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IMPEACHMENT OR INDICTMENT: IS A SITTING PRESIDENT SUBJECT TO THE COMPULSORY CRIMINAL PROCESS?

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, FEDERALISM, AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

ON

EXAMINING THE EXTENT TO WHICH A SITTING PRESIDENT SHOULD BE SUBJECT TO INDICTMENT OR OTHER COMPULSORY CRIMINAL PROCESS

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Senator ASHCROFT. I am pleased now to call upon Professor Amar from Yale University Law School.

Professor Amar.

STATEMENT OF AKHIL REED AMAR

Mr. AMAR. Thank you, Mr. Chair, members of the subcommittee. My name is Akhil Reed Amar. I am Southmayd Professor of Law at Yale Law School, where I have taught constitutional law for the last 13 years. I have written three books and close to 100 articles on general topics in constitutional law.

In 1996, my student, Brian Kalt, and I coauthored an article explaining that a sitting President is constitutionally immune from ordinary criminal prosecution, State or Federal, but is, of course, subject to ordinary prosecution the instant he leaves office, a prospect that can obviously be hastened by impeachment. Today, I will try to summarize my reasons for continuing to believe this.

The issue, as I understand it, concerns not Bill Clinton, the man, but the institution of the Presidency. The rules laid down by the Framers apply equally to Democrats and Republicans, liberals and conservatives. I never asked Brian Kalt about his party affiliation, and we drafted our article before the 1996 elections, not knowing who would be President thereafter and not knowing when this momentous question would next be on the national agenda.

In analyzing this and other constitutional questions, I often try to reverse existing partisan polarities in my mind so as to arrive at a result and a reasoning process untinged by current political preference. I would invite the Senators and the administration to do the same thing. Constitutional law shouldn't be partisan.

The position Brian and I put forth that a sitting President may only be criminally tried in this court, the Senate, sitting in impeachment, and can be criminally tried elsewhere only after he has left office, has a very distinguished and bipartisan pedigree. It is the position put forth in passing in two Federalist Papers, Nos. 69 and 77. It is the position clearly taken by both John Adams and Thomas Jefferson, men who disagreed about many other things, who both risked their lives to fight against monarchy, and who both deeply believed in the rule of law.

It is the position clearly set forth in the first Congress by Senator Oliver Ellsworth, a Philadelphia Framer, the author of the Judiciary Act of 1789, and later Chief Justice of the United States. It is the position that makes the most sense of the analysis of the great Justice Joseph Story in his landmark 1833 treatise on the Constitution. It is the position articulated in the Supreme Court as early as 1867 by Attorney General Stanbery and the traditional position of the Justice Department.

It is the position taken 25 years ago when Richard Nixon was President by two of my own teachers at Yale Law School, Robert Bork and Charles Black. In a symposium in which the Amar-Kalt article appeared, our views were largely in sync with those of most, but not all, of the other participants, including my distinguished friend, Terry Eastland.

Apart from these points about history and tradition, my basic constitutional argument is more structural than textual, sounding in both separation of powers and federalism. Other impeachable of-

ficers—Vice Presidents, Cabinet officers, judges, justices—may be indicted while in office. But the Presidency is constitutionally unique. In the President, the entirety of the power of a branch of Government is vested. And so the language of impeachment in the Constitution sensibly means something different as applied to Presidents, on the one hand, and other officials on the other, an analogy that may be helpful to the members of this subcommittee.

The Constitution gives the Senate the power of advice and consent as to both Cabinet officials and Supreme Court justices. But these words sensibly mean different things in these two contexts. Constitutionally, Cabinet officers are members of the President's team; justices are not. Thus, the Senate historically gives more deference to the President's nominees when Cabinet officers, who will leave when the President leaves, are at stake than when justices, who will be in place for life, are involved. The same words, "advice and consent," must be understood in different ways when they interact with different clauses, with different structural implications. So, too, with the Constitution's words concerning impeachment.

Let's begin structural analysis by pondering the following hypothetical which implicates federalism as well as separation of powers. Could some clever State or county prosecutor in Charleston, SC, have indicted Abraham Lincoln in March 1861 and order him to stand trial in Charleston? If so, there might well be no United States today bringing us all together.

I believe the Constitution gave Lincoln immunity in this situation, so long as he was in office. The President is elected by the whole Nation and no one part of the Nation should have the power to undo a decision of the whole. This is the kind of structural argument exemplified by John Marshall's classic opinion in *McCulloch* v. *Maryland*.

What is true of State criminal prosecution is also true of a Federal criminal prosecution. Here, too, we cannot allow a part to undo the whole. Any one Federal grand jury or Federal petit jury will come from only one city, be it Charleston or Little Rock or the District of Columbia. The President is elected by the entire Nation and should be judged by the entire Nation. His true grand jury is the House, his true petit jury is the Senate, and the true indictment that he is subject to is called an impeachment.

What is more, any effort to indict him by an independent counsel would also violate the Constitution's Article II Appointments Clause. Let me make clear, by the way, that Kenneth Starr, the man, is my friend. I admire him and respect him. Nothing that I say here should be understood as a personal criticism.

Counsel Starr is, constitutionally speaking, an inferior officer. Those are the words of the Constitution itself. He was never, as counsel, confirmed by this body, the Senate of the United States. Were he to claim the power to indict a sitting President, it would be impossible to argue with a straight face that he is simply some inferior officer. It would be breaking with the historical and traditional approach of the Justice Department. And even if you think he would be right, you cannot say that he would truly be inferior. He would be claiming for himself the power to imprison the chief

executive officer. This power is awesome; it is anything but an inferior power that can be vested in an inferior officer.

This issue, of course, did not arise in the 1988 Supreme Court case *Morrison* v. *Olson,* since the President in that case was not a target. And, remember, Richard Nixon was only named an unindicted co-conspirator. Since *Morrison,* the Court has been even more strict in insisting that the word "inferior" be taken seriously in the Appointments Clause, as evidenced by the 1997 case *Edmond* v. *United States,* which I have not heard discussed in any of these conversations. Any indictment of the President by Counsel Starr would, in my view, plainly violate the teaching of *Edmond.*

Let me conclude by making clear that, of course, no man is above the law. Once out of office, an ex-President may be tried just like anyone else, and that day of reckoning can, of course, be speeded up if the House and the Senate decide to impeach and remove. Moreover, since a sitting President's immunity sounds in personal jurisdiction, it may well be waivable, and if so, political pressure may be brought upon a President to consent to be tried in a drunk driving case or something else. The question is not whether a President is accountable to law and to the country, but how, when, and by whom.

Mr. Chairman, that concludes my formal testimony. Perhaps later on, I would be grateful to have a chance in just a minute to express a disagreement that I have with one thing that you had said that I think actually, in my view, is a mistake as a matter of constitutional law. But I will be happy to reserve that for later on.

Senator ASHCROFT. You may proceed while your time exists.

Mr. AMAR. Thank you. The one thing that, Mr. Chair, you said that I think—you said many things that I agree with and are very thoughtful and wise. But one thing that you said that I think is just a mistake is that it is a good argument that because the Constitution talks about immunities of legislators, that is a good argument that Presidents don't have immunities. That view was rejected by two U.S. Supreme Court opinions, *Nixon* v. *Fitzgerald,* footnote, I think, 16, the Nixon tapes case. I can give you the footnote in just a second. It is discussed in detail in a Harvard Law Review article. I would be happy to give you the pages.

Just to give you a reason why that is wrong, judges are not subject to being sued for things that they say in libel for things that they say in their judicial opinions. The Vice President, who presides over this body and casts a tie-breaking vote, is not subject constitutionally to a lawsuit for something that he says on the floor of the Senate, even though he is not a Senator or Representative.

When the President comes and gives the State of the Union Address and criticizes, say, the health care companies, the pharmaceutical companies, he is not covered by that clause, and yet no one has thought that he doesn't have constitutional immunity from the structure of his office.

So I think there are thoughtful arguments on both sides, but that particular one, negative implication from expressio unius, is one that I would urge you maybe to rethink, if you would.

Senator ASHCROFT. Thank you very much.

[The prepared statement of Mr. Amar follows:]

PREPARED STATEMENT OF AKHIL REED AMAR

My name is Akhil Reed Amar. I am Southmayd Professor of Law at Yale Law, where I have taught constitutional law for the last thirteen years. I have written three books and close to one hundred articles on general topics in constitutional law. In 1996, my student Brian Kalt and I coauthored an article explaining that a sitting President is constitutionally immune from ordinary criminal prosecution—state or federal—but is of course subject to ordinary prosecution the instant he leaves office, a prospect that can obviously be hastened by impeachment. Today, I shall summarize my reasons for continuing to believe this.

The issue, as I understand it, concerns not Bill Clinton the man, but the institution of the Presidency. The rule laid down by the Framers apply to equally to Democrats and Republicans, liberals and conservatives. I never asked Brian Kalt about his party affiliation, and we drafted our article before the 1996 elections, not knowing who would be President thereafter, and not knowing when this momentous question would next be on the national agenda. In analyzing this and other constitutional questions, I often try to reverse existing partisan polarities in my mind so as to arrive at a result and a reasoning process untinged by current political preference: I would invite the Senators and the Administration to do the same thing. Constitutional law should not be partisan.

The position Brian and I put forth—that a sitting President may only be criminally tried by this Court, the Senate, sitting in impeachment, and can be criminally tried elsewhere only after he has left office—has a very distinguished, and bipartisan, pedigree. It is the position put forth, in passing, in two Federalist Papers, Numbers 69 and 77. It is the position clearly taken by both John Adams and Thomas Jefferson—men who disagreed about many other things, who both risked their lives to fight against monarchy, and who both believed deeply in the rule of law. It is the position clearly set forth in the First Congress by Senator Oliver Ellsworth—a Philadelphia Framer, the author of the Judiciary Act of 1798, and later the Chief Justice of the United States. It is the position that makes the most sense of the analysis of the great Justice Joseph Story in his landmark 1833 treatise on the Constitution. It is the position articulated in the Supreme Court as early as 1867 by Attorney General Stanbery, and the traditional position of the Justice Department. It is the position taken twenty-five years ago, when Richard Nixon was President, by two of my own teachers at Yale Law School, Robert Bork and Charles Black. In the symposium in which the Amar-Kalt article appeared, our views were largely in sync with those most of the other participants, including my distinguished friend Terry Eastland.

Apart from these points about history and tradition, my basic constitutional argument is more structural than textual, sounding in both separation of powers and federalism. Other impeachable officers—Vice Presidents, cabinet officers, judges and justices—may be indicted while in office. But the Presidency is constitutionally unique—in the President the entirety of the power of a branch of government is vested. And so the language of impeachment in the Constitution sensibly means something slightly different as applied to the Presidents on the one hand, and other officials on the other. An analogy: The Constitution gives the Senate the power of Advice and Consent, as to both cabinet officials and Supreme Court Justices. But these words sensibly mean different things in these two contexts. Constitutionally, Cabinet officers are members of the President's team; Justices are not. Thus, the Senate historically gives more deference to the President's nominees when Cabinet officers (who will leave when the President leaves) are at stake, than when Justices (who will be in place for life) are involved. The same words—"advise and consent"—must be understood in different ways when they interact with different clauses with different structural implications. So too with the Constitution's words concerning impeachment.

Let us begin structural analysis by pondering the following hypothetical, which implicates federalism as well as separation of powers: Could some clever state or county prosecutor in Charleston, South Carolina have indicted Abraham Lincoln in March 1861, and ordered him to stand trial in Charleston? If so, there might well be no United States today bringing us all together. I believe that the Constitution gave Lincoln immunity in this situation—so long as he was in office. The President is elected by the whole nation, and no one part of the nation should have the power to undo a decision of the whole. This is the kind of structural argument exemplified by Marshall's classic opinion in *McCulloch* v. *Maryland*.

What is true of a state criminal prosecution is also true of a federal criminal prosecution. Here too, we cannot let a part undo the whole. Any one federal grand jury or federal petit jury will come from one city—be it Charleston or Little Rock or the District of Columbia. The President is elected by the entire nation, and should be

judged by the entire nation. His true grand jury is the House, his true petit jury is the Senate, and the true indictment that he is subject to is called an impeachment. What's more, any effort to indict him by an independent counsel would also violate the Constitution's Article II Appointments Clause. (Let me make clear that Kenneth Starr the man is my friend, and I admire and respect him. Nothing that I say here should be understood as a personal criticism.) Counsel Starr is, constitutionally speaking, an "inferior" officer. He was never, as counsel, confirmed by this body, the Senate of the United States. Were he to claim the power to indict a sitting President, it would be impossible to argue with a straight face that he is simply some "inferior" officer. He would be breaking with the historical and traditional approach of the Justice Department—and even if you think he would be right, you cannot say he would truly be inferior. He would be claiming for himself the power to imprison the Chief Executive Officer. This power is awesome—it is anything but an *inferior* power that can be vested in an *inferior* officer. This issue of course did not arise in the 1988 Supreme Court case, *Morrison* v. *Olson,* since the President in that case was not a target (And remember, Richard Nixon was only named as *unindicted* coconspirator.) Since *Morrison*, the Court has been even more strict in insisting that the word "inferior" be taken seriously in the Appointments Clause, as evidenced by the 1997 case, *Edmond* v. *United States*. Any indictment of the President by Counsel Starr would in my view plainly violate the teaching of *Edmond.*

Let me conclude by making clear that of course no man is above the law. Once out of office, an ex-President may be tried just like anyone else—and that day of reckoning can of course be speeded up if the House and the Senate decide to impeach and remove. Moreover, since a sitting President's immunity sounds in personal jurisdiction, it may well be waivable, and if so, political pressure may be brought upon a President to consent to be tried. The question is not whether a President is accountable to law and to the country—but how, when, and by whom.

PRESIDENTIAL IMPEACHMENT: THE FOUNDERS' MOUSETRAP

America delights in her inventions. From bifocals at the Founding to light bulbs, flying machines, and computers in the modern era, we constantly quest for the holy grail of the better mousetrap. America's constitutional lawyers over the centuries have also proved remarkably inventive, crafting clever legal contraptions to solve recurring problems. Since Watergate, the problem of wayward Presidents has grabbed our imagination, and creative constitutional lawyers have responded with a new invention: an independent counsel, appointed by judges and insulated from executive branch supervision. But the theoretical possibility of a President gone bad did not suddenly arise with the reelection of Richard Nixon. Our inventive founders foresaw the problem, and forged their own clever machinery to solve it: impeachment. And this machinery, I suggest, is a better mousetrap. Once we understand how it was engineered to work, we will see more clearly some of the design flaws of the modern independent counsel statute.

Presidential impeachment features a brilliant mix of temporary immunity and ultimate accountability. A sitting President is immune from ordinary criminal prosecution, but once impeached by the House and convicted by the Senate, or otherwise out of office, he may be punished just like everyone else. Granted, the Constitution does not say this in so many words, and all other impeachable officers—from Vice Presidents and cabinet secretaries to judges and justices—may be indicted, tried, convicted and imprisoned while still in office. But history and structure make clear what the constitutional text leaves open. In two different Federalist Papers (Numbers 69 and 77), Publius suggested that criminal prosecution of the President could not occur until after he left office, a point stressed in the First Congress by Senator (and later Chief Justice) Oliver Ellsworth and Vice President (and later President) John Adams.

Structurally, this makes good sense. Unlike other national officers, the President is vested with the power of an entire branch of government. He is not fungible in the way that judges and cabinet officers are, and his duties are far more continuous and weighty than those of the Vice President. Suppose a President is actually innocent of wrongdoing, and a given criminal prosecution is simply designed to stop him from doing what he was elected to do. Such a prosecution, even if unsuccessful, could effectively (and perhaps literally, given pretrial detention) incapacitate him and thereby nullify a national election—it is a kind of temporary assassination, a highjacking and kidnapping of the President. Could some clever state prosecutor from South Carolina have indicted Abraham Lincoln in the spring of 1861, demanding that he stand trial in Charleston on some trumped up charge? Surely not. Thus, a sitting President may not be trifled with in this way—but Congress may boot him out if they decide that he has indeed committed offenses that make him unfit to

govern. After he leaves office, whether via impeachment or resignation or the natural expiration of his term, he can be tried like any other citizen. If the charges are sound, he will be held to account: no man is above the law. If the charges are instead trumped up, they can be quashed beforehand or overturned afterwards by judges (as is true for all other citizens). The ex-President would be inconvenienced by all this, but he could be compensated by Congress. Most important, the American people would not be denied one millisecond of his tenure of office unless and until Congress made that awesome decision, via impeachment.

Last year's Supreme Court ruling in the Paula Jones case might seem to squint against this reading of the Constitution's structure and history: the Jones Court denied that a sitting president should enjoy temporary immunity from a civil lawsuit. But criminal prosecution is hugely different, constitutionally. The Jones Court stressed the lack of historical support for civil immunity, but there is clear historical support for temporary immunity from criminal prosecution. In Jones, no question arose about who could initiate the lawsuit—in America, any plaintiff can sue any defendant. But not every citizen can indict; who can indict the President? A county or state prosecutor?

Even in civil cases, Jones refused to rule on whether a sitting President could be made to answer in state court, emphasizing that the case at hand would be carefully managed by a federal Article III judge nominated by the nation's President and confirmed by the nation's Senate. If state prosecution is impermissible—recall Lincoln in 1861—how about federal prosecution? Here the problem is not one of federalism but of separation of powers. How can an "inferior" executive officer—counsel Kenneth Starr, who was neither appointed by the President, nor confirmed by the Senate—undermine and overrule his constitutional superior, the chief executive? (This issue did not arise in the 1988 *Morrison* v. *Olson* case upholding the independent counsel statute, since the investigation in that case targeted a lower level official, not the President himself.) Doesn't even a federal grand jury pose some of the same risks as a state prosecution, given that any given grand jury will come from a single city or county—the "part" and not the "whole" in the language of *McCulloch* v. *Maryland*?

Unlike Jones's civil case, no federal judge representing the people of the nation monitors grand jury proceedings day by day and in person. Consider next issues of enforcement and remedy. Had President Clinton refused to participate in Jones—saying that he was elected to do the people's business, and could not be distracted—a simple default judgment could have been entered. With a push of a button, funds could be transferred from his bank account to the plaintiff's. But if the President were to refuse to acknowledge the legitimacy of a criminal proceeding—claiming that the only criminal court with jurisdiction over him was the High Court of Impeachment—what are courts to do? Put him in leg irons? Order his imprisonment? Note also that any presidential claim that exclusive jurisdiction over a sitting President rests in an impeachment court is highly plausible in the context of criminal prosecution, but would have been utterly off-point in Jones. The plaintiff there was seeking personal compensation in tort, not a public verdict about criminal guilt.

Here, then, are a few of the most impressive features of the framers' mousetrap. First, impeachment is national. The President uniquely represents the entire American people, and the decision to arrest his performance in office can only be made by representatives of the country as a whole. A President may need to pursue policies that are nationally sound, but regionally unpopular. Thus the true grand and petit juries eligible to judge a sitting president must come not from one city or county but from all cities and counties. That grand jury is the House of Representatives, and the formal name of its bill of indictment is a bill of impeachment. That petit jury is the Senate, and in impeachment it sits as a great national court, representing the vast geographic diversity of America. A related advantage is that it sits in the capital, thus minimizing any geographic inconvenience to a sitting President. To allow regular federal grand juries into this picture, whether in Charleston or Little Rock, would in the words of President Thomas Jefferson "bandy [the President] from pillar to post, keep him constantly trudging from north to south and east to west, and withdraw him entirely from his constitutional duties."

Next, impeachment is public and accountable. Ordinary grand juries are subject to strict secrecy rules, but these may tend to break down where something as awesome and interesting as an investigation of the President is afoot. The impeachment process is more flexible—presumptively done in public, as it the rest of congressional business, but allowing secrecy where appropriate. If independent counsels or ordinary grant juries are too hard on Presidents—or too soft—there is no recourse for the American people. But if congress is too hard or soft, they will pay at election time.

A related point: impeachment is sensibly political as well as legal. Politicians judge other politicians and impose political punishment—removal from office and disqualification from future office-holding. The standard of conduct is not narrowly legal but also political: what counts as a "high crime and misdemeanor" cannot be decided simply by parsing criminal law statutes. A statute-book offense is not necessary for impeachment. We should not use state criminal law as the sole test—which state would we pick? And George Washington was surely impeachable for any serious misdeeds he may have committed early on, even though no federal criminal laws had yet been passed. More generally, a President might be unfit to govern even if his misconduct was not an ordinary crime. (Imagine a President who simply runs off on vacation in the middle of a crisis). Conversely, not every technical offense in statute books—especially offenses that are not ordinary prosecuted—should count as the kind of high misconduct that unfits a man to be President after his fellow citizens have chosen him. Indeed, what counts as sufficiently high misconduct may be different for judges or cabinet officers—who lack a personal mandate from the electorate—than for a President who enjoys such a mandate. An offense that was made known to electors, or that could have been foreseen by them, may differ from an offense carefully hidden from them. (On this view, lying to the American people—even if not under oath and not technically criminal—might be more serious than technical perjury in a civil deposition).

All these distinctions have little place in our formal criminal law, but they are precisely the sorts of factors statesmen may sensibly consider in the impeachment process. And such statesmen have strong incentives to set the bar of acceptable conduct neither too high—they and their friends will have to live under these rules—not too low (lest they disgust ordinary voters appalled by backscratching and selfdealing).

Impeachment is also nicely nonpartisan. In the endgame, a President will be ousted only if fairminded members of his own party condemn him; anything less than a two-thirds vote of conviction is an acquittal. Though the framers did not envision the emergence of two permanent parties that would alternate in the presidency, they did expect congress at any given time to be divided between the president's allies and his enemies; and they devised a beautiful system giving the balance of power to Senators who could be expected to give the President the benefit of the doubt in close cases. Talk of "vast conspiracies" could be easily laughed off, given the structural safeguards built into the system. And by keeping judges out of the process of appointing independent counsels and trying sitting Presidents—actions inevitably tinged with politics—the impeachment model keeps judges above the fray of partisan politics.

Impeachment is also beautifully final. No appeal lies from the judgment of an impeachment court. By contrast imagine the chaos that might be created by ordinary prosecution and conviction of a sitting President. Could he run the country from a jail cell? This seems outlandish. If, instead, we treated imprisonment as a "disability" triggering Vice-President succession under the Twenty-Fifth Amendment, how will we all feel if a later court invalidates the President's conviction on appeal?

Finally, impeachment is—or should be made—regularized and routine. An ad hoc independent counsel must build an organization from scratch, and those who volunteer may have an ax to grind, since the target is known in advance. Institutional routines to guard against leaks and other unprofessional conduct may be harder to develop and implement in an ad hoc enterprise. But congress can and should create a standing committee on impeachment and oversight. The committee could have permanent staff, and be insulated by House tradition from partisanship. Over time, the committee will develop policies and procedures and protocols and precedents that can be applied consistently regardless of which party controls the House, and which party occupies the Oval Office. Other high constitutional functions of Congress have been routinized—appropriations, discipline of errant legislators, foreign affairs, and so on. Why not impeachment? If we want the framers' mousetrap to work, we must keep it well oiled.

THE PRESIDENTIAL PRIVILEGE AGAINST PROSECUTION

Akhil Reed Amar* and Brian C. Kalt**

[*Akhil Amar is the Southmayd Professor of Law at Yale Law School; B.A. 1980, Yale University; J.D. 1984, Yale Law School.]

[**Brian C. Kalt is a third year student at Yale Law School; J.D. Candidate, 1997.]

SUMMARY

Can a sitting President ever be criminally prosecuted (outside an impeachment court)? The question has been debated—sometimes hotly, sometimes coolly—since the beginning of the Republic. Since the executive branch is so big and has substantial inertia allowing it to function without the President around, would it really be such a crisis if the President had to face prosecution? With modern technology, couldn't a President even run the country from inside a jail cell? The skeptic misses a crucial point. This temporary privilege from prosecution is less of a threat to the rule of the law than the immunity given to Presidents acting in their official capacities. Relatedly, and as we have been arguing all along, if we assume that the presidency is going to be disrupted, who is allowed, and who do we want, to disrupt it? Few Presidents are saints, but who ultimately should decide whether they must stand trial for their alleged sins? A prosecutor and twenty-three grand jurors, or the representatives of half of "We the People" acting through explicit constitutional procedures? The Founders knew what they were doing when they designed the impeachment process. As one of us has argued at length elsewhere, though, Presidents cannot pardon themselves. 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.—Justice Joseph Story, 1833[1]

Can a sitting President ever be criminally prosecuted (outside an impeachment court)? The question has been debated—sometimes hotly, sometimes coolly—since the beginning of the Republic. Although the long pedigree of this debate suggests that reasonable people can disagree, we believe that the best view of constitutional text, history, structure, and precedent supports the conclusion that Justice Story reached: Sitting Presidents cannot be prosecuted.

This privilege does not place Presidents above the law; they can be held accountable for their actions after they leave office, and they can be impeached to hasten this. The privilege does not make Presidents imperial; their special status is ultimately traceable to the rights of the American People. Nor does the privilege clash with the structure of American constitutional government; the President is constitutionally distinct from other, prosecutable officials.

The President Is Unique

That last point is a good place to begin. An obvious counter-argument, a reason to think that a sitting President might be susceptible to prosecution, is that members of Congress, federal judges, Vice Presidents, cabinet officers, and governors can all be prosecuted. But the Constitution does not view the President as it does these other officials. As Alex Bickel put it, "In the presidency is embodied the continuity and indestructibility of the state."[2]

How exactly is the President so different, constitutionally speaking? First and most important, the President is a unitary executive. The Constitution vests the nation's legislative authority in 535 Senators and Representatives, its judicial authority in over 1300 Article III judges, but its entire executive power in a single President. Governors are elected separately from other state executive officials—attorney generals, treasurers, and secretaries of state—and thus do not embody the full executive power of their states.

Congress can (and does) function as if it were whole even when up to half of its members are absent; prosecuting an individual member of Congress thus does not interfere unduly with the legislature's usual function. The judiciary, too, maintains

[1] Joseph Story, Commentaries on the Constitution of the United States at 1563 (Boston, Hilliard, Gary & Co. 1833). Notwithstanding his language of "arrest, imprisonment, and detention," Story's conclusion was that Presidents have some immunity "in civil cases at least." See Akhil Reed Amar & Neal Kumar Katyal, Executive Privileges and Immunities: The Nixon and Clinton Cases, 108 Harv. L. Rev. 701, 716 (1995). For the reasons discussed above, though, we read the immunity more broadly.

[2] Alexander Bickel, The Constitutional Tangle, The New Republic, Oct. 6, 1973, at 14, 15.

excess capacity and has largely fungible personnel. Even if, say, an entire circuit court were arrested, other judges could sit by designation if need be. When a governor is prosecuted, much of the executive power of the state can still be exercised in her absence. When, by contrast, the President is being prosecuted, the presidency itself is being prosecuted. When the President is substantially distracted from his job, he is half-absent and his job goes half-undone. If he is arrested, so too is the executive branch of the government.

Second, the President is national. Members of Congress and governors are elected to represent districts or states. Judges are unelected and represent, essentially, the pieces of paper that it is their job to interpret and apply. The President is elected by the entire polity and represents all 260 million citizens of the United States of America. If the President were prosecuted, the steward of all the People would be hijacked from his duties by an official of few (or none) of them.

Third, the President's job requires immediacy and constant vigilance. Our bicameral Congress was designed to be slow and deliberative. The judiciary is supposed to be even more unhurried and circumspect. But the President must often act instantly and decisively, and unlike the other two branches, is on call to do so 24 hours a day, 365 days a year. As one of us has written elsewhere: Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people: prosecute wars, command armed forces (and nuclear weapons), protect Americans abroad, negotiate with heads of state, and take care that the laws be faithfully executed.[3]

This obviously distinguishes the President from legislators and judges, but it also makes the President distinct from governors. While governors do have some continuous responsibilities, they have fewer problems of such extreme importance to cope with on a moment's notice. To take two obvious examples, they do not deal with foreign policy emergencies and they do not command nuclear weapons. And in practice, significantly, when an emergency does strike a state, a governor's response is usually to call the President.

Other structural evidence shows the President's unique position in the government. Congress does not reconstitute itself when an emergency occurs during recess; it is up to the President to convene it. Additionally, the President is the only official with a constitutionally-defined instant understudy. Constitutionally, the Vice President's main job is to be ready to assume the mantle of state at a moment's notice.

For all of these reasons, any distraction of the President from his duties is much more significant than similar distractions of these other, prosecutable officials, and has a much bigger impact on the well-being of the nation and all its People.

State Prosecution

The question of prosecuting the President is really two questions: one state and one federal. We'll start with the former: Can a sitting President be prosecuted by state officials for violating state criminal laws?

The argument that sitting Presidents cannot be so prosecuted begins with the venerable case of *McCulloch* v. *Maryland*. Under McCulloch, state officials are not allowed to obstruct the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the nation of a part on the whole.[4]

In other words, a single state cannot use its power to derail the functioning of the United States.

Does this prove too much? Surely the Constitution does not give federal officials license to become a lawless marauding horde. Surely indeed, but McCulloch provides a helpful dividing line:

If we apply the principle for which the state of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states.[5]

Ordinarily, in other words, states can enforce their laws and prosecute federal officials without "arresting" and "prostrating" the normal functions of the federal government. But this is not so with the President, and so under McCulloch they cannot prosecute him until he has left office. McCulloch dealt, of course, with Maryland's legislative power to tax a National Bank, not with any state executive attempt to prosecute the President. But the principle is the same. To reiterate and paraphrase,

[3] Amar & Katyal, supra note 1, at 713.
[4] *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 435–36 (1819).
[5] Id. at 432.

no county prosecutor is allowed to "arrest all the [executive powers] of the government and prostrate it at the foot of the states."

Importantly, this privilege is not designed to protect the President's personal interests (although it does, temporarily), but rather the public interest of the People—all the People of America—to have their chosen leader able to execute his duties "for their benefit." This right of all the People to a functioning government trumps the right of only a few of them to have an instant prosecution.

A helpful example: Imagine that in April 1861, after the Civil War began but before his state had seceded, a local prosecutor in Virginia decided to prosecute President Lincoln. Would it make sense to say that Lincoln was subject to "arrest, imprisonment, or detention" at that crucial moment? Indeed, who is this local prosecutor that he could act in the name of the people of his county, at the expense of the protection of all the People of the Union? If President Lincoln were held to answer for a crime, in whose name could he have been so held? The answer we will give below—and more importantly, that the Constitution gives—is, in the name of All the People of America, through their chosen representatives.

A skeptic might ask if a criminal prosecution would really be so disruptive. After all, in this day and age Presidents are often subject to crises that divert their attention. Since the executive branch is so big and has substantial inertia allowing it to function without the President around, would it really be such a crisis if the President had to face prosecution? With modern technology, couldn't a President even run the country from inside a jail cell? The skeptic misses a crucial point. We do not mind the President responding to a public crisis by diverting his attention from other matters, because that is precisely his job. If a war or a natural disaster requires his immediate attention, we expect him to be able to give it. The difference is that these so-called distractions are within the scope of his job. The presidency is designed to juggle a myriad of demands, but public ones. Mounting a personal, criminal defense would be a serious drain on the President's ability to do this.

"Is this necessarily so?" asks the skeptic. "Couldn't it be a minor violation that requires very little time at all?" Perhaps. But such lines are hard to draw, especially when they would be (necessarily) so politically charged. This political nature inherent in anything the President might do provides another answer. If the distraction of the President's crime is such that it is less disruptive for the President to just waive his immunity and plead guilty, he can always do that. If he refuses to waive his privilege and the political pressures persist, rendering him unable to execute his duties, he can be impeached and then prosecuted. More on that mechanism later.

Our skeptic might still have nagging doubts. One is historical. In 1804, Vice President Aaron Burr killed Alexander Hamilton and was indicted in two states as a result. In 1973, Vice President Spiro Agnew faced prosecution too (though his was federal). No one successfully argued that these men should have been immune as a matter of their high constitutional rank—in fact the federal government in Agnew's case argued just the opposite.[6] But Vice Presidents are not Presidents to put it mildly). The government can certainly function without them—at various points in our history, totaling almost forty years, we have not even had a Vice President. Although the Twenty-Fifth Amendment dramatically narrows this window of vulnerability, our Constitution also allows Congress to provide for Presidential succession without Vice Presidents, making them, ultimately, a constitutional luxury.

But at bottom, our skeptic asks, "isn't this supposed to be a government of laws, not men?" Certainly, we do not suggest otherwise. This temporary privilege from prosecution is less of a threat to the rule of the law than the immunity given to Presidents acting in their official capacities. President Nixon said that "if the President does it, it's not illegal" and the Supreme Court (in the case of *Nixon* v. *Fitzgerald*) essentially agreed with him.[7] That compromises the rule of law. By contrast, the privilege we assert says that, "if the President does it,[8] he can be held responsible for it after he leaves office." This "leaving office" can be hastened by an election

[6] In his brief filed for the United States in the Agnew case, Solicitor General Bork pointed out that "the President is the only officer whose temporary disability while in office incapacitates an entire branch of government," and that: 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 at least one Vice President successfully fulfilled the responsibilities of his office while under indictment in two states.

Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, In re Proceedings of the Grand Jury Impaneled Dec. 5, 1972, at 18 (D. Md. 1973).

[7] 457 U.S. 731 (1982).

[8] Or if he "did" it; the privilege extends to prosecutions for acts committed before becoming President. If an offense could have prosecuted before the assumption of office, though, we would probably have less sympathy for the state in that case.

or an impeachment. The statute of limitations can be stayed. In short, the crime will out.

Our argument for temporary immunity is far from novel. Listen to Vice President John Adams and Senator (later Chief Justice) Oliver Ellsworth. A senator in conversation with them about Presidential prosecutability asserted that the president was not above the laws, to which they replied that "you could only impeach him and no other process whatever lay against him," [9] But then, the senator pointed out, a President committing murder on the streets could only be removed by impeachment. True, acknowledged Adams and Ellsworth, but "when he is no longer President, you can indict him." [10]

Federal Prosecution

Most of these same arguments apply to federal prosecutions as well. The main differences are structural. Instead of the division of power between state and federal, it is the separation of powers between the judicial, legislative, and executive branches at work here.

Adams and Ellsworth agreed: "The President personally was not the subject to any process whatever * * * For [that would] put it in the power of a common Justice to exercise any authority over him and stop the whole machine of Government." [11] Thomas Jefferson, not usually an intellectual ally of Adams and Ellsworth on constitutional matters, clarified this further: "would the executive be independent of the judiciary, if he were subject to the commands of the latter, and to imprisonment for disobedience; if the several courts could * * * withdraw him entirely from his constitutional duties?" [12]

If the "common justice" is a state authority, this possibility raises the concerns already discussed. If the justice is federal, though, it raises separation of powers problems. First, it puts the entire executive branch at the mercy of the judiciary. Second, the Constitution designates Congress as the court that tries sitting Presidents. [13]

This principle does have limits. Obviously, the judiciary has some injunctive power over the presidency when the latter is acting in its official capacity. It is not as if ongoing wrongdoing cannot be enjoined. But punishing a sitting President for a past, wholly completed, bad act is a very different thing. On this the Court has spoken instructively:

It is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States. See, e.g., *United States* v. *Nixon; United States* v. *Burr;* cf. *Youngstown Sheet & Tube Co.* v. *Sawyer.* 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. [14]

Prosecution of the President easily meets this standard of disruption. Indeed, if successful, it amounts to a de facto "removal" from office.

For its part, the Constitution foresees only two ways of removing a disfavored President from office; voting him out and impeaching him. [15] Of course, the Presi-

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[9] The Diary of William Maclay and Other Notes on Senate Debates 168 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

[10] Id. at 163.

[11] Id.

[12] Letter from Thomas Jefferson to George Hay (June 20, 1807), in 10 The Works of Thomas Jefferson 404 (Paul L. Ford ed., 1905) (emphasis added). Jefferson was referring to his being required to produce evidence in the federal treason trial of Aaron Burr. "Aha!" says our skeptic, "but what about when the President has himself done something wrong?" Well, notice that Jefferson is not complaining that he is innocent; he is complaining that he is being diverted from his duties. It is not a matter of how much or little the President deserves to be punished for a crime; he will get his due, whatever it is, when he has left office. It is a matter of keeping the government running.

In the event, the trial court was able to force Jefferson to assist in the Burr case in part because responding to a request for evidence was a relatively minor encroachment and in part because it was under the President's authority that Burr was being prosecuted in the first place. That is, it was unfair for the President to simultaneously prosecute someone and refuse to produce relevant evidence in that case. If Jefferson didn't want to comply with any subpoena he deemed onerous, he was at all times free to simply drop the prosecution.

[13] We do not mean by this that impeachment is intended as an exclusive means of acting against other federal officials. It is so for the President, though, since as we have argued (and will argue below) the President is unique.

[14] *Nixon* v. *Fitzgerald,* 457 U.S. 731, 753–54 (1982) (citations and footnotes omitted).

[15] A third mechanism, the Twenty-Fifth Amendment, allows a disabled President to be removed against his will with the acquiescence of the Vice President, half the Cabinet, and two-

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dent can always choose to resign or hand over power to the Vice President temporarily, just as he can choose to consent to prosecution. Without the background option of immunity from prosecution, however, this is no more a choice than is handing over your wallet to a mugger. As mentioned in the state context too, the question is who can legitimately act against the President in this way. The answer once again is the chosen representatives of All the People, acting through the well-designed mechanism of impeachment, and not a lone judge and a lone prosecutor, wielding the sword of federal criminal law against the swordbearer, the President.

All of this might give our skeptic one reason to perk up. If the President is the Chief Federal Prosecutor, why is there a separation of powers problem if he, in effect, prosecutes himself? This is a good structural question. There are two answers. First of all, if the President is prosecuted, it is most likely to be by an independent counsel (who is, as a political matter, usually a member of the other party, and is, as a factual matter, often going to err on the side of prosecution), not the Justice Department. If the President freely allows his regularly appointed lieutenants to pursue him, then there is no separation of powers problem. As for an independent counsel pursuing the President, the President can refuse to allow her to be appointed in the first place, and he can fire her if he so chooses as well.

The case of *Morrison* v. *Olson* allowed independent counsels to be removable for cause only, but this was in the context of the prosecution of a lower executive official. If the President himself is the target of the independent counsel, it is harder to see how the Justices could credibly uphold the "for cause" limitation by claiming that they "simply do not see how the President's need to control the exercise of [prosecutorial] discretion is so central to the functioning of the executive branch."[16] Obviously, the question of prosecuting the President is central to the functioning of the executive branch, in a unique way. If Congress has passed a statute that does not give the President this discretion, it has violated the separation of powers. If judges uphold it, they have too.

Impeachment: First Things First

Contrast the check-and-balance of impeachment, in which the Constitution specifically gives Congress and the Chief Justice the job of charging and "trying" the President. Structurally, impeachment fits neatly with the temporary nature of the President's privilege. The Constitution explicitly states that impeached officials are subject to "indictment, trial, judgment and punishment" after their conviction by the Senate. Of course, for other federal officials this does not preclude pre-impeachment prosecution (as we have seen, the President is unique). But since the punishment for impeachment is specifically limited to removal (and disqualification) from office, and since regular prosecution is then possible, impeachment provides a constitutional method—removal—for prosecuting a President almost immediately without freezing the functions of the presidency. And while impeachment only comes into play for serious offenses (high crimes and misdemeanors) this is as it should be: it is only for such serious offenses that a prosecution cannot simply wait for the expiration of the President's term.

Doesn't impeachment freeze the functions of the presidency just as surely as a criminal prosecution would? Possibly, though not necessarily. For one thing, impeachment allows for a much more flexible and stripped-down version of procedure than do our courts. For another, the President is already institutionally equipped to deal with Congress; while impeachment is a rare event, it is much closer to the regular business of Presidents than is a criminal prosecution. It certainly makes geographical sense to minimize disruption by trying the President down the street from his office instead of dragging him to a county courthouse thousands of miles away.[17] Also, it is harder to impeach than to indict, making it less likely that an impeachment will get to trial than in a regular criminal process, an important fact in this age of overcriminalization and rubberstamp grand juries. Finally, after impeachment and conviction, the President is replaced and the function of government returns to full speed, while in a criminal prosecution conviction is just the beginning of the disruption: who would be in charge of the Oval Office pending an appeal?

Furthermore, even if the disruption of impeachment is no less than that of a trial, there is good reason for us to not mind. The disruption of impeachment is much more difficult to bring about; a prosecutor and a grand jury are much easier to convince than is half of the House of Representatives. Relatedly, and as we have been

thirds of each House of Congress. This method is intended mainly for physical, not political disabilities, and anyway requires broader agreement than mere impeachment.

[16] *Morrison* v. *Olson*, 487 U.S. 654, 691 (1988).

[17] The Founders designed impeachment with this sort of geographical convenience in mind. See The Federalist No. 65, at 400 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

arguing all along, if we assume that the presidency is going to be disrupted, who is allowed, and who do we want to disrupt it? Few Presidents are saints, but who ultimately should decide whether they must stand trial for their alleged sins? A prosecutor and twenty-three grand jurors, or the representatives of half of "We the People" acting through explicit constitutional procedures? The Founders knew what they were doing when they designed the impeachment process. When a President is removed, it is not by an unaccountable state official or an even less accountable special prosecutor. It is done instead by the most august, most representative, most constitutionally elaborated, and most accountable deliberative body we have, the Congress. Aware that politics could enter into the equation, the Founders wisely and purposely put the final decision in the hands of the more deliberative Senate, and required a super-majority so that conviction of the President would not be possible without the assent of at least some of his political allies.[18] Impeachment, then, is the sole means of removing a sitting President, and is a good one at that.

There is one more point to be made. In the Founding debates, in a discussion of limiting the President's pardon power, the scenario of a malfeasing President pardoning his friends was raised. James Wilson responded to this scenario with a reassurance that, "if [the President] himself be a party to the guilt he can be impeached and prosecuted."[19] Besides hinting at what we have said about impeachment necessarily preceding prosecution,[20] this introduces us to another structural consideration, the pardon. Then-solicitor General Robert Bork argued that, logically, Presidents must be immune from federal prosecution, since they can always just pardon themselves. As one of us has argued at length elsewhere, though, Presidents cannot pardon themselves.[21] Among other reasons, the self pardon would be permanent, not temporary, and would thus place the President above the rule of law.[22] And anyway, it cannot be so lightly assumed that a President facing prosecution would pardon himself, since doing so would almost certainly guarantee an impeachment (potentially as a [self-] bribe, one of the enumerated bases of impeachment), and might even be prosecutable as a crime (public misconduct, obstruction of justice, etc.) in itself.

Conclusion

The Constitution provides for a government of laws, not men. At the same time, the People have the right to a vigorous Executive who protects and defends them, their country, and their Constitution. Temporary immunity is the only way to ensure both of these things. It prevents relatively unrepresentative actors from holding the country hostage, leaving discretion instead in the proper, more representative hands of Congress. By leaving the constitutional mechanism of impeachment available, it ultimately holds the President responsible for his actions. Put simply, it makes good constitutional sense.

Senator ASHCROFT. Professor Turley, if you would go ahead.

STATEMENT OF JONATHAN TURLEY

Mr. TURLEY. Thank you, Mr. Chairman, Senator Torricelli. My name is Jonathan Turley. I am a law professor at George Washington University Law School, where I hold the J.B. and Maurice C. Shapiro Chair for Public Interest Law.

I sincerely appreciate the opportunity to share my thoughts on the developing constitutional crisis and the question of indicting a sitting President. I realize your time is limited this morning, so I will attempt the impossible for an academic. I will attempt to be brief.

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[18] See id. at 396–401.

[19] The Records of the Federal Convention of 1787, at 185 (Max Farrand ed., 1911).

[20] See Federalist No. 69, AT 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The President * * * would be liable to be impeached, tried, and, upon conviction * * * would afterwards be liable to prosecution and punishment in the ordinary course of law.") (emphasis added); Id. No. 77 at 464 (Alexander Hamilton) (discussing Presidential impeachment and "subsequent prosecution in the common course of law"). (emphasis added).

[21] See Brian C. Kalt, Pardon Me?: The Constitutional Case Against Presidential Self-Pardons, 106 Yale L.J. 779 (1996).

[22] Even if the President could pardon himself, however, immunity does not necessarily follow. Bork's argument proves too much, since the President can pardon all sorts of people who are still subject to prosecution. Indeed, if immunity followed from ability to receive pardons, then no one could be prosecuted (paradoxically leaving no one to pardon).