and punitive damages for alleged misconduct by President Clinton occurring before he took federal office. The district court denied the President's motion to dismiss based on a constitutional claim of temporary immunity and held that discovery should go forward, but granted a stay of the trial until after the President left office. The court of appeals vacated the order staying the trial, while affirming the denial of the immunity-based motion to dismiss. The Supreme Court affirmed, permitting the civil proceedings to go forward against the President while he still held office.

In considering the President's claim of a temporary immunity from suit, the Court first distinguished *Nixon v. Fitzgerald*, maintaining that "[t]he principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct." *Clinton v. Jones*, 520 U.S. at 692–93. The point of immunity for official conduct, the Court explained, is to "enabl[e] such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability." *Id.* at 693. But "[t]his reasoning provides no support for an immunity for *unofficial* conduct." *Id.* at 694. Acknowledging *Fitzgerald*'s additional concern that " '[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government,' " the Court treated this prior statement as dictum because "[i]n context . . . it is clear that our dominant concern" had been the chilling effect that liability for official conduct would impose on the President's performance of his official duties. *Id.* at 694 n.19 (quoting *Nixon v. Fitzgerald*, 457 U.S. at 751).

After determining that the historical evidence of the Framers' understanding of presidential immunity was either ambiguous or conflicting and thus could not by itself support the extension of presidential immunity to unofficial conduct, *see id.* at 695–97, the Court considered the President's argument that the "text and structure" of the Constitution supported his claim to a temporary immunity. The Court accepted his contention that "the doctrine of separation of powers places limits on the authority of the Federal Judiciary to interfere with the Executive Branch," *id.* at 697–98, and conceded that the powers and obligations conferred upon a single President suggest that he occupies a " 'unique position in the constitutional scheme.' " *Id.* at 698 (quoting *Nixon v. Fitzgerald*, 457 U.S. at 749). But "[i]t does not follow . . . that separation-of-powers principles would be violated by allowing this action to proceed." *Id.* at 699.

Rather than claiming that allowing the civil suit would either aggrandize judicial power or narrow any constitutionally defined executive powers, the President

argued that, as an inevitable result of the litigation, "burdens will be placed on the President that will hamper the performance of his official duties," *id.* at 701, both in the *Jones* case and others that might follow. The Court first rejected the factual premise of the President's claim, asserting that the President's "predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case." *Id.* at 702. "As for the case at hand," the Court continued, "if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's time." *Id.* The Court emphasized at the outset that it was not "confront[ing] the question whether a court may compel the attendance of the President at any specific time or place," *id.* at 691, and it "assume[d] that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person." *Id.* at 691–92.

Moreover, the Court explained, "even quite burdensome interactions" between the judicial and executive branches do not "necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Id.*; *see also id.* at 703 ("that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution"). Noting that courts frequently adjudicate civil suits challenging the legality of official presidential actions, the Court also observed that courts occasionally have ordered Presidents to provide testimony and documents or other materials. *Id.* at 703–05 (citing *United States v. Nixon* as an example). By comparison, the Court asserted, "[t]he burden on the President's time and energy that is a mere byproduct of [the power to determine the legality of his unofficial conduct through civil litigation] surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions." *Id.* at 705.

Finally, the Court agreed with the court of appeals that the district court abused its discretion by invoking its equitable powers to defer any trial until after the President left office, even while allowing discovery to continue apace. The Court observed that such a "lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial," *id.* at 707, in particular the concern that delay "would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party." *Id.* at 707–08. On the other hand, continued the Court, assuming careful trial management, "there is no reason to assume that the district courts will be either unable to accommodate the President's [scheduling] needs or unfaithful to the tradition — especially in matters involving national security — of giving 'the utmost deference to Presidential responsibilities.'" *Id.* at 709 (quoting *United States v. Nixon*, 418 U.S. at 710–11). On this

basis, the Court determined that a stay of any trial pending the President's leaving office was not supported by equitable principles.[16]

B.

We believe that these precedents, *United States v. Nixon*, *Nixon v. Fitzgerald*, and *Clinton v. Jones*, are consistent with the Department's analysis and conclusion in 1973. The cases embrace the methodology, applied in the OLC memorandum, of constitutional balancing. That is, they balance the constitutional interests underlying a claim of presidential immunity against the governmental interests in rejecting that immunity. And, notwithstanding *Clinton*'s conclusion that *civil* litigation regarding the President's unofficial conduct would not unduly interfere with his ability to perform his constitutionally assigned functions, we believe that *Clinton* and the other cases do not undermine our earlier conclusion that the burdens of *criminal* litigation would be so intrusive as to violate the separation of powers.

1.

The balancing analysis relied on in the 1973 OLC memorandum has since been adopted as the appropriate mode of analysis by the Court. In 1996, this Office summarized the principles of analysis for resolving separation of powers issues found in the Court's recent cases. *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 133–35 (1996). As noted there, " 'the proper inquiry focuses on the extent to which [a challenged act] pre-

[16] One final recent precedent merits brief mention. the federal district court's decision to hold President Clinton in civil contempt for statements made in the course of a deposition taken in the *Jones* case and to order him to pay expenses (including attorneys' fees) to the plaintiff and costs to the court. *See Jones v. Clinton*, 36 F Supp 2d 1118 (E.D. Ark 1999) This decision was not appealed, and for purposes of our analysis here we assume arguendo that it is correct But a court order citing a sitting President for civil contempt does not support the proposition that a sitting President can be subject even to criminal contempt sanctions, let alone indictment and criminal prosecution. Civil contempt differs from criminal contempt because the former is designed to ensure compliance with court orders or to remedy harms inflicted upon another litigant, while criminal contempt is intended to punish the commission of a public wrong *See United Mine Workers v Bagwell*, 512 U.S 821, 826–30 (1994) A civil contempt proceeding is thus not likely to be either as consuming of the defendant's time or as detrimental to the defendant's public standing as a criminal contempt proceeding; that is particularly true when the civil contempt sanction takes the form of an award of costs to the court or other litigant. Significantly, the district court that imposed the contempt citation emphasized the narrow scope of its decision. *See Jones*, 36 F Supp. 2d at 1125 (explaining that "the Court recognizes that significant constitutional issues would arise were this Court to impose sanctions against the President that impaired his decision-making or otherwise impaired him in the performance of his official duties," and emphasizing that "[n]o such sanction will be imposed") The court further noted that, while "the power [upheld by the Supreme Court in *Clinton v. Jones*] to determine the legality of the President's unofficial conduct includes with it the power to issue civil contempt citations and impose sanctions for his unofficial conduct which abuses the judicial process," *id*, the Supreme Court's decision did not imply the existence of any authority to impose criminal sanctions on the President, *id.* at 1134 n.22 ("the question of whether a President can be held in criminal contempt of court and subjected to criminal penalties raises constitutional issues not addressed by the Supreme Court in the *Jones* case") For these reasons, this distinct court decision does not affect our analysis of the soundness of the Department's 1973 conclusion that it would be unconstitutional to indict or prosecute a President while he remains in office

vents the Executive Branch from accomplishing its constitutionally assigned functions.' " *Id.* at 133 (quoting *Administrator of General Services*, 433 U.S. at 443). The inquiry is complex, because even where the acts of another branch would interfere with the executive's "accomplishing its functions," this "would not lead inexorably to" invalidation; rather, the Court "would proceed to 'determine whether that impact is justified by an overriding need to promote' " legitimate governmental objectives. *Id.* (quoting *Administrator of General Services*, 433 U.S. at 443).

These inquiries formed the basis for the Court's analysis in *United States v. Nixon*, where the Court employed a balancing test to preserve the opposing interests of the executive and judicial branches with respect to the President's claim of privilege over confidential communications. The Court's resort to a balancing test was quite explicit. *See e.g.*, 418 U.S. at 711–12 ("In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in the performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice."). In *Nixon v. Fitzgerald*, the Court's recognition of an absolute presidential immunity from civil suits for damages concerning official conduct also reflected a balance of competing interests. As the Court explained, "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States. But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." 457 U.S. at 753–54. And in *Clinton v. Jones*, the Court again acknowledged that " '[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.' " 520 U.S. at 701 (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996)).[17]

We now explain why, in light of the post-1973 cases, we agree with the 1973 conclusions that indicting and prosecuting a sitting President would "prevent the executive from accomplishing its constitutional functions" and that this impact cannot "be justified by an overriding need" to promote countervailing and legitimate government objectives.

[17] Although the Court in *Clinton v Jones* did not explicitly use the language of "balancing" to weigh the President's interests against those of the civil litigant, the Court did assess both what it saw as the rather minor disruption to the President's office from defending against such civil actions as well as the interests in the private litigant in avoiding delay in adjudication *See id.* at 707–08 In any event, the Court may not have explicitly invoked the second part of the analysis (weighing the intrusions on the executive branch against the legitimate governmental interests opposed to immunity), because it found the burdens of civil litigation insufficiently weighty to warrant an extended inquiry. *See Administrator of General Services*, 433 U.S at 443 (emphasis added) (explaining that when there is a potential for disruption of presidential authority, "the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions *Only where the potential for disruption is present* must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."), *cited with approval in Clinton v Jones*, 520 U.S. at 701

2.

Three types of burdens merit consideration: (a) the actual imposition of a criminal sentence of incarceration, which would make it physically impossible for the President to carry out his duties; (b) the public stigma and opprobrium occasioned by the initiation of criminal proceedings, which could compromise the President's ability to fulfill his constitutionally contemplated leadership role with respect to foreign and domestic affairs; and (c) the mental and physical burdens of assisting in the preparation of a defense for the various stages of the criminal proceedings, which might severely hamper the President's performance of his official duties. In assessing the significance of these burdens, two features of our constitutional system must be kept in mind.

First, the Constitution specifies a mechanism for accusing a sitting President of wrongdoing and removing him from office. *See* U.S. Const. art. II, § 4 (providing for impeachment by the House, and removal from office upon conviction in the Senate, of sitting Presidents found guilty of "Treason, Bribery or other high Crimes and Misdemeanors"). While the impeachment process might also, of course, hinder the President's performance of his duties, the process may be initiated and maintained only by politically accountable legislative officials. Supplementing this constitutionally prescribed process by permitting the indictment and criminal prosecution of a sitting president would place into the hands of a single prosecutor and grand jury the practical power to interfere with the ability of a popularly elected President to carry out his constitutional functions.

Second, "[t]he President occupies a unique position in the constitutional scheme." *Fitzgerald*, 457 U.S. at 749. As the court explained, "Article II, § 1 of the Constitution provides that '[t]he executive Power shall be vested in a President of the United States . . . .' This grant of authority establishes the President as the chief constitutional officer of the Executive branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Id.* at 749–50. In addition to the grant of executive power, other provisions of Article II make clear the broad scope and important nature of the powers entrusted to the President. The President is charged to "take Care that the Laws be faithfully executed." *See* U.S. Const. art. II, § 3. He and the Vice President are the only officials elected by the entire nation. *See id.* art. II, § 1. He is the sole official for whose temporary disability the Constitution expressly provides procedures to remedy. *See id.* art. II, § 1, cl. 6; *id.* amend. XXV. He is the Commander in Chief of the Army and the Navy. *See id.* art. II, § 2, cl. 2. He has the power to grant reprieves and pardons for offenses against the United States. *See id.* He has the power to negotiate treaties and to receive Ambassadors and other public ministers. *See id.* art. II, § 2, cl. 2. He is the sole representative to foreign nations. He appoints all of the "Judges of the supreme Court" and the principal officers of the government. *See id.* art. II, § 2, cl. 2. He is the only constitutional officer

empowered to require opinions from the heads of departments, *see id.* art. II, § 2, cl. 1, and to recommend legislation to the Congress. *See id.* art. II, § 3. And he exercises a constitutional role in the enactment of legislation through the presentation requirement and veto power. *See id.* art. I, § 7, cls. 2, 3.

Moreover, the practical demands on the individual who occupies the Office of the President, particularly in the modern era, are enormous. President Washington wrote that "[t]he duties of my Office * * * at all times * * * require an unremitting attention," Brief for the United States as Amicus Curiae in Support of the Petitioner at 11, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95–1853) (quoting Arthur B. Tourtellot, *The Presidents on the Presidency* 348 (1964)). In the two centuries since the Washington Administration, the demands of government, and thus of the President's duties, have grown exponentially. In the words of Justice Jackson, "[i]n drama, magnitude and finality [the President's] decisions so far overshadow any others that almost alone he fills the public eye and ear." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring). In times of peace or war, prosperity or economic crisis, and tranquility or unrest, the President plays an unparalleled role in the execution of the laws, the conduct of foreign relations, and the defense of the Nation. As Justice Breyer explained in his opinion concurring in the judgment in *Clinton v. Jones*:

> The Constitution states that the "executive Power shall be vested in a President." Art. II, § 1. This constitutional delegation means that a sitting President is unusually busy, that his activities have an unusually important impact upon the lives of others, and that his conduct embodies an authority bestowed by the entire American electorate. . . . [The Founders] sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many.

520 U.S. at 711–12. The burdens imposed on a sitting President by the initiation of criminal proceedings (whether for official or unofficial wrongdoing) therefore must be assessed in light of the Court's "long recogni[tion of] the 'unique position in the constitutional scheme' that this office occupies." *Id.* at 698 (quoting *Nixon v. Fitzgerald*, 457 U.S. at 749).

a.

Given the unique powers granted to and obligations imposed upon the President, we think it is clear that a sitting President may not constitutionally be imprisoned. The physical confinement of the chief executive following a valid conviction

would indisputably preclude the executive branch from performing its constitutionally assigned functions. As Joseph Story wrote:

> There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office . . . .

3 Joseph Story, *Commentaries on the Constitution of the United States* 418–19 (1st ed. 1833) (*quoted in Nixon v. Fitzgerald*, 457 U.S. at 749).[18]

To be sure, the Twenty-fifth Amendment provides that either the President himself, or the Vice-President along with a majority of the executive branch's principal officers or some other congressionally determined body, may declare that the President is "unable to discharge the powers and duties of his office," with the result that the Vice President assumes the status and powers of Acting President. *See* U.S. Const. amend. XXV, §§ 3, 4. But it is doubtful in the extreme that this Amendment was intended to eliminate or otherwise affect any constitutional immunities the President enjoyed prior to its enactment. None of the contingencies discussed by the Framers of the Twenty-fifth Amendment even alluded to the possibility of a criminal prosecution of a sitting President.[19] Of course, it might be argued that the Twenty-fifth Amendment provides a mechanism to ensuring that, if a sitting President were convicted and imprisoned, there could

[18] *See also* Alexander M. Bickel, *The Constitutional Tangle*, The New Republic, Oct 6, 1973, at 14, 15 ("In the presidency is embodied the continuity and indestructibility of the state It is not possible for the government to function without a President, and the Constitution contemplates and provides for uninterrupted continuity in that office. Obviously the presidency cannot be conducted from jail, nor can it be effectively carried on while an incumbent is defending himself in a criminal trial ").

[19] The Framers of the Twenty-fifth Amendment were primarily concerned with the possibility that a sitting President might be unable to discharge his duties due to incapacitation by physical or mental illness *See generally Hearings on Presidential Inability Before the Subcomm. on Constitutional Amendments of the Senate Comm on the Judiciary*, 88th Cong. (1963), *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 88th Cong. (1964); *Hearings on Presidential Inability Before the House Comm on the Judiciary*, 89th Cong. (1965), *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcomm on Constitutional Amendments of the Senate Comm. on the Judiciary*, 89th Cong. (1965) ("1965 Senate Hearings"); *Selected Materials on the Twenty-Fifth Amendment*, S. Doc. No 93–42 (1973) which includes Senate Reports Nos 89–1382 and 89–66 But the amendment's terms "unable" and "inability" were not so narrowly defined, apparently out of a recognition that situations of inability might take various forms not neatly falling into categories of physical or mental illness *See, e.g*, 1965 Senate Hearings at 20 ("[T]he intention of this legislation is to deal with any type of inability, whether it is from traveling from one nation to another, a breakdown of communications, capture by the enemy or anything that is imaginable. The inability to perform the powers and duties of the office, for any reason is inability under the terms that we are discussing ") (statement of Sen Bayh); John D Feerick, *The Twenty-fifth Amendment* 197 (1976) ("Although the terms 'unable' and 'inability' are nowhere defined in either Section 3 or 4 of the Amendment (or in Article II), this was not the result of an oversight. Rather, it reflected a judgment that a rigid constitutional definition was undesirable, since cases of inability could take various forms not neatly fitting into such a definition."). Thus, while imprisonment appears not to have been expressly considered by the Framers as a form of inability, the language of the Twenty-fifth Amendment might be read broadly enough to encompass such a possibility

be a transfer of powers to an Acting President rather than a permanent disabling of the executive branch. But the possibility of Vice-Presidential succession "hardly constitutes an argument in favor of allowing other branches to take actions that would disable the sitting President." [20] To rationalize the President's imprisonment on the ground that he can be succeeded by an "Acting" replacement, moreover, is to give insufficient weight to the people's considered choice as to whom they wish to serve as their chief executive, and to the availability of a politically accountable process of impeachment and removal from office for a President who has engaged in serious criminal misconduct.[21] While the executive branch would continue to function (albeit after a period of serious dislocation), it would still not do so as the people intended, with their elected President at the helm.[22] Thus, we conclude that the Twenty-fifth Amendment should not be understood *sub silentio* to withdraw a previously established immunity and authorize the imprisonment of a sitting President.

b.

Putting aside the possibility of criminal confinement during his term in office, the severity of the burden imposed upon the President by the stigma arising both from the initiation of a criminal prosecution and also from the need to respond to such charges through the judicial process would seriously interfere with his ability to carry out his constitutionally assigned functions. To be sure, in *Clinton v. Jones* the Supreme Court rejected the argument that a sitting President is constitutionally immune from civil suits seeking damages for unofficial misconduct. But the distinctive and serious stigma of indictment and criminal prosecution imposes burdens fundamentally different in kind from those imposed by the initiation of a civil action, and these burdens threaten the President's ability to act as the Nation's leader in both the domestic and foreign spheres. *Clinton*'s reasoning does not extend to the question whether a sitting President is constitutionally immune from criminal prosecution; nor does it undermine our conclusion that a proper balancing of constitutional interests in the criminal context dictates a presidential immunity from such prosecution.

---

[20] 1 Laurence H. Tribe, *American Constitutional Law* § 4–14, at 755 n.5 (3rd ed. 2000)

[21] If the President resists the conclusion that he is "unable" to discharge his public duties, a transition of power to the Vice President as Acting President depends on the concurrence of both Houses of Congress by a two-thirds vote But this ultimate congressional decision does not transform the process into a politically accountable one akin to impeachment proceedings, for the situation forcing Congress's hand would have been triggered by the decision of a single prosecutor and unaccountable grand jury to initiate and pursue the criminal proceedings in the first place

[22] Although we do not consider here whether an elected President loses his immunity from criminal prosecution if and while he is temporarily dispossessed of his presidential authority under either § 3 or § 4 of the Twenty-fifth Amendment, structural considerations suggest that an elected President remains immune from criminal prosecution until he permanently leaves the Office by the expiration of his term, resignation, or removal through conviction upon impeachment

The greater seriousness of criminal as compared to civil charges has deep roots not only in the Constitution but also in its common law antecedents. Blackstone distinguished between criminal and civil liability by describing the former as a remedy for "public wrongs" and the latter as a response to "private wrongs." 4 William Blackstone, *Commentaries* *5. As he explained, "[t]he distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity." *Id.* This fundamental distinction explains why a criminal prosecution may proceed without the consent of the victim and why it is brought in the name of the sovereign rather than the person immediately injured by the wrong. The peculiar public opprobrium and stigma that attach to criminal proceedings also explain, in part, why the Constitution provides in Article III for a right to a trial by jury for all federal crimes, *see Lewis v. United States*, 518 U.S. 322, 334 (1996) (Kennedy, J. concurring), and provides in the Sixth Amendment for a "speedy and public trial," U.S. Const. amend. VI, *see Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967) (pendency of an indictment "may subject [the defendant] to public scorn" and "indefinitely prolong[ ] this oppression, as well as the 'anxiety and concern accompanying public accusation' ") (citation omitted).[23]

The magnitude of this stigma and suspicion, and its likely effect on presidential respect and stature both here and abroad, cannot fairly be analogized to that caused by initiation of a private civil action. A civil complaint filed by a private person is understood as reflecting one person's allegations, filed in court upon payment of a filing fee. A criminal indictment, by contrast, is a public rather than private allegation of wrongdoing reflecting the official judgment of a grand jury acting under the general supervision of the District Court. Thus, both the ease and public meaning of a civil filing differ substantially from those of a criminal indictment. *Cf. FDIC v. Mallen*, 486 U.S. 230, 243 (1988) ("Through the return of the indictment, the Government has already accused the appellee of serious wrongdoing.").[24] Indictment alone risks visiting upon the President the disabilities that

[23] In *Klopfer*, the Supreme Court held that the Sixth Amendment right to a speedy trial is violated by the practice of having a prosecutor indefinitely suspend a prosecution after a grand jury returns an indictment. One of the purposes of the speedy trial right is to enable the defendant to be freed, as promptly as reasonably possible, from the "disabling cloud of doubt and anxiety that an overhanging indictment invariably carries with it." 1 Laurence H Tribe, *American Constitutional Law* § 4–14, at 756. *Cf In re Winship*, 397 U.S. 358, 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 ").

[24] In *Mallen*, for example, the Court rejected a due process challenge to a statute authorizing the immediate suspension for up to 90 days, without a pre-suspension hearing, of a bank officer or director who is indicted for a felony involving dishonesty or breach of trust. In describing the significance of indictment for purposes of the due process calculus, the Court observed as follows

> The returning of the indictment establishes that an independent body has determined that there is probable cause to believe that the officer has committed a crime . This finding is relevant in at least two

stem from the stigma and opprobrium associated with a criminal charge, undermining the President's leadership and efficacy both here and abroad. Initiation of a criminal proceeding against a sitting President is likely to pose a far greater threat than does civil litigation of severely damaging the President's standing and credibility in the national and international communities. While this burden may be intangible, nothing in the Supreme Court's recent case law draws into question the Department's previous judgment that "to wound [the President] by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs." OLC Memo at 30.

c.

Once criminal charges are filed, the burdens of responding to those charges are different in kind and far greater in degree than those of responding to civil litigation. The Court in *Clinton v. Jones* clearly believed that the process of defending himself in civil litigation would not impose unwieldy burdens on the President's time and energy. The Court noted that "[m]ost frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement of the defendant." 520 U.S. at 708. Moreover, even if the litigation proceeds all the way to trial, the Court explicitly assumed that "there would be no necessity for the President to attend in person, though he could elect to do so." *Id.* at 692.

These statements are palpably inapposite to criminal cases. 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. The Constitution contemplates the defendant's attendance at trial and, indeed, secures his right to be present by ensuring his right to confront witnesses who appear at the trial. *See* U.S. Const. amend. VI; *Illinois v. Allen*, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."); *see also* Fed. R. Crim. P. 43(a); *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (Due Process Clause also protects right to be present). The Constitution also guarantees the defendant a right to counsel, which is itself premised on the defendant's ability to communicate with such counsel and assist in the preparation of

important ways First, the finding of probable cause by an independent body demonstrates that the suspension is not arbitrary Second, the return of the indictment itself is an objective fact that will in most cases raise serious public concern that the bank is not being managed in a responsible manner.

486 U S at 244–45.

his own defense. *See* U.S. Const. amend. VI.[25] These protections stand in stark contrast to the Constitution's relative silence as to the rights of parties in civil proceedings, and they underscore the unique mental and physical burdens that would be placed on a President facing criminal charges and attempting to fend off conviction and punishment. These burdens inhere not merely in the actual trial itself, but also in the substantial preparation a criminal trial demands.

It cannot be said of a felony criminal trial, as the Court said of the civil action before it in *Clinton v. Jones*, that such a proceeding, "if properly managed by the District Court, . . . [is] highly unlikely to occupy any substantial amount of petitioner's time." *Clinton*, 520 U.S. at 702.[26] The Court there emphasized the many ways in which a district court adjudicating a civil action against the President could and should use flexibility in scheduling so as to accommodate the demands of the President's constitutionally assigned functions on his time and energy. *See id.* at 706 (noting that a district court "has broad discretion to stay proceedings as an incident to its power to control its own docket").[27] The Court explicitly "assume[d] that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule." *Id.* at 691–92. The Court thus concluded that "[a]lthough scheduling problems may arise, there is no reason to assume that the district courts will be . . . unable to accommodate the President's needs." *Id.* at 709.[28]

Although the Court determined in *Clinton v. Jones* that "[t]he fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the chief Executive is not sufficient to establish a violation of the Constitution," 520 U.S. at 703, this determination must be understood in light of the Court's own characterizations of the manageable burdens imposed

[25] In theory, of course, the President could decline to appear at his own criminal trial, notwithstanding the strong Anglo-American tradition against trials *in absentia* But availability of this option says little about the constitutional issue, there is no evidence that the Framers intended that the President waive an entire panoply of constitutional guarantees and risk conviction in order to fulfill his public obligations.

[26] With respect specifically to concerns about mental preoccupation, the Court in *Clinton v. Jones* "recognize[d] that a President, like any other official or private citizen, may become distracted or preoccupied by pending litigation," 520 U.S at 705 n.40, but likened this distraction to other "vexing" distractions caused by "a variety of demands on their time, . . . some private, some political, and some as a result of official duty." *Id* As a "predictive judgment," *id.* at 702, however, the level of mental preoccupation entailed by a threat of criminal conviction and imprisonment would likely far exceed that entailed by a private civil action

[27] In his opinion concurring in the judgment, Justice Breyer further emphasized the Court's assumptions with respect to the scheduling flexibility properly due the President by the district court He explained that he agreed "with the majority that the Constitution does not automatically grant the President an immunity from civil lawsuits based upon his private conduct " 520 U S. at 710. Nevertheless, he emphasized that

> once the President sets forth and explains a conflict between judicial proceeding and public duties, the matter changes At that point, the Constitution permits a judge to schedule a trial in an ordinary civil damages action (where postponement normally is possible without overwhelming damage to a plaintiff) only within the constraints of a constitutional principle—a principle that forbids a federal judge in such a case to interfere with the President's discharge of his public duties.

Id.

[28] The Court added that, "[a]lthough Presidents have responded to written interrogatories, given depositions, and provided videotaped trial testimony, no sitting President has ever testified, or been ordered to testify, in open court " *Id.* at 692 n 14. In criminal litigation, as compared to civil litigation, however, the presence of the accused is a *sine qua non* of a valid trial, absent extraordinary circumstance.

by civil litigation. By contrast, criminal proceedings do not allow for the flexibility in scheduling and procedures upon which *Clinton v. Jones* relied. Although the Court emphasized that "our decision rejecting the immunity claim and allowing the case to proceed does not require us to confront the question whether a court may compel the attendance of the President at any specific time or place," *id.* at 691, a criminal prosecution would require the President's personal attention and attendance at specific times and places, because the burdens of criminal defense are much less amenable to mitigation by skillful trial management. Indeed, constitutional rights and values are at stake in the defendant's ability to be present for all phases of his criminal trial. For the President to maintain the kind of effective defense the Constitution contemplates, his personal appearance throughout the duration of a criminal trial could be essential. Yet the Department has consistently viewed the requirement that a sitting President personally appear at a trial at a particular time and place in response to judicial process to raise substantial separation of powers concerns. *See* Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutional Concerns Implicated by Demand for Presidential Evidence in a Criminal Prosecution* (Oct. 17, 1988).[29]

In contrast to ordinary civil litigation, moreover, which the Court in *Clinton v. Jones* described as allowing the trial court to minimize disruptions to the President's schedule, the Sixth Amendment's guarantee to criminal defendants of a "speedy and public trial," U.S. Const. amend. VI, circumscribes the trial court's flexibility. Once a defendant is indicted, his right to a speedy trial comes into play. *See United States v. Marion*, 404 U.S. 307 (1971) (defendant's speedy trial right is triggered when he is "accused" by being indicted). In addition, under the federal Speedy Trial Act, the trial judge's discretion is constrained in order to meet the statutory speedy trial deadlines. *See* 18 U.S.C. §§ 3161–3174 (1994). While a defendant may waive his speedy trial rights, it would be a peculiar constitutional argument to say that the President's ability to perform his constitutional

[29] The Kmiec memorandum explained that "it has been the rule since the Presidency of Thomas Jefferson that a judicial subpoena in a criminal case may be issued to the President, and any challenge to the subpoena must be based on the nature of the information sought rather than any immunity from process belonging to the President." *See* Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re Constitutional Concerns Implicated by Demand for Presidential Evidence in a Criminal Prosecution* at 2 (Oct. 17, 1988). However, the memorandum proceeded to explain, "[a]lthough there are no judicial opinions squarely on point, historical precedent has clearly established that sitting Presidents are not required to testify in person at criminal trials." *Id.* at 3 (reviewing precedents). The memorandum noted in particular that Attorney General Wirt had advised President Monroe in 1818 that "[a] subpoena ad testificandum may I think be properly awarded to the President of the U.S. . . . But if the presence of the chief magistrate be required at the seat of government by his official duties, I think those duties paramount to any claim which an individual can have upon him, and that his personal attendance on the court from which the summons proceeds ought to be, and must, of necessity, be dispensed with . . . ." *Id.* at 4 (quoting Opinion of Attorney General Wirt, January 13, 1818, *quoted in* Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses. A Brief Historical Footnote*," 1975 U. Ill. L. F. 1, 6). The memorandum concluded that "the controlling principle that emerges from the historical precedents is that a sitting President may not be required to testify in court at a criminal trial because his presence is required elsewhere for his 'official duties'—or, in the vernacular of the time, required at 'the seat of government.'" *Id.* at 6 (citations and footnote omitted).

duties should not be considered unduly disrupted by a criminal trial merely because the President could, in theory, waive his personal constitutional right to a speedy trial. The Constitution should not lightly be read to put its Chief Executive officer to such a choice.

In sum, unlike private civil actions for damages — or the two other judicial processes with which such actions were compared in *Clinton v. Jones* (subpoenas for documents or testimony and judicial review and occasional invalidation of the President's official acts, *see* 520 U.S. at 703–05) — criminal litigation uniquely requires the President's *personal* time and energy, and will inevitably entail a considerable if not overwhelming degree of mental preoccupation.[30] Indictment also exposes the President to an official pronouncement that there is probable cause to believe he committed a criminal act, *see, e.g., United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297–98 (1991), impairing his credibility in carrying out his constitutional responsibilities to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and to speak as the "sole organ" of the United States in dealing with foreign nations. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936); *see also Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (describing the President "as the Nation's organ for foreign affairs"); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) ("The President . . . is the constitutional representative of the United States in its dealings with foreign nations."). These physical and mental burdens imposed by an indictment and criminal prosecution of a sitting President are of an entirely different magnitude than those imposed by the types of judicial process previously upheld by the Court.

It is conceivable that, in a particular set of circumstances, a particular criminal charge will not in fact require so much time and energy of a sitting President so as materially to impede the capacity of the executive branch to perform its constitutionally assigned functions. It would be perilous, however, to make a judgment in advance as to whether a particular criminal prosecution would be a case of this sort. Thus a categorical rule against indictment or criminal prosecution is most consistent with the constitutional structure, rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President.[31]

---

[30] While illustrating the potentially burdensome nature of judicial review of Presidential acts with the "most dramatic example" of *Youngstown Sheet & Tube Co. v Sawyer*, 343 U S 579 (1952) (invalidating President Truman's order directing the seizure and operation of steel mills), the Court mentioned "the substantial time that the President must necessarily have devoted to the matter as a result of judicial involvement" *Clinton v Jones*, 520 U S at 703. Of course, it is most frequently the case that the President spends little or no time *personally* engaged in such confrontations, with the task of defending his policies in court falling to subordinate executive branch officials *See, e g.*, Maeva Marcus, *Truman and the Steel Seizure Case* 102–77 (1977) (describing in detail Department of Justice attorneys' involvement in the steel seizure litigation without discussing any role played personally in the litigation by President Truman). Such a routine delegation of responsibilities is unavailable when the President personally faces criminal charges

[31] *Cf. Clinton v Jones*, 520 U.S at 706 ("Indeed, if the Framers of the Constitution had thought it necessary to protect the President from the burdens of private litigation, we think it far more likely that they would have

3.

Having identified the burdens imposed by indictment and criminal prosecution on the President's ability to perform his constitutionally assigned functions, we must still consider whether these burdens are "justified by an overriding need to promote" legitimate governmental objectives, *Administrator of General Services*, 433 U.S. at 443, in this case the expeditious initiation of criminal proceedings. *United States v. Nixon* underscored the legitimacy and importance of facilitating criminal proceedings in general. Although Nixon did not address the interest in facilitating criminal proceedings against the President, it is fair to say that there exists an important national interest in ensuring that no person—including the President—is above the law. *Clinton v. Jones* underscored the legitimacy and importance of allowing civil proceedings against the President for unofficial misconduct to go forward without undue delay. Nevertheless, after weighing the interests in facilitating immediate criminal prosecution of a sitting President against the interests underlying temporary immunity from such prosecution, considered in light of alternative means of securing the rule of law, we adhere to our 1973 determination that the balance of competing interests requires recognition of a presidential immunity from criminal process.

Recognizing an immunity from prosecution for a sitting President would not preclude such prosecution once the President's term is over or he is otherwise removed from office by resignation or impeachment.[32] The relevant question, therefore, is the nature and strength of any governmental interests in *immediate* prosecution and punishment.

With respect to immediate punishment, the legitimate objectives of retribution and specific deterrence underlying the criminal justice system compete against a recognition of presidential immunity from penal incarceration. The obvious and overwhelming burdens that such incarceration would impose on the President's ability to perform his constitutionally assigned functions, however, clearly support the conclusion that a sitting President may not constitutionally be imprisoned upon a criminal conviction. *See supra* note 18 and accompanying text. The public's general interest in retribution and deterrence does not provide an "overriding need" for immediate as opposed to deferred incarceration.

With respect to immediate prosecution, we can identify three other governmental interests that might be impaired by deferring indictment and prosecution

---

adopted a categorical rule than a rule that required the President to litigate the question whether a specific case belonged in the 'exceptional case' subcategory")

[32] The temporary nature of the immunity claimed here distinguishes it from that pressed in *Nixon v. Fitzgerald*, which established a permanent immunity from civil suits challenging official conduct. The temporary immunity considered here is also distinguishable from that pressed by the President but rejected in *United States v. Nixon*, since the claim of executive privilege justifying the withholding of evidence relevant to the criminal prosecution of other persons would apparently have suppressed the evidence without any identifiable time limitation. The asserted privilege might therefore have forever thwarted the public's interest in enforcing its criminal laws. *See United States v. Nixon*, 418 U.S. at 713 ("Without access to specific facts a criminal prosecution may be totally frustrated.").

until after the accused no longer holds the office of President: (1) avoiding the bar of a statute of limitations; (2) avoiding the weakening of the prosecution's case due to the passage of time; and (3) upholding the rule of law. We consider each of these in turn.

The interest in avoiding the statute of limitations bar by securing an indictment while the President remains sitting is a legitimate one. However, we do not believe it is of significant constitutional weight when compared with the burdens such an indictment would impose on the Office of the President, especially in light of alternative mechanisms to avoid a time-bar. First, a President suspected of the most serious criminal wrongdoing might well face impeachment and removal from office before his term expired, permitting criminal prosecution at that point. Second, whether or not it would be appropriate for a court to hold that the statute of limitations was tolled while the President remained in office (either as a constitutional implication of temporary immunity or under equitable principles[33]), Congress could overcome any such obstacle by imposing its own tolling rule.[34] At most, therefore, prosecution would be delayed rather than denied.

Apart from concern over statutes of limitations, we recognize that a presidential immunity from criminal prosecution could substantially delay the prosecution of a sitting President, and thereby make it more difficult for the ultimate prosecution to succeed.[35] In *Clinton v. Jones*, the Court observed that — notwithstanding the continuation of civil discovery — "delaying trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party." 520 U.S. at 707–08.

[33] Federal courts have suggested that, in proper circumstances, criminal as well as civil statutes of limitation are subject to equitable tolling. *See, e.g., United States v. Midgley*, 142 F.3d 174, 178–79 (3d Cir 1998) ("Although the doctrine of equitable tolling is most typically applied to limitation periods on civil actions, there is no reason to distinguish between the rights protected by criminal and civil statutes of limitations.") (internal quotation omitted); *cf United States v. Levine*, 658 F.2d 113, 119–21 (3d Cir 1981) (noting that criminal statutes of limitations have a primary purpose of providing fairness to the accused, but are "perhaps not inviolable" and are subject to tolling, suspension, and waiver). Equitable tolling, however, is invoked only sparingly, in the "rare situation where [it] is demanded by sound legal principles as well as the interests of justice" *Alvarez-Machain v. United States*, 107 F 3d 696, 701 (9th Cir 1996) (tolling two-year limitation period for FTCA actions where plaintiff had been incarcerated for two years)

[34] *See, e.g*, 18 U S C. § 3287 (1994) (suspension of criminal statutes of limitation for certain fraud offenses against the United States until three years after the termination of hostilities); *United States v. Grainger*, 346 U.S 235 (1953) (applying this statutory suspension). We believe Congress derives such authority from its general power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U S Const. art I, § 8, cl. 18. *Cf. Clinton v. Jones*, 520 U.S. at 709 ("If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation."). Indeed, without deciding the question, we note that Congress may have power to enact a tolling provision governing the statute of limitations for conduct that has already occurred, at least so long as the original statutory period has not already expired *Cf United States v. Powers*, 307 U S. 214 (1939) (rejecting *Ex Post Facto* challenge to a prosecution based on a statute extending the life of a temporary criminal statute before its original expiration date); *cf., e.g., United States v Grimes*, 142 F.3d 1342, 1350–51 (11th Cir. 1998) (collecting decisions rejecting *Ex Post Facto* challenges to statutes extending the limitations period as applied to conduct for which the original period had not already run), *cert denied*, 525 U S. 1088 (1999)

[35] In theory, the delay could be as long as 10 years, for a President who originally assumes the office through ascension rather than election and then fully serves two elected terms. *See* U S. Const. amend. XXII, § 1 Given quadrennial elections and the possibility of impeachment, however, it seems unlikely that a President who is seriously suspected of grave criminal wrongdoing would remain in office for that length of time

The Court considered this potential for prejudice to weigh against recognition of temporary immunity from civil process. We believe that the costs of delay in the criminal context may differ in both degree and kind from delay in the civil context.[36] But in any event it is our considered view that, when balanced against the overwhelming cost and substantial interference with the functioning of an entire branch of government, these potential costs of delay, while significant, are not controlling. In the constitutional balance, the potential for prejudice caused by delay fails to provide an "overriding need" sufficient to overcome the justification for temporary immunity from criminal prosecution.

Finally, recognizing a temporary immunity would not subvert the important interest in maintaining the "rule of law." To be sure, as the Court has emphasized, "[n]o man in this country is so high that he is above the law." *United States v. Lee*, 106 U.S. 196, 220 (1882). Moreover, the complainant here is the Government seeking to redress an alleged crime against the public rather than a private person seeking compensation for a personal wrong, and the Court suggested in *Nixon v. Fitzgerald* that "there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions," 457 U.S. at 754 n.37; *see id.* (describing *United States v. Nixon* as "basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision"). However, unlike the immunities claimed in both *Nixon* cases, *see supra* note 32, the immunity from indictment and criminal prosecution for a sitting President would generally result in the delay, but not the forbearance, of any criminal trial. Moreover, the constitutionally specified impeachment process ensures that the immunity would not place the President "above the law." A sitting President who engages in criminal behavior falling into the category of "high Crimes and Misdemeanors," U.S. Const. art. II, § 4, is always subject to removal from office upon impeachment by the House and conviction by the Senate, and is thereafter subject to criminal prosecution.

4.

We recognize that invoking the impeachment process itself threatens to encumber a sitting President's time and energy and to divert his attention from

[36] On the one hand, there may be less reason to fear a prejudicial loss of evidence in the criminal context A grand jury could continue to gather evidence throughout the period of immunity, even passing this task down to subsequently empaneled grand juries if necessary. *See* Fed. R. Crim. P 6(e)(3)(C)(iii) Moreover, in the event of suspicion of serious wrongdoing by a sitting President, the media and even Congress (through its own investigatory powers) would likely pursue, collect and preserve evidence as well These multiple mechanisms for securing and preserving evidence could mitigate somewhat the effect of a particular witness's failed recollection or demise By contrast, many civil litigants would lack the resources and incentives to pursue and preserve evidence in the same comprehensive manner

On the other hand, the consequences of any prejudicial loss of evidence that does occur in the criminal context are more grave, given the presumptively greater stakes for both the United States and the defendant in criminal litigation *See United States v Nixon*, 418 U S at 711–13, 713 (in emphasizing the importance of access to evidence in a pending criminal trial, giving significant weight in the constitutional balance to "the fundamental demands of due process of law in the fair administration of criminal justice").

his public duties. But the impeachment process is explicitly established by the Constitution. While in some circumstances an impeachment and subsequent Senate trial might interfere with the President's exercise of his constitutional responsibilities in ways somewhat akin to a criminal prosecution, "this is a risk expressly contemplated by the Constitution, and it is a necessary incident of the impeachment process." OLC Memo at 28. In other words, the Framers themselves specifically determined that the public interest in immediately removing a sitting President whose continuation in office poses a threat to the Nation's welfare outweighs the public interest in avoiding the Executive burdens incident thereto.

The constitutionally prescribed process of impeachment and removal, moreover, lies in the hands of duly elected and politically accountable officials. The House and Senate are appropriate institutional actors to consider the competing interests favoring and opposing a decision to subject the President and the Nation to a Senate trial and perhaps removal. Congress is structurally designed to consider and reflect the interests of the entire nation, and individual Members of Congress must ultimately account for their decisions to their constituencies. By contrast, the most important decisions in the process of criminal prosecution would lie in the hands of unaccountable grand and petit jurors, deliberating in secret, perhaps influenced by regional or other concerns not shared by the general polity, guided by a prosecutor who is only indirectly accountable to the public. The Framers considered who should possess the extraordinary power of deciding whether to initiate a proceeding that could remove the President — one of only two constitutional officers elected by the people as a whole — and placed that responsibility in the elected officials of Congress. It would be inconsistent with that carefully considered judgment to permit an unelected grand jury and prosecutor effectively to "remove" a President by bringing criminal charges against him while he remains in office.

Thus, the constitutional concern is not merely that any *particular* indictment and criminal prosecution of a sitting President would unduly impinge upon his ability to perform his public duties. A more general concern is that permitting such criminal process against a sitting President would affect the underlying dynamics of our governmental system in profound and necessarily unpredictable ways, by shifting an awesome power to unelected persons lacking an explicit constitutional role vis-a-vis the President. Given the potentially momentous political consequences for the Nation at stake, there is a fundamental, structural incompatibility between the ordinary application of the criminal process and the Office of the President.

For these reasons we believe that the Constitution requires recognition of a presidential immunity from indictment and criminal prosecution while the President is in office.

In 1973, this Department concluded that a grand jury should not be permitted to indict a sitting President even if all subsequent proceedings were postponed until after the President left office. The Court's emphasis in *Clinton v. Jones* on the interests of Article III courts in allowing ordinary judicial processes to go forward against a sitting President, and its reliance on scheduling discretion to prevent those processes from interfering with performance of the President's constitutional duties, might be thought to call this aspect of the Department's 1973 determination into question. We have thus separately reconsidered whether, if the constitutional immunity extended only to criminal prosecution and confinement but not indictment, the President's ability to perform his constitutional functions would be unduly burdened by the mere pendency of an indictment against which he would need to defend himself after leaving office.

We continue to believe that the better view of the Constitution accords a sitting President immunity from indictment by itself. To some degree, indictment alone will spur the President to devote some energy and attention to mounting his eventual legal defense.[37] The stigma and opprobrium attached to indictment, as we explained above, far exceed that faced by the civil litigant defending a claim. Given "the realities of modern politics and mass media, and the delicacy of the political relationships which surround the Presidency both foreign and domestic," there would, as we explained in 1973, "be a Russian roulette aspect to the course of indicting the President but postponing trial, hoping in the meantime that the power to govern could survive." OLC Memo at 31.[38] Moreover, while the burdens imposed on a sitting President by indictment alone may be less onerous than those imposed on the President by a full scale criminal prosecution, the public interest in indictment alone would be concomitantly weaker assuming that both trial and punishment must be deferred, and weaker still given Congress' power to extend the statute of limitations or a court's possible authority to recognize an equitable tolling.

Balancing these competing concerns, we believe the better view is the one advanced by the Department in 1973: a sitting President is immune from indictment as well as from further criminal process. Where the President is concerned,

[37] *Cf Moore v. Arizona*, 414 U.S. 25, 27 (1973) (indictment with delayed trial "may disrupt [a defendant's] employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends") (citations omitted) Indeed, indictment coupled with temporary immunity from further prosecution may even magnify the problem, since the President would be legally stigmatized as an alleged criminal without any meaningful opportunity to respond to his accusers in a court of law

[38] Our conclusion would hold true even if such an indictment could lawfully be filed, and were filed, under seal. Given the indictment's target it would be very difficult to preserve its secrecy *Cf United States v Nixon*, 418 U S. at 687 n.4 (noting parties' acknowledgment that "disclosures to the news media made the reasons for continuance of the protective order no longer meaningful," with respect to the "grand jury's immediate finding relating to the status of the President as an unindicted co-conspirator") Permitting a prosecutor and grand jury to issue even a sealed indictment would allow them to take an unacceptable gamble with fundamental constitutional values

only the House of Representatives has the authority to bring charges of criminal misconduct through the constitutionally sanctioned process of impeachment.

III.

In 1973, the Department of Justice concluded that the indictment and criminal prosecution of a sitting President would unduly interfere with the ability of the executive branch to perform its constitutionally assigned duties, and would thus violate the constitutional separation of powers. No court has addressed this question directly, but the judicial precedents that bear on the continuing validity of our constitutional analysis are consistent with both the analytic approach taken and the conclusions reached. Our view remains that a sitting President is constitutionally immune from indictment and criminal prosecution.

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel