unemployment resulted from indigenous factors such as its residents' lack of education and training, rather than from an influx of job-seekers as such. Moreover, the statutory preference extended to all Alaskans, not just the unemployed.

The 1985 case of Supreme Court of New Hampshire v. Piper, 470 U.S. 274, involved a challenge to the New Hampshire Supreme Court's Rule 42, which made residency in the state a requirement for admittance to the New Hampshire bar. Plaintiff Kathryn Piper had passed the New Hampshire state bar examination, but wanted to continue to reside in Lower Waterford, Vermont—about 400 yards from the New Hampshire border. Justice Powell, for an eight-Justice majority, held that the opportunity to practice law is a "fundamental right." According to the Court:

> The Clause does not preclude discrimination against nonresidents where: (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective. In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means.

Noting that the state met neither of these criteria, the Court struck down the law. Justice Rehnquist dissented, writing that "conclusory second-guessing of difficult legislative decisions, such as the Court resorts to today, is not an attractive way for federal courts to engage in judicial review." The Court later relied on *Piper* to strike down similar residency requirements in Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988), and Virgin Islands Bar Association v. Thorsten, 489 U.S. 546 (1989).

For a thoughtful general framework of analysis for assessing various issues of horizontal federalism, see Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 Colum. L. Rev. 249 (1992). See also infra, Chapter 9, discussing related issues of interstate federalism under the "right to travel" rubric.

IV. The Executive Power of the United States

Alongside federalism, separation of powers stands as a central structural feature of the American Constitution. Much of the material we have already reviewed in this chapter can be understood as implicating both themes, involving the three-way interplay between the Court, the Congress, and states. In this interplay, the federal executive branch has often been hidden from view—although the careful reader will have glimpsed the important roles of Franklin Roosevelt, Richard Nixon, and Ronald Reagan, among others, in the story thus far.

It is now time to bring the American President center stage, and consider in more detail some of the extraordinary powers of this office, and some important limits on those powers. Although we shall consider these powers seriatim, recall that all of them are, by the first sentence of Article II, vested in a single person: the President. Try to see how these powers might interact and overlap in specific contexts. For example, note that the same person has important war powers as Commander-in-Chief, treaty negotiator, appointer and receiver of ambassadors, and more general head of state; and also important controls over domestic prosecutions, via the pardon power and the power to appoint the Attorney General. Are there synergies across these powers?

Note that in this respect the President is rather different from state governors, who are not central figures in wars and foreign affairs, and who typically lack power under their respective state constitutions over their state attorneys general.[50]

A. The (Non)Prosecution Power

One overarching theme of this casebook is that many important constitutional decisions occur outside of the judiciary. Even within the judiciary, not all major decisions are made by the Supreme Court. Recall, for example, that various lower federal courts in the 1790s addressed the constitutionality of the 1798 Sedition Act, but that the issue never reached the Supreme Court, and was eventually mooted by the victory of Jefferson and the Republicans in the election of 1800. President Jefferson pardoned all those convicted, and the new Congress allowed the Act to expire. Thus the lower courts; the President (both Adams and Jefferson); the Congress (both in 1798 and after 1800); the state legislatures (two of which issued famous Resolutions against the Act in 1798, most of which elected senators in 1800, and all of which helped pick the President in 1800); and the electorate — all these actors played more direct roles in the constitutional drama than did the Supreme Court itself.

In the mid-1960s, many vital questions of constitutional law were being decided by the Warren Court; but Congress and the President were also in the thick of things, adopting landmark civil rights laws and pursuing important strategies of civil rights enforcement. Another lead actor in the great national drama was the U.S. Court of Appeals for the (old) Fifth Circuit, spanning the deep South from Florida to Texas. It was this court that had primary responsibility for enforcing the Second Reconstruction coming out of Washington, D.C. See generally Jack Bass, Unlikely Heroes (1981). The next case comes from that court and that era. The facts of the case are gripping, but they fully appear only at the end of the last opinion, per Judge Wisdom. No peeking.

UNITED STATES v. COX

342 F.2d 167, cert. denied sub nom. Cox v. Hauberg, 381 U.S. 935 (1965)

JONES, Circuit Judge.

On October 22, 1964, an order of the United States District Court for the Southern District of Mississippi, signed by Harold Cox, a judge of that Court, was entered. The order, with caption and formal closing omitted, is as follows:

> "THE GRAND JURY, duly elected, impaneled and organized, for the Southern District of Mississippi, reconvened on order of the Court at 9:00 A.M., October 21, 1964, in Court Room Number 2 in Jackson, Mississippi, for the general dispatch of its business. . . . On the morning of October 22, 1964, the grand jury, through its foreman, made known to

50. For important overall assessments of presidential power, see Steven G. Calabresi and Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153 (1992); Steven G. Calabresi and Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541 (1994); Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23 (1995). For a more recent essay inspired by the impressive work of Professor Calabresi, see Akhil Reed Amar, Some Opinions on the Opinions Clause, 82 Va. L. Rev. 647 (1996).

> the Court in open court that they had requested Robert E. Hauberg, United States Attorney, to prepare certain indictments which they desired to bring against some of the persons under consideration and about which they had heard testimony, and the United States Attorney refused to draft or sign any such indictments on instructions of the Acting Attorney General of the United States; whereupon the Court ordered and directed said United States Attorney to draft such true bills or no bills as the grand jury may have duly voted and desired to report and to sign such instruments as required by law under penalty of contempt. The United States Attorney was afforded one hour within which to decide as to whether or not he would abide by the instructions and order of the Court in such respect. At the end of such time, the Court re-convened and the United States Attorney was specifically asked in open court as to whether or not he intended to conform with the order and direction of the Court in said respects whereupon the United States Attorney answered that he respectfully declined to do so on instructions from Nicholas deB. Katzenbach, Acting Attorney General. He was thereupon duly adjudged by the Court to be in civil contempt of the Court. . . .
>
> "WHEREFORE, IT IS ORDERED AND ADJUDGED by the Court that Robert E. Hauberg, United States Attorney, is guilty of civil contempt of this Court and in the presence of the Court for his said refusal to obey its said order and he is ordered into custody of the United States Marshal to be confined by him in the Hinds County, Mississippi, jail, there to remain until he purges himself of this contempt by agreeing to conform to said order by performing his official duty for the grand jury as requested. . . .
>
> "IT IS FURTHER ORDERED by the Court that a citation issue to Nicholas deB. Katzenbach, Acting Attorney General of the United States, directing him to appear before this Court and show cause why he should not be adjudged guilty of contempt of this Court for his instructions and directions to the United States Attorney to disregard and disobey the orders of this Court in the respects stated. . . ."

The United States Attorney, Robert E. Hauberg, and the Acting Attorney General, Nicholas deB. Katzenbach, have appealed from the order. . . . The facts recited in the order are uncontroverted. No further facts are essential to a decision of the issues before this Court. Although the issues here presented arose, in part at least, as an incident of a civil rights matter, no civil rights questions are involved in the rather broad inquiry which we are called upon to make.

The constitutional requirement of an indictment or presentment as a predicate to a prosecution for capital or infamous crimes has for its primary purpose the protection of the individual from jeopardy except on a finding of probable cause by a group of his fellow citizens, and is designed to afford a safeguard against oppressive actions of the prosecutor or a court. The constitutional provision is not to be read as conferring on or preserving to the grand jury, as such, any rights or prerogatives. The constitutional provision is, as has been said, for the benefit of the accused. . . .

Traditionally, the Attorney for the United States had the power to enter a nolle prosequi of a criminal charge at any time after indictment and before trial, and this he could have done without the approval of the court or the consent of the accused. . . .

It is now provided by the Federal Rules of Criminal Procedure that the Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment. Rule 48(a) Fed. Rules Crim. Proc. 18 U.S.C.A. In the absence of the Rule, leave of court would not have been required. The purpose of the Rule is to prevent harassment of a defendant by charging, dismissing and re-charging without

placing a defendant in jeopardy. Rule 7 . . . provides that "[the indictment] shall be signed by the attorney for the government."

The judicial power of the United States is vested in the federal courts, and extends to prosecutions for violations of the criminal laws of the United States. The executive power is vested in the President of the United States, who is required to take care that the laws be faithfully executed. The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed. The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed. The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions. The provision of Rule 7, requiring the signing of the indictment by the attorney for the Government, is a recognition of the power of Government counsel to permit or not to permit the bringing of an indictment. If the attorney refuses to sign, as he has the discretionary power of doing, we conclude that there is no valid indictment. It is not to be supposed that the signature of counsel is merely an attestation of the act of the grand jury. The signature of the foreman performs that function. . . . Rather, we think, the requirement of the signature is for the purpose of evidencing the joinder of the attorney for the United States with the grand jury in instituting a criminal proceeding in the court. Without the signature there can be no criminal proceeding brought upon an indictment.

If it were not for the discretionary power given to the United States Attorney to prevent an indictment by withholding his signature, there might be doubt as to the constitutionality of the requirement of Rule 48 for leave of court for a dismissal of a pending prosecution.

Because, as we conclude, the signature of the Government attorney is necessary to the validity of the indictment and the affixing or withholding of the signature is a matter of executive discretion which cannot be coerced or reviewed by the courts, the contempt order must be reversed. . . .

Judges Tuttle, Jones, Brown and Wisdom join in the conclusion that the signature of the United States Attorney is essential to the validity of an indictment. Judge Brown, as appears in his separate opinion, is of the view that the United States Attorney is required, upon the request of the grand jury, to draft forms of indictments in accordance with its desires. The order before us for review is in the conjunctive; it requires the United States Attorney to prepare and sign. A majority of the court, having decided that the direction to sign is erroneous, the order on appeal will be reversed. . . .

Rives, Gewin and Griffen B. Bell, Circuit Judges (concurring in part and dissenting part):

[T]he basic issue before this Court is whether the controlling discretion as to the institution of a felony prosecution rests with the Attorney General or with the grand jury. The majority opinion would ignore the broad inquisitorial powers of the grand jury, and limit the constitutional requirement of Amendment V to the benefit of the accused.

We agree with Professor Orfield that:

> "The grand jury serves two great functions. One is to bring to trial persons accused of crime upon just grounds. The other is to protect persons against unfounded or malicious prosecutions by insuring that no criminal proceeding will be undertaken without a disinterested determination of probable guilt. The inquisitorial function has been called the more important. . . ."

A federal grand jury has the unquestioned right to inquire into any matter within the jurisdiction involving violations of law and to return an indictment if it finds a reasonable probability that a crime has been committed. This it may do at the instance of the court, the District Attorney, the Attorney General or on its own initiative, from evidence it may gather or from knowledge of its members. . . .

The finding and return of the indictment are the acts of the grand jury. When United States Attorney prepares and signs an indictment, he does not adopt, approve, or vouch for the charge, nor does he institute a criminal prosecution. . . . The United States Attorney cannot, except in an advisory capacity, inquire into the merits of whether indictments should be found and returned in particular cases being considered by the grand jury. Only the grand jurors themselves have that power. It would be grossly wrong for it to be usurped. . . .

. . . The signature of the United States Attorney is a mere authentication that the indictment is the act of the grand jury. . . .

The Attorney General insists that the prosecution of offenses against the United States is an executive function of the Attorney General deraigned from the executive power vested in the President to "take care that the laws be faithfully executed." The short answer is that one of the most fundamental and important of the laws so to be faithfully executed is the clear and explicit provision of the Fifth Amendment to the Constitution that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

Moreover, in point of law and reality, the plenary inquisitorial power of the grand jury does not impinge in the slightest upon the executive function of the Attorney General to prosecute or not to prosecute offenses against the United States, for as soon as the indictment is returned, "The Attorney General or the United States Attorney may by leave of court file a dismissal. . . ." Rule 48(a), F. R. Crim. P. . . .

The grand jury may be permitted to function in its traditional sphere, while at the same time enforcing the separation of powers doctrine as between the executive and judicial branches of the government. This can best be done, indeed, it is mandatory, by requiring the United States Attorney to assist the grand jury in preparing indictments which they wish to consider or return, and by requiring the United States Attorney to sign any indictment that is to be returned. Then, once the indictment is returned, the Attorney General or the United States Attorney can refuse to go forward. That refusal will, of course, be in open court and not in the secret confines of the grand jury room. To permit the district court to compel the United States Attorney to proceed beyond this point would invest prosecutorial power in the

judiciary, power which under the Constitution is reserved to the executive branch of the government. It may be that the court, in the interest of justice, may require a showing of good faith, and a statement of some rational basis for dismissal. In the unlikely event of bad faith or irrational action, not here present, it may be that the court could appoint counsel to prosecute the case. In brief, the court may have the same inherent power to administer justice to the government as it does to the defendant. That question is not now before us and may never arise. Except for a very limited discretion, however, the court's power to withhold leave to dismiss an indictment is solely for the protection of the defendant. . . .

We agree that proper enforcement of the law does not require that indictments should be returned in every case where probable cause exists. Public policy may in some instances require that a case not be prosecuted. Such consideration of public policy may be submitted to and acted on by the grand jury. . . . In the few cases in which the United States Attorney is unable to persuade the grand jury and the Attorney General disagrees with its action, his recourse is not to prevent the grand jury from finding and returning an effective indictment, but to file a dismissal of the indictment under Rule 48(a), F. R. Crim. P. . . . [The executive decision to forgo prosecution should not be made] in the shadows of secrecy, with the Attorney General not being required to disclose his reasons. How much better is the constitutional system by which the grand jury can find and return an effective indictment upon which a prosecution for crime is instituted. At that point the power of the grand jury ceases. It is effectively checked and overbalanced by the power of the Attorney General, recognized in Rule 48(a), to move for a dismissal of the indictment. The court may then require such a motion to be heard in open court. Instead of a prevention in the shadows of secrecy, there would be a dismissal in a formal, public judicial proceeding. . . .

John R. Brown, Circuit Judge (concurring specially):

Mine is a middle course. I agree with the opinion written by Judge Jones that the District Attorney may not be compelled to sign the formal indictment which the Grand Jury has voted to return. . . . But I do not agree that the District Attorney may ignore the efforts of the Grand Jury to the point of declining to prepare in proper legal form the indictment they have voted to return. On the contrary, I am of the view that the Court may properly compel the District Attorney to act as legal scrivener to the Grand Jury. The Court may, therefore, order the District Attorney to prepare the indictment in legal form [but not to sign it]. . . .

Responsibility for determining whether a prosecution is to be commenced or maintained must be clearly fixed. The power not to initiate is indeed awesome. But it has to reside somewhere. And the more clearly pinpointed it is, the more the public interest is served through the focus of relentless publicity upon that decision. It may not, with safety, be left to a body whose great virtue is the combination of anonymity, transitory authority, and political unresponsibility.

All must be aware now that there are times when the interests of the nation require that a prosecution be foregone. These instances will most often be in the area of state secrets and national security. With stakes so high, the safety of our country, and hence the security of the world, ought not to be imperiled by leaving the important decision to a body having no definitive political responsibility. And it is hardly realistic to suggest, as do the dissenters, that these factors may be evaluated by the Grand Jury. What will be the source of their information? How extensive will it

be? How close will a Grand Jury session approach a presidential cabinet meeting? How will essential government secrets be kept when disclosed to persons none of whom as Grand Jurors will have been subjected to customary security clearance checks?

And even in less sensitive areas, the practical operation of the prosecutorial function makes imperative the need for executive determination. The familiar example is the deliberate choice between those to be prosecuted and those who, often equally guilty, are named as co-conspirators but not as defendants, or others not named who are used as star government witnesses. And in other situations, of which the instant case may well be typical, the executive's purpose to effectuate specific policies thought to be of major importance would be frustrated or encumbered were a Grand Jury given the sole prerogative of determining when a prosecution is to be effectively commenced. . . .

Finally, it seems to me incongruous to assert, as do the dissenters, that the signing of the indictment is a ministerial act having no function other than one of authentication. . . . I do not see why an indictment formally signed by the foreman and reported in a solemn open court proceeding as the act of the Grand Jury needs ''authentication.'' And I am at a complete loss to understand how the District Attorney — excluded as he is from the Grand Jury while it is voting, — can ''authenticate'' from hearsay, or why his imprimatur is any better or different than that which would come from other Grand Jurors, each of whom can be polled by the Judge, not as to his vote, but whether a majority did vote to return the true bill. . . .

The fact is that the signature of the District Attorney has much more awesome consequence. Without a doubt that signature, together with that of the Grand Jury's foreman, is a formal, effective initiation of a prosecution. . . . With it, the whole prosecution has been started. And what was previously an unfettered discretionary right on the part of the executive not to initiate prosecution has now been set in motion and can be stopped only on the executive taking affirmative action for dismissal with all of the uncertainties which F. R. Crim. P. 48(a) generates.

But while I am firm that signature is a vital and significant act which reflects the exercise of an executive discretion to initiate prosecution — a thing here lacking — I am equally positive that the District Attorney has the duty to prepare the indictment when requested to do so by the Grand Jury. . . .

To me the thing seems this simple: the Grand Jury is charged to report. It determines what it is to report. It determines the form in which it reports. Once it determines that what it wants to report is to be in the form of a true bill indictment, it obviously needs legal help. . . . Although, as the Court holds, the ''indictment'' thus returned would be ineffective without the signature of the District Attorney, reporting its conclusion in traditional legal form would do two things. First, it would clearly reflect the conscientious conclusion of the Grand Jury itself. And, second, it would, at the same time, sharply reveal the difference of view as between the Grand Jury and the prosecuting attorney.

This leads to the second important reason. The powers of the Executive are so awesome in determining those whom it will not prosecute, that where there is a difference between the Grand Jury and the Executive, this determination and the resulting conflict of views should be revealed in open court. With great power comes great responsibility. Disclosure of this difference of view and the resulting impasse would subject this decision of the Executive to the scrutiny of an informed electorate. The issue would be clearly drawn and the responsibility, both legally and in the

public mind, plainly fixed. There would not be the sort of thing reflected in this record in which only in the loosest way could the public see what it was the Grand Jury purposed to do and what the Executive declined to help it to do. . . .

By following this middle course we preserve fully the rightful independence of the Grand Jury in its inquisitorial role and the time-proved wisdom of the separation of powers which commits determination (and responsibility) to the Executive. . . .

WISDOM, Circuit Judge (concurring specially): . . .

The dissenters show judicial craftsmanship of the highest order in writing persuasively about ''the traditional sphere'' of the grand jury while not turning up one case holding that a court may compel a prosecutor to prepare and sign a bill of indictment requested by a grand jury. Not one case in all the years between 1166 and 1965! I submit that the result reached in the dissent is the product of a misunderstanding of the historical meaning of ''presentment and indictment,'' a failure to give effect to the difference between the sword and the shield of the grand jury, and an abstract approach that disregards the factual setting in which the issue is presented.

Nothing in the position of any of the judges in the majority ''ignores'' or tends to diminish the purely inquisitorial role of the federal grand jury. But when that role goes beyond inquiry and report and becomes accusatorial, no aura of traditional or constitutional sanctity surrounds the grand jury. The Grand Jury earned its place in the Bill of Rights by its shield, not by its sword.

I

The Fifth Amendment requires the grand jury's ''presentment or indictment'' as a prerequisite to trial for a ''capital, or otherwise infamous crime.'' This language provides no aid and comfort to the notion that either the grand jury or the court has the power to compel prosecution once the grand jury has exercised its accusatorial function. . . .

Historians usually trace the English grand jury back to the Assize of Clarendon issued by Henry II in 1166, based not on Anglo-Saxon antecedents but on Norman-French inquests. . . .

From its beginning until its abolition by Parliament in 1933, the English common law presenting jury could act on its own knowledge, or on the information of others, or on the Crown's written bill of indictment. But only when this bill was preferred to the grand jury by the Crown and endorsed as a ''true bill'' was the accusation known as an indictment. This was the accepted usage when the Fifth Amendment was adopted. Blackstone explained:

> ''A presentment, generally taken, is a very comprehensive term; including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. A presentment, properly speaking, is the notice taken by a grand jury of any offence from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king. . . . An indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury. . . . When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill, 'ignoramus'; or, we know nothing of it; intimating, that though the facts might possibly be true, that

> truth did not appear to them: but now, they assert in English, more absolutely, 'not a true bill'; or (which is the better way) 'not found'; and then the party is discharged without farther answer. . . . If they are satisfied of the truth of the accusation, they then endorse upon it, 'a true bill,' antiently, 'billa vera.' The indictment is then said to be found, and the party stands indicted.''

The Fifth Amendment, therefore, does not offer a grand jury a choice between presentment or indictment. Unless there is a bill of indictment preferred to the grand jury at the instance of the Government, there can be no indictment. It is entirely in the hands of the Government whether to submit an accusation to the grand jury leading to presentment in the form of an indictment and serving as the initial pleading in a criminal prosecution. . . .

Presentment is a natural corollary to the grand jury's inquisitorial power, either for an inquisition of office or for a prosecutory purpose. Its use here would not accomplish its prosecutory purpose, because the Attorney General still could decline to submit a bill of indictment to the grand jury. On the other hand, in this case a presentment in open court with an appropriate minute entry would meet many of the objections to the government's position raised in the dissenting opinion and Judge Brown's opinion. . . . This use of presentment would be in accord with the established procedure in the common law and with the original understanding of the framers. . . .

In sum, there is nothing in my view or in that of the other judges in the majority that would, as the dissenting judges assert, authorize Government counsel to ''radically reduce the powers of the grand jury.'' The grand jury never had a plenary power to indict. It had a limited power to indict—after accusation by the Crown or the Government in the form of a bill of indictment preferred to the grand jury. . . .

The decision of the majority does not affect the inquisitorial power of the grand jury. No one questions the jury's plenary power to inquire, to summon and interrogate witnesses, and to present either findings and a report or an accusation in open court by presentment.

Finally, the decision does not affect the power of the grand jury to shield suspected law violators. By refusing to indict, the grand jury has the unchallengeable power to defend the innocent from government oppression by unjust prosecution. And it has the equally unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce twelve or more jurors to give sanctuary to the guilty.

II

Because recognition of the grand jury's shield-like function is lodged in the Bill of Rights, the bedrock of basic rights, it is fair to say that national policy favors a liberal construction of the power of the grand jury to protect the individual against official tyranny. No such policy favors the grand jury in its accusatorial role. Accordingly, we look for and should expect to find a check on its unjust accusations similar to the grand jury's check on the government's unjust accusations.

[T]he framers wove a web of checks and balances designed to prevent abuse of power, regardless of the age, origin, and character of the institution. . . . [T]he power of the executive not to prosecute, and therefore not to take steps necessarily leading to prosecution, is the appropriate curb on a grand jury in keeping with the

constitutional theory of checks and balances. Such a check is especially necessary, if there is any question of the grand jury's and the district court's being in agreement; if they differ, of course the district court may dismiss the grand jury. The need is rendered more acute if there is a possibility that community hostility against the suspected offenders, individually or as a race, may jeopardize justice before the petit jury. In short, if we give the same meaning to "presentment or indictment" that Madison and others gave to these terms when Madison introduced the Bill of Rights in the First Congress, the grand jury provision in the Bill of Rights cuts both ways: it prevents harassment and intimidation and oppression through unjust prosecution — by the Grand Jury or by the Government.

III

The prosecution of offenses against the United States is an executive function within the exclusive prerogative of the Attorney General. . . . That official, the chief law-enforcement officer of the Federal Government is "the hand of the president in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses be faithfully executed." . . .

"The district attorney has absolute control over criminal prosecutions, and can dismiss or refuse to prosecute, any of them at his discretion. The responsibility is wholly his." The determination of whether and when to prosecute "is a matter of policy for the prosecuting officer and not for the determination of the courts." As another court has stated it:

> All of these considerations point up the wisdom of vesting broad discretion in the United States Attorney. The federal courts are powerless to interfere with his discretionary power. The Court cannot compel him to prosecute a complaint, or even an indictment, whatever his reasons for not acting. The remedy for any dereliction of his duty lies, not with the courts, but, with the executive branch of our government and ultimately with the people.[a]

. . . Thus, "courts generally refuse to order the prosecutor to initiate a prosecution on the ground that it is a discretionary act which may not be compelled by mandamus." . . . Rule 7(c), requiring that the indictment be signed by the United States Attorney, preserves the prosecutor's traditional discretion as to whether to initiate prosecution.

a. In the hearing on the confirmation of Attorney General Jackson as Associate Justice of the Supreme Court, the nomination was attacked because of Jackson's failure to prosecute Drew Pearson and Robert S. Allen for criminal libel on Senator Tydings. Jackson had taken the position that it was the policy of the Department of Justice to avoid the criminal libel laws when the courts were open to the injured party in civil proceedings, and that prosecutions of this character would tend to impair freedom of the press. Republican Senator (now Mr. Justice) Burton stated:

> "The prosecuting attorney, being charged, as he is charged, with the great responsibility of deciding under the laws of the United States, the laws under which he is serving, whether a case should be prosecuted, owes a duty to himself, his community, and the Constitution to decide whether the case should be prosecuted. . . . In my judgment the Attorney General was within his rights when he declined to prosecute, and in stating the grounds as he did state them under the circumstances.".

The reason for vesting discretion to prosecute in the Executive, acting through the Attorney General is two-fold. First, in the interests of justice and the orderly, efficient administration of the law, some person or agency should be able to prevent an unjust prosecution. The freedom of the petit jury to bring in a verdict of not guilty and the progressive development of the law in the direction of making more meaningful the guarantees of an accused person's constitutional rights give considerable protection to the individual before and after trial. They do not protect against a baseless prosecution. This is a harassment to the accused and an expensive strain on the machinery of justice. The appropriate repository for authority to prevent a baseless prosecution is the chief law-enforcement officer whose duty, unlike the grand jury's duty, is to collect evidence on both sides of a case.

Second, when, within the context of law-enforcement, national policy is involved, because of national security, conduct of foreign policy, or a conflict between two branches of government, the appropriate branch to decide the matter is the executive branch. The executive is charged with carrying out national policy on law-enforcement and, generally speaking, is informed on more levels than the more specialized judicial and legislative branches. In such a situation, a decision not to prosecute is analogous to the exercise of executive privilege. The executive's absolute and exclusive discretion to prosecute may be rationalized as an illustration of the doctrine of separation of powers, but it would have evolved without the doctrine and exists in countries that do not purport to accept this doctrine. . . .

IV

This brings me to the facts. They demonstrate, better than abstract principles or legal dicta, the imperative necessity that the United States, through its Attorney General, have uncontrollable discretion to prosecute.

The crucial fact here is that Goff and Kendrick, two Negroes, testified in a suit by the United States against the Registrar of Clarke County, Mississippi, and the State of Mississippi, to enforce the voting rights of Negroes under the Fourteenth Amendment and the Civil Rights Act.

Goff and Kendrick testified that some seven years earlier at Stonewall, Mississippi, the registrar had refused to register them or give them application forms. They said that they had seen white persons registering, one of whom was a B. Floyd Jones. Ramsey, the registrar, testified that Jones had not registered at that time or place, but had registered the year before in Enterprise, Mississippi. He testified also that he had never discriminated against Negro applicants for registration.[b] Jones testified that he was near the registration table in Stonewall in 1955, had talked with the registrar, and had shaken hands with him. The presiding judge, Judge W. Harold

b. Judge Cox found "as a fact from the evidence that negro citizens have been discriminated against by the registrar," although he found also that there was "no pattern or practice of discrimination." In its original opinion in the Ramsey case this Court noted the "testimony which witness by witness convicts Ramsey of palpable discrimination." In his opinion Judge Rives noted that "This case reveals gross and flagrant denials of the rights of Negro citizens to vote." And on rehearing, this Court ruled that the finding that "there was no pattern or practice in the discrimination by the Registrar" was "clearly erroneous." No one has suggested that Mr. Ramsey may have been guilty of perjury.

Cox, stated from the bench that Goff and Kendrick should be ''bound over to await the action of the grand jury for perjury.''[c]

In January 1963 attorneys of the Department of Justice requested the Federal Bureau of Investigation to investigate the possible perjury. The FBI completed a full investigation in March 1963 and referred the matter to the Department's Criminal Division. In June 1963 the Criminal Division advised the local United States Attorney, Mr. Hauberg, that the matter presented ''no basis for a perjury prosecution.'' Mr. Hauberg informed Judge Cox of the Department's decision. Judge Cox stated that in his view the matter was clearly one for the grand jury and that he would be inclined, if necessary, to appoint an outside attorney to present the matter to the grand jury. (I find no authority for a federal judge to displace the United States Attorney by appointing a special prosecutor.) On receiving this information, the Criminal Division again reviewed its files and concluded that the charge of perjury could not be sustained. General Katzenbach, then Deputy Attorney General, after reviewing the files, concurred in the Criminal Division's decision. In September 1963 General Katzenbach called on Judge Cox as a courtesy to explain why the Department had arrived at the conclusion that no perjury was involved. Judge Cox, unconvinced, requested the United States Attorney to present to the grand jury the Goff and Kendrick cases, which he regarded as cases of ''palpable perjury.''

In October 1963 Goff and Kendrick were arrested, jailed for two days, and placed on a $3,000 bond for violations of State law for falsely testifying in federal court. After their indictment by a state grand jury, the Department of Justice filed suit against the State District Attorney, seeking to enjoin the state prosecution on the grounds that: (1) the States have no authority to prosecute for alleged perjury committed while testifying in a federal court; (2) the purpose and effect of the State's prosecution was to threaten and intimidate Goff and Kendrick and to inhibit them and other Negroes from registering to vote. The district court (per Mize, J.) ruled in favor of the United States. . . .

Against the backdrop of Mississippi versus the Nation in the field of civil rights, we have a heated but bona fide difference of opinion between Judge Cox and the Attorney General as to whether two Negroes, Goff and Kendrick, should be prosecuted for perjury. Taking a narrow view of the case, we would be justified in holding that the Attorney General's implied powers, by analogy to the express powers of Rule 48(a), give him discretion to prosecute. Here there was a bona fide, reasonable exercise of discretion made after a full investigation and long consideration of the case — both sides of the case, not just the evidence tending to show guilt. If

c. When counsel for the State, Mr. Riddell, completed Mr. Ramsey's direct examination, and before his cross-examination, respondent Judge W. Harold Cox, who was presiding, stated:

> ''I want to hear from the government about why this Court shouldn't require this Negro Reverend W.G. Goff and his companion Kendrick to show cause why they shouldn't be bound over to await the action of the grand jury for perjury. I want to hear from you on that.
>
> ''I think they ought to be put under about a $3,000.00 bond each to await the action of a grand jury. Unless I change my mind that is going to be the order. 'BY MR. STERN (Government counsel): I will be happy to reconcile their testimony.' 'BY THE COURT: I just want these Negroes to know that they can't come into this Court and swear to something as important as that was and is and get by with it. I don't care who brings them here.' 'BY MR. STERN: understand.' 'BY THE COURT: Yes sir. And I mean that for whites alike, but I am talking about the case at hand. I just don't intend to put up with perjury. . . .'''

the grand jury is dissatisfied with that administrative decision, it may exercise its inquisitorial power and make a presentment in open court. It could be said, that is all there is to the case. But there is more to the case.

This Court, along with everyone else, knows that Goff and Kendrick, if prosecuted, run the risk of being tried in a climate of community hostility. They run the risk of a punishment that may not fit the crime. The Registrar, who provoked the original litigation, runs no risk, notwithstanding the fact that the district court, in effect, found that Ramsay did not tell the truth on the witness stand. In these circumstances, the very least demands of justice require that the discretion to prosecute be lodged with a person or agency insulated from local prejudices and parochial pressures. This is not the hard case that makes bad law. . . . This case is unusual only for the clarity with which the facts, speaking for themselves, illuminate the imperative necessity in American Federalism that the discretion to prosecute be lodged in the Attorney General of United States.

The decision not to prosecute represents the exercise of a discretion analogous to the exercise of executive privilege. As a matter of law, the Attorney General has concluded that there is not sufficient evidence to prove perjury. As a matter of fact, the Attorney General has concluded that trial for perjury would have the effect of inhibiting not only Goff and Kendrick but other Negroes in Mississippi from registering to vote. There is a conflict, therefore, between society's interest in law enforcement (diluted in this case by the Attorney General's conclusion that the evidence does not support the charge of guilt) and the national policy, set forth in the Constitution and the Civil Rights Acts, of outlawing racial discrimination. It is unthinkable that resolution of this important conflict affecting the whole Nation should lie with a majority of twenty-three members of a jury chosen from the Southern District of Mississippi. The nature of American Federalism, looking to the a differences between the Constitution and the Articles of Confederation, requires that the power to resolve this question lies in the unfettered discretion of the President of a United States or his deputy for law enforcement, the Attorney General. . . .

Discussion

1. *Just the facts, ma'am.* Ordinarily, judicial opinions open with the facts. Yet Judge Jones's plurality opinion offers a rather thin rendition of the facts; and Judge Wisdom puts the facts at the end of his opinion. What accounts for this? It is important to understand that every narrative of facts in an opinion or brief or other legal document is unavoidably selective; lawyers and judges must decide which of the infinite number of real-world facts are legally relevant to the case at hand — and to do this (or at least, to do this well), they must obviously have a legal theory that explains why some facts are relevant and others are not. Which, if any, of the facts at the end of Judge Wisdom's opinion, do you think were legally relevant? (Would your legal view of the case be different if a multiracial grand jury were seeking to indict a white lynch mob, and a white supremacist Attorney General were balking?)

2. *Construing statutes in the shadow of constitutional principles.* Note the intricate interplay between issues of statutory construction under Rules 7 and 48, and issues of constitutional principle under Articles II and III and the Fifth Amendment. A good deal of American-style ''judicial review'' occurs not when judges wheel out the Constitution to strike down a law, but when they invoke it more subtly to inflect their readings of statutes, regulations, ordinances, rules, and the like.

3. *Jury service and voting.* Note that the grand jury in *Cox* was doubtless all white; very few blacks served on Mississippi juries in 1965 because very few blacks were permitted to vote in that state at that time. See South Carolina v. Katzenbach, supra p. 639. Of course, this vicious cycle of jury exclusion and voting was precisely what civil rights activists and the Attorney General were trying to break by proving, for example, the voting rights violations of Mississippi registrars.

4. *The Cold War imperative.* How important were issues of foreign policy in shaping the President's response to domestic issues of race policy and prosecution policy? Consider the arguments of Professors Dudziak and Bell that these issues were tightly intertwined. America in the 1950s and 1960s was locked in a global struggle against Communism, with Asia, Africa, Central America, and South America as major ideological battlegrounds. To win this war, America needed to win the hearts and minds of "colored" persons around the globe, but the mistreatment of blacks in places like Mississippi — gleefully publicized by America's enemies — threatened to undermine America's efforts abroad. Even Presidents unmoved by considerations of justice had to pay attention, Dudziak and Bell argue. See Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61 (1988); Mary L. Dudziak, The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy, 70 S. Cal. L. Rev. 1641 (1997); Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518 (1980); see also Michael J. Klarman, *Brown*, Racial Change, and the Civil Rights Movement, 80 Va. L. Rev. 7 (1994). See also the discussion of *Brown* and the Cold War in Chapter 7.

5. *Prosecutions, presentments, publicity, and pardons.* Although the executive is often said to have the power of "prosecutorial" discretion, the power is better described as one of "nonprosecutorial" discretion — the discretionary and plenary power *not* to prosecute. This is the power upheld by *Cox* — the courts may not compel or mandamus a prosecution, and neither may a grand jury. Conversely, the President's power to affirmatively prosecute can rather easily be thwarted by grand juries and courts; the former may simply refuse to agree to an indictment, and the latter may always throw the case out.

Of course, plenary power not to prosecute is capable of great abuse. But does *Cox* persuade you of some of the reasons why the power should exist — why not all crimes can or should be prosecuted, and why complete power to say no should reside in the executive branch? Note how all the judges propose *publicity* as the main check on this power — though at different stages of the game. Judge Wisdom points to the power of publicity early on — the grand jury's power to make known that it thinks something stinks, via a public presentment or report. For historical background on this key presentment power, see Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 19, 84-87 (1998). For a fascinating discussion of a grand jury's efforts to publicize perceived wrongdoing in Rocky Flats, Colorado, and a more general modern-day analysis of the presentment power, see Renee B. Lettow, Note, Reviving Federal Grand Jury Presentments, 103 Yale L.J. 1333 (1994). Judge Brown picks a slightly different mechanism of publicity, in his decision that the prosecutor must help the grand jury draft the document it seeks to publicize. The dissenters opt for a later point — in open court after the (forcibly signed) indictment has been filed. And note that even if judges were to somehow invoke Rule 48 to prevent the prosecutor from dismissing the indictment at that point, the President himself always retains the power to say no — decisively — via the pardon

power vested in him by Article II. The exercise of this power of course is highly visible, satisfying the functional need to focus responsibility for controversial or dubious exercises of the power of nonprosecution. Recall that a presidential pardon may issue well before any trial or conviction, as Hamilton pointed out in The Federalist No. 69 — and as the more famous facts surrounding our next case should remind us.

UNITED STATES v. NIXON, PRESIDENT OF THE UNITED STATES

418 U.S. 683 (1974)

BURGER, C.J. . . .

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging seven named individuals[a] with various offenses, including conspiracy to defraud the United States and to obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted coconspirator.[b] On April 18, 1974, upon motion of the Special Prosecutor, see n.[c], infra, a subpoena duces tecum was issued . . . to the President by the United States District Court and made returnable on May 2, 1974. This subpoena required the production, in advance of the September 9 trial date, of certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings [in the Oval Office] between the President and others. . . . On April 30, the President publicly released edited transcripts of 43 conversations; portions of 20 conversations subject to subpoena in the present case were included. On May 1, 1974, the President's counsel filed a ''special appearance'' and a motion to quash the subpoena [on the ground that the subpoenaed materials were within his executive privilege against disclosure of confidential communications]. . . .

II. JUSTICIABILITY

In the District Court, the President's counsel argued that the court lacked jurisdiction to issue the subpoena because the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to judicial resolution. That argument has been renewed in this Court with emphasis on the contention that the dispute does not present a ''case'' or ''controversy'' which can be adjudicated in the federal courts. The President's counsel argues that the federal courts should not intrude into areas committed to the other branches of Government. He views the present dispute as essentially a ''jurisdictional'' dispute within the Executive Branch which he analogizes to a dispute between two

a. The seven defendants were John N. Mitchell, H.R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson, and Gordon Strachan. Each had occupied either a position of responsibility on the White House staff or a position with the Committee for the Re-election of the President. [John Mitchell, for example, had served as Richard Nixon's Attorney General — EDS.]

b. The cross-petition . . . raised the issue whether the grand jury acted within its authority in naming the President as an unindicted coconspirator. [W]e find resolution of this issue unnecessary to resolution of the question whether the claim of privilege is to prevail . . . [footnote relocated by editors].