

The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?

By ERIC M. FREEDMAN*

Table of Contents

Introduction	8
I. The Original Intent	15
II. The Historical Practice.....	22
A. The Federal Executive Branch	22
B. The Federal Judicial and Legislative Branches	24
1. The Federal Judicial Branch	25
2. The Federal Legislative Branch.....	30
C. Federal Prosecution of State and Local Officials.....	33
D. State-Level Practice	37
III. Theoretical Considerations	39
A. The Dual Nature of the Impeachment Clause	41
B. The Rule of Law.....	46
1. Civil Immunity	46

* Assistant Professor of Law, Hofstra University School of Law. J.D. 1979, B.A. 1975, Yale University; M.A. 1977, Victoria University of Wellington (New Zealand).

This Article has had an unusually long gestation period. See Eric M. Freedman, *2 Routes to the Agnew Inquiry: Their Virtues and Perils*, N.Y. TIMES, Oct. 6, 1973, at A22 (letter to the editor arguing that President or Vice President may be indicted while still in office); see also Eric M. Freedman, *Presidential Paradox*, NAT'L L.J., Aug. 12, 1991, at 17 (summarizing argument presented here).

During the earlier part of that period, the work benefitted particularly from conversations with those who strongly disagreed with its thesis, especially Robert H. Bork and Martin D. London. More recently, it was the subject of a great deal of constructive commentary from my colleagues when it was presented to a Hofstra Law School faculty workshop. I am particularly grateful to Andrew Shepard and Wendy M. Rogovin. Richard K. Neumann, Edward Chikofsky, and John D. Gregory read drafts and contributed many helpful suggestions.

I have also been fortunate in the diligence and enthusiasm of my research assistants, William E. Schetlick, Richard C. Schoenstein, and Edward Teitelbaum, of the Hofstra Law School Class of 1990; Paul Reiser of the Hofstra Law School Class of 1991; and Steven Weinstein and Jonathan Farrell of the Hofstra Law School Class of 1992—as well as in the devoted secretarial assistance of Nancy A. Grasser.

My efforts were partially underwritten by research funding from Hofstra University and the generous logistical support of Yale Law School.

2. The Law as Fence and Crown.....	49
IV. Practical Considerations.....	51
A. The Removal Objection.....	51
B. The Harassment Objection.....	59
1. Historical Judicial Protection.....	59
2. Self-Protection.....	64
3. Future Statutory and Judicial Protection.....	65
C. The Intrusiveness Objection.....	67
Conclusion.....	68

Introduction

Our Presidents and Vice Presidents are frequently accused of potentially criminal misconduct.¹ For instance, serious inquiries have been made into the activities of Presidents Reagan² and Bush³ during this

1. See RESPONSES OF THE PRESIDENT TO CHARGES OF MISCONDUCT at xii (C.V. Woodward ed., 1974); David Johnston, *Bush Pardons 6 in Iran-Contra Affair, Aborting a Weinberger Trial; Prosecutor Assails 'Cover-Up,'* N.Y. TIMES, Dec. 25, 1992, at A1 (independent counsel accuses President Bush of misconduct in belated production of documents; says inquiry, which may include interview of Bush, ongoing).

2. In early 1987, high officials of the Reagan Administration were concerned that the President had been personally involved in the illegal diversion to the Nicaraguan Contras of the proceeds of the sale of arms to Iran, a concern that was eventually defused when the National Security Advisor at the time, Admiral John Poindexter, testified that he had approved the diversion without the President's knowledge. See Joel Brinkley, *Birth of a Scandal and Mysteries of Its Parentage*, N.Y. TIMES, Dec. 25, at A23; David Johnston, *Meese Testifies that Impeachment Was a Worry*, N.Y. TIMES, Mar. 29, 1989, at A17. Several pending prosecutions raise the issue of whether President Reagan or any of his top advisors lied during the effort to absolve him of responsibility. See *Walsh is Said to be Mulling Reagan Charges*, WALL ST. J., July 27, 1992, at A12 (describing speculation that Iran-Contra independent counsel Lawrence Walsh might indict former President Reagan for covering up American role in November 1985 shipment of Hawk missiles to Iran); David Johnston, *In Iran-Contra Inquiry, New Interest in Reagan Aides' Actions*, N.Y. TIMES, July 12, 1992, at A17 (stating that since perjury indictment of former Secretary of Defense Casper Weinberger focus of Iran-Contra inquiry has been on evidence that top officials may have improperly tried to conceal President's actions); David Johnston, *Iran-Contra Inquiry Turns to Top Reagan Officials*, N.Y. TIMES, June 26, 1992, at A17; NEW YORKER, Dec. 30, 1991, at 23.

3. There have been a series of questions raised as to whether George Bush, (1) as a vice-presidential candidate was involved in a plan to persuade the government of Iran not to release its American hostages until after the 1980 election, so that the Republican ticket would not be confronted with an "October surprise," or (2) as Vice President knew of the illegal diversion of funds to the Contras. See *CIA Documents Raise New Questions About Bush's Knowledge of Iran-Contra*, WALL ST. J., Sept. 30, 1992, at A16; Walter Pincus, *Bush 'Out of the Loop' on Iran-Contra?*, WASH. POST, Sept. 24, 1992, at A1; *On 1980 Deal With Iran, Read Bush's Lips*, N.Y. TIMES, Nov. 17, 1991, at E16 (letter to editor); Leslie H. Gelb, *Iran-Contra, the Movie*, N.Y. TIMES, Oct. 6, 1991, at E17; Richard L. Berke, *Inquiry is Ordered on 1980 Campaign*, N.Y. TIMES, Aug. 6, 1991, at A1; *Nightline: The October Surprise* (ABC television broadcast, June 20, 1991); NEW YORKER, June 17, 1991, at 27; Cameron Barr, *Stranger than Fiction*, AM. LAW., Dec., 1990, at 70; David Johnston, *Tough Call for Bush: A Presidential Pardon for Poindexter?*, N.Y. TIMES, Apr. 9, 1990, at A13; see also David Johnston, *A Broader Role for*

country's intertwined dealings with the government of Iran and the Nicaraguan Contras during the late 1980s.⁴

The frequent investigations examining the possibility of executive misconduct suggest the country eventually will have to face a major and hitherto unresolved issue: May Presidents and Vice Presidents be indicted while in office?

During Watergate,⁵ lawyers for both President Nixon and Vice President Agnew asserted that those officials could not be required to

Bush Hinted in Iran Affair, N.Y. TIMES, Aug. 26, 1992 at A14; Neil A. Lewis, *Panel Rejects Theory Bush Met Iranians in Paris in '80*, N.Y. TIMES, July 2, 1992, at A16 (discussing House October Surprise Task Force interim report whose only conclusion was that Bush did not hold alleged meeting). See generally NEW YORKER, July 29, 1991, at 21.

In addition, a number of members of Congress have demanded an investigation into this country's relationship with Iraq prior to the Persian Gulf War, an inquiry that could also implicate President Bush. See Elaine Sciolino, *Iraq Policy Still Bedevils Bush as Congress Asks: Were Crimes Committed*, N.Y. TIMES, Aug. 9, 1992, at A18; William Safire, *Obstructing Justice*, N.Y. TIMES, July 9, 1992, at A21 (charging that the White House, as part of "a pattern of obstruction of justice and lying to Congress," concealed support for Iraq in 1989 and improperly sought to influence federal prosecution of an Atlanta bank charged with assisting Iraq in misapplying federal agriculture loans for military purposes). Their request for an independent prosecutor was denied by Attorney General William Barr, see N.Y. TIMES, Aug. 15, 1992, at A18 (criticizing this decision); cf. Terry Eastland, *Thanks to Barr, No Lawrence Walsh for Iraqgate*, WALL ST. J., Aug. 26, 1992, at A7 (defending decision), but received the support of candidate Bill Clinton, see William Safire, *A Smoking Gun?*, N.Y. TIMES, Sept. 10, 1992, at A23.

4. While these issues remain unresolved at present, one thing that may be said with certainty is that we do not as yet know the full story of these events. See HAROLD HONJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 115-16 n.54 (1990); Anthony Lewis, *Loop the Loop*, N.Y. TIMES, Sept. 11, 1992, at A35 (arguing that press has been "dismally negligent in failing to pin Mr. Bush down on what he knew and did" on Iran-Contra); *More 'October Surprise' Surprises*, N.Y. TIMES, Dec. 11, 1991, at A26 (editorial reviewing unanswered questions). This makes all the more imperative a serious re-examination of the so-far unresolved problem of reconciling the statutory independence of the independent counsel with presidential responsibility for the preservation of state secrets. See KOH, *supra*, at 31-33; Sandra D. Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice After Iran-Contra*, 91 COLUM. L. REV. 1651 (1991); Martin Edelman, *Law that Didn't Work*, N.Y. TIMES, Oct. 30, 1992, at A30 (letter to the editor). As matters have so far transpired in the Iran-Contra prosecutions, the independent counsel has been forced to drop key charges against important defendants because executive branch officials—many of them political intimates of those whose conduct might be in question—have refused to permit him to use certain classified information. See *Two Charges Against Poindexter Dismissed*, N.Y. TIMES, July 26, 1989, at B6; David Johnston, *U.S. Drops Part of its Case Against Iran-Contra Figures*, N.Y. TIMES, June 17, 1989, at A7; Michael Wines, *Key North Counts Dismissed by Court*, N.Y. TIMES, Jan. 14, 1989, at A1. See also *Justice Delays Iran-Contra Justice*, N.Y. TIMES, Oct. 21, 1989, at A24 (editorial criticizing Justice Department performance).

5. The Nixon Administration scandals collectively known as Watergate are summarized in Frank Tuerkheimer, *Watergate as History*, 1990 WIS. L. REV. 1323, 1324-27 (reviewing STANLEY KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* (1990)). See generally Sirica, 88, *Dies; Persistent Judge in Fall of Nixon*, N.Y. TIMES, Aug. 15, 1992, at A1 (obituary of judge who presided over Watergate prosecutions).

face criminal charges during their incumbencies.⁶ At least as to the President, special prosecutor Leon Jaworski apparently agreed.⁷ In other words, if the public desired prompt action, the President would have to be impeached before he could be indicted.

Because of Vice President Agnew's plea bargain,⁸ and because the

6. President Nixon took this position in his cross-petition for certiorari in *United States v. Nixon*, 418 U.S. 683, 687 n.2 (1974). Vice President Agnew asserted it in Memorandum in Support of Motion at 2-3, *In re Proceedings of the Grand Jury Impaneled Dec. 5, 1972* (D. Md. 1973).

7. As he has stated it in the intervening years, Jaworski's view was that, "[w]hile legally an indictment could be returned against a sitting President for the offense of murder, [say,] I did not believe the United States Supreme Court would have permitted indictment of a sitting President for obstruction of justice, especially when the House Judiciary Committee was then engaged in an inquiry into whether the President should be impeached on that very ground." LEON JAWORSKI, *THE RIGHT AND THE POWER* 100 (1976).

Actually, strictly legal considerations appear to have played only a small role in Jaworski's decision. See PHILIP B. KURLAND, *WATERGATE AND THE CONSTITUTION* 135 (1978) ("It is obvious that the special prosecutor had no clear legal reasons in mind for not prosecuting the President. It was enough for him that the Supreme Court might not like it.").

The special prosecutor had before him an extensive staff memorandum arguing that the President should be named in either an indictment or a presentment. See Memorandum to Leon Jaworski (Feb. 12, 1974) (on file with the *Hastings Constitutional Law Quarterly*) [hereinafter Prosecutors' Memorandum]. But he commented, "Those fellows are still law clerks. . . . [A]ll they know is casebooks. This is the real world." JAMES DOYLE, *NOT ABOVE THE LAW* 277 (1977).

In the real world, Jaworski believed, the Supreme Court might choose not to follow precedent. More significantly, fighting this issue would stiffen the President's resolve not to resign, and would squander time, resources, public support, and national energy on "the wrong issue on which to take on the President." RICHARD BEN-VENISTE & GEORGE FRAMPTON JR., *STONEWALL* 232 (1977).

While this Article argues that, as a legal matter, there is no barrier to indicting a sitting President, I do not suggest that the considerations Jaworski believed most decisive were inappropriate ones. Cf. Prosecutors' Memorandum, *supra*, at 10-11 (arguing that because evidence sufficiently strong to indict, other matters should not be taken into account). On the contrary, any independent counsel in the same position would doubtless consider such factors in exercising prosecutorial discretion over the charging decision. See, e.g., Ronald J. Ostrow & Robert L. Jackson, *Meese Probably Broke Law 4 Times, McKay Concludes*, L.A. TIMES, July 19, 1988, at A1 (discussing an 814-page report issued by independent counsel James C. McKay, appointed to investigate Attorney General Edwin Meese III, detailing conclusions that factfinder would probably find beyond a reasonable doubt that Meese violated federal conflict-of-interest and tax laws in connection with ownership of telephone company stock, but, as matter of prosecutorial discretion, declining to seek charges); Richard Ben-Veniste, *What's Meese's Problem*, WASH. POST, July 24, 1988, at C7 (article by former Watergate prosecutor supporting independent counsel's decision to proceed by public report rather than indictment). The existence of prosecutorial discretion as an additional layer of protection against harassment is further argument in support of a power to indict. Cf. Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 137-38 (1988) (criticizing independent counsel statute for removing prosecutorial discretion).

8. The story of the Agnew case is told in RICHARD M. COHEN & JULES WITCOVER, *A HEARTBEAT AWAY* (1974), which suggests that President Nixon's staff was eager to see the Vice President resign so as to avoid a definitive resolution of "the basic constitutional question

Supreme Court purposely ducked the question in deciding the Nixon tapes case,⁹ there was no judicial resolution of the issue then.¹⁰ Similarly, in creating the statutory post of special prosecutor (now independent counsel) as a result of Watergate, Congress recognized the issue but chose to leave it unresolved.¹¹ Although the question thus remains open, the lingering memory of these events—along with the entire lack of serious scholarship on the subject¹²—may have left the impression that the

vexing the Watergate-plagued President: was impeachment the mandatory first step for a President or Vice President accused of crime, or could he be indicted first in a court of law?" *Id.* at 219.

9. See *United States v. Nixon*, 418 U.S. 683, 687 n.2 (1974).

10. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-14, at 268-69 (2d ed. 1988) (recounting these events and concluding, "[t]he question must be regarded as an open one, but the burden should be on those who insist that a President is immune from criminal trial prior to impeachment and removal from office.")

11. The legislation (originally the Senate version of the bill) specifically authorized a special prosecutor to "advise the House of Representatives of any substantial and credible information which such special prosecutor receives that may constitute grounds for an impeachment" Pub. L. No. 95-521, § 595(c), 92 Stat. 1867, 1871 (1978), thereby codifying the holding of *In re* Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219 (D.D.C. 1974) (authorizing special prosecutor Jaworski to transmit to House Judiciary Committee evidence against President Nixon). See generally JOHN J. SIRICA, *TO SET THE RECORD STRAIGHT* 217-18 (1979). But the Senate report stated that this section "should in no way be interpreted as identifying individuals who are not subject to criminal prosecution prior to being impeached and removed from office," S. REP. NO. 170, 95th Cong., 2d Sess. 71-72 (1978), reprinted in 1978 U.S.C.A.N. 4287, 4287-88. The statutory section has since been re-enacted without substantial change. See 28 U.S.C. § 595(c) (1987). See generally Michael L. McCoy, Note, *The Office of Independent Counsel—A Constitutional Overview*, 28 WASHBURN L.J. 150, 150-56 (1988) (providing historical summary of events leading to statute); Stuart Taylor Jr., *Who Handles the Next Scandal*, AM. LAW., Sept. 1992, at 5 (proposing modification of statute); David Johnston, *Weinberger Case Livens Debate on Counsel Law*, N.Y. TIMES, June 28, 1992, at A15 (reporting controversy over whether law should be re-enacted prior to its expiration on December 15, 1992). See also *infra* note 198.

12. Virtually all of the writing on our issue was put into print, often bearing indicia of partisanship or haste, in response to Watergate. See KURLAND, *supra* note 7, at 135 (arguing that the President is immune from criminal prosecution because he "is the sole indispensable man in government"); Raoul Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1123-36 (1974) (arguing, contrary to author's position taken in an earlier book, that a sitting President may be indicted); Alexander M. Bickel, *The Constitutional Tangle*, NEW REPUBLIC, Oct. 6, 1973, at 14 (arguing that President is immune because Presidency embodies "the continuity and indestructibility of the state"); George E. Danielson, *Presidential Immunity from Criminal Prosecution*, 63 GEO. L.J. 1065 (1975) (five-page summary by sitting Congressman of argument in favor of presidential amenability to criminal prosecution); Edwin B. Firmage & R. Collin Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment*, 1974 DUKE L.J. 1023, 1085-89 (containing brief argument against immunity, because our government is based on "adherence to constitutional institutions, not to the elevated personalities of our leaders"); Arthur J. Keeffe, *Explorations in the Wonderland of Impeachment*, 59 A.B.A. J. 885, 886 (1973) (stating that since impeachment is the exclusive method of removal from office, "under Article I, Section 3, President Nixon is right, and no person subject to impeachment can be called before a grand jury or prosecuted in any way so long as he remains in office"); see also HOUSE COMM. ON THE JUDICIARY, *IMPEACHMENT OF*

Nixon-Agnew position is the correct one.

That impression, however, is false, and the argument should be rejected the next time it is raised by a President or Vice President.¹³ This Article supports that thesis with a four-part argument.

Part I reviews what is known about the history of the issue at the time of the adoption of the Constitution. It brings to light the previously unremarked fact that there was explicit disagreement on this point

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 1305, 93d Cong., 2d Sess. 363-73 (1974) (outlining argument of Republican minority in favor of immunity). See generally Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 5 (1989) (“[T]he literature on impeachment . . . is, with few exceptions, unenlightening and unimpressive. Scholarship on impeachment inevitably degenerates into political commentary, but scholars generally fail to explain or justify this result. In addition, scholarship on impeachment either inexplicably ignores relevant historical evidence or fails to explain its reliance on an incomplete or unclear historical record.” (footnotes omitted)).

Presidential immunity in the civil area has received more scholarly treatment in recent years, much of it favorable. See, e.g., Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341 (1983); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 627-28 (1984). But see KOH, *supra* note 4, at 182. The latest comprehensive treatment is Laura Krugman Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 KY. L.J. 739 (1991-92).

13. Particularly in light of the precedent of Vice President Aaron Burr, see discussion *infra* part II.A, and the possibility that under the Constitution “the Vice President presides at his own impeachment,” Remarks of Stephen Carter, in Symposium, *The Presidency and Congress: Constitutionally Separated and Shared Powers*, 68 WASH. U. L.Q. 669, 675 (1990), there seems no point in attempting to argue this conclusion separately for the Vice President; if it is sound with respect to the President, the Vice President is an *a fortiori* case.

At least as the office is now constituted, it seems difficult to argue that the country would suffer any irremediable loss if it had to muddle through without a Vice President for some period of time. But cf. Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703 (1988) (suggesting ways to strengthen office); J. Michael Medina, *The American Vice-Presidency: Toward a More Utilized Institution*, 13 GEO. MASON U. L. REV. 77 (1990) (same). It has successfully done so in the past (most recently in the period after the assassination of President Kennedy), and such intervals will presumably be shorter in the future as a result of § 2 of the 25th Amendment, which was employed without significant delay to appoint Vice Presidents Ford and Rockefeller. Compare Marie D. Natoli, *The Vice-Presidency in The Third Century*, in THE PRESIDENCY IN TRANSITION 404, 412-14 (James P. Pfiffner & R. Gordon Hoxie eds., 1989) (criticizing vice-presidential mechanisms of the Amendment, and suggesting that the Rockefeller confirmation process took too long).

For these reasons, in response to Vice President Agnew’s assertion that he was immune from indictment while in office, the Justice Department (in a brief signed by Solicitor General Robert H. Bork) took the position that the Vice President did not have such an immunity, although the President did. See Memorandum for the United States Concerning the Vice President’s Claim of Constitutional Immunity at 18, *In re Proceedings of the Grand Jury Impaneled Dec. 5, 1972* (D. Md. 1973), reprinted in N.Y. TIMES, Oct. 6, 1973, at 9 (“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.”)

among members of the founding generation, and concludes that we must base our judgment on other considerations.

Part II examines national historical practice since the ratification of the Constitution, and finds that all high federal officeholders—through and including the Vice President—have been uniformly considered subject to criminal prosecution while in office.

Part III considers issues of constitutional theory. Beginning with the Framers' views on the dangers of official abuse, this Part examines the two-fold nature of the Impeachment Clause—separating issues of political suitability to hold office from those of criminal liability for wrongdoing—and then turns to the regime of civil but not criminal immunity that has been developed in the case of other officeholders. It reaches two conclusions. First, holding Presidents and Vice Presidents amenable to criminal prosecution while in office would be consistent with the letter and spirit of the immunity cases. Second, and more significantly, that result would be justified by both the traditional understanding of the purpose of “the rule of law,” *viz.* to curb the bad officeholder, and by a newer one that I propose as an outgrowth of the recent “republican revival” in constitutional scholarship, *viz.* to demonstrate the virtue of a good officeholder.

Part IV considers and rejects, on factual and legal grounds, a series of practical objections: (A) the argument that indicting the President would effectively constitute a removal from office in derogation of the constitutional exclusivity of the impeachment remedy, (B) the threat that the President might be subject to frivolous prosecutions, and (C) the danger that fear of criminal liability might chill the President from the vigorous discharge of duty.

Ultimately, though, the dispute over whether the President is immune from criminal liability is not a dispute exclusively, or perhaps even primarily, about legal rules. It is, as the members of the first Senate saw,¹⁴ a clash over how we conceive of our President and our country.

If the President is merely one of “We the People” temporarily delegated to perform certain functions,¹⁵ then the concept of absolute immu-

14. *See infra* text accompanying notes 37-38.

15. *Cf.* Amendments to Constitution Proposed by Virginia Ratifying Convention (June 27, 1788), in EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 182 (1957); Amendments Proposed by North Carolina Convention (Aug. 1, 1788), *in id.* at 198, 199 (stating “that all power is naturally vested in, and consequently derived from the people; that Magistrates therefore are their trustees, and agents, and at all times amenable to them”).

The analogous debate over the respective responsibilities of legislative representatives and their constituents is described in Eric M. Freedman, *Freedom of Information and the First Amendment in a Bureaucratic Age*, 49 *BROOK. L. REV.* 835, 835-36 (1983) (suggesting that the

nity has no more resonance than in the case of any other officeholder, and is as easily rejected. If, however, the President upon taking office becomes a different order of being, one who embodies “the continuity and indestructibility of the state,”¹⁶ then the issue takes on a different cast. In that case, an errant officeholder should first be removed so that the sacred nature of the office will not be profaned by outside intrusion.

But this view, which is precisely the one Thomas Paine ridiculed in the passage from *Common Sense* alluded to in the title of this Article,¹⁷ is

growth of federal executive power has made the discussion “increasingly irrelevant to the exercise of political power”). On the judicial context, see Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983, 1025 (1990) (“[T]he post-New Deal elevation of the judiciary to rabbinic status may have had a hand in relieving the rest of us from our role as the people of the book.”).

16. Bickel, *supra* note 12, at 14. See Berger, *supra* note 12, at 1131-32 (attacking this statement). Compare BARBARA HINCKLEY, *THE SYMBOLIC PRESIDENCY: HOW PRESIDENTS PORTRAY THEMSELVES* 134 (1990) (observing that Presidents consistently portray themselves as the “moral leader of the nation who . . . may be taken as equivalent to all the people”); Steven R. Weisman, *Japan Enthrones Emperor in an Old Rite With a New Twist*, N.Y. TIMES, Nov. 12, 1990, at A10 (describing Japan’s first investiture ceremony under post-war constitution to repose sovereignty in Japanese people rather than Emperor).

17. See THOMAS PAINE, *COMMON SENSE* 57 (Philadelphia 1776) (“[L]et a day be solemnly set apart for proclaiming the Charter; let it be brought forth placed on the Divine Law, the Word of God; let a crown be placed thereon, by which the World may know, that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is Law, so in free Countries the law ought to be king; and there ought to be no other.”). See generally Christopher Collier, *The Fundamental Orders of Connecticut and American Constitutionalism*, 21 CONN. L. REV. 863 (1989) (“[E]vents of recent years, echoing those of the early 1970s, remind us that our system of government is based on [Paine’s concept.]”); Richard Ben-Veniste, *Sirica’s Legacy*, N.Y. TIMES, Sept. 4, 1992, at A20 (letter to editor from former Watergate prosecutor on death of Watergate trial judge John Sirica; “His legacy is to remind us that in our system no one is above the law.”), discussed in Monroe H. Freedman, *Evaluating Sirica’s Watergate Legacy*, LEGAL TIMES, Sept. 7, 1992 at 26.

The second allusion in the title is to an action known to history as the Ship Money Case. In 1637, Charles I laid a defense tax, and John Hampden, a leader of the popular party in the House of Commons, refused to pay it on the grounds that Parliament had not authorized it. The Crown sued for the sum in the Court of Exchequer, and, after elaborate argument, the twelve judges ruled by a split vote in favor of the King. Concurring in this judgment, Sir Robert Berkeley stated: “I never read nor heard, that *Lex was Rex*, but it is common and most true, that *Rex is Lex*, for he is a *lex loquens*, a living, a speaking, an acting Law.” *THE TRYAL OF JOHN HAMPDEN, ESQ.* 131 (T. Salmon ed., 1719), reprinted in 3 *STATE TRIALS* 1098 (T.B. Howell & T.C. Hansard eds., London 1816). This judgment is generally thought to have been the first act in a drama that progressed to the impeachment of the Earl of Strafford, the Civil War, and the execution of Charles I. For a brief overview by an esteemed English jurist, see ALFRED T. DENNING, *LEAVES FROM MY LIBRARY* 34-49 (1986); see also 24 *DICTIONARY OF NATIONAL BIOGRAPHY* 254 (1890) (entry for John Hampden).

Long before the drama had reached its denouement, the judgment in the Ship Money Case had been vacated by Parliament, and Justice Berkeley had been impeached, convicted, and fined for his role in it. See 3 *STATE TRIALS*, *supra*, at 1283-96, 1300-01; 2 *DICTIONARY OF NATIONAL BIOGRAPHY*, *supra*, at 366-67 (entry for Sir Robert Berkeley). See generally ALBERT V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 202-04

politically debilitating—not just because it feeds the imperial delusions of the President,¹⁸ not just because it frees the incumbent from popular control, but because it relieves “We the People” from the responsibility that we should bear for the actions of the head of a representative government.¹⁹

The difference between The Law as King and the President as King is that the President is a person and The Law is not. The Law is an abstraction, but an abstraction with real meaning. In a system of representative democracy, The Law is us. Subjecting our highest officeholder to The Law thus represents our collective determination to be responsible for our own destiny.

I. The Original Intent

The recorded discussions on impeachment at the Philadelphia Convention²⁰ shed little light on the issue of presidential immunity, since the debates centered on the issue of the forum in which the President would be tried after the House had exhibited its articles.²¹

The most relevant scrap of data that can be collected from presently known sources is that on September 4, 1787, during a debate on the privileges of Congress, Madison “suggested also the necessity of considering what privileges ought to be allowed to the Executive,” but this was never

(8th ed. 1959) (explaining meaning of the rule of law in contemporary England); Geoffrey Elton, *Introduction to JOHN N. FIGGIS, THE DIVINE RIGHT OF KINGS* at xi-xxxviii (1965) (summarizing political role of the theory of divine right of kings); Richard W. Wallach, *Natural Law and Supreme Court Nominees*, N.Y. L.J., Dec. 3, 1992, at 2 (recounting confrontation between Lord Chief Justice Coke and James I over the words of Bracton: “[T]he king ought not be under man, but under God and law.”). Cf. N.Y. TIMES, Oct. 23, 1990, at B7 (reporting that Princess Anne, daughter of Queen Elizabeth, pleaded guilty in magistrates’ court to speeding, had her license suspended, and was fined).

18. See William Safire, *Creeping Royalism*, N.Y. TIMES, June 22, 1989, at A23 (criticizing President for becoming too much like a king).

19. Cf. *Let’s Get this Ambassador Thing Straight*, N.Y. TIMES, Nov. 11, 1989, at A26 (letter to editor arguing that the people, not their employee the President, are sovereign; that is why Revolution was fought). See generally Cynthia W. Ward, *The Limits of “Liberal Republicanism”: Why Group-Based Remedies and Republican Citizenship Don’t Mix*, 91 COLUM. L. REV. 581, 588-89 (1991).

20. For a summary of the Convention’s proceedings on impeachment, see PETER C. HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 96-106 (1984); Gerhardt, *supra* note 12, at 10-18.

21. In that context, Gouverneur Morris objected to trial by the Supreme Court since it “was to try the President after the trial of the impeachment.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 500 (Max Farrand ed., rev. ed. 1966) (reprinting Madison’s notes of Sept. 4, 1787). But since the objection would be equally cogent whether criminal proceedings came first or second, this statement seems peripheral to the immunity question.

done.²² According to one delegate, Charles Pinckney, this silence reflected a deliberate determination by the delegates that the President (in contrast to legislators) should not have any special immunity.²³ Although no one taking notes on the convention floor recorded such a decision, it is perfectly possible that Pinckney's report is correct, since we have no evidence of anyone expressing a contrary view during the discussion that eventually did take place concerning legislative privileges. The closest anyone came was this argument in favor of implied privileges: "Mr. [James] Wilson thought the power involved, and the express insertion of it needless. It might beget doubts as to the power of other public bodies, as Courts &c. Every Court is the judge of its own privileges."²⁴ But these remarks did not concern executive privileges and Wilson specifically urged in the Pennsylvania ratifying convention that the failure to give the President any specific immunities meant that he had none.²⁵ On the other hand, as the rest of this Part demonstrates, the issue was controverted during the ratification debates, which would tend to make it somewhat less likely that, if the Convention indeed discussed the point, it reached agreement.

Whatever may have happened in Philadelphia, there plainly was disagreement about presidential immunity among contemporaries outside the Convention.²⁶ During the ratification debates, various pamphleteers,

22. See 2 *id.* at 502-03. It is perfectly possible that Madison never actually intended to have the Convention address this subject in any detail. He made his suggestion because he opposed the proposal on the floor that each House should be the judge of its own privileges, and was seeking reasons why the matter should not be addressed then, but rather postponed (as in fact it was).

23. See 10 ANNALS OF CONG. 72-74 (1851). During a debate on the privileges of the House of Representatives, Pinckney stated that, mindful of the abuses that had taken place in Great Britain, the Framers had intended to exclude all executive or legislative privileges except those expressly granted. *Id.*

24. Speech of James Wilson to the Constitutional Convention (Sept. 4, 1787), in THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 21, at 503.

25. Wilson's speech to the Pennsylvania ratifying convention is described *infra* note 31. Cf. Speech of James Wilson in the Yard of the Pennsylvania State House (Oct. 6, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 167-68 (Merrill Jensen ed., 1976) [hereinafter DOCUMENTARY HISTORY] (no implied congressional powers under proposed Constitution); Eric M. Freedman, Note, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 YALE L.J. 142, 163-64 (1978) (describing Wilson's expansive reading of implied powers for the Confederation government). See generally Stephen A. Conrad, *James Wilson's "Assimilation of the Common-Law Mind,"* 84 NW. U. L. REV. 186 (1989).

26. On one view, this would make irrelevant any consensus that may have been reached inside the Convention. See 5 ANNALS OF CONG. 776 (1849) (remarks of James Madison) ("[W]hatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as an oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan

reviewing the provisions of the proposed constitution, reached conflicting conclusions on our question. Some read Article I, section 3, clause 7²⁷ as Alexander Hamilton did²⁸—to mean that a party must be impeached and removed from office before being subject to indictment.²⁹ Others thought the text meant the precise opposite.³⁰ Similarly, many delegates to the state ratifying conventions believed that the President could be indicted while in office,³¹ while numerous others held the contrary

. . . . If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it . . . in the State Conventions.”). See generally Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CAL. L. REV. 235, 259-74 (1989); Carter, *supra* note 7, at 122-23; H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 684-87 (1987); Jack Rakove, *On Understanding the Constitution: A Historian's Reflections (And Dissent)*, in PRINCIPLES OF THE CONSTITUTIONAL ORDER 33, 42-46 (Robert L. Utley, Jr. & Patricia B. Gray eds., 1989).

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

28. See THE FEDERALIST NOS. 65, 69 (Alexander Hamilton).

29. See, e.g., NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 37 (Philadelphia 1787), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 52 (photo. reprint 1968) (Paul L. Ford ed., 1888) (“[A]fter a judgement upon an impeachment, the offender is liable to a prosecution, before a common jury, in a regular course of law.”); Letter I of Americanus to the Virginia Independent Chronicle (Dec. 5, 1787), in 8 DOCUMENTARY HISTORY, *supra* note 25, at 203 (“Should he . . . attempt to pass the bounds prescribed to his power, he is liable to be impeached . . . and afterwards he is subject to indictment, trial, judgment, and punishment according to law.”).

30. See, e.g., TENCH COXE, AN EXAMINATION OF THE CONSTITUTION FOR THE UNITED STATES OF AMERICA 8 (Philadelphia 1788), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 25, at 138, 141 (President’s “person is not so much protected as that of a member of the house of representatives; for he may be proceeded against like any other man in the ordinary course of law.”) (emphasis omitted); ALEXANDER CONTEE HANSON, REMARKS ON THE PROPOSED PLAN OF A FEDERAL GOVERNMENT 10, 17 (Annapolis 1788), reprinted in 15 *id.* at 517, 525, 531 (“Like any other individual, [the President] is liable to punishment”; “Not even his person is particularly protected.”); JAMES IREDELL, ANSWERS TO MR. MASON’S OBJECTIONS TO THE NEW CONSTITUTION 6 (Newbern, N.C. 1788), reprinted in 16 *id.* at 322 (President “is not exempt from a trial, if he should be guilty, or supposed guilty, of [treason] or any other offence”).

In general, modern scholars—even those favoring immunity on other grounds—have concluded that the textual language does not dispose of the issue one way or the other. See, e.g., KURLAND, *supra* note 7, at 132; Bickel, *supra* note 12, at 15. But see *Nixon v. Sirica*, 487 F.2d 700, 757 (D.C. Cir. 1973) (en banc) (MacKinnon, J., dissenting).

31. Speeches explicitly or implicitly concluding that the President could be indicted while in office include the following: Speech of Patrick Henry to Virginia Ratifying Convention (June 5, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 59-60 (Jonathan Elliot & J.B. Lippincott eds., 2d ed. 1881) [hereinafter ELLIOT’S DEBATES] (criminal process will be insufficient to control President; he will prefer to conduct coup backed by army rather than “being ignominiously tried and punished”); Speeches of James Iredell to North Carolina Ratifying Convention (July 24, 1788; July 28, 1788), in 4 *id.* at 37, 109 (federal officers “may be tried by a court of common law . . . for common law offenses, whether impeached or not”; “No man is better than his

view.³²

Given the elliptical nature of some of the historical evidence, and the fact that many of the debaters knew far less about the Constitution than we do today, if this were the only evidence of the original understanding, it might be possible to gloss over these disagreements as arising from either an imperfect comprehension of the issue by our predecessors or from our own weak grasp of the historical record. But a review of the proceedings of the first Congress makes this position untenable, and shows that well-informed contemporaries simply disagreed over whether or not the President should be immune from criminal prosecution while in office.

The diary of William Maclay, a Pennsylvania member of the first Senate,³³ contains the following entry under the date September 26, 1789:

When I first went into the Senate chamber this morning, the Vice President [Adams], Elsworth, and Ames stood together, railing against the vote of adherence in the House of Representatives

fellow-citizens, nor can pretend to any superiority over the meanest man in the country. If the President does a single act by which the people are prejudiced, he is punishable himself If he commits any crime, he is punishable by the law of his country, and in capital cases may be deprived of his life.”); Speech of James Wilson to Pennsylvania Ratifying Convention (Dec. 11, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 25, at 579 (“Does even the first magistrate of the United States draw to himself a single privilege or security that does not extend to every person throughout the United States? . . . Far, far other is the genius of this system.”).

32. See, e.g., Speech of Robert Barnwell to South Carolina House of Representatives (Jan. 17, 1788), in 4 ELLIOT’S DEBATES, *supra* note 31, at 293 (Framers have appropriately “postponed the period at which [the President] could be tried” so that “fervor of party” has a chance to die down and “cool reflection can determine his fate”); Speech of Samuel Johnston to North Carolina Ratifying Convention (July 24, 1788), in 4 *id.* at 37 (stating that men in very high offices “could not be come at by the ordinary course of justice,” but could be impeached, and “stripped of their dignity, and reduced to the ranks of their fellow-citizens, and then the courts of common law might proceed against them.”); Speech of George Mason to Virginia Ratifying Convention (June 14, 1788), in 3 *id.* at 402-03 (members of the government apparently “could be tried neither in the state nor federal courts” for “the commission of indictable offences, or injuries to individuals”); see also Speech of George Nicholas to Virginia Ratifying Convention (June 10, 1788), in 3 *id.* at 240.

33. Maclay was a leader of the Jeffersonian forces in the Senate, see 12 DICTIONARY OF AMERICAN BIOGRAPHY 123 (Dumas Malone ed., 1933), and frequently found himself at odds with Federalists like those with whom he was speaking during the conversation described in the text, see, e.g., WILLIAM G. BROWN, THE LIFE OF OLIVER ELLSWORTH 224-25 (1905). Of the principals in the main portion of the discussion he recounts, only Oliver Ellsworth had been a member of the Philadelphia Convention, see 6 DICTIONARY OF AMERICAN BIOGRAPHY, *supra*, at 113. Philip Schuyler, a controversial general during the Revolutionary War, had been serving as an advisor to Congress and as a New York State Senator. 16 *id.* at 479. John Adams had been abroad as ambassador to England at the time of the Convention, see Letter from Rufus King to John Adams (Oct. 27, 1787), in 8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 668-69 (Edmund C. Burnett ed., 1936); Joyce Appleby, *The New Republican Synthesis and the Changing Political Ideas of John Adams*, 25 AM. Q. 578, 579-80 (1973).

on throwing out the words "the President" in the beginning of the Federal writs.³⁴ I really thought them wrong, but, as they seemed very opinionated, I did not contradict them. This is only a part of their old system of giving the President as far as possible every appendage of royalty . . . Ames left them and they seemed rather to advance afterward. Said the President, personally, was not the subject to any process whatever; could have no action whatever brought against him; was above the power of all judges, justices, etc. For what, said they, would you put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government? I said that, although President, he is not above the laws. Both of them declared you could only impeach him, and no other process whatever lay against him.

I put the case: "Suppose the President committed murder in the street. Impeach him? But you can only remove him from office on impeachment. Why, when he is no longer President you can indict him. But in the mean time he runs away. But I will put up another case. Suppose he continues his murders daily, and neither House is sitting to impeach him. Oh, the people would arise and restrain him. Very well, you will allow the mob to do what legal justice must abstain from." Mr. Adams said I was arguing from cases nearly impossible. There had been some hundreds of crowned heads within these two centuries in Europe, and there was no instance of any of them having committed murder. Very true, in the retail way, Charles IX of France excepted. They generally do these things on a great scale. I am, however, certainly within the bounds of possibility, though it may be improbable. General Schuyler joined us. "What think you, General?" said I . . . "I am not a good civilian, but I think the President a kind of sacred

34. The House of Representatives had taken that position earlier the same day by a 28-22 vote with Madison among the majority, *see* 1 ANNALS OF CONG. 951 (Joseph Gales ed., 1789). The only recorded speaker in the House debate was Representative Michael J. Stone of Maryland, who favored the measure:

He thought substituting the name of the President, instead of the name of the United States, was a declaration that the sovereign authority was vested in the Executive. He did not believe this to be the case. The United States were sovereign; they acted by an agency, but could remove such agency without impairing their own capacity to act. He did not fear the loss of liberty by this single mark of power; but he apprehended that an aggregate, formed of one inconsiderable power, and another inconsiderable authority, might, in time, lay a foundation for pretensions it would be troublesome to dispute, and difficult to get rid of. A little prior caution was better than much future remedy.

Id. Compare Bickel, *supra* note 12 (favoring presidential criminal immunity because "in the Presidency is embodied the continuity and indestructibility of the state").

Apparently because both sides believed that a matter of high principle was at stake, the issue proved very contentious between the two houses, *see* 1 ANNALS OF CONG., *supra*, at 962. It was eventually resolved by the passage of a series of temporary statutes requiring the federal courts to follow state forms of practice. *See* 1 Stat. 93 (1789); *id.* at 123 (1790); *id.* at 191 (1791); *id.* at 275 (1792). The effect of this resolution was to hand a practical, although theoretically reversible, victory to the House of Representatives.

person.” Bravo, my “*jure divino*” man! Not a word of the above is worth minuting, but it shows clearly how amazingly fond of the old leaven many people are.³⁵

Nor was this the first time the Senators had disagreed on exactly this same point. They had done so just a few months earlier during a rancorous argument over whether the President enjoyed the sole power of removing officers that he had appointed and the Senate had confirmed. Beginning from opposing premises as to the locus of national sovereignty, some placing it in the President and others in the People, the Senators had debated the existence, nature, and extent of implied executive powers under the Constitution³⁶—and specifically clashed over whether the President was immune from criminal and civil proceedings while in office.³⁷

Thus, the known evidence is not particularly obscure. It is just unhelpful if one is looking for some single “original intent.”³⁸ The members of the founding generation simply disagreed on this issue,³⁹ and

35. WILLIAM MACLAY, JOURNAL OF WILLIAM MACLAY 166-67 (Edgar S. Maclay ed., 1890); see CHARLENE BANGS BICKFORD & KENNETH R. BOWLING, BIRTH OF THE NATION: THE FIRST FEDERAL CONGRESS 1789-1791, at 18 (1989) (calling Maclay’s diary of “tremendous importance” for its insights into first Senate).

The Maclay diary has recently been republished in a more scholarly but somewhat less readable edition, THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES (Kenneth R. Bowling & Helen E. Veit eds., 1988). It makes no substantive changes in the passage quoted in the text.

36. See generally Leonard R. Sorenson, *The Federalist Papers on the Constitutionality of Executive Prerogative*, 19 PRESIDENTIAL STUD. Q. 267 (1989) (tracing efforts of historians and political scientists to understand views of founding generation on this issue).

37. See 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 217-20 (L.H. Butterfield ed., 1961) (Adams’ notes of the debate). These notes are also reproduced in THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES, *supra* note 35, at 445-49, together with those of several other of the participants. See *id.* at 464-67 (Senator William Samuel Johnson of Connecticut); *id.* at 483-89 (Senator William Paterson of New Jersey); *id.* at 499 (Senator Wingate Paine of New Hampshire). When the issue came to a vote, on July 16, 1789, the Senate split 10-10, and the matter was resolved in favor of exclusive presidential removal power by the tie-breaking vote of Vice President Adams. See *id.* at 115; *Myers v. United States*, 272 U.S. 52, 115 (1926).

38. Cf. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 208-09 (1980) (arguing that the Framers’ original understanding is in many cases impossible to determine); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989) (reviewing difficulties in determination and application of original intent). See generally DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 373-97 (1990) (summarizing current status of originalism debate); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77 (1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

39. Compare Carter, *supra* note 12, at 1360 (“The great weight of the historical evidence suggests the existence of a consensus at the time of ratification to the effect that those checks

knew full well that they did.⁴⁰ Hence, it seems fair to conclude that if one had asked any of the antagonists how future generations should resolve it, he would have answered that they would have to reach their own conclusions on the basis of practice, precedent, the nature and underlying philosophy of our government, and concerns of policy and practicality.⁴¹

on presidential abuse of power expressly set forth in the document were the only checks available.”).

40. Although perhaps disappointing to lawyers, this fact would be unsurprising to historians. The first Senators were closely divided on every issue of importance, *see* MACLAY, *supra* note 35, at 310 (every “question of moment” carried either by a majority of one or by the tie-breaking vote of the Vice President). Their disagreements clearly presaged the bitter partisan struggles that were to dominate American politics for the next twenty years, struggles which historians have long located within a debate over the nature of sovereignty under the emerging national government. *See generally* ROY F. NICHOLS, *THE INVENTION OF THE AMERICAN POLITICAL PARTIES* 180, 216-17 (1967); Paul Goodman, *The First American Party System, in THE AMERICAN PARTY SYSTEMS* 56 (2d ed. 1975); John R. Howe, Jr., *Republican Thought and the Political Violence of the 1790s*, 19 AM. Q. 147 (1967), *reprinted in* THE EARLY AMERICAN PARTY SYSTEM 162 (1969) (attributing intensity of struggle to republican ideology shared by opponents).

41. *See* Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* 12 THE WORKS OF THOMAS JEFFERSON 11-12 (Paul L. Ford ed., 1905) (“Some men look at constitutions with a sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead [L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed . . . and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.”); Susan Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 563 (observing that the Framers themselves disputed many issues, but “understood they were creating—’constituting’—a dynamic organism” and expected pragmatic resolutions); L. Kinvin Wroth, *The Constitution and the Common Law: The Original Intent About the Original Intent*, 22 SUFFOLK U. L. REV. 553, 567-68 (1988) (concluding that the Framers intended their successors to use methods of common law); William A. Aniskovich, Note, *In Defense of the Framers’ Intent: Civic Virtue, the Bill of Rights, and the Framers’ Science of Politics*, 75 VA. L. REV. 1311, 1341 (1989) (Framers anticipated that unanticipated would occur and expected later generations to resolve issues by practical consideration of whether choices would tend “to promote or to destroy republican institutions formed to protect individual liberty”); Freedman, *supra* note 25, at 161-65 (in theory and practice, common law lawyers who created both Articles and Constitution “sanctioned flexible interpretation” to meet future practical problems); *see also* Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 395-96 (Julian P. Boyd ed., 1958) (“No society can make a perpetual constitution. . . . The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct.”); Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1516-17 (1988) (Jefferson view represents the republican tradition, since “[a] constitution cannot retain its claim to republican validity without changing in response to historical change in the people’s composition and values.”). *See generally* Estelle v. Gamble, 429 U.S. 97, 102-05 (1976) (original intent of Eighth Amendment was that its meaning develop over time); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 30 (1980) (Privi-

The remaining parts of this Article examine each of these areas in turn.

II. The Historical Practice

To the extent that the history of our own unbroken practice from the founding generation through the present furnishes a reliable guide to what the law should be,⁴² it strongly supports the proposition that presidential amenability to indictment is perfectly consistent with the unfettered discharge of the legitimate functions of the office.

A. The Federal Executive Branch

On July 11, 1804, Aaron Burr, who was then Vice President, fatally shot Alexander Hamilton in a duel.⁴³ As a result, he was indicted for murder both in New York⁴⁴ and in New Jersey.⁴⁵ Amid the considerable public tumult that followed, there was no suggestion that he had any immunity from prosecution on these charges. On the contrary, Burr himself initially proposed to surrender in New York,⁴⁶ although he later changed his mind.⁴⁷ More significantly, the charges in New Jersey pro-

leges and Immunities Clause of Fourteenth Amendment should be taken "as a delegation to future constitutional decision-makers to protect rights that are not listed either in the Fourteenth Amendment or elsewhere in the document"), *discussed in* Eric M. Freedman, Book Review, 48 BROOK. L. REV. 391, 396-99 (1982); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) (arguing that the framers of the Fourteenth Amendment intended to enact evolving idea of equality).

42. See Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 493 nn.15-16 (1930) ("In deciding such questions, the practical construction of the Constitution by different organs of the federal government in the performance of their several functions, is hardly less significant than the judicial decisions themselves."); see also *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819).

43. See 2 MEMOIRS OF AARON BURR 309-10, 314-18 (Matthew L. Davis ed., 1836) (containing agreed statement of seconds to the duelists and account of physician who attended Hamilton); 1 MILTON LOMASK, AARON BURR 354-55 (1979).

44. See 2 MEMOIRS, *supra* note 43, at 329.

45. See 2 *id.* at 349.

46. See Letter from Aaron Burr to Joseph Alston (Aug. 11, 1804), in 2 *id.* at 332-33 ("Warrants have been issued in New-York. . . . I am negotiating to get an assurance from authority that I shall be bailed, on receipt of which I shall surrender.").

47. Letter from Aaron Burr to Theodosia Alston (Dec. 4, 1804), in 2 *id.* at 351-52 ("You have doubtless heard that there has subsisted for some time a contention of a very singular nature between the states of New-York and New-Jersey. . . . The subject in dispute is which shall have the honour of hanging the vice president. I have not now the leisure to state the various pretensions of the parties, . . . nor is it yet known that the vice president has made his election, though a paper received this morning asserts, but without authority, that he had determined in favour of the New-York tribunals."). In fact, once his term of office had expired, Burr found it wise to travel west and to avoid both states, see Letter of Aaron Burr to Theodosia Alston (March 10, 1805), in 2 *id.* at 359. It was during this trip that he conducted the activities which eventually led to his treason trial, which is described *infra* in the text accompanying notes 168-81.

voked a letter from eleven United States senators to the Governor, requesting him in polite terms to attempt to terminate the prosecution. The basis for this request was "to facilitate the public business by relieving the President of the Senate from the peculiar embarrassments of his present situation, and the Senate from the distressing imputation thrown on it, by holding up its President to the world as a common murderer," not any suggestion that the Vice President had immunity.⁴⁸

To be sure, an argument based upon this silence can be pushed only so far. Perhaps, for example, the senators thought that it would be more politically effective to appeal to the Governor's discretion rather than to assert an aggressive legal posture. In addition, while an acknowledgment that Burr was amenable to prosecution on the state murder charges would be inconsistent with the strong form of immunity urged by Vice President Agnew,⁴⁹ one could take the view that, while impeachment is the exclusive remedy for "crimes that only the President [or Vice President] could commit,"⁵⁰ officeholders are subject to the general criminal process with respect to other charges.⁵¹ Under that view, the recognition that Burr had no immunity from the state murder charges would simply constitute an acknowledgement that killing one's rivals in duels is no part of the Vice President's official duties. Finally, the Vice President is not as important to the governance of the country as the President,⁵² so that the absence of an immunity for the former would not conclusively foreclose it in the case of the latter.

Nonetheless, the Burr episode is highly instructive for two reasons. First, the most important founders were still alive and active, and had strong incentives to assert the existence of an immunity; but they did not.⁵³ Second, the very contentious affair did no damage to the ability of

48. The text of the letter is to be found in CHARLES BIDDLE, AUTOBIOGRAPHY OF CHARLES BIDDLE 306-08 (Philadelphia 1883). Biddle, a close friend of Burr's, *see* 2 MEMOIRS, *supra* note 43, at 325, recounts that the "letter was sent open to me to be forwarded to Governor Bloomfield." 2 *id.* at 306. For a discussion of the political background to the letter and an account of the events that followed it, *see* 2 POLITICAL CORRESPONDENCE AND PUBLIC PAPERS OF AARON BURR 898-902 (Mary-Jo Kline & Joanne W. Ryan eds., 1983), a work which is the subject of Gaspare J. Saladino, Book Review, 41 WM. & MARY L. REV. 675 (1984).

49. *See* Memorandum in Support of Motion, *supra* note 6, at 2-3 (no prosecution on any charges during incumbent's tenure in office).

50. *See infra* note 109.

51. *Cf. infra* part IV.C (adopting position intermediate between these approaches).

52. *See* Carter, *supra* note 12, at 1352 & n.47; Carter, *supra* note 13, at 675. *But compare infra* part IV.B (President receives unique deference from the courts and has unique legal resources for self-defense).

53. When Burr returned to Washington following the duel, he was greeted with solicitude by two of his political adversaries, President Thomas Jefferson and Secretary of State James

the executive branch to conduct public business.⁵⁴ Particularly in light of the conditions of today,⁵⁵ this fact should lend some weight to the view that it would be perfectly possible for the President to be indicted, and conduct a defense or be temporarily replaced by the Vice President, without danger to the functioning of the government.

B. The Federal Judicial and Legislative Branches

While the Aaron Burr case provides the closest historical parallel to the situation this Article addresses,⁵⁶ there is also much to be learned from looking at the history of indictments of federal judges and legisla-

Madison. See 2 POLITICAL CORRESPONDENCE AND PUBLIC PAPERS OF AARON BURR, *supra* note 48, at 899; PHILIP VAIL, THE GREAT AMERICAN RASCAL 104-05 (1973); William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 NW. U. L. REV. 903, 906 (1991). Apparently, this courtship was due to the desire of the Administration to secure his cooperation during the forthcoming Senate impeachment trial of Supreme Court Justice Samuel Chase. See RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 92 (1971); 1 LOMASK, *supra* note 43, at 364-65. Thus, it seems reasonable to speculate that if either of them had thought that he had some basis for a claim of official immunity, they would have made the suggestion. Instead, the Administration seems to have supported the plan of writing the letter described in the text. See 1 *id.* at 364.

54. In the months following the indictments, Burr engaged in his normal political and official activities, drawing bipartisan praise for the manner in which he presided over the Chase impeachment trial, see *supra* note 53, and for his farewell address to the Senate upon the expiration of his term of office. There is a summary account in the historical novel GORE VIDAL, BURR 401-06 (1973).

The Justice Department relied on this history in arguing that Vice President Agnew was subject to indictment. See Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity at 13, *In re Proceedings of the Grand Jury Impaneled Dec. 5, 1972* (D. Md. 1973), reprinted in N.Y. TIMES, Oct. 6, 1973, at 9 ("[A]s the case of Aaron Burr illustrates, mere indictment standing alone apparently does not seriously hinder full exercise of the Vice-Presidency.").

55. See *infra* part IV (discussing impact of 20th century technological and legal developments).

56. The only other federal cabinet-level official to be charged criminally while still in office was Secretary of Labor Raymond J. Donovan. He was indicted by a New York State grand jury in September 1984 on charges, centering on fraud in public works contracts, unconnected to his official position. He resigned in March 1985 and eventually won a complete acquittal. See Selwyn Raab, *Donovan Cleared of Fraud Charges by Jury in Bronx*, N.Y. TIMES, May 26, 1987, at A1. It apparently did not even occur to him to claim immunity.

He did, however, seek unsuccessfully to remove the charges to federal court pursuant to 28 U.S.C. § 1442(a)(1) (1985). See *In re Application of Donovan*, 601 F.Supp. 574 (S.D.N.Y. 1985) (noting adverse effect of indictment on functioning of federal government, but rejecting removal because charges unrelated to defendant's official conduct); see also *infra* text accompanying note 203 (discussing applicability of federal removal statute to indictment of President). See generally Frank M. Tuerkheimer, *The Executive Investigates Itself*, 65 CAL. L. REV. 597, 603-09 (1977) (summarizing previous investigations into wrongdoing by Cabinet-level officials); David Johnston, *Ex-Education Chief's Travel Is Under a Criminal Inquiry*, N.Y. TIMES, May 11, 1991, at A7 (Justice Department investigating whether Lauro F. Cavazos, who resigned as Secretary of Education in December 1990, stole Government money while in office through improper travel arrangements).

tors. As a legal matter, in each case we have judicial determinations directly on point. More importantly, as a structural matter, it can be powerfully argued that the ability of judicial and legislative officeholders to do their constitutionally mandated jobs is impaired if a hostile executive branch can indict them—an argument that is far weaker in the case of a President. The Presidency is unmatched in its ability to defend its institutional prerogatives against assaults, whether launched horizontally (by federal criminal proceedings) or vertically (by state ones).⁵⁷ Thus, the long history of authority rejecting judicial and legislative claims of immunity in the criminal context, even while upholding them in the civil context,⁵⁸ significantly strengthens the case that the same rule should apply to the President.

1. *The Federal Judicial Branch*

Judicial independence is important, and easily could be threatened if the executive branch used its indictment power in a partisan way. Nonetheless, there is an unbroken consensus that the value of punishing crimes outweighs the risk of partisan abuse. The country's experience to date supports that judgment; the potential for executive branch abuse has not been realized, and there is every reason to believe that a judge who was improperly indicted would have ample legal and political tools to fight back.⁵⁹

The indictment of sitting judges was accepted as proper both before the adoption of the Constitution⁶⁰ and in the decades following its ratifi-

57. This subject is discussed at length in part IV *infra*. Compare Dexter K. Case, *Don't Subject the President to Indictment*, NAT'L L.J., Oct. 28, 1991, at 14 (letter to editor criticizing view presented here as "flawed" because "[t]he doctrine of separation of powers is not affected by bringing charges against a sitting federal judge or legislator. However, because the executive branch is solely responsible under the Constitution for prosecution of crimes, the chief of the executive branch is rightfully entitled to the ultimate prosecutorial discretion while he or she remains in office.").

58. See *infra* text accompanying note 115.

59. Thus, for example, after the indictments of Judges Hastings and Collins, see *infra* text accompanying notes 71, 73, both of whom are Black, senior members of the House of Representatives announced their intention to hold hearings into whether the Justice Department was inappropriately targeting Black public officials for prosecution. See A.B.A. J., May 1991, at 22; see also Sharon Donovan, *Friends Race to the Side of a Jurist*, NAT'L L.J., July 8, 1991, at 8 (reporting that Judge Collins is being defended pro bono by three law firms; National Bar Association, an offshoot of which has been raising funds for the defense, has been monitoring the proceedings). In affirming Judge Collins' conviction, the Fifth Circuit explicitly rejected his claim of selective prosecution based on race. *United States v. Collins*, 972 F.2d 1385, 1397-98 (5th Cir. 1992).

60. See, e.g., CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA at xxii (P.C. Hoffer & W.B. Scott eds., 1984) ("At the February 1723 sessions, Justice John Tarpley stepped down from the bench to bond himself for his good behavior after the grand jury had presented him

cation.⁶¹ The best-known example dates from 1796 when a group of inhabitants of the Northwest Territory petitioned the House of Representatives to take some action against George Turner, a judge of the territorial Supreme Court, said to be abusing the power of his office. The House referred the matter to Attorney General Charles Lee who replied four days later with a short letter. Apparently considering the matter uncontroversial, he stated without argument: "A judge may be prosecuted . . . for official misdemeanors or crimes . . . before an ordinary court, or by impeachment before the Senate of the United States."⁶² Because of the logistical difficulties of trying an impeachment 1500 miles away from the territory in question, he continued, "The Attorney General is of opinion that it will be more advisable . . . that the prosecution should not be carried on by impeachment, but . . . before the supreme court of that Territory, which is competent to the trial."⁶³ After receiving this report, the House committee considering the matter reported to the full House its "opinion that the mode of prosecution recommended by the Attorney General will afford Judge Turner a fair opportunity of defending himself against said charges, . . . and, for the reasons given in the Attorney General's report, is preferable to a prosecution by way of impeachment."⁶⁴ Accordingly, the House took no further action; another judge was appointed two years later.⁶⁵

for swearing. Other justices paid fines for failures to repair bridges and roads and for disturbing the peace."); HOFFER & HULL, *supra* note 20, at 81-83 (Francis Hopkinson, chief judge of Pennsylvania admiralty court, impeached in 1780 but upper house ruled that charges could be pursued by civil and criminal court proceedings; Virginia assembly declined to impeach John Price Posey, justice of the peace, in 1783, whereupon he was criminally prosecuted and convicted); *see also* 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 873-77 (1816) (describing mode of criminal proceedings at King's Bench against magistrates for misconduct in office).

61. This seems to have been accepted as a matter of course, requiring no elaborate justification. For example, the First Congress, in Section 21 of the Act of April 30, 1790, 1 Stat. 112, 117 (1790), provided penalties for judges who took bribes. *See* Gerhardt, *supra* note 12, at 68-69; *Judicial Reform Act: Hearings on S. 1506 Before the Subcomm. on Improvements in Judicial Machinery*, 91st Cong., 2d Sess. 85, 87 (1970) (statement of William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Department of Justice). Another example of the general assumption that sitting judges were liable to criminal indictment and punishment is to be found in the argument of Luther Martin at the impeachment trial of Justice Samuel Chase. *See* 14 ANNALS OF CONG. 431 (1805). Martin had been a member of the Philadelphia Convention, as had at least two of the Senators. *See id.* at 430.

62. 20 AMERICAN STATE PAPERS 151 (Washington 1834) (H.R. Misc. Doc. No. 87) (report dated May 9, 1796, communicated to the House May 10, 1796).

63. *Id.*

64. *Id.* at 157 (H.R. Misc. Doc. No. 95) (report communicated to the House Feb. 27, 1797).

65. *See* JOSEPH BORKIN, THE CORRUPT JUDGE 251-52 (1962). *See generally* Andrew R.L. Cayton, *Land, Power and Reputation: The Cultural Dimension of Politics in the Ohio*

The suggestion in recent years that Judge Turner's status as an Article I judge robs this case of precedential value in the case of the Article III judiciary⁶⁶ seems untenable since, under the terms of the Northwest Ordinance (itself a constitutive document), Turner's tenure in office was the same as that of an Article III judge: during good behavior.⁶⁷

In any event, as defendants in modern times have begun to challenge the proposition that criminal indictment of sitting judges is permissible under the Constitution,⁶⁸ the courts have unanimously endorsed it.⁶⁹ Over the past twenty years, Otto Kerner of the United States Court of Appeals Seventh Circuit,⁷⁰ Alcee L. Hastings of the United States District Court for the Southern District of Florida,⁷¹ and Eugene Henry

Country, 47 WM. & MARY Q. 266 (1990) (describing political conflicts, centering on judicial system, in the Northwest Territory from 1788 to 1803).

66. See Keffe, *supra* note 12, at 887.

67. See An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio § 4 (July 13, 1787), reprinted in 1 U.S.C. at XLIX (1988); U.S. CONST. art. III, § 1; see also *McAllister v. United States*, 141 U.S. 174, 186-88 (1891) (distinguishing judges appointed during good behavior under Northwest Ordinance and similar statutes from other territorial judges); cf. 1 ANNALS OF CONG. 393-94 (Joseph Gales ed., 1789) (statement of James Madison that executive officer with tenure during good behavior could be convicted of crime while in office).

68. Until the 1970s, indicted federal judges had not questioned this principle. See *United States v. Hastings*, 681 F.2d 706, 709 n.7 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983) ("Judge Francis Winslow of the southern district of New York was indicted in 1929 and resigned before trial commenced. Judge John Warren Davis of the third circuit court of appeals was indicted and stood trial twice before resigning in 1941. Neither of these men claimed that they were immune from criminal prosecution prior to impeachment.").

69. See Gerhardt, *supra* note 12, at 77-82 (defending these cases).

70. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974). Judge Kerner was convicted principally on charges of accepting bribes while Governor of Illinois, but also for making false statements to the grand jury and Internal Revenue Service investigators after becoming a judge.

71. *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983). Judge Hastings was charged with accepting a bribe in exchange for leniency to a criminal defendant. He was acquitted, but successful impeachment proceedings were later brought on the theory that he had procured his exoneration wrongfully, see David Johnston, *Hastings Ousted as U.S. Judge by Senate Vote*, N.Y. TIMES, Oct. 20, 1989, at A1.

On June 1, 1989, Judge Hastings filed a lawsuit against the Senate in the United States District Court for the District of Columbia charging that impeachment after his acquittal in the criminal trial placed him in double jeopardy. He also challenged the decision of the Senate to conduct the evidentiary proceedings before a committee rather than the full body, and claiming that the failure of the government to pay his defense costs unconstitutionally diminished his compensation. See Marcia Coyle & Fred Strasser, *Impeachment Watch*, NAT'L L.J., June 19, 1989, at 38. Not surprisingly, in light of the preliminary and equitable nature of the relief sought, the action was promptly dismissed. *Hastings v. United States Senate*, 716 F. Supp. 38 (D.D.C. 1989), *aff'd*, 887 F.2d 332 (D.C. Cir. 1989); cf. *Johnson v. United States*, 79

Claiborne of the United States District Court for the District of Nevada⁷² have each been indicted and claimed immunity from prosecution. In all

F. Supp. 208, 213 (Ct. Cl. 1948) (rejecting benefits claim of judge who resigned rather than face impeachment inquiry into charges on which he had been acquitted in court).

The challenge by Judge Hastings to the Senate's use of a "trial committee" to hear the live evidence appears to be his most viable contention, it probably will not ultimately prevail—since the entire Senate had access to videotaped records of the committee proceedings, and there is no constitutional requirement that a Senator attend a trial conducted by the full body—the challenge by Judge Hastings to the Senate's use of a "trial committee" to hear the live evidence appears the most serious of his contentions. In fact, upon reaching the merits, the District Court upheld this claim. *Hastings v. United States*, Civ. No. 91-1713, 1992 U.S. Dist. LEXIS 13838 (D.D.C. Sept. 17, 1992); see also *Let the Senate Alone Impeach*, N.Y. TIMES, Sept. 28, 1992, at A14 (criticizing the decision in an editorial); *Constitution Wins in Impeachment Case*, N.Y. TIMES, Oct. 9, 1992, at A22 (letter to editor defending decision).

The Supreme Court, which has granted review of the only other judicial ruling addressing the issue in a post-removal context, will address this question during its October 1992 Term. In that case, arising from the criminal conviction and impeachment of Judge Walter Nixon, described *infra* note 73, the United States Court of Appeals for the District of Columbia Circuit held 2-1 that the matter was non-justiciable as one committed exclusively to the Senate; the third judge would have reached the merits and upheld the procedure. See *Nixon v. United States*, 938 F.2d 239 (D.C. Cir. 1991), *cert. granted*, 112 S. Ct. 1158 (U.S. Feb. 24, 1992) (No. 91-740); Linda Greenhouse, *Supreme Court Debates Senate Trial Procedure*, N.Y. TIMES, Oct. 15, 1992, at B11 (describing oral argument); see also Steven I. Friedland, *The Impeachment Process: Still Functional After All These Years?*, 15 U. DAYTON L. REV. 229, 236-38 (1990); Gerhardt, *supra* note 12, at 94 ("There is little doubt that such a procedure is constitutional."); Daniel Luchinger, *Committee Impeachment Trials: The Best Solution?*, 80 GEO. L.J. 163, 164 (1991) (procedure "unfair and unconstitutional" and should be amended); Rose Auslander, Note, *Impeaching the Senate's Use of Trial Committees*, 67 N.Y.U. L. REV. 68 (1992) (procedure presents justiciable questions and is unconstitutional); Arlin Specter, *Impeachment: Another Look?*, NAT'L L.J., Nov. 27, 1989, at 13 (defense of procedure by member of Senate Judiciary Committee); David O. Stewart, *Impeachment by Ignorance*, A.B.A. J., June 1990, at 52 (attack on procedure by attorney for Judge Walter Nixon); *Impeachment: Time to Change the System?*, N.Y. TIMES, Aug. 11, 1989, at A12. See generally Deborah Pines, *Disciplinary Rules Revised for U.S. Judges*, N.Y. L.J., Jan. 6, 1992, at 1 (National Commission on Judicial Discipline and Removal, chaired by former Congressman Robert W. Kastenmeier, to consider possible reforms, including amendment of Constitution to remove judicial removal function from Congress).

Following his removal from office, Judge Hastings returned to practice as a criminal defense lawyer, N.Y. TIMES, Sept. 5, 1992, at A8, and ran successfully for a seat in the House of Representatives. N.Y. TIMES, Nov. 5, 1992, at B11. Since the Senate, in removing Judge Hastings from the bench, did not vote to disqualify him from further officeholding as it might have pursuant to U.S. CONST. art. I, § 3, cl. 7, the prior impeachment proceedings would not be a barrier to his occupying the seat. See NAT'L L.J., Nov. 2, 1992, at 3; see also *Suit to Block Ex-Judge from U.S. House Fails*, CHI. TRIB., Jan. 5, 1993, at 8 (U.S. District Court for the Southern District of Florida dismisses on standing grounds suit seeking to prevent Hastings from taking seat; he is sworn in the next day, WASH. POST, Jan. 6, 1993, at A10).

72. *United States v. Claiborne*, 727 F.2d 842 (9th Cir.), *stay denied*, 465 U.S. 1305 (Rehnquist, Circuit Justice), *cert. denied*, 469 U.S. 829 (1984), *on appeal*, 765 F.2d 784 (9th Cir. 1985), *reh'g denied*, 781 F.2d 1325, *cert. denied*, 475 U.S. 1120, *stay denied in postconviction proceedings*, 790 F.2d 1355 (9th Cir. 1986) (permitting defendant to be imprisoned prior to impeachment and removal from bench), *postconviction relief denied*, 870 F.2d 1463 (9th Cir. 1989). Judge Claiborne was convicted of evading taxes after becoming a judge.

three instances, the circuit court has rejected the claim, and the Supreme Court has denied certiorari. Indeed, more recently, Judge Walter Nixon of the United States District Court for the District of Mississippi did not even find it worthwhile to make the assertion.⁷³

The courts' unanimous rejection of claims of judicial immunity from criminal prosecution is soundly based. The cases have reasoned correctly that the impeachment and indictment remedies were designed to be separate;⁷⁴ that the Supreme Court has approved the indictment of sitting federal legislators;⁷⁵ and that "whatever immunities . . . the Constitution confers for the purpose of assuring the independence of the co-equal branches of government, punishment for criminal conduct will not interfere with the legitimate operations of a branch of government."⁷⁶

73. See *United States v. Nixon*, 816 F.2d 1022 (5th Cir.), *reh'g denied*, 827 F.2d 1019 (5th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988), *postconviction relief denied*, 881 F.2d 1305 (5th Cir. 1989). Judge Nixon was convicted of perjury for denying that he had used his judicial influence to assist someone who had given him a lucrative business opportunity while on the bench. Like Judge Claiborne, *see supra* note 72, he was not removed from office by impeachment until well after he had begun to serve his prison term. See *Former U.S. Judge is Paroled*, N.Y. TIMES, Nov. 22, 1989, at A18; Neil A. Lewis, *Senate Convicts U.S. Judge, Removing Him From Bench*, N.Y. TIMES, Nov. 4, 1989, at A7; *Impeachment Voted; Federal Judge Faces a Trial in the Senate*, N.Y. TIMES, May 11, 1989, at A20. Following his release, he was rearrested on a charge of violating his parole by carrying a firearm. See *Impeached Judge is Charged With Violation of His Parole*, N.Y. TIMES, Aug. 7, 1990, at A12.

Since the cases noted in the text, Judge Robert P. Aguilar of the United States District Court for the Northern District of California has been convicted on charges that he abused his judicial position for the benefit of a potential criminal defendant, *see Katherine Bishop, Federal Judge Is Given Reduced Prison Sentence in Corruption Case*, N.Y. TIMES, Nov. 2, 1990, at A14, and Judge Robert F. Collins of the United States District Court for the Eastern District of Louisiana has been convicted on charges of accepting bribes to influence his sentencing of a marijuana smuggler, *see Henry J. Reske, Collins Guilty of Bribery*, A.B.A. J., Sept. 1991, at 32; Francis F. Marcus, *U.S. Judge is Convicted in New Orleans Bribe Case*, N.Y. TIMES, June 30, 1991, at A13, resulting in a prison sentence of nearly seven years, *see U.S. Judge is Given Prison Sentence*, N.Y. TIMES, Sept. 7, 1991, at A12. Neither judge raised an immunity defense, although Judge Collins did argue unsuccessfully on appeal that heightened probable cause requirements should apply to the executive branch's commencement of investigations into sitting federal judges. *United States v. Collins*, 972 F.2d 1385, 1395-96 (5th Cir. 1992) (affirming conviction and sentence).

74. See *infra* part III.A.

75. See *infra* part II.B.2.

76. *United States v. Isaacs*, 493 F.2d 1124, 1144 (7th Cir. 1974), *cert. denied*, 417 U.S. 976-77 (1974). Compare Steven W. Gold, Note, *Temporary Criminal Immunity for Federal Judges: A Constitutional Requirement*, 53 BROOK. L. REV. 699 (1987) (arguing that this case was wrongly decided; since indictment constitutes *de facto* removal from office, impeachment must come first). For reasons discussed *supra* part II.B and *infra* part IV.A, the courts have the better of this disagreement.

2. *The Federal Legislative Branch*

The amenability of sitting senators and representatives to indictment is a similarly well-accepted part of our legal order. The practice is consistent with what we know of original intent,⁷⁷ and has long been approved by the Supreme Court.⁷⁸ Even defendants appear to believe any claim of absolute congressional immunity from prosecution would be untenable.⁷⁹ Indictments of sitting federal legislators have become almost common,⁸⁰ but the principle that they are permissible under the Consti-

77. See Speech of James Iredell to the North Carolina Ratifying Convention (July 28, 1788), in 1 ELLIOT'S DEBATES, *supra* note 31, at 125-26 (Senators "are punishable by law for crimes and misdemeanors in their personal capacity. For instance, the members of Assembly are not liable to impeachment, but, like other people, are amenable to the law for crimes and misdemeanors committed as individuals."); Speech of James Wilson to Pennsylvania Ratifying Convention (Dec. 4, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 25, at 492 (even if political considerations prevent a successful impeachment, Senators may be tried criminally); see also *Blondes v. State*, 294 A.2d 661 (Md. App. 1972) (relying on history of ratification period to reach same construction of parallel state constitutional provisions).

78. See *United States v. Helstoski*, 442 U.S. 477 (1979) (holding that a Representative could be prosecuted for taking bribes to introduce private bills to assist aliens, but Speech or Debate Clause would preclude evidence that he had actually introduced them); *United States v. Brewster*, 408 U.S. 501 (1972) (upholding bribery prosecution of former Senator against Speech or Debate Clause challenge); *United States v. Johnson*, 383 U.S. 169 (1966) (holding that a Representative is liable to prosecution for defrauding the U.S. by selling his services, but the Speech or Debate Clause would preclude inquiry into preparation of a floor speech), *on remand*, 419 F.2d 56 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970) (affirming convictions on remaining counts); *Williamson v. United States*, 207 U.S. 425, 446 (1908) (holding Representative convicted of conspiracy to suborn perjury could be imprisoned during his term; constitutional privilege from arrest does not extend to criminal offenses); *Burton v. United States*, 202 U.S. 344, 365-70 (1906) (affirming conviction of a Senator on conflict-of-interest charges; however, conviction could not operate to vacate his seat).

79. See *Brewster*, 408 U.S. at 552. Congressional defendants generally argue only that particular prosecutions (or portions thereof) run afoul of the specific textual privileges in U.S. CONST., art. I, § 6, cl. 1 ("Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses . . . and for any Speech or Debate in either House, they shall not be questioned in any other Place."). All of the Supreme Court cases cited *supra* in note 78 are examples of this pattern.

80. A survey of the cases arising during the 1980s should suffice to illustrate the point. See *Members in Trouble: A Roll Call*, WASH. POST, Feb. 10, 1980, at D2 (listing "former and current members of Congress who, since World War II, have been indicted, convicted or cleared of criminal charges, have been subject to disciplinary action by Congress, or have resigned under ethics pressure").

In 1984, Representative George Hansen of Idaho was convicted of lying on his House financial disclosure forms, see *United States v. Hansen*, 772 F.2d 94 (D.C. Cir. 1985) (Scalia, J.) (affirming conviction), and ultimately imprisoned, see *Former Congressman Is Found Guilty*, N.Y. TIMES, Dec. 13, 1992, at A40 (reporting 1992 conviction on check-kiting charges).

Seven sitting federal legislators were indicted as a result of the Abscam investigation, see R.W. GREENE, *THE STING MAN* 187 (1981); Bennett L. Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565, 1571-75 (1982), and the courts specifically

rejected an immunity claim, *see* *United States v. Myers*, 635 F.2d 932, 937-39 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980), *on later appeal*, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983). *See generally* *United States v. Williams*, 705 F.2d 603 (2d Cir.), *cert. denied*, 464 U.S. 1007 (1983).

Representative Mario Biaggi of New York was indicted and convicted in 1987 for receiving unlawful gratuities from a political leader while in office. *See* *United States v. Biaggi*, 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989) (rejecting claim of immunity under Speech or Debate Clause); Frank Lynn, *Politicians Say Conviction is Likely to End Career of Another Bronx Power*, N.Y. TIMES, Sept. 23, 1987, at B4. He was also indicted in 1987 and eventually convicted on charges arising out of his participation in the much-publicized affairs of the Wedtech Corporation. *See* *Dow Jones & Co. v. Simon*, 842 F.2d 603 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988); *United States v. Biaggi*, 909 F.2d 662 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1102 (1991); Howard W. French, *Biaggi Convicted In Wedtech Case: Simon Also Guilty*, N.Y. TIMES, Aug. 5, 1988, at A1. *See generally* Merrill Perlman, *The Crimes and Punishments of Wedtech*, N.Y. TIMES, Oct. 22, 1989, at E5 (summarizing criminal actions arising from Wedtech operations). As a result, Biaggi served slightly more than two years in prison, *see* Glenn Fowler, *U.S. Judge Signs Biaggi Release, Citing Ill Health*, N.Y. TIMES, June 29, 1991, at A26. Following his release, he launched a primary campaign to reclaim his seat, *see* Alessandra Stanley, *Out of Cell (and Sickbed), Biaggi Tries Anew*, N.Y. TIMES, Sept. 12, 1992, at A1; *see also* *Fit Enough to Serve—in Prison*, N.Y. TIMES, July 30, 1992, at A24 (editorial criticizing this decision), but was unsuccessful, *see* Sam H. Verhovek, *The 1992 Campaign: Weiss Wins, Biaggi Loses in House Bids*, N.Y. TIMES, Sept. 16, 1992, at B8.

In October 1988, Representative Patrick L. Swindall of Georgia was indicted on perjury charges. Following the indictment, he was defeated for re-election, and subsequently convicted. *See* *Former Lawmaker Given Year in Jail*, N.Y. TIMES, Aug. 29, 1989, at A16.

In mid-1989, Representative Donald E. Lukens of Ohio was sentenced to thirty days in jail for engaging in sex with an underage girl. *See* *Rep. Lukens Gets 30 Days for Sex with Minor*, N.Y. TIMES, July 1, 1989, at A6; *see also* *Conviction Is Upheld in Rep. Lukens's Case*, N.Y. TIMES, June 13, 1990, at A24; *Lukens May Face New Counts*, N.Y. TIMES, July 4, 1989, at A6. Notwithstanding this, as well as allegations by the State of Ohio that he was delinquent in the payment of income taxes, *Congressman Certified as Owing Ohio Taxes*, N.Y. TIMES, May 7, 1990, at B12, Representative Lukens remained in office and ran for re-election, although he was defeated in his party's primary. *Lukens Loses Ohio Primary; Had Been Tainted in Sex Case*, N.Y. TIMES, May 9, 1990, at A26. He served nine days of his thirty-day sentence and was released in early 1991. *See* *Former Representative is Released from Jail*, N.Y. TIMES, Jan. 12, 1991, at A11.

In the fall of 1989, Representative Robert Garcia of New York was convicted of extortion and conspiracy for receiving money from the Wedtech Corporation in return for favors. William Glaberson, *Garcia and Wife are Found Guilty in Extortion Case*, N.Y. TIMES, Oct. 21, 1989, at A1. That conviction resulted in a reversal, *United States v. Garcia*, 907 F.2d 380 (2d Cir. 1990), followed by a series of unsuccessful efforts by the defendant to persuade the courts that a retrial would violate his double jeopardy rights, *see* *United States v. Garcia*, 938 F.2d 12 (2d Cir. 1991), *cert. denied*, 116 L. Ed. 2d 774 (1992); Constance L. Hays, *Jury Convicts Garcia in Partial Verdict*, N.Y. TIMES, Oct. 19, 1991, at B26, (on retrial, jury convicts on one count, reaches no verdict on others); *see also* Ronald Sullivan, *Prison for Wife but not for Garcia in Wedtech*, N.Y. TIMES, June 17, 1992, at B3 (since Congressman had served 104 days in prison before reversal of first conviction, judge spares him additional incarceration).

As the 1990s began, Representative Harold E. Ford of Tennessee remained embroiled in criminal proceedings alleging that he sold his influence to bankers, charges which eventuated in a mistrial when first tried. *See* *Mistrial Declared in Case of Congressman*, N.Y. TIMES, April 29, 1990, at A25.

To judge by the number of cases open as this is written, the record of the 1990s will prove little different from that of the 1980s. *See* *United States v. McDade*, No. 92-249, 1992 U.S.

tution has not drawn scholarly, judicial, or political attack.⁸¹

Dist. LEXIS 9703 (E.D. Pa. June 22, 1992) (denying motion by Rep. Joseph M. McDade of Pennsylvania to dismiss charges of bribe-taking); *Rostenkowski Probe May Include Tax Fraud*, S.F. CHRON., Jan. 9, 1993, at A4 (reporting that felony charges may soon be brought in widening federal investigation into whether Rep. Dan Rostenkowski of Illinois criminally converted campaign funds to personal use); Ralph Blumenthal, *Investigation of D'Amato Is Transferred to Washington*, N.Y. TIMES, Oct. 16, 1992, at B5 (Justice Department investigating allegation that Senator Alfonse D'Amato of New York tried to persuade potential grand jury witnesses to lie); *U.S. Congressman Pleads Not Guilty*, N.Y. TIMES, Aug. 29, 1992, at A6 (Representative Nicholas Mavroules of Massachusetts denies charges of selling official favors; later defeated for re-election, N.Y. TIMES, Nov. 5, 1992, at B11); Richard L. Berke, *For Hatfield, a Shining Image Tarnished by Ethics Charges*, N.Y. TIMES, June 6, 1991, at A1 (reporting federal grand jury investigation of gifts to Senator Mark O. Hatfield of Oregon from the former president of the University of South Carolina; Senate ethics committee finds failure to report these and other gifts a violation of federal law, Adam Clymer, *Senate Panel Cites Hatfield for Failing to Report Gifts*, N.Y. TIMES, Aug. 13, 1992, at B10); B. Drummond Ayres Jr., *Grand Jury Meets in Robb Eavesdropping Inquiry*, N.Y. TIMES, June 21, 1991, at A16 (federal and state authorities investigating possible criminal conduct by Senator Charles S. Robb of Virginia in connection with eavesdropping on car telephone of Governor L. Douglas Wilder); *Durenberger Finances Are Examined Anew*, N.Y. TIMES, Feb. 19, 1991, at A18 (pursuant to mandatory referral from Senate ethics committee, Justice Department investigating whether Senator Dave Durenberger of Minnesota committed criminal violations in connection with acceptance of money from private groups and Senate travel reimbursement); see also Stephen Labaton, *Prosecutor Sees House Violations*, N.Y. TIMES, Sept. 18, 1992, at A12, ("A Federal grand jury investigating the House post office has been told that a member of Congress cashed at least one campaign check worth hundreds of dollars there in violation of Federal laws.").

In all of the cases discussed in this footnote so far, the alleged criminal conduct took place while the legislator was in office. Compare M.P. Farber, *U.S. Dismisses Charges Faced by Rep. Flake*, N.Y. TIMES, Apr. 4, 1991, at A1 (federal charges against Representative Floyd H. Flake of New York of evading taxes prior to his election dropped at the request of the government after three weeks of trial); NAT'L L.J., Aug. 27, 1990, at 2 (Representative Craig Washington of Texas cleared of state contempt of court charges arising out of his pre-election law practice).

81. Politicians do sometimes express concern about particular prosecutions. See, e.g., *Jackson Sees Pattern in Probe of Black Officials*, UPI, June 10, 1990, available in LEXIS, Nexis Library, UPI File (charging pattern of racial bias in recent investigations); Ronald J. Ostrow, *FBI Goes from Skeptic to True Believer in 'Sting' Technique*, L.A. TIMES, Oct. 2, 1988, at A3, (summarizing congressional misgivings over "sting" operations used against public officials); see also Clifford Krauss, *3 Congressmen Defy Post Office Subpoena*, N.Y. TIMES, July 25, 1992, at A6 (Representatives called before federal grand jury investigating scandal at House post office say they will resist because inquiry represents "prosecutorial overreaching").

Thus, for example, during the investigation of Senator Harrison Williams of New Jersey as part of the Abscam operation, a number of lawmakers suggested that the investigative techniques of the FBI had bordered on entrapment, see Steven V. Roberts, *Senators Keep F.B.I. Conduct in Mind*, N.Y. TIMES, Mar. 5, 1982, at B2, and their promise to investigate that issue further was one of the key inducements for the Senator's agreement to resign, see Gersham, *supra* note 80, at n.3.

More recently, when news organizations incorrectly reported that Congressman William H. Gray III of Pennsylvania was the subject of a criminal investigation, many public officials—believing the story to have originated in a partisan Justice Department leak—reacted with outrage, forcing the Attorney General to take a lie detector test and to reassign two key aides.

C. Federal Prosecution of State and Local Officials

State and local officials—governors,⁸² legislators,⁸³ judges,⁸⁴ and

See David Johnston, *Thornburgh Took Polygraph Test in Leak Inquiry*, N.Y. TIMES, May 26, 1990, at A8.

But there seems to be no one in public life who takes the position that federal legislators should have immunity from criminal charges. Indeed, following the conviction of Congressman Lukens in the case described *supra* in note 80, politicians of his own party took the lead in referring the matter to the House ethics committee and in urging him to resign. *See* Philip Shenon, *Republicans Are Said to Pressure Accused Congressman to Resign*, N.Y. TIMES, Oct. 24, 1990, at A21; Dirk Johnson, *Constituents Unhappy About Lukens*, N.Y. TIMES, June 30, 1989, at A12.

82. *See, e.g.*, *United States v. Edwards*, 828 F.2d 111 (5th Cir.), *reh'g denied*, 823 F.2d 772 (5th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988) (upholding sealing orders entered in bribery trial of Governor Edwin Edwards of Louisiana, tried twice while in office, resulting in mistrial and acquittal); *United States v. Mandel*, 415 F. Supp. 1025 (D. Md. 1976), *aff'd*, 602 F.2d 653 (4th Cir.), *reh'g en banc denied*, 609 F.2d 1076 (4th Cir. 1979) (rejecting claim of Governor Marvin Mandel of Maryland that he should have immunity from federal charges of influence peddling), *coram nobis granted*, *United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989) (vacating convictions in light of *McNally v. United States*, 483 U.S. 350 (1987)); *United States v. Leche*, 34 F. Supp. 982 (W.D. La. 1940), *aff'd*, 118 F.2d 246 (5th Cir.), *cert. denied*, 314 U.S. 617, *reh'g denied*, 314 U.S. 712 (1941) (Richard W. Leche, former Governor of Louisiana, convicted of taking kickbacks on state contracts); *Blanton Sentencing Culminates Five Years of Controversy*, UPI, Aug. 14, 1981, available in LEXIS, Nexis Library, UPI File (former governor Ray Blanton of Tennessee sentenced to three years imprisonment on federal charges of accepting payoffs for liquor licenses; other officials jailed for selling paroles and highway bid-rigging); *see also* *United States v. Moore*, 931 F.2d 245 (4th Cir.), *cert. denied*, 112 S. Ct. 171 (1991) (rejecting challenge to guilty plea entered by Arch A. Moore, Jr. to charges that he committed bribery and extortion while Governor of West Virginia); *Former West Virginia Governor Is Sentenced to 5 Years for Graft*, N.Y. TIMES, July 11, 1990, at A10 (describing case, noting that Moore had been tried and acquitted on extortion charges while serving previous term as Governor).

83. *See, e.g.*, *McCormick v. United States*, 111 S. Ct. 1807 (1991) (reversing on statutory grounds Hobbs Act conviction of West Virginia legislator Robert L. McCormick for taking unreported campaign contributions); *United States v. Gillock*, 445 U.S. 360 (1980) (in federal bribery prosecution, state legislator does not have evidentiary privilege against prosecutorial use of official acts); *United States v. Jenkins*, 943 F.2d 167 (2d Cir.), *cert. denied*, 112 S. Ct. 659 (1991) (affirming conviction of former New York state senator Andrew Jenkins on charges arising from money-laundering scheme); *United States v. Davis*, 967 F.2d 516 (11th Cir. 1992) (affirming bribe-taking conviction of Alabama legislator Patricia Davis); *United States v. Ruiz*, 894 F.2d 501 (2d Cir. 1990) (affirming conviction for loan fraud of New York state senator Israel Ruiz; later developments described *infra* note 87); *United States v. Aimone*, 715 F.2d 822 (3d Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984) (affirming RICO convictions of New Jersey state senator William Musto and numerous local officials); *F.B.I. Looking into Kentucky Corruption*, N.Y. TIMES, Apr. 2, 1992, at A16 (top legislative leaders subpoenaed); Arnold H. Lubasch, *Miller is Found Guilty of Fraud; Speaker Loses Seat in Assembly*, N.Y. TIMES, Dec. 14, 1991, at A1 (Mel Miller, Speaker of New York State Assembly, convicted of fraud charges arising out of private law practice); *State Senator From California Facing Racketeering Charges*, N.Y. TIMES, Nov. 20, 1991, at A24 (Alan Robbins resigns and acknowledges law-breaking after being indicted for extorting money in exchange for legislative action; two other state senators, Joseph Montoya—who later won a partial reversal, *Convictions Overturned in California Politicians Case*, N.Y. TIMES, Sept. 22, 1991, at A20—and Paul Carpenter, convicted on similar charges since early 1990; more indictments expected); *Carolina Inquiry In-*

dicts 18th Lawmaker, N.Y. TIMES, Aug. 22, 1991, at A24 (South Carolina state senator Bud Long becomes 18th current or former legislator charged with bribery and related offenses as result of 2-year investigation into vote-buying scheme); Peter Applebume, *Scandals Casting Shadows over Public Life in South Carolina*, N.Y. TIMES, May 12, 1991 (describing inquiries); Elizabeth Kolbert, *Indictments: Just a Part of the Albany Routine*, N.Y. TIMES, Dec. 23, 1990, at E12 (ten sitting New York legislators indicted in last five years); John Gurman & Joel Kaplan, *State Rep. DeLeo Is Sentenced to Probation, Fined in Tax Case*, CHI. TRIB., Feb. 3, 1990, at A5 (state representative James DeLeo sentenced on misdemeanor tax charges in plea arrangement after jury deadlocked on felony charges of bribe-taking); Harold Farber, *Out of Jail, Ex-Legislator Turns to Art*, N.Y. TIMES, June 25, 1989, at A24 (former New York state senator Joseph R. Pisani convicted of tax evasion); *West Virginian In Corruption Inquiry Is Punished by Court*, N.Y. TIMES, Feb. 16, 1989, at A14 (following federal probe of corruption in West Virginia legislature, former president of state senate, Dan Tonkovich, sentenced for extortion; during same week, former state senate president Larry Tucker sentenced for taking illegal payment from gambling interests, and former state senate majority leader Si Boettner sentenced for income tax evasion); see also *West Virginia Senate Head Is Fourth Leader to Resign*, N.Y. TIMES, Sept. 9, 1989, at A8 (same probe included state's Attorney General and Treasurer). See generally *From the Statehouse to the Jailhouse*, WASH. POST NAT'L WKLY., Mar. 4-10, 1991, at 14 (summarizing recent cases).

84. The most notable recent example has been Operation Greylord, which resulted in the conviction of 15 judges and 66 lawyers and police officers in Cook County, Illinois for various forms of judicial corruption. See Randall M. Sanborn, *Shades of 'Greylord': Did Jurist Take Bribe?* NAT'L L.J., Sept. 2, 1991, at 8; *The FBI's Biggest Hits and Misses of the 1980s*, FORTUNE, Oct. 9, 1989, at 136; see, e.g., *United States v. Glecier*, 923 F.2d 496 (7th Cir.), cert. denied, 112 S. Ct. 54 (1991) (affirming conviction of former judge Daniel P. Glecier of the Circuit Court of Cook County); *United States v. Oakey*, 853 F.2d 551 (7th Cir. 1988), cert. denied, 488 U.S. 1033 (1989) (affirming conviction for tax evasion of James Oakey, former Cook County traffic court judge); *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986) (affirming conviction of John M. Murphy, former Associate Judge of the Circuit Court of Cook County, and defending operation against claim that it was unwarranted federal intrusion into state system).

But, while they often receive less national publicity, such instances are far from rare; See, e.g., *Brennan v. United States*, 867 F.2d 111 (2d Cir. 1989), cert. denied, 490 U.S. 1022 (1989) (affirming sentence reduction for William C. Brennan, former New York Supreme Court justice, convicted of numerous felonies related to bribe-taking); *United States v. Shields*, No. 90-1044, 1992 U.S. Dist. LEXIS 2157 (N.D. Ill. Feb. 20, 1992) (denying post-trial acquittal motions filed by David J. Shields, former presiding judge of Chancery Division of Circuit Court of Cook County, Illinois, arrested as part of Operation Gambat, described *infra* in note 85, and convicted under Hobbs Act for taking bribe to fix case); Josh Barbanel, *Chief Judge of New York State Is Arrested in Extortion Scheme*, N.Y. TIMES, Nov. 8, 1992, at A1 (federal agents arrest Sol Wachtler, Chief Judge of New York Court of Appeals, on charges of threatening former lover); *Ex-Judge Is Sentenced for Bribery and Drugs*, N.Y. TIMES, Aug. 11, 1992 at A14 (Tee Ferguson, convicted while sitting as South Carolina circuit judge of extortion charges relating to bribe-taking as a legislator, sentenced to 33 months imprisonment; also sentenced in separate federal case on misdemeanor cocaine charges); *Judge Busted for Drugs*, NAT'L L.J., Sept. 2, 1991, at 6 (W. Mark Dalton, circuit court judge in Illinois, says he will seek drug counseling while free on bond following his arrest on marijuana charges); Mark Hansen, *Operation Court Broom*, A.B.A. J., Sept. 1991, at 27 (joint federal-state bribery investigation dubbed "Operation Court Broom" commences with raids on homes and offices of five present and former judges in Dade County, Florida; four are later indicted, N.Y. TIMES, Sept. 25, 1991, at A16); Rosalind Resnick, *Court Broom's Sweep*, NAT'L L.J., Aug. 26, 1991, at 2 (as a result of Operation Court Broom, Dade Circuit Judge Roy T. Gelber agrees to leave the bench and plead guilty to one racketeering count); *Ex-Judge Sentenced to a 9-Month Term*,

others⁸⁵—are routinely indicted by federal prosecutors.⁸⁶ This is a fact

N.Y. TIMES, Jan. 30, 1990, at B5 (William T. Martin of New York Supreme Court, who had pleaded guilty to cocaine possession and tax evasion); Andrew Blum, *Judge's Indictment Ends Detroit Probe*, NAT'L L.J., Aug. 14, 1989, at 6 (Judge Donald Hobson of Recorder's Court accused of taking bribes to fix cases; fourth Detroit judge to be indicted in a five-year corruption investigation) and can claim a long pedigree, see *Ex parte Virginia*, 100 U.S. 339 (1879) (upholding indictment of state judge under Civil Rights Act of 1875).

85. See, e.g., *United States v. Caldwell*, 544 F.2d 691, 693 n.1 (4th Cir. 1976) (John H. Kelly, State Treasurer of West Virginia and Joseph F. Rykoskey, Assistant State Treasurer, pleaded guilty to mail fraud charge arising out of bribery scheme); *Ex-Albany Leader Pleads Guilty in Deal over Fraud Charges*, N.Y. TIMES, Aug. 22, 1992, at B26, (James Coyne, former County Executive of Albany, N.Y., pleads guilty to false statements in applying for bank loans; already facing jail on charges of taking bribe for steering county contracts; later sentenced to concurrent 46-month prison terms for both sets of charges, N.Y. TIMES, Oct. 15, 1992, at B7); N.Y. TIMES, June 14, 1992, at B49 (Joseph J. Santopietro sentenced to nine years imprisonment for taking payoffs from developers and stealing federal grant money while Mayor of Waterbury, Connecticut); *Kansas Official is Indicted on Perjury Charge*, N.Y. TIMES, Feb. 2, 1992, at A23 (Kansas Attorney General Bob Stephan indicted for committing perjury while defending action alleging breach of settlement in sexual harassment case); *id.* (Brian J. Sarault, former mayor of Pawtucket, R.I., sentenced to five and one-half years imprisonment for using his office to extort money from those seeking city business); *U.S. to Reveal Tapes in Trial of Ex-Rochester Police Chief*, N.Y. TIMES, Feb. 2, 1992, at A39 (Gordon F. Urlacher, former chief of police in Rochester, N.Y., on trial for embezzling \$300,000 from department); Joseph F. Sullivan, *Jersey City's Mayor Is Convicted in Fraud Case and Faces Ouster*, N.Y. TIMES, Dec. 18, 1991, at A1 (Mayor Gerald McCann of Jersey City, N.J. guilty of fraud in business dealings while out of office); *Miami Beach Mayor Charged in Indictment*, N.Y. TIMES, Oct. 30, 1991, at A18 (Mayor Alex Daoud charged with official corruption); *5 Ex-Los Angeles Deputies Accused of Theft*, N.Y. TIMES, Sept. 5, 1991, at A20 (eighteen Los Angeles law-enforcement officers charged since 1988 in corruption inquiry focused on sheriff's department); *Jury Finds 5 Law Officers Guilty of Accepting Bribes in Kentucky*, N.Y. TIMES, Aug. 17, 1991, at A8 (four county sheriffs and suspended town police chief convicted of receiving bribes from federal agents posing as drug dealers); *Louisiana Insurance Official Is Sentenced*, N.Y. TIMES, June 13, 1991, at A24 (Doug Green, insurance commissioner of Louisiana, sentenced to 25 years on charges of winning his office for the benefit of a private insurance company and then taking bribes to keep it in operation); Don Terry, *30 in Cleveland Police Held in Federal Gambling Inquiry*, N.Y. TIMES, May 31, 1991, at A12; Michael de Courcy Hinds, *The Primary for Mayor Is Leaving Many in Philadelphia Befuddled*, N.Y. TIMES, May 20, 1991, at A13, (James J. Tayoun of Philadelphia City Council indicted on bribery charges); Allan R. Gold, *New Jersey Sewage Official Quits After Being Charged in Dumping*, N.Y. TIMES, Feb. 17, 1991, at A49 (Stanley A. Peterson, head of Municipal Utilities Authority in North Bergen, N.J., resigns after federal indictment charges him with sludge-dumping scheme while holding similar post in neighboring town); Isabel Wilderson, *Indictments of 2 Officials Darken Detroit's Mood*, N.Y. TIMES, Feb. 13, 1991, at A18 (police chief William L. Hart and his former deputy face charges arising out of embezzlement of official funds; both ultimately convicted and imprisoned, *Ex-Police Chief Gets a 10-year Sentence in Detroit Graft Case*, N.Y. TIMES, Aug. 28, 1992, at A17); William E. Schmidt, *5 Indicted in Latest Inquiry into Corruption in Chicago*, N.Y. TIMES, Dec. 20, 1990, at A24 (various state and local officials indicted on federal charges of fixing criminal and civil cases, and taking bribe to introduce legislation; Operation Gambat, which led to indictments, is third major federal inquiry into official corruption in Chicago since mid-1980s, following Operation Greylord, discussed *supra* note 84, and Operation Incubator, which obtained approximately a dozen convictions or guilty pleas "including those from five members of the City Council"); *Top New Orleans Law Enforcer on Trial*, N.Y. TIMES,

of some significance since the unequal resources of the federal and state governments, and the frequent political tensions between their officeholders, would seem to raise the danger of unjustified prosecutions. If realized, this threat could significantly weaken federalism.

Yet real, or even perceived, abuses of federal prosecutorial power in this field are rare, and are dealt with through the normal mechanisms of politics,⁸⁷ rather than through the creation of an immunity.

June 22, 1990, at B5 (New Orleans District Attorney Harry Connick, on trial on charges of assisting gambler—of which he was ultimately acquitted, N.Y. TIMES, Aug. 26, 1990, at A15—says United States Attorney is conducting a vendetta; Mr. Connick goes to his office regularly and says it is running well); Ted Gest, *When Law Enforcers Get Money Under the Table*, U.S. NEWS & WORLD REP., Sept. 24, 1984, at 58 (summarizing recent public corruption cases); see also *Mayor of Los Angeles Is Cleared in Long U.S. Corruption Inquiry*, N.Y. TIMES, Dec. 22, 1991, at A18 (government decides not to pursue allegations that Mayor Tom Bradley had improper links to banks and brokerage houses); Francis Frank Marcus, *Kennedy Film Puts Originator of a Conspiracy Theory in Limelight*, N.Y. TIMES, Dec. 20, 1991, at A26, (while serving as New Orleans District Attorney in 1973, Jim Garrison tried and acquitted of taking bribes to protect gamblers); Charles Strum, *Another Milepost on the Long Trial of Corruption in Hudson County*, N.Y. TIMES, Dec. 19, 1991, at B7 (reviewing 25-year record of public corruption prosecutions against officeholders of Hudson County, N.J.); Constance L. Hays, *Simon's Sentence is Cut in Wedtech Bribe Case*, N.Y. TIMES, July 2, 1991, at B3 (Stanley Simon, former borough president of the Bronx, convicted of racketeering charges in connection with Wedtech scandal, released from prison); Ralph Blumenthal & M.A. Farber, *Dryfoos Is Facing New Questions on Personal Use of Donated Money*, N.Y. TIMES, June 30, 1991, at A24 (grand jury investigating fundraising practices of New York City Councilmember Robert J. Dryfoos); Sam H. Verhovek, *Political Talk*, N.Y. TIMES, June 2, 1991, at A42 (prison interview with Lee Alexander, former mayor of Syracuse, N.Y., convicted in January 1988 of kick-back scheme in office); Ronald Smothers, *Tennessee Republicans See an Election Weapon in State's Bingo Scandal*, N.Y. TIMES, Jan. 28, 1990, at A22 (three grand jury investigations ongoing into Tennessee officials linked to bingo scandals).

86. See *United States v. Gillock*, 445 U.S. 360, 373 n.11 (1980) (“Federal prosecutions of state and local officials, including state legislators, using evidence of their official acts are not infrequent.”). See generally Charles N. Whitaker, Note, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 VA. L. REV. 1617 (1992).

87. See, e.g., Ronald Smothers, *Charge Against Mayor Strikes Chord in Birmingham*, N.Y. TIMES, Jan. 20, 1992, at A12 (following contempt citation, Mayor Richard Arrington of Birmingham invites numerous local and national organizations to hearings on “the selective prosecution and harassment of black leadership”; later reports to prison in a protest march of 700 supporters, N.Y. TIMES, Jan. 24, 1992, at A12); James C. McKinley, Jr., *New York City Council Results Show Ripples of Change*, N.Y. TIMES, Nov. 6, 1991, at B1 (New York State Senator Israel Ruiz wins reelection despite ouster from seat in 1989 after federal conviction, see *supra* note 83, for falsifying loan application); Sam H. Verhovek, *Facing Jail, Ruiz May Be Vote Winner*, N.Y. TIMES, Aug. 8, 1989, at B1 (describing reelection campaign); Peter Applebome, *Black Officials Charge U.S. Harassment*, N.Y. TIMES, June 26, 1989, at A14; Wayne King, *Issue of Race Rules on Test of Mayor*, N.Y. TIMES, June 9, 1990, at 25 (Mayor James L. Usry of Atlantic City, N.J. running for reelection despite indictment for taking bribe; says indictment part of racist plot; opponent not pressing issue). See *supra* notes 59 and 81.

The most publicized recent example involved then-Mayor Marion S. Barry of Washington, who was charged with three felony and ten misdemeanor counts of violating federal drug laws, and convicted on one of the latter, see B. Drummond Ayres, Jr., *Barry Guilty on One*

D. State-Level Practice

Most states' constitutional provisions for impeachment closely track those on the federal level.⁸⁸ Laying particular stress on the different functions served by the impeachment and criminal processes, the state courts have ruled uniformly that officers who are subject to impeachment are also subject to indictment while still in office,⁸⁹ and the states in fact

Drug Count; Mistrial is Declared on Felonies, N.Y. TIMES, Aug. 11, 1990, at A1. The remaining charges were dropped, and he was sentenced to six months imprisonment and a year on probation, N.Y. TIMES, Aug. 27, 1991, at A1. On appeal, the sentence was vacated for clarification under the federal sentencing guidelines, see *United States v. Barry*, 938 F.2d 1327 (D.C. Cir. 1991), and then reimposed by the trial judge, *Barry Is Sentenced Again to Six-Month Term on Cocaine Conviction*, N.Y. TIMES, Sept. 28, 1991, at A7. See B. Drummond Ayres Jr., *Calling His Conviction Part of a Racist Plot, Barry Starts a Six-Month Prison Term*, N.Y. TIMES, Oct. 27, 1991, at A16. A week before Mayor Barry completed this term, his sentence was affirmed by the Court of Appeals. See *United States v. Barry*, 961 F.2d 260 (D.C. Cir. 1992). Upon his release he ran successfully for a seat on the city council. N.Y. TIMES, Nov. 5, 1992, at B11.

The prosecution resulted in widespread public debate, focusing on two areas:

(1) the accuracy of Mayor Barry's repeated charge, see, e.g., B. Drummond Ayers, Jr., *Barry Says FBI Is After Blacks*, N.Y. TIMES, July 27, 1990, at A9; Robin Toner, *Barry's Ordeal Accents City's Racial Divisions*, N.Y. TIMES, July 8, 1990, at A10; Felicity Barringer, *Line Between Villain and Victim Blurs as Barry Takes Case to Capital's Blacks*, N.Y. TIMES, June 8, 1990, at A13, that Black officials were being discriminatorily targeted for prosecution, see, e.g., Mark Curriden, *Selective Prosecution*, A.B.A. J., Feb. 1992, at 54 (summarizing charges); Charles Anderson, *Racism and Entrapment*, A.B.A. J., Nov. 1992, at 32 (Executive Director Benjamin F. Hooks of NAACP charges campaign of harassment to bring Black officials "to trial on the flimsiest of evidence"); Jason DePerle, *Talk of Government Being Out to Get Blacks Falls on More Attentive Ears*, N.Y. TIMES, Oct. 29, 1990, at B7 (polling finds many more Blacks than whites believe that Black public officials are selectively prosecuted); David Johnston, *F.B.I. Hoping to Erase Poor Image on Racism*, N.Y. TIMES, Oct. 19, 1990, at A18 (Congress planning to hold hearings on harassment of Black officials; Congressman has called for the formation of an organization to raise money and prepare defense strategies for Black officials); Joel Cohen, *Are Black Officials Being Singled Out for Prosecution?*, N.Y. L.J., Sept. 14, 1990, at 1 (analysis of all state and federal prosecutions of public and party officials in New York finds no discriminatory pattern); and

(2) the propriety of the investigative tactics employed by the government, see, e.g., William Safire, *Unequal Justice*, N.Y. TIMES, Aug. 14, 1990, at A21 (sexual entrapment of Mayor Barry was "repugnant" and a "low point in Federal law enforcement . . . that shames the law.")

88. See *Mecham v. Gordon*, 751 P.2d 957, 961 (Ariz. 1988); *Kinsella v. Jaekle*, 475 A.2d 243, 252 (Conn. 1984).

89. See, e.g., *Wallace v. State*, 211 A.2d 845, 849-50 (Del. 1965) (city council member); *State v. Winne*, 96 A.2d 63, 73 (N.J. Super. 1953) (county prosecutor); *State v. Jefferson*, 101 A. 569 (N.J. 1917) (county prosecutor); *Commonwealth v. Rowe*, 66 S.W. 29 (Ky. 1902) (Commonwealth's attorney); *State v. Hastings*, 55 N.W. 774, 784-85 (Neb. 1893) (attorney general, secretary of state, and commissioner of public lands and buildings); see also *Cargile v. State*, 20 S.E.2d 416, 420 (Ga. 1942) (distinguishing statutory and impeachment penalties for official misconduct); *In re Investigation*, 2 A.2d 804, 808 (Pa. 1938) (holding that the legislature's suspension of a grand jury investigation until conclusion of legislative impeachment investigation violates that state constitution since impeachment and criminal proceedings "are independent of each other"). See generally *In re Mattera*, 168 A.2d 38, 42 (N.J. 1961) (re-

regularly bring criminal proceedings against their officeholders.⁹⁰

jecting argument that court could not disbar attorney where result would be to remove him, without impeachment, from office as magistrate; criminal prosecution also available); *Gordon v. Clinkscales*, 114 S.E.2d 15 (Ga. 1960) (same; superior court judge); *Commonwealth ex rel. Pike County Bar Ass'n. v. Stump*, 57 S.W.2d 524, 525-26 (Ky. 1933) (same; Commonwealth's attorney).

In the most recent major case, Governor Evan Mecham of Arizona was indicted in January 1988 by a state grand jury for perjury and related campaign offenses, and subsequently impeached by the Arizona House of Representatives. See Paul F. Eckstein, *The Impeachment of Evan Mecham*, 16 LITIG. 41 (Spring 1990) (describing proceedings). Perhaps mindful of the array of precedent against him, he did not plead an immunity to the criminal charges. Rather, he sought to enjoin the impeachment proceedings. That effort failed, see *Mecham v. Gordon*, 751 P.2d 957 (Ariz. 1988) (distinguishing purpose of impeachment and criminal proceedings), as did his subsequent effort to obtain judicial review of alleged procedural errors in the impeachment trial which resulted in his removal from office, see *Mecham v. Arizona House of Representatives*, 782 P.2d 1160 (Ariz. 1989). See generally *Ingram v. Shumway*, 794 P.2d 147 (Ariz. 1990) (when Arizona Senate, acting under a clause textually close to that of the federal Constitution, removed Mecham from office, it had discretion with respect to disqualifying him from future offices; since it chose not to do so, Mecham was entitled to run in September, 1990 Republican gubernatorial primary).

90. See, e.g., *People v. Ohrenstein*, 565 N.E.2d 493 (N.Y. 1990) (prohibiting portion of prosecution of state Senate minority leader on charges of payroll abuse), N.Y. L.J., July 15, 1991, at 25 (allowing state to proceed with some of remaining charges); Ronald Sullivan, *Judge Drops Final Charges for Legislator*, N.Y. TIMES, Sept. 5, 1991, at B1 (all charges dropped); *Judge Sentenced*, NAT'L L.J., July 27, 1992, at 6 (Paul T. Foxgrover, former judge in Cook County, Illinois, sentenced to six years in prison after pleading guilty to stealing fines and restitution he had ordered defendants to pay; had remained in office while under indictment); *Lawmaker Draws 5 Years for Taking Bribe*, N.Y. TIMES, Oct. 13, 1991, at A26 (after an inquiry in which seven Arizona legislators were indicted for taking bribes in return for legislative action, six have pleaded guilty and one awaits trial; the scandal, known as Azscam, is the subject of a book by the undercover agent who triggered it, WALL ST. J., Aug. 13, 1992, at A12); Elizabeth Kolbert, *Long Hot Summer of Political Sleaze Leaves Rhode Islanders Boiling Mad*, N.Y. TIMES, Aug. 27, 1991, at A16 (Rhode Island political events of summer of 1991 include criminal charges of extortion against Pawtucket mayor Brian J. Sarault, of soliciting kickbacks against retired judge Antonio S. Almeida, and of bank fraud against Family Court Judge John E. Fuyat); *Judge Indicted*, NAT'L L.J., Aug. 12, 1991, at 6 (Judge Paul T. Foxgrover of Cook County Circuit Court in Illinois indicted for stealing fines; suspended with pay until charges resolved); *Kentucky Farm Chief Begins a Term in Jail*, N.Y. TIMES, Jan. 22, 1991, at A20 (Kentucky Agriculture Commissioner Ward Burnette sent to jail for payroll abuse; state House of Representatives committee to consider impeachment); *24 Florida Politicians Charged with Hiding Gifts of Lobbyists*, N.Y. TIMES, June 18, 1991, at A15 (24 current or former Florida legislators charged with violating state law by failing to report gifts from lobbyists); Robert Suro, *Powerful Texas Politician Is Indicted*, N.Y. TIMES, Dec. 29, 1990, at A9 (Gib Lewis, Speaker of the Texas House of Representatives, indicted by state grand jury for taking gifts from lobbyists; ultimately agrees to retire from legislature and plead guilty to lesser charges, *Texas Speaker Pleads No Contest*, N.Y. TIMES, Jan. 24, 1992, at A12); *Arkansas Official Is Guilty of Theft*, N.Y. TIMES, Nov. 2, 1990, at A16 (Steve Clark, Attorney General of Arkansas, convicted of misusing a state credit card for personal purposes); *Judges' Troubles*, NAT'L L.J., Aug. 6, 1990, at 6 (Indiana circuit judge Ronald E. Drury on trial for misuse of state telephones); *Judge Sentence Reduced*, NAT'L L.J., July 9, 1990, at 6 (Virginia District Judge Joseph H. Campbell sentenced for altering court records); see also Joseph P. Fried, *For Ex-Judge, a Lonely Crusade to Clear His Name*, N.Y. TIMES, Nov. 1, 1991, at B3 (following

In light of our overwhelming tradition of official amenability to criminal prosecution, any justification for granting the President immunity must rest on theoretical or practical considerations unique to the Presidency. Parts III and IV explore those issues.

III. Theoretical Considerations

The argument advanced here is consistent with the ideas of human nature that underlie the structure of our government and with the implications that have been drawn from those ideas in recent years.⁹¹

release from prison, Francis X. Smith, supervising judge in Queens, New York until his indictment, continuing to fight 1987 state convictions for perjury and contempt); *Alabama Governor May Face Prosecution*, N.Y. TIMES, Sept. 21, 1991, at A22 (Alabama ethics commission sends to state attorney general for possible prosecution allegation that Governor Guy Hunt wrongfully traveled by state airplane to preaching engagements and accepted money at them; same grand jury will also investigate governor's receipt of \$10,000 gift from individual he later appointed to state liquor commission, N.Y. TIMES, Sept. 14, 1992, at A10, and burglary at law firm that discovered the payment, N.Y. TIMES, Sept. 21, 1992, at A10); Ronald Smothers, *Indicted Alabama Governor Behaves as if He Isn't*, N.Y. TIMES, Dec. 30, 1992, at A10 (Governor Guy Hunt indicted on charges he diverted \$200,000 from not-for-profit corporation set up to pay for inauguration and transition activities; grand jury continuing to investigate other charges); *Cleveland Jury Decides Not to Indict the Mayor*, N.Y. TIMES, May 16, 1991, at A20 (grand jury hears six hours of testimony by Mayor Michael R. White of Cleveland while investigating whether he improperly used his former city council position to assist real estate projects in which he was investor, then declines to indict); Joseph P. Fried, *Judge Is Cleared in Bribe Inquiry, Prosecutor Says*, N.Y. TIMES, Feb. 16, 1991, at B30 (grand jury declines to indict Judge Lawrence J. Finnegan, Jr. of New York Supreme Court on charge of bribing complainant in criminal case against his son); *After 5 Years, Case Against Former Mayor of San Diego Is Resolved*, N.Y. TIMES, Jan. 2, 1991, at A14 (plea bargain to misdemeanor charge concludes case against Roger Hedgecock, originally indicted in 1984 on state charges of accepting illegal campaign contributions).

91. Although the few simple and generally accepted propositions that follow in the text are sufficient for the purposes of the argument, it is worth noting that the past 25 years have seen a rich debate and elaborate reconstruction of the ideological underpinnings of the Revolutionary and early national periods. For a general introduction to the "republican revival" debate in the historical literature, see Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334 (1982), which provoked Joyce Appleby, *Republicanism in Old and New Contexts*, 43 WM. & MARY Q. 20 (1986) and Lance Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 WM. & MARY Q. 3 (1986). See also Symposium, *Republicanism in the History and Historiography of the United States*, 37 AM. Q. 461 (1985); Jack P. Greene, *Values and Society in Revolutionary America*, 426 ANNALS AM. ACAD. POL. SOC. SCI. 53 (1976); Suzanna Sherry, *The Intellectual Origins of the Constitution: A Lawyer's Guide to Contemporary Historical Scholarship*, 5 CONST. COMMENTARY 323 (1988); see generally Stephan A. Conrad, *Polite Foundation: Citizenship and Common Sense in James Wilson's Political Theory*, 1984 SUP. CT. REV. 359.

For a view from the perspective of American Studies, see David Paul Nord, *A Republican Literature: A Study of Magazine Reading and Readers in Late Eighteenth-Century New York*, 40 AM. Q. 42 (1988).

The relevance of this large body of work to legal scholarship was the subject of Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988). For a helpful overview, see Richard H. Fallon, Jr., *What Is Republicanism and Is It Worth Reviving?*, 102 HARV. L. REV.

As historians have long highlighted, the founding generation shared a deep suspicion of human nature⁹² and a strong sense that any power entrusted to a government officeholder was likely to be abused.⁹³ This outlook underlies two broad insights supporting the proposition that there should be no criminal immunity for a sitting President.

1695 (1989). *See generally* Symposium, *Classical Philosophy and the American Constitutional Order*, 66 CHI.-KENT L. REV. (1990). The latest major effort in the field is Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1991).

92. *See* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 21-22 (1969); JAMES S. YOUNG, *THE WASHINGTON COMMUNITY 1800-1828*, at 55 (1961) (“Power made men unscrupulous The possession of power was seen to unleash men’s aggressive instincts, and power-seeking was associated with antisocial behavior.”); *THE ANTI-FEDERALISTS* at xxix (Cecilia M. Kenyon ed., 1966) (“Self-interest and . . . a lust for power were anticipated.”); Jack P. Greene, *Ideas and the American Revolution*, 17 AM. Q. 592, 594 (1965) (reviewing PAMPHLETS OF THE AMERICAN REVOLUTION (B. Bailyn ed., 1965)) (“[A] dominant and comprehensive theory of politics had emerged in the colonies by the middle of the eighteenth century. At the heart of this theory were the convictions that man in general could not withstand the temptations of power, that power was by its very nature a corrupting and aggressive force, and that liberty was its natural victim.”); Shalhope, *supra* note 91, at 334-35 (reviewing historical literature from 1960s through 1980s).

93. *See, e.g.*, MACLAY, *supra* note 35, at 83 (entry for June 18, 1789) (“It is the fault of the best governors, when they are placed over a people to endeavour to enlarge their powers.”); Broadside from “A True Friend” (Richmond Dec. 5, 1787), in 14 DOCUMENTARY HISTORY, *supra* note 24, at 373-74 (“[I]t is unhappily in the nature of men, when collected for any purpose whatsoever into a body, to take a selfish and interested bias, tending invariably towards the increasing of their prerogatives and the prolonging of the term of their function.”); Speech of William Grayson to the Virginia Ratifying Convention (June 21, 1788), in 3 ELLIOT’S DEBATES, *supra* note 31, at 563 (“[P]ower . . . ought to be granted on a supposition that men will be bad.”); Speech of Patrick Henry to the Virginia Ratifying Convention (June 16, 1788), in 3 *id.* at 436 (“Look at the predominant thirst of dominion which has invariably and uniformly prompted rulers to abuse their powers.”); Speech of William Lenoir to the North Carolina Ratifying Convention (July 30, 1788), in 4 *id.* at 203-04 (“[I]t is the nature of man to be tyrannical. . . . We ought to consider the depravity of human nature [and] the predominant thirst for power which is in the breast of every one.”); Speech of Samuel Spencer to the North Carolina Ratifying Convention (July 25, 1788), in 4 *id.* at 68 (“It is well known that men in power are apt to abuse it, and extend it if possible.”); *see also* THE FEDERALIST NO. 51 (James Madison) (“[W]hat is government itself but the greatest of all reflections on human nature? If men were angels no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed and in the next place oblige it to control itself.”); Letter from John Adams to Thomas Jefferson (Nov. 13, 1815), in 2 THE ADAMS-JEFFERSON LETTERS 456 (Lester J. Cappon ed., 1959); Letter from Nathaniel Barrell to George Thatcher (June 15, 1788), in 15 DOCUMENTARY HISTORY, *supra* note 25, at 372-73.

The roots of this attitude have been traced deep into American history. *See* T.H. Breen, *Looking Out for Number One: Conflicting Cultural Values in Early Seventeenth-Century Virginia*, 78 S. ATLAN. Q. 342, 349 (1979) (Virginia settlers of early 1600’s “assumed that persons in authority would use their office for personal gain”).

A. The Dual Nature of the Impeachment Clause

The primary reason the Impeachment Clause of the Constitution⁹⁴ has the structure it does is to separate the question of possible criminal misbehavior from the issue of fitness to hold office. "One thing that the writers of the American Constitution made clear was that no matter how close to English precedent they wished to come, the American impeachment process was basically a political process for removal and not an alternative to, or substitute for, criminal proceedings."⁹⁵

It is now well known that parliamentary impeachment in England, from its beginnings in the mid-fourteenth century, through its period of most intense use in the seventeenth century, and until its gradual withering away late in the eighteenth century, normally involved the simultaneous removal from office and imposition of criminal punishment.⁹⁶

Because this background has been familiar for some time, students of American impeachment have often casually assumed that the Framers had absorbed it as well, and repelled by the spectacle of a political body imposing criminal punishment, sought to insure that American officeholders would not be so oppressed.⁹⁷ Thus, for example, when Governor

94. U.S. CONST. art. I, § 3, cl. 7. See *supra* note 26 for text of clause.

95. KURLAND, *supra* note 12, at 108; see Speech of Samuel Johnston to North Carolina Ratifying Convention (July 25, 1788), in 4 ELLIOT'S DEBATES, *supra* note 31, at 48 (contrasting impeachment and criminal sanctions; opponents of Constitution need not "be afraid that officers who commit oppressions will pass with impunity," since they are subject to both).

96. See, e.g., HOFFER & HULL, *supra* note 20, at 3 ("A criminal penalty was almost always attached to conviction. Prison, fines, along with forfeiture of lands and goods, and loss of office were meted out to defendants. Capital punishment was rarely ordered."); J.S. ROSKELL, THE IMPEACHMENT OF MICHAEL DE LA POLE, EARL OF SUFFOLK, IN 1386, at 180-81 (1984) (William de Thorpe, chief justice of King's Bench, charged in 1350 with bribery, sentenced to have property seized and be hanged; sentence commuted to imprisonment and pardon granted).

On the statistical pattern of English impeachments through the centuries, see generally J. Hampden Dougherty, *Inherent Limitations Upon Impeachment*, 23 YALE L.J. 60, 68-69 (1913); see also John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REVIEW 1, 5-8 (1970). A number of the better-known English precedents are summarized in E. Mebry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025, 1036-42 (1975).

97. See, e.g., 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 783, at 252-53 (Boston 1833) ("[English] history had sufficiently admonished them, that the power of impeachment had been thus mischievously and inordinately applied in other ages; and it was not safe to disregard those lessons, which it had left for our instruction, written not unfrequently in blood."); Shartel, *supra* note 42, at 870, 894 n.69 ("[I]mpeachment was often regarded as a real criminal proceeding in which a defendant might be punished by fine, imprisonment or otherwise. The indefiniteness of common-law impeachment, and the resulting abuses, explain in large measure the specific provisions in our Constitution regarding this remedy.").

David Butler of Nebraska was impeached in 1871, his counsel cited an English case in which the offender was sentenced to severe criminal punishment, and continued:

When the Constitution of the United States was framed, all those bloody annals were before the framers of that instrument and fresh in their recollection. And what did they do? Our fathers, in the organic law of the nation, placed this matter especially, so that it could not be mistaken, providing that judgment because of impeachment should extend only to removal from office and disqualification from holding office. Now can there be any question about this?⁹⁸

The answer to counsel's question is apparently "yes and no."⁹⁹

The Framers certainly did wish to allocate governmental power in such a way as to minimize the danger of legislative feeding frenzies. By the time of the Philadelphia Convention, debtor relief acts and other developments had made the legislative branch especially feared,¹⁰⁰ and in that context there was a particular distaste for having legislatures per-

98. Argument of Clinton Briggs (Mar. 15, 1871), in *IMPEACHMENT TRIAL OF DAVID BUTLER, GOVERNOR OF NEBRASKA AT LINCOLN* 16 (Omaha 1871). Counsel reported that the offender was sentenced, inter alia, "to ride from the Fleet to Cheapside on horseback without a saddle, with his face to the horse's tail and the tail in his hand, and then to stand two hours in the pillory, and to be branded in the forehead with the letter 'K;' to ride four days afterward in the same manner to Westminster, and there to stand two hours more in the pillory, with words on a paper in his hat showing his offense; to be whipped at a cart's tail from the Fleet to Westminster Hall; to pay £5,000 fine and to be a prisoner at Newgate during life." *Id.*

The offender in question was Edward Floyd, whose case is summarized in COLIN G.C. TITE, *IMPEACHMENT AND PARLIAMENTARY JUDICATURE IN EARLY STUART ENGLAND* 122-31 (1974). In keeping with a common pattern, James I "at once remitted the flogging and at the end of the session he also remitted the fine and caused Floyd to be released," NORMAN WILDING & PHILIP LAUNDY, *AN ENCYCLOPEDIA OF PARLIAMENT* 395-96 (3d ed. 1968).

99. Because the issue arises more frequently, scholars have long recognized an analogous problem in deciding how closely the Framers intended the American law of treason to follow English precedent. See Robert K. Faulkner, *John Marshall and the Burr Trial*, 53 *J. AM. HIST.* 247, 249-54 (1966).

100. See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 12 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 41, at 276 (observing that flagrant injustices of state legislatures to private individuals spurred the national will to reform of Confederation); Speech of Richard Henry Lee to Virginia Ratifying Convention (June 9, 1788), in 3 *ELLIOT'S DEBATES*, *supra* note 31, at 179 ("If Pandora's box were on one side of me, and a tender-law on the other, I would rather submit to the box than to the tender-law."); Speech of Edmund Randolph to Virginia Ratifying Convention (June [6,] 1788), in 3 *id.* at 66-67 (denouncing unjust and oppressive legislative acts since Revolution); Speech of Jasper Yeates to Pennsylvania Ratifying Convention (Nov. 30, 1787), in 2 *DOCUMENTARY HISTORY*, *supra* note 25, at 438-39 (By such enactments, "the government of laws has been almost superseded. . . . [But the Constitution will be] the glorious instrument of our political salvation."). See generally Letter XII of The Landholder to the *Connecticut Courant* (Mar. 17, 1788), in 16 *id.* at 405 (denouncing Rhode Island tender acts).

form judicial functions.¹⁰¹

But, with specific respect to impeachment, the most recent re-examination of the subject suggests that this distaste did not arise from an aversion to the English precedents, with which the Framers were largely unfamiliar.¹⁰² Rather, the current theory goes, colonial legislatures under the Crown had long been limited by sheer lack of power from inflicting any punishment on officeholders beyond removal from office, and it was this experience—combined with a renewed dislike for concentrating power in any one branch of government—that explains the limitations on the impeachment remedy that the revolutionaries wrote into

101. See *Merrill v. Sherburne*, 1 N.H. 199, 208-11 (1816); see also *United States v. Brown*, 381 U.S. 437, 441-46 (1965); *United States v. Lovett*, 328 U.S. 303, 317-18 (1946); *INS v. Chadha*, 462 U.S. 919, 961-62 (1983) (Powell, J., concurring) (“One abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures.”); Letter from Thomas Jefferson to John Rutledge, Jr. (Feb. 2, 1788), in 12 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 41, at 556-57. See generally *TRIBE*, *supra* note 9, § 10-4, at 641-63.

For examples of this viewpoint during the ratification debates, see Letter from a Democratic Federalist to the [Philadelphia] *Independent Gazetteer* (Nov. 26, 1787), in 8 *DOCUMENTARY HISTORY*, *supra* note 25, at 297; Letter V from An Impartial Citizen to the *Virginia Gazette* (Feb. 28, 1788), in 8 *id.* at 441-42 (unfavorably contrasting House of Lords which has original jurisdiction over capital crimes of its members, appellate judicial role in all cases of law and equity and “the power of trying impeachments, in which they may proceed to judgment of death” with the proposed Senate); Speech of Thomas McKean to Pennsylvania Ratifying Convention (Dec. 10, 1787), in 2 *id.* at 536-37; Speech of James Wilson to Pennsylvania Ratifying Convention (Dec. 4, 1787), in 2 *id.* at 494-95. See generally Speech of James Madison to Virginia Ratifying Convention (June 18, 1788), in 2 *id.* at 498 (pardoning power properly in President rather than Congress “because numerous bodies were actuated more or less by passion, and might, in the moment of vengeance, forget humanity.”).

102. *HOFFER & HULL*, *supra* note 20, at 9-14. One well-recognized exception was the contemporaneous case of Warren Hastings, which was mentioned briefly during the debates in the Constitutional Convention. See *id.* at 96-97.

Hastings, Governor General of India, was impeached by the House of Commons for a series of political errors in the administration of British colonial policy. Other than the inordinate length of time that it took to reach a judgment of acquittal in the House of Lords, the case's chief claim to fame seems to be the passion and eloquence that Edmund Burke devoted to pursuing it in both Houses. For a general study, see PETER J. MARSHALL, *THE IMPEACHMENT OF WARREN HASTINGS* (1965); see also Feerick, *supra* note 96, at 9. A contemporary account was published as *THE HISTORY OF THE TRIAL OF WARREN HASTINGS, ESQ.* (London 1796), and the British government later published a four-volume set entitled *SPEECHES OF THE MANAGERS AND COUNSEL IN THE TRIAL OF WARREN HASTINGS* (E.A. Bond ed., 1859). Lord Denning summarizes the proceedings in *DENNING*, *supra* note 17, at 50-58.

After the case came to the attention of Thomas Jefferson at his ambassadorial post in Paris, he wrote an illuminating letter attacking trial by Parliament as depriving the defendant of benefit of the law of the land, and criticizing state constitutions that “have copied this absurdity.” Letter from Thomas Jefferson to John Rutledge, Jr. (Feb. 2, 1788), in 12 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 41, at 556-57. Since, in the very next sentence, he went on to express pleasure at the progress being made towards ratifying the Constitution, there is every reason to believe that his objection was to criminal trials by legislatures, not to proceedings aimed at removal from office. Interestingly, young Rutledge responded with a letter stoutly defending the English practice. 12 *id.* at 605 (Feb. 18, 1788).

the constitutions of the newly independent states, and, ultimately, the United States.¹⁰³

In any event, whatever the origin of the differentiation between impeachment and criminal proceedings, the critical point for present purposes is that the Framers thought that the two remedies—the judicial remedy for ordinary crimes and the impeachment remedy for political misdeeds (which could, of course, include crimes)—should and would play distinct roles in controlling the behavior of government officials.¹⁰⁴

Impeachment was designed to curb behavior undermining the President's fitness to continue governing. As Hamilton wrote in *The Federalist*, its purpose is to reach those offenses "of a nature which may with peculiar propriety be denominated political," that is, those which "proceed from the abuse or violation of some public trust," rendering the offender unworthy of continued public confidence.¹⁰⁵

Thus, although the Constitution speaks in terms of "high crimes and misdemeanors,"¹⁰⁶ it has long been settled that impeachable abuses of power are not limited to crimes.¹⁰⁷ For example, Congress could properly have considered Richard Nixon's secret bombing of Cambodia an

103. This thesis is presented in HOFFER & HULL, *supra* note 20, at 266-70, which also convincingly demonstrates the weaknesses of RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEM* (1973), as does Gerhardt, *supra* note 12, at 22-27. For a recent study of the powers of colonial legislatures, see Alison G. Olson, *Eighteenth-Century Colonial Legislatures and Their Constituents*, 79 J. AM. HIST. 543 (1992).

104. See HOFFER & HULL, *supra* note 20, at 97, 99; 2 STORY, *supra* note 97, § 784, at 253 ("There is wisdom, and sound policy, and intrinsic justice in this separation of the offence, . . . bringing the political part under the power of the political department of the government, and retaining the [judicial] part for presentment and trial in the ordinary forum."). See generally KOH, *supra* note 4, at 179-80 (suggesting that impeachment may be better remedy than indictment for certain executive branch misconduct, such as that in the Iran-Contra affair); Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity at 8-9, *In re Proceedings the Grand Jury Impaneled Dec. 5, 1972* (D. Md. 1973), reprinted in N.Y. TIMES, Oct. 6, 1973, at 9 (argument on behalf of Justice Department that Vice President is not immune from indictment because different considerations govern propriety of application of impeachment and criminal sanctions).

105. THE FEDERALIST No. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

106. U.S. CONST. art. II, § 4.

107. See *Mecham v. House of Representatives*, 78 P.2d 1160, 1161 (Ariz. 1939); *Ferguson v. Maddox*, 263 S.W. 888, 892 (Tex. 1924); BERGER, *supra* note 103, at 62-63; TRIBE, *supra* note 10, § 4-17, at 291; STAFF OF IMPEACHMENT INQUIRY, HOUSE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 26-27 (Comm. Print 1974); Committee on Federal Legislation, Association of the Bar of the City of New York, *The Law of Presidential Impeachment*, 29 ASS'N N.Y. B. 155-59 (1974); Feerick, *supra* note 96, at 54-55; Rogers & Young, *supra* note 96, at 1048; 116 CONG. REC. H3113-14 (daily ed. Apr. 15, 1970) (remarks of Rep. Gerald Ford on proposed impeachment of Justice William O. Douglas); Speech of James Iredell to North Carolina Ratifying Convention (July 25, 1788), in 4 ELLIOT'S DEBATES, *supra* note 31, at 113-14; see also Gerhardt, *supra* note 12, at 88-89.

impeachable offense, even if not a crime, and removed him from office on the basis of it. The rationale would have been that a leader who committed sustained acts of war against a neutral country without subjecting his actions to scrutiny by the people's representatives in Congress was an unworthy steward of public power.

Criminal sanctions serve a different social purpose. The criminal code, defined in statutes and applied by a neutral judiciary, embodies a minimum standard of behavior which society requires of all citizens. If, for instance, Lyndon Johnson drove drunk, he should have been convicted of drunken driving, not impeached. In this way, society would have expressed its disapproval of his conduct, while retaining a leader who had done nothing to undermine his political legitimacy.

In light of their unflattering view of human nature, one of the Framers' key purposes in designing constitutional institutions was to control the predictable misconduct of those who would hold high office. But if the President were immune from criminal prosecution while in office, practicalities ranging from the running of statutes of limitations¹⁰⁸ to the possibility that the Congress might be dominated by members of the President's political party¹⁰⁹ might often frustrate this purpose. Hence, the soundest way to view the relationship between the impeachment and the criminal sanction is that these dual controls are available simultaneously, rather than only sequentially.

108. For example, the general statute of limitations in the federal criminal system is five years. *See* 18 U.S.C. § 3282 (1988). If as few as 34 Senators shared the view that criminal tax evasion is not an impeachable offense, *see* Edward M. Mezvinsky & Doris S. Freedman, *Federal Income Tax Evasion as an Impeachable Offense*, 63 GEO. L.J. 1071, 1078-81 (1975) (Despite strong evidence that Richard Nixon criminally evaded taxes, majority of House impeachment committee refused to vote for Article charging this, on theory that impeachable offenses confined to ones "that only the President could commit."), then, if a sitting President has immunity, a two-term President could commit that offense during his or her first three years in office with total impunity (unless the courts were willing to invent a new tolling doctrine to cover this situation). Such an immunity seems far broader than is defensible on any theory.

The Justice Department urged precisely this point in the Agnew prosecution, arguing that, since a statute of limitations was due to expire in a few weeks, the Vice President would have permanent immunity from criminal prosecution if he could not be indicted while still in office. *See* Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity at 22, *In re* Proceedings of the Grand Jury Impaneled Dec. 5, 1972 (D. Md. 1973), *reprinted in* N.Y. TIMES, Oct. 6, 1973, at 9.

109. *Cf.* Speech of Patrick Henry to Virginia Ratifying Convention (June 13, 1788), *in* 3 ELLIOT'S DEBATES, *supra* note 31, at 355 (warning that impeachment will be an ineffectual check if a sufficient number of Senators are corrupted).

B. The Rule of Law

I. Civil Immunity

The concept that the government of the United States is a "government of laws, and not of men,"¹¹⁰ also follows from the Framers' pessimistic view of human nature. The courts have been called upon to give concrete meaning to this concept in the course of crafting rules of civil immunity for federal and state officeholders¹¹¹ that seek to encourage them to discharge their duties vigorously, but to discourage abuses.¹¹² These cases have both substantive and methodological application to the problem of presidential criminal immunity.

Substantively, as already discussed, civil immunity for officeholders has never been coupled with criminal immunity. Indeed, the existing legal structure for control of virtually all federal and state policymaking officers combines broad civil immunity with no criminal immunity.¹¹³

110. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

111. In the case of state officers, this has taken place principally in the course of interpreting 42 U.S.C. § 1983 (1988). With respect to federal officers, it has occurred primarily through judicial explications of the common law damages remedy for official violation of citizens' rights that was first recognized in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). See generally Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1749-53 (1991). But the legal context does not affect the judicial approach. See *Butz v. Economou*, 438 U.S. 478, 504 (1978) ("[W]ithout congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials."); see also *Hafer v. Melo*, 112 S. Ct. 358, 363-64 (1991) (citing the two lines of cases interchangeably.)

In both situations, while the courts consider themselves to have much common law discretion in creating the rules, see *Butz v. Economou*, 438 U.S. at 501-03; *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974), they recognize the ultimate control of Congress. See, e.g., *Westfall v. Erwin*, 484 U.S. 292, 295 (1988); *Bush v. Lucas*, 462 U.S. 367, 387-90 (1983); *United States v. Gillock*, 445 U.S. 360, 374 (1980).

112. See *Forrester v. White*, 484 U.S. 219, 223 (1988); *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982). This quest, of course, is only an effort to achieve in particular cases the appropriate resolution of the two fundamental goals underlying the Constitution itself, see *Speech of Alexander Hamilton to New York Ratifying Convention* (June 25, 1788), in 2 ELLIOT'S DEBATES, *supra* note 31, at 316 ("There are two objects in forming systems of government—*safety* for the people, and *energy* in the administration."); *Speech of Richard Morris to New York Ratifying Convention* (June 24, 1788), in 2 *id.*, at 296 ("[I]t is a principle on all sides conceded . . . that a constitution for these states ought to unite firmness and vigor in the national operations, with the full security of our rights and liberties."); see also *Williams v. Luneburg, Civic Republicanism, the First Amendment, and Executive Branch Policymaking*, 43 ADMIN. L. REV. 367, 369-70 (1991).

113. See *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) ("This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law."), *quoted with approval in Mesa v. California*, 489 U.S. 121, 133 (1989); see also *United States v. Gillock*, 445 U.S. 360, 372 (1980) ("[The] cases in this Court which have recognized an immunity from civil suit for state officials

Methodologically, the lesson of the civil immunity cases is their highly pragmatic approach to the issue. The courts have attempted on a case-by-case basis to determine the effect of immunity on the actual functioning of the office in light of the policy objectives of the underlying enactment.¹¹⁴ This is the “functional” method of determining the exist-

have presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials.”), *cited with approval in* *Nixon v. Fitzgerald*, 457 U.S. 731, 754 & n.37 (1982) (holding President absolutely immune from civil liability for his official acts since civil actions implicate “a lesser public interest . . . than, for example, . . . criminal prosecutions”).

114. A few of the most prominent results of cases taking this approach have been:

State judges enjoy immunity from paying damages for the issuance or non-issuance (as distinguished from the enforcement) of rules, *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 734, 738 (1980), and for judicial rulings, *Mireles v. Waco*, 112 S. Ct. 286, 286-87 (1991) (*per curiam*), unless made in the “‘clear absence of all jurisdiction,’” *Stump v. Sparkman*, 435 U.S. 349, 357 (1978) (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872)), but are subject to injunctive relief and the payment of attorneys fees in those cases, *Pulliam v. Allen*, 466 U.S. 522, 541-44 (1984), and do not have absolute immunity from actions arising out of personnel decisions, *Forrester v. White*, 484 U.S. 219, 230 (1988).

State prosecutors are absolutely immune for initiating prosecutions, *Imbler v. Pachtman*, 424 U.S. 409, 420-28 (1976), and for participating in probable cause hearings, but have only qualified immunity for advice given to the police, *Burns v. Reed*, 111 S. Ct. 1934, 1940-44 (1991). *See also* *Buckley v. Fitzsimmons*, 113 S. Ct. 53 (1992) (granting certiorari to consider whether prosecutorial immunity extends to investigations, trial preparation activities, and press conferences to announce indictments).

State governors enjoy a qualified immunity that depends on an examination of the totality of the circumstances. *See Scheuer v. Rhodes*, 416 U.S. 232, 247-49 (1974) (“[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.”).

State legislators have virtually complete immunity from civil damages actions when “acting in a field where legislators traditionally have power to act.” *Tenney v. Brandhove*, 341 U.S. 367, 378-79 (1951).

Federal executive branch officials “performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), unless the “special functions” of the officer “require a full exemption from liability,” *Butz v. Economou*, 438 U.S. at 508 (1978) (granting absolute immunity to judges and prosecutors in federal administrative proceedings). *See generally* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989).

Finally, the President has absolute immunity from judicially implied civil causes of action based upon conduct within the “outer perimeter” of official duty. *See Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982) (citing *Barr v. Matteo*, 360 U.S. 564, 575 (1959)). In deciding this case, the Court applied a functional approach to determine that the President should have absolute immunity, *id.* at 750-56, but specifically noted that Congress had not spoken to the issue, *id.* at 748 n.27. In light of the Court’s traditional deference to Congress in this field, *see supra* note 111, it seems fairly clear that the Court’s discussion of the constitutional importance of the President’s office, *id.* at 749, was supportive argument for the rule it created, rather than a ruling that the Constitution prohibited the congressional imposition of liability. *See* TRIBE, *supra* note 10, § 4-14, at 273-74; Casenote, *Absolute Presidential Immunity from Civil Damage*

ence and contours of official immunity from civil lawsuits.

To apply this method, the Court has explained,

we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of 'qualified' immunity that avoids unnecessarily extending the scope of the traditional concept of absolute immunity.¹¹⁵

While there has been a good deal of disagreement over the validity of the assessments the Court has made with respect to particular classes of officials,¹¹⁶ the functional approach enjoys strong judicial support,¹¹⁷ and is likely to dominate the law for the foreseeable future.¹¹⁸

If, therefore, subjecting the President to indictment did not interfere with the proper functioning of the office (the subject addressed in Part IV), doing so would be fully consistent with existing caselaw. Perhaps more critically, such an outcome would be justified by the same insights into "the rule of law" which supported the results in those cases, as well as some newer ones.

Liability: Nixon v. Fitzgerald, 24 B.C. L. REV. 737, 754-5, 766-7 (1983). *But see* Carter, *supra* note 12, at 1345-50 (unclear whether Court was stating common law or constitutional rule).

115. Forrester v. White, 484 U.S. 219, 224 (1988).

116. *See, e.g.*, Rudovsky, *supra* note 114, at 77-79 (criticizing Harlow v. Fitzgerald, 457 U.S. 800 (1982) and Anderson v. Creighton, 483 U.S. 635 (1987) for unnecessarily subordinating "constitutional protections to interests of government efficiency"); John D. Kirby, Note, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 CORNELL L. REV. 462, 463-64 (1990) (current standards over-protect lower level government officials); Thomas M. Cunningham, Note, *Nixon v. Fitzgerald: A Justifiable Separation of Powers Argument for Absolute Presidential Civil Damages Immunity?*, 68 IOWA L. REV. 557, 581-84 (1983) (criticizing Nixon v. Fitzgerald, 457 U.S. 731 (1982), for creating absolute civil immunity for President and urging that application of functional approach should have led to qualified immunity); *cf.* Carter, *supra* note 12, at 1367-68 (Court ought to have ruled in *Nixon* that absolute civil damages immunity for President was mandated by Constitution).

117. The Justices of the Supreme Court have been unanimous in adopting (albeit not in applying) the functional approach for nearly a decade. *See* Burns v. Reed, 111 S. Ct. 1934, 1939 (1991); Westfall v. Erwin, 484 U.S. 292, 296 n.3 (1988); Forrester v. White, 484 U.S. 219, 224 (1988); Strauss, *supra* note 12, at 628 (In *Nixon*, 457 U.S. 731 (1982), "[t]he differences do not appear to have been methodological; all the justices appear to have agreed that any immunity must be justified on functional grounds and that the appropriate criterion is the prospect of significant interference with official function."); *see also* Hafer v. Melo, 112 S. Ct. 358, 363-4 (1991) (unanimous) (restating holdings of cases described in *supra* note 114).

118. *See* Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 598 (1989) ("The Court seems committed to the course it charted" in Harlow v. Fitzgerald, 457 U.S. 800 (1982)).

2. *The Law as Fence and Crown*

“The rule of law,” a shorthand expression of the thought that officeholders should be subject to the same demands they place on others, is intimately linked to the late eighteenth century concept of “virtue.” That concept had two aspects, leading to two rationales for “the rule of law”—one of which has long been prominent in legal thinking, and the other of which we are only now beginning to rediscover. Both support the position advanced here.

One meaning of “virtue” to the members of the founding generation was the self-restraint that kept an officeholder from succumbing to the well-known temptations of power.¹¹⁹ But they had little faith in the strength of such resistance.¹²⁰ Hence, the first rationale for “the rule of law”—the negative one which dominates the immunity cases—was that officeholders would predictably abuse their powers and should be inhibited from misrule by the threat of legal sanctions.¹²¹ In other words, the law was a fence designed to keep the willful officeholder within safe bounds. On this view of “the rule of law,” the President should be subject to indictment so as to deter improper conduct.¹²²

The second meaning of “virtue” to the members of the founding generation was the devotion to the public good which would move a citizen to take up public office as an act of sacrifice for the benefit of the community.¹²³ The power of this concept as a rationale for “the rule of

119. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 108 (1992). See generally ALLYN MATHER, *THE CHARACTER OF A WELL ACCOMPLISHED RULER DESCRIB'D* 8-11 (New Haven 1776).

120. See *THE ANTIFEDERALISTS*, *supra* note 92, at xxix (Despite “constant appeals to altruism and patriotism in the political language of the day, there was little tendency to rely on the success of such appeals in the ordinary conduct of politics.”).

121. See Thomas A. Smith, Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 *YALE L.J.* 561, 567-68 (1984) (summarizing Framers’ views to this effect).

122. Opponents of this view would say that, since one can only know what the rule of law requires when one knows what the law is, the concept adds nothing to the discussion. See, e.g., L. Peter Schultz, *The Constitution, the Presidency, and the Rule of Law*, 76 *KY. L.J.* 1, 4 (arguing that the principal checks on the President are political, not legal, and therefore “we should interpret the ‘rule of law’ in light of the Constitution; we should not interpret the Constitution in light of the ‘rule of law.’”); Strauss, *supra* note 12, at 627 n.230 (1984) (rejecting fears of the dissenters in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), that the majority put President above the law as purely rhetorical, since other non-litigation checks remain). This is not quite so. While, even if my argument is accepted, there is ample room for debate over the precise contours of the legal rules, see *infra* text accompanying notes 211-13, there is a qualitative difference between the view that the President is subject to legal restraints and the view that he or she is not.

123. See WOOD, *supra* note 119, at 104 (“Liberty was realized when the citizen was virtuous—that is, willing to sacrifice their private interest for the sake of the country, including serving in public office without pecuniary rewards.”); Richard R. Beeman, *Deference, Republi-*

law” is more subtle than the first one. It emerges from a consideration of the literature of the “republican revival” in legal scholarship.¹²⁴ Although rightly criticized for instances of historical wishful thinking,¹²⁵ the movement has made a valuable contribution in calling attention to “law as potentially positive and emancipatory,” embodying “structures that enable[] individuals and communities to fulfill their deepest aspirations.”¹²⁶ That is, legal rules may reflect not only their authors’ fears of the failures to which future mortals will succumb, but also the lawmakers’ dreams for the successes that later generations will achieve.

From this perspective, subjecting the President to “the rule of law” is not negative, but positive. Rather than degrading the office, as some have argued,¹²⁷ the incumbent’s amenability to prosecution enhances the reputation of the Presidency and reflects the nation’s hopes: a good citizen will undertake the position as a public service, rather than as an op-

canism, and the Emergence of Popular Politics in Eighteenth-Century America, 49 WM. & MARY Q. 401 (1992) (describing implementation during second half of 18th century of ideal that government officeholders perform disinterested public service). Wilson C. McWilliams, *The Anti-Federalists, Representation, and Party*, 84 NW. U. L. REV. 12, 25, 38 (1990) (tracing through thought of Antifederalist idea that citizens should undertake officeholding for common good and regard it as source of honor); see also Jack P. Greene, *Society, Ideology, and Politics: An Analysis of the Political Culture of Mid-Eighteenth Century Virginia*, in FREEDOM, AND CONSCIENCE: THE AMERICAN REVOLUTION IN VIRGINIA, MASSACHUSETTS AND NEW YORK 28-35 (Richard M. Jellison ed., 1976) (Virginia gentry prior to Revolution had “deep sense of public responsibility,” which led “the social and economic leaders of society” to believe that “it was not merely the[ir] right but the[ir] duty . . . to exercise the responsibilities of government”). See generally Joseph A. Ernst, *The Political Economy of the Chesapeake Colonies, 1760-1775: A Study in Comparative History*, in THE ECONOMY OF EARLY AMERICA: THE REVOLUTIONARY PERIOD, 1763-1790, at 196, 220-21 (Ronald Hoffman et al. eds., 1988) (thought of the period expected “a union of self-interest and civic morality in support of the public good”). Cf. Hirshman, *supra* note 15, at 1024 (“Classical political philosophy recognizes that law has a role in providing the occasion for virtue.”).

124. See *supra* note 91.

125. See, e.g., Jonathan R. Macey, *The Missing Element in the Republican Revival*, 97 YALE L.J. 1673, 1673-74 (1988) (criticizing Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988), for lacking the Framers’ “appreciation of the frightening power of man to subvert the offices of government for what can only be described as evil ends,” and adopting “a faith in human virtue that the framers did not themselves embrace, and which does not conform to reality.”).

126. Morton J. Horowitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 73 (1987).

127. Compare *United States v. Poindexter*, 732 F. Supp. 142, 156 (D.D.C. 1990) (described *infra* text accompanying notes 191-95). The court there responded to the objection made in President Reagan’s brief to “the spectacle of a former President being subjected to peremptory judicial process” as follows:

In view of recent developments toward the establishment of democratic forms of government in many parts of the world, and the concomitant halt to the isolation and organized adulation of all-powerful leaders, foreign nations might regard the amenability of a President of the United States to the processes of justice and to courts of law with understanding, and perhaps admiration, rather than with scorn.

portunity for self-aggrandizement, and will therefore glory in the known constraint of acting lawfully.¹²⁸ On this positive view of “the rule of law”—one which sees it as a crown, signifying the officeholder’s virtue—the President should be subject to indictment so as to legitimate his or her good character as a republican leader.

Thus even if no prosecution ever actually took place, a recognition that the President has no immunity would further the twin purposes underlying the “rule of law.”

IV. Practical Considerations

Resolving the practical issues is central to assessing the validity of the thesis of this article. As already noted, those issues are critical to the legal argument.¹²⁹ Moreover, even many commentators who are willing to concede that the position taken here is legally sound nonetheless reject it as simply unworkable. They urge three general propositions, which will be considered in turn: (A) The Removal Objection: The indictment of the President is the functional equivalent of a removal from office, which, under the Constitution, may only be accomplished by impeachment; (B) The Harassment Objection: If the President were subject to criminal prosecution, numerous frivolous indictments would follow; and (C) The Intrusiveness Objection: The President would be chilled from the vigorous discharge of duty by the fear of potential criminal prosecution.

A. The Removal Objection

“Obviously,” wrote Alexander Bickel in arguing for presidential criminal immunity, “the presidency cannot be conducted from jail, nor can it be effectively carried on while an incumbent is defending himself in a criminal trial.”¹³⁰ Therefore, the argument continues, to indict or punish the President is tantamount to a removal from office. Since this can assertedly only be accomplished by impeachment, the proposed conclusion is that the President may not be indicted while in office.¹³¹ This reasoning is vulnerable at four points.

First, it hypothesizes a remote sequence of events, albeit one that I have argued we should provide for: the President is facing criminal pro-

128. See WOOD, *supra* note 119, at 109; cf. Arthur A. Leff, *Law and*, 87 YALE L.J. 989, 1001, 1004 n.35 (1978) (analogizing satisfaction of engaging in principled legal behavior to winning a game played by the rules).

129. See *supra* text accompanying notes 115-117.

130. Bickel, *supra* note 12, at 15.

131. See Prosecutors’ Memorandum, *supra* note 7, at 10 (summarizing this argument).

ceedings, but not impeachment proceedings. If so, the criminal charges are likely to be relatively minor ones—e.g., drunk driving,¹³²—and the objection that one is effectively removing the President from office is to that extent of less force. If not, then in measuring whether the Presidency can “be effectively carried on while an incumbent is defending himself,” the true comparison is not between the disruptiveness of criminal proceedings and no proceedings, but rather between the disruptiveness of criminal proceedings and impeachment proceedings—which would appear to be approximately equal.¹³³

The removal objection also implausibly assumes that—notwithstanding the creativity in sentencing that judges exercise daily¹³⁴ and the

132. To take another example, it is not inconceivable that a President might do as many public figures in our society have done: admit an addiction to alcohol or cocaine, plead guilty to relatively minor criminal charges, vanish for a month or so of rehabilitation in an institution, and reemerge to resume his or her prior role. *See infra* text accompanying notes 143-45.

133. *See* Prosecutors' Memorandum, *supra* note 7, at 14 (“The disruption caused by indictment and trial of the President would be no greater, and possibly less, than that caused by the impeachment process.”).

The scanty national experience we have on this subject supports this equivalence. Andrew Johnson did not attend his impeachment trial, but was acquitted nonetheless. Richard Nixon never appeared in a courtroom throughout the Watergate affair, and, even when considering fining him for contempt, the trial judge was prepared to excuse him from personal appearance, *SIRICA*, *supra* note 11, at 179 (“The order I had drawn up required the President to appear the next morning in my court to explain why a contempt citation should not be issued and fines not imposed. And should he elect simply to send his lawyers, I required that he personally sign a waiver of his right to appear.”).

134. The overwhelming majority of convicted criminals in this country are not sentenced to prison, but to probation. *See* Stephen Labaton, *Probation Overload*, N.Y. TIMES, June 19, 1990, at A1. As cell space grows increasingly scarce relative to demand, the use of alternative sentences is increasing. *See Feeling Prisons' Costs, Governors Weigh Alternatives*, N.Y. TIMES, Aug. 7, 1992, at A17; Andrew H. Malcolm, *New Strategies to Fight Crime Go Far Beyond Stiffer Terms and More Cells*, N.Y. TIMES, Oct. 10, 1990, at A16; Andrew H. Malcolm, *Drunken Drivers Pay Own Way in Innovative Jail*, N.Y. TIMES, Aug. 13, 1989, at A16; Andrew H. Malcolm, *States' Prisons Continue to Bulge*, N.Y. TIMES, May 20, 1990, at A1; *see also Number of Parolees Rose by 12% in 1989, Justice Department Says*, N.Y. TIMES, Nov. 5, 1990, at A15. *See generally* John N. Hauser & William D. Kissinger, *An Answer to Overcrowding*, CRIM. JUST., Winter 1992, at 13; *How to Save Money on Jails*, N.Y. TIMES, Apr. 22, 1991, at A16 (editorial supporting trend towards alternative sanctions); Jonathan Turley, *Our Prison Profiteers*, N.Y. TIMES, June 3, 1990, at A27, (op-ed article to same effect).

Thus, no great judicial creativity would be required to impose a non-jail (or perhaps weekend jail) sentence on a convicted President, and the tools for doing so would lie close at hand. *See, e.g.,* Alicia M. Grace, Note, *Home Incarceration Under Electronic Monitoring: A Statutory Review*, 7 N.Y.L. SCH. J. HUM. RTS. 285 (1990); Sam Dillon, *Wachtler Seeking New Delay in Court Case*, N.Y. TIMES, Jan. 4, 1993, at B6 (reporting that since arrest on federal extortion charges in November, Sol Wachtler, former Chief Judge of New York Court of Appeals, has been confined at home with movements monitored by an electric ankle bracelet); David C. Anderson, *Probation, Georgia Style*, N.Y. TIMES, July 17, 1991, at A20 (reviewing Georgia's hierarchy of intermediate sanctions); Elizabeth Anderson, *States Using Electronic Device to Monitor Prisoners at Home*, N.Y. TIMES, May 13, 1990, at A1 (“Nationally, experts estimate,

extreme deference with which the President has always been treated by the courts¹³⁵—a court would impose a jail term upon conviction.¹³⁶

Second, even assuming a jail sentence, it may indeed be possible to conduct the Presidency from a jail cell. The sentence would almost necessarily be brief, assuming, as we must for the removal objection to have any relevance, that the crime is not serious enough to result in removal from office—and that the country has already handled analogous situations. Earlier presidencies have survived periods of constraint. Woodrow Wilson after his stroke in 1919 and Ronald Reagan following his prostate surgery in early 1987 were both so incapacitated as to be well-nigh absent.¹³⁷ But, through surrogates, the presidency was conducted nonetheless. Recent developments in communications technology, moreover, have greatly enhanced the ability of white collar workers like the President to conduct their business from virtually anywhere.¹³⁸

10,000 criminals in more than 40 states are electronically monitored” by bracelet device that creates “an unstructured structured environment” which can be adapted to convicts’ scheduling needs.); Selwyn Raab, *Electronic Monitoring Is Planned for Detainees*, N.Y. TIMES, Nov. 26, 1991, at B3, (“In campaigns to cut soaring prison costs, at least 40 states . . . use electronic monitoring to release detainees or sentenced inmates.”); Anthony R. Smith, *A Brief for Electronic Monitoring*, N.Y. L.J., Dec. 3, 1991, at 2; *Birmingham Mayor Cited for Contempt*, N.Y. TIMES, Jan. 18, 1992, at A6 (federal contempt citation issued against Mayor Richard Arrington, Jr., “drawn to consider the ‘right of the people of Birmingham to have their Mayor on duty,’ ” calls for him to serve jail terms lasting from Thursday evenings to Monday mornings of each week he fails to comply with document subpoena in corruption investigation); see also Dirk Johnson, *Convict in Home Custody Is Charged in a Killing*, N.Y. TIMES, Dec. 2, 1990, at A41 (reporting participation of 1800 prisoners in Illinois program and federal plans to increase use of such devices).

Nor would the federal sentencing guidelines stand in the way of such creativity. They permit departures from mandated sentences in circumstances “not adequately taken into consideration by the Sentencing Commission in formulating the guidelines,” 18 U.S.C. § 3553(b) (1988)—which our hypothetical circumstances would certainly be—and the Commission is in the process of writing guidelines that specifically permit the use of intermediate sentencing options, see Benjamin F. Baer, *When Prison Isn’t Punishment Enough*, CRIM. JUST., Spring 1991, at 8; Deborah Pines, *Changes Seen Likely in Rules on Sentencing*, N.Y. L.J., Dec. 16, 1991, at 1.

135. See *infra* text accompanying note 165.

136. Cf. Speech of James Madison to Virginia Ratifying Convention (June 14, 1788), in 3 ELLIOT’S DEBATES, *supra* note 31, at 408 (“We must keep within the compass of human probability. If a possibility be the cause of objection, we must object to every government in America.”).

137. See KENDRICK A. CLEMENTS, *WOODROW WILSON: WORLD STATESMAN* 216 (1987); DONALD T. REGAN, *FOR THE RECORD: FROM WALL STREET TO WASHINGTON* 71 (1988); EDWIN A. WEINSTEIN, *WOODROW WILSON: A MEDICAL AND PSYCHOLOGICAL BIOGRAPHY* 357-69 (1981).

138. See generally *The Strongman in Stir*, NEWSWEEK, Nov. 5, 1990, at 24 (describing special arrangements for General Manuel Noreiga of Panama in Miami federal prison). Cf. Maureen Dowd, *Aides Worry About How Bush’s Vacation Looks in a Crisis*, N.Y. TIMES, Aug. 11, 1990, at A8 (not wishing “to appear to be held hostage in the White House to events,”

Farfetched as this may sound, experience shows that we are much more likely to underestimate than overestimate the robustness of the Presidency. When subpoenaed for the Burr trial, Jefferson complained that such a precedent would make it impossible for him to discharge his duties;¹³⁹ yet the President managed to conduct a vigorous defense at the same time as he was overseeing the military and diplomatic preparations for what seemed to be imminent wars with both Britain and the Indian tribes of the Midwest.¹⁴⁰ Similarly, the crises of Watergate came simultaneously with both the Agnew resignation and a Middle Eastern war,¹⁴¹ with no visible adverse effect on the President's performance.

Third, even assuming that the President could not perform his or her duties effectively while defending against criminal charges or serving a criminal sentence, the removal objection is flawed because its legal premise—that impeachment is the exclusive means of removing a President from office—is constitutionally inaccurate. The Twenty-fifth Amendment provides two mechanisms for having the President leave office temporarily.

The simplest possibility would be for the President, invoking section 3 of the Amendment,¹⁴² to step aside voluntarily for the duration of the criminal proceedings. The language of section 3 deliberately was left broad, both to cover unexpected contingencies and to encourage the President to relinquish his or her duties when circumstances warranted.¹⁴³ For this reason, its use by a President prior to entering jail

President Bush goes on vacation to Maine three days after sending troops to Persian Gulf, assuring public that "highly complex and highly efficient communications" enable him to conduct necessary business from there).

139. See *infra* note 181.

140. See Letter from Thomas Jefferson to James Madison (Sept. 1, 1807), in 11 THE WRITINGS OF THOMAS JEFFERSON 350-51 (Andrew A. Lipscomb ed., 1904); Letter from Thomas Jefferson to Henry Dearborn (Sept. 6, 1807), in 11 *id.* at 361; Letter from Thomas Jefferson to Thomas Paine (Sept. 6, 1807), in 11 *id.* at 362.

141. See 2 RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON 475-503 (1978).

142. "Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President." U.S. CONST. amend. XXV, § 3.

143. See JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT 197 (1976) (Lack of definition of disability "was not the result of an oversight. Rather, it reflected a judgment that a rigid constitutional definition was undesirable."); William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: "The Emperor Has No Clones,"* 75 GEO. L.J. 1389, 1405 (1987) ("Section 3 of the amendment is intended . . . to encourage an incapacitated President to step aside temporarily by assuring that resumption of the office will be possible immediately upon recovery.").

would be as appropriate as its use prior to undergoing surgery.¹⁴⁴ For instance, a popular President, arrested for relatively minor wrongdoing, might apologize to the nation, serve the sentence, and return to the good graces of the country. In fact, during Watergate, lawyers for both the White House and the Special Prosecutor planned for the possibility of President Nixon making use of section 3 if he wished to step aside temporarily while fighting legal battles.¹⁴⁵

Professor Bickel argued against using the Twenty-fifth Amendment in this way, urging that the Amendment should be applied only to physical disability because "the amendment would be a dangerous instrument indeed were it otherwise."¹⁴⁶ But that position has little force when applied to section 3, which can only be triggered by the voluntary action of the President.

The argument for a limited definition of disability is more plausible when the discussion turns to the second option under the Twenty-fifth Amendment—a declaration by the Vice President and the Cabinet, acting under section 4,¹⁴⁷ that the President "is unable to discharge the powers and duties of his office" due to the criminal proceedings. Because such a declaration would have the effect of suspending the President from office, if those officers thought that the President's legal difficulties were incapacitating and the President thought otherwise, a crisis might well ensue. But this precise problem was foreseen by the framers of the Amendment, who did not choose to solve it by Professor Bickel's method

144. See FEERICK, *supra* note 143, at 198 (such use of amendment "probably would not be beyond the scope of Section 3"); see also Prosecutors' Memorandum, *supra* note 7, at 15.

145. See BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* 325 (1976); Prosecutors' Memorandum, *supra* note 7, at 15.

146. Bickel, *supra* note 12, at 15.

147. Section 4 provides:

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to [Congress] their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the [Congress] his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days . . . their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue If the Congress . . . determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office."

U.S. CONST. amend. XXV, § 4.

of limiting the definition of "inability" to physical illness.¹⁴⁸ Rather, they deliberately made it more difficult to remove the President through section 4 (two-thirds vote in both Houses) than by impeachment (majority in the House, two-thirds in the Senate). In the words of the Amendment's author and prime sponsor, "We were concerned about the politics of the palace coup. So in reality, we created a vehicle where it is more difficult to declare a president disabled than it is to impeach him for a breach of his constitutional duties."¹⁴⁹ Hence, any President involuntarily removed under section 4 would be one who in any event lacked the votes to stave off impeachment.

History has already shown the wisdom of the framers' choice. One serious concern during Watergate was that President Nixon might be impeached and convicted, and yet remain in the White House, perhaps protected by the military, and refuse to leave.¹⁵⁰ This nightmare scenario had been envisioned by the opponents of the original Constitution;¹⁵¹ the availability of section 4, with its unambiguous procedures for demonstrating the overwhelming will of the country, helps reduce the likelihood of the nightmare coming true.

Section 4 could prove equally valuable if an incumbent President were to be indicted. There could be, for example, a form of plea bargain

148. See PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 68-69 (Kevin W. Thompson ed., 1988) (Justice Department contemplated that President might be taken hostage); FEERICK, *supra* note 143, at 197-99 (describing various emergencies considered in floor debates); Brown & Cinquegrana, *supra* note 143, at 1407 n.6 (sponsors considered as an example the capture of President by enemy). For a general discussion of the issues surrounding section 4, see Kenneth W. Thompson, *Presidential Disability, Succession and the Twenty-Fifth Amendment*, in *THE PRESIDENCY IN TRANSITION*, *supra* note 13, at 433, 441-44.

149. See PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT, *supra* note 148, at 10-11 (remarks of former Sen. Birch Bayh); see also Brown & Cinquegrana, *supra* note 143, at 1413-14. Senator Bayh's account of the writing and passage of the amendment is BIRCH BAYH, *ONE HEARTBEAT AWAY* (1968).

150. See WOODWARD & BERNSTEIN, *supra* note 145, at 215-216 (group headed by Phil Buchen, later White House counsel, that met to plan for Ford presidency considered this possibility and potential need to remove Nixon through Section 4); William Safire, *Command and Control*, N.Y. TIMES, Dec. 7, 1989, at A35 (corroborative account of former Secretary of Defense James Schlesinger).

151. See LUTHER MARTIN, *THE GENUINE INFORMATION DELIVERED TO THE STATE OF MARYLAND* 69 (Philadelphia 1788), in 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 21, at 219-20 (In light of President's powers, "to him it would be of little consequence whether he was impeached or convicted, since he will be able to set both at defiance."); Letter from Tamony to *Virginia Independent Chronicle* (Jan. 1, 1788), in 15 *DOCUMENTARY HISTORY*, *supra* note 25, at 324 (President will use the army to resist impeachment; no hope for "the bauble of a mace, hazarded in the mouth of a mortar"); cf. Speech of Patrick Henry to Virginia Ratifying Convention (June 5, 1788), reprinted in 3 *ELLIOT'S DEBATES*, *supra* note 31, at 59-60 (President will not be stopped by criminal process any more than by impeachment; he will prefer to conduct a coup backed by army rather than "being ignominiously tried and punished").

under which the President, rather than be impeached, agreed not to contest a section 4 suspension from office during the pendency of criminal proceedings.¹⁵² But even without the President's consent, the use of section 4 to accomplish such a suspension would be perfectly appropriate and might under some circumstances be preferable to impeachment. Suppose, for example, the charges were serious but the evidence of guilt unclear. Remitting the President to the criminal process, from which he or she could seek to return to office at any time, might well be more desirable from the viewpoint of governmental efficiency and as a matter of due process than protracted impeachment proceedings.

In short, using either section 3 or section 4 of the Twenty-fifth Amendment to remove the President from office until the resolution of criminal charges would be not only legal, but eminently practical.

Fourth, the question of how to enforce a criminal sentence against the President is the same question as how to enforce a subpoena against the President.¹⁵³ Yet, while acknowledging potential problems in implementing their decrees,¹⁵⁴ judges have regularly ordered Presidents to comply with testimonial demands.¹⁵⁵ The courts have believed, apparently with some reason, that should push come to shove: (1) they would be able to formulate an appropriate coercive sanction,¹⁵⁶ or (2) the President would deem the political costs of resistance too high,¹⁵⁷ or (3) the country would consider defiance itself to be an impeachable offense. All of the same considerations apply to the enforcement of criminal sanctions. Certainly, a President who wished to retain office would have

152. Cf. William Safire, *Taking the Twenty-fifth*, N.Y. TIMES, July 15, 1985, at A19 ("Someday a President will be faced with a debilitating physical or mental ailment, and will find tempting an option that is short of resignation.").

153. Thus, for instance, in arguing *Mississippi v. Johnson*, 71 U.S. (1 Wall.) 475, 487 (1866), on behalf of the President, Attorney General Henry Stanbury vigorously criticized the Burr subpoena case, *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d) (discussed *infra* text accompanying notes 170-81), on the basis that the testimonial duty recognized there could not be enforced without imprisoning the President, which would constitute an improper judicial removal from office. See Ray, *supra* note 12, at 755. The same argument was made by the dissent in *Nixon v. Sirica*, 487 F.2d 700, 757 (D.C. Cir. 1973) (en banc).

154. See SIRICA, *supra* note 11, at 179 ("As I said, I had thought a few times about imposing a jail sentence, but that was absurd And what would I have done to enforce the sentence? Send the United States marshals over to confront the Secret Service?").

155. See *infra* part IV.B.1. Perhaps the enforcement problem has encouraged the courts in their practice of showing great deference to Presidents, see *infra* text accompanying note 165, but that would be true in the criminal context as well. The courts would no doubt be mindful of the problem as they drew the contours of the President's substantive privilege, see *infra* text accompanying note 212.

156. See, e.g., SIRICA, *supra* note 11, at 178-80 (trial judge prepared to enforce the grand jury subpoena issued to President Nixon by a contempt citation and fines).

157. This is the conclusion President Nixon reached. See *infra* note 186.

strong incentives to appear to be cooperating with, rather than defying, the criminal process.

This is the context in which one should consider the suggestion of then-Solicitor General Robert Bork that the President must have immunity because the power to pardon oneself would render any conviction nugatory.¹⁵⁸ The brief response is that this possibility is logically unconnected to the issue of whether the officeholder has immunity while in office. If a President deemed the legal and political risks of the pardon route worth taking in order to achieve protection after leaving office, he or she could take it regardless of how the immunity issue was decided.¹⁵⁹

But there is also a slightly longer answer. The Bork scenario is somewhat different from the one which this Article principally addresses. In cases where the President's crimes are also impeachable offenses, the amenability of the President to prosecution while in office is of less importance than in other circumstances.¹⁶⁰ The President's lack of immunity from criminal proceedings is most critical in situations where the crime is not impeachable, such as drunken driving, and prosecution serves as a mechanism to enable society to express its disapprobation while retaining a leader who continues to enjoy political support. Any President who pardoned herself for a crime of that sort would likely forfeit that political support and be impeached.

Yet, an indicted President would have a strong incentive to remain in the good graces of the country. Since the power to pardon extends only to "offenses against the United States,"¹⁶¹ the officeholder would remain subject to correlative state prosecutions regardless of the self-pardon; and whether or not those could be brought while he remained in office,¹⁶² they could be afterwards.¹⁶³

These legal, political, and practical considerations all reinforce the conclusion validated by the actual experience of President Nixon: the

158. See Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity at 20, *In re Proceedings of the Grand Jury Impaneled Dec. 5, 1972* (D. Md. 1973); Berger, *supra* note 12, at 1130.

159. See WOODWARD & BERNSTEIN, *supra* note 145, at 325-26 (during Watergate, President Nixon's staff researched issue of whether he could pardon himself and concluded he could); Daniel Schorr, *Will Bush Pardon Himself?*, N.Y. TIMES, Dec. 29, 1992, at A15 (describing this episode); R.W. Apple, Jr., *The President as Pardoner: A Calculated Gamble*, N.Y. TIMES, Dec. 25, 1992, at A23 (stating that President Bush's Iran-Contra pardons raise the risk that he will "be remembered . . . as the President who in effect pardoned himself").

160. *But cf. supra* text accompanying notes 108-09 (discussing practical benefits of having both sanctions available).

161. U.S. CONST. art. II, § 2.

162. See *infra* text accompanying notes 200-03.

163. Of course, substantive privileges might still apply. See *infra* text accompanying note 211.

possibility of self-pardon does not weaken the argument against the removal objection. Realistically, criminal prosecution is less likely to be a removal from office than an alternative to it.

B. The Harassment Objection

The view that permitting indictment of the President could unleash a potentially debilitating swarm of frivolous prosecutions¹⁶⁴ is practically, historically, and legally unsound. It is, in addition, inconsistent with the experience we have had, and with the legal framework we could have.

1. Historical Judicial Protection

The President receives more deference from the courts than any other official in the country, as the cases regarding amenability to give testimony show. The courts have long insisted on, and Presidents have generally accepted, a presidential duty to provide relevant trial testimony. Yet the judiciary has enforced this duty with considerable deference to the demands of the President's office,¹⁶⁵ thus protecting the incumbent from harassment while making evidence available in appropriate cases.¹⁶⁶

164. This argument is the one that persuaded Professor Kurland, who otherwise agreed with many of my own conclusions, that the President does have criminal immunity. See KURLAND, *supra* note 7, at 135-36.

165. Thus, as described in the following paragraphs of text and *infra* note 179, President Jefferson was permitted to send in the relevant document rather than appear personally in the Burr trial; President Monroe provided his testimony by way of interrogatory answers; President Grant was deposed; the trial judge was willing to dispense with President Nixon's personal appearance in the tapes case, even during contempt proceedings; President Ford's testimony against his alleged assailant was taken by videotape in Washington; and, after a series of limiting rulings, the trial judge in the Iran-Contra prosecution of Admiral John Poindexter ordered that the testimony of ex-President Reagan be taken on videotape in California under a variety of safeguards, see *United States v. Poindexter*, 732 F. Supp. 142, 157-60 (D.D.C. 1990) (describing court's reasons for imposing these conditions).

166. Although all of the contested episodes have arisen in criminal contexts, the strong stand taken by the courts in those cases, as well as their consistent recognition of the superintending power of Congress, see *supra* note 111, lead me to disagree with Professor Carter's suggestion that if Congress created a federal tort action "for damages caused by presidential act or order," the President could probably refuse "to produce papers or appear personally in connection with such a suit." Carter, *supra* note 12, at 1350 n.41; compare RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 191 n.156 (1974) (scope of President's duty of production same in civil and criminal cases). In my view, it is more likely that the courts would assert their authority to compel such testimony, see *United States v. Burr*, 25 F. Cas. 187, 191 (C.C. D. Va. 1807) (No. 14,694) (applying, as counsel had in argument, civil analogies to criminal subpoena), but then be extremely chary, both procedurally and substantively, about exercising this authority, much as they already are in the case of cabinet officers.

Any court faced with the problem of protecting the President from an abusive criminal prosecution would approach the issue against the backdrop of this rich constitutional history.¹⁶⁷

In 1807, Aaron Burr stood trial for treason. In substance, the charges were that, following his term as Vice President, he had sought to separate some of the country's newly acquired western territories from their allegiance to the United States.¹⁶⁸ During the course of the proceedings, he demanded that President Jefferson produce a letter that Jefferson had received from General James Wilkinson.¹⁶⁹ The basis for the request was that Jefferson had informed Congress of the letter in a message that stated that Burr's "guilt is placed beyond question."¹⁷⁰ Chief Justice Marshall, presiding at the trial, distinguished the President from the King and ordered issuance of the subpoena. He stated that once the document had been produced, he would review it in camera to redact any irrelevant material implicating matters of state.¹⁷¹

On receiving the subpoena, Jefferson wrote counsel for the government, promised to send the requested letter, and requested that counsel

See generally In re Attorney General of the United States, 596 F.2d. 58, 64-65 (2d Cir. 1979), *cert. denied*, 444 U.S. 903 (1979).

Since the underlying tensions are the same in the criminal and civil contexts, although of course the need for the testimony is often more compelling in the former, I believe that my predicted form of analysis is also the preferable one.

167. In light of this history, it seems fair to conclude that the legal principle requiring presidents to give testimony in appropriate cases is now permanently woven into our constitutional fabric. *See generally* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1071-72 (1984) (suggesting that constitutional law is established through re-constitutive crises). The practical meaning of this statement is not just that the courts are likely to continue to rule in the future as they have in past, but that any President who defied an order to testify would, in absence of extraordinary circumstances, face insurmountable political problems—making such defiance highly unlikely. *Cf.* Carter, *supra* note 12, at 1369 (speculating that if President Nixon had not turned over tapes, "the Justices would not have created a fresh remedy through which to try and punish him," but would have left enforcement to the impeachment process).

168. *See* JOSEPH J. COOMBS, *THE TRIAL OF AARON BURR* at v-*lii* (1864) (outlining events leading up to trial).

169. *See generally* BERGER, *supra* note 166, at 187-93.

170. *See* *United States v. Burr*, 25 F. Cas. 30, 32, 36 (C.C.D. Va. 1807) (No. 14,692d); 16 *ANNALS OF CONG.* 39, 40 (1807) (message to Congress of January 22, 1807). *See generally* DONALD B. CHIDSEY, *THE GREAT CONSPIRACY* 114-15 (1967) (arguing that letter was not material to the defense "and the whole business was simply a trick to embarrass the President").

171. *See* *United States v. Burr*, 25 F. Cas. 30, 34, 37 (C.C.D. Va. 1807) (No. 14,692d); THOMAS JEFFERSON CORRESPONDENCE (Worthington C. Ford ed., 1916) (photoreproduction of subpoena on unnumbered page between 144 and 145; court clerk's endorsement states: "The transmission to the Clerk of this Court of the original letter . . . will be admitted as sufficient observance of the process without the personal attendance of any . . . of the persons therein named.").

furnish the defense with the material sections.¹⁷² Counsel accordingly tendered the defense portions of the letter while offering to submit the entire document to the court.¹⁷³ Burr objected that this was insufficient,¹⁷⁴ and Marshall delivered another opinion, this one stating that he would not even consider permitting any redactions unless they were personally directed by the President; Marshall added, however, that he would limit circulation of the letter.¹⁷⁵ Counsel for the government thereupon sent a messenger with the letter to Jefferson at Monticello who returned it with a certificate stating that he was withholding only confidential matters having nothing to do with the pending charges.¹⁷⁶ Since the trial had in the meantime been progressing very favorably to Burr,¹⁷⁷ he apparently accepted the redacted version,¹⁷⁸ and did not pursue the matter further prior to his acquittal on the remaining charges shortly thereafter.¹⁷⁹

172. See *United States v. Burr*, 25 F. Cas. 55, 65 (C.C.D. Va. 1807) (No. 14,693).

173. See 2 REPORTS OF THE TRIALS OF COLONEL AARON BURR 514 (David Robertson ed., 1808); 3 THE TRIAL OF COL. AARON BURR 25, 28 (T. Carpenter ed., 1808).

174. 3 THE TRIAL OF COL. AARON BURR, *supra* note 173, at 28-30.

175. *United States v. Burr*, 25 F. Cas. 187, 190-92 (C.C.D. Va. 1807) (No. 14,694).

176. *Id.* at 193; 3 THE TRIAL OF COL. AARON BURR, *supra* note 173, at 46.

177. See *United States v. Burr*, 25 F. Cas. 55, 180-81 (C.C.D. Va. 1807) (No. 14,693) (acquittal on most serious charges).

178. See 3 THE TRIAL OF COL. AARON BURR, *supra* note 173, at 39, 46.

179. See *United States v. Burr*, 25 F. Cas. 187, 201 (C.C.D. Va. 1807) (No. 14,694); BERGER, *supra* note 166, at 191 n.157. It is possible that Burr took the position he did because he already knew the contents of the letter in question; see 3 THE TRIAL OF COL. AARON BURR, *supra* note 173, at 280-82, where Burr's counsel stated that he knew the entire contents of a related letter to the President (which had been read in full to the grand jury, 3 *id.* at 254), and correctly summarized the redacted portion. See BERGER, *supra* note 12, at 1116; Irwin S. Rhodes, *What Really Happened to the Jefferson Subpoenas*, 60 A.B.A. J. 52, 53 (1974).

After the trial, Jefferson, who had a long history of conflict with Marshall and believed that the Federalists sitting on the bench had a partisan bias against him, see Letter from Thomas Jefferson to James Bowdoin (Apr. 2, 1807), in 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 140, at 186; Letter from Thomas Jefferson to George Hay (June 20, 1807), in 11 *id.* at 240, complained that Marshall had been wrong in his decision, particularly in asserting in dictum the right to compel his personal attendance, see *id.*; *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d); *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694); THE TRIAL OF COL. AARON BURR, *supra* note 173, at 36. It would be impractical, Jefferson asserted, to expect him and his cabinet officers to be removed from their constitutional duties and "be dragged from Maine to Orleans by every criminal who will swear that their testimony 'may be of use to him.'" Letter from Thomas Jefferson to George Hay (June 20, 1807), in 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 173, at 241-42; see also Letter from Thomas Jefferson to George Hay (Sept. 7, 1807), in 11 *id.* at 365.

Nonetheless, during the trial itself Jefferson wrote the court, "[I]f the defendant suppose there are any facts within the knowledge of the heads of departments or of myself, which can be useful for his defence, from a desire of doing anything our situation will permit in furtherance of justice, we shall be ready to give him the benefit of it, by way of deposition . . . at this place." *United States v. Burr*, 25 F. Cas. 55, 69 (C.C.D. Va. 1807) (No. 14,693).

This pragmatic series of rulings established the pattern that future courts have followed—insisting on the power to compel presidential testimony, but exercising that power in a way maximally protective of the officeholder's official functioning.

In keeping with this precedent, President Monroe in 1818 sent interrogatory answers to the court martial of his appointee, Dr. William Barton, after having been served with a subpoena by the defense and advised by the Attorney General that he was required to provide information, although not necessarily to attend the trial.¹⁸⁰

Since this later precedent was not widely known and the precise events of the Burr trial were subject to dispute, by the time of Watergate some commentators considered the President's amenability to process doubtful.¹⁸¹ In October 1973, however, the en banc United States Court of Appeals for the District of Columbia Circuit upheld a subpoena from the Watergate grand jury for tape recordings of presidential conversations,¹⁸² and President Nixon chose not to appeal the decision.¹⁸³

Any remaining doubts about the President's obligations to respond to judicial testimonial demands were convincingly dispelled nine months later by the unanimous opinion in *United States v. Nixon*,¹⁸⁴ which relied heavily on *Burr* to uphold a trial subpoena that, subject to a series of safeguards, compelled the President to surrender tapes and documents for use in the Watergate prosecutions of various key presidential aides and political operatives.¹⁸⁵ Despite some prejudgment hints that he might not comply with an adverse ruling—a course of action that surely would have resulted in his immediate impeachment and conviction¹⁸⁶—President Nixon produced the materials, and was forced to resign as a

180. This episode, along with several similar ones, was rescued from obscurity by an assistant counsel to the Senate committee investigating Watergate. His description of it can be found in Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 34 U. ILL. L. REV. 1, 5-6 (1975).

181. See *On Taking a President Before a Grand Jury*, N.Y. TIMES, June 10, 1973, at E14 (two letters to the editor); Nathan Lewin, *Subpoenaing The President*, THE NEW REPUBLIC, June 9, 1973, at 19; *President Nixon Can Be Made to Appear Before the Grand Jury*, WASH. POST, June 1, 1973, at A25 (letter to the editor).

182. *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (en banc).

183. See WOODWARD & BERNSTEIN, *supra* note 145, at 72-73; 2 NIXON, *supra* note 141, at 937.

184. 418 U.S. 683, 697-716 (1974).

185. See WOODWARD & BERNSTEIN, *supra* note 145, at 264 (reporting that the Justices unanimously decided against the President on the day after argument).

186. See 2 NIXON, *supra* note 141, at 630 ("In the event that the Court ruled flatly against me in the tapes case, I could decide to defy the ruling. But that would almost certainly bring about impeachment and therefore could not realistically be considered.").

result of the disclosures in them.¹⁸⁷

Applying the *Nixon* ruling the following year, a district court overruled the government's objections and directed enforcement of a subpoena issued to President Ford by a criminal defendant accused of attempting to assassinate him.¹⁸⁸ But the court made sure to minimize any inconvenience; the lawyers travelled to Washington and the President gave his testimony on videotape in his office.¹⁸⁹

In the Iran-Contra affair, the courts showed a similar pattern of maximum deference, but ultimate compulsion. In the prosecution of Colonel Oliver North, the trial judge ruled that the presidential materials sought were not necessary to the defense, thus mooted any questions concerning the mode of compliance.¹⁹⁰ In the prosecution of Admiral John M. Poindexter, the trial judge ruled: (1) the materials sought from President Bush (who had been Vice President during the relevant period) were irrelevant or cumulative;¹⁹¹ (2) the court would conduct an in camera inspection of portions of the diary kept by Ronald Reagan while he was President to determine whether they had to be turned over to the defense;¹⁹² (3) the defense was entitled to take the videotaped deposition of former President Reagan concerning his conduct in office, but under the supervision of the trial judge, at a time and place convenient to the witness, and in secret, so that the government would have the opportunity to move for redactions from the testimony before it was made pub-

187. See *id.* at 647-54; DOYLE, *supra* note 7, at 330, 339-49; WOODWARD & BERNSTEIN, *supra* note 145, at 255, 275; John Osborne, *Demise*, NEW REPUBLIC, Aug. 24, 1974, at 9.

188. United States v. Fromme, 405 F. Supp. 578, 583 (E.D. Cal. 1975).

189. See N.Y. TIMES, Oct. 5, 1975, at A1.

190. United States v. North, No. 88-0080-02, 1989 U.S. Dist. LEXIS 2903 (D.D.C. Mar. 31, 1989) (refusing to enforce subpoena issued to ex-President Reagan and noting that court had previously quashed subpoena issued to ex-Vice President, and sitting President, Bush; court had power in both cases, but defendant had failed to show subpoenas were likely to yield relevant evidence). See Christopher Walther, Comment, *Legitimacy: The Sacrificial Lamb at the Altar of Executive Privilege*, 78 KY. L.J. 817, 832-33 (1989-90) (agreeing with decision insofar as it affirmed power, but criticizing it for imposing an excessively heavy threshold burden on defendant).

191. United States v. Poindexter, 725 F. Supp. 13, 30 (D.D.C. 1989).

192. United States v. Poindexter, 727 F. Supp. 1501, 1511 (D.D.C. 1989). After conducting this examination, the court initially determined that some of the entries were relevant, see United States v. Poindexter, 732 F. Supp. 135 (D.D.C. 1990); David Johnston, *Reagan is Ordered to Provide Diaries in Poindexter Case*, N.Y. TIMES, Jan. 31, 1990, at A1, but ultimately refused to provide them to the defense in light of the government's assertion of executive privilege and Admiral Poindexter's opportunity (described in the text) to take the former President's testimony, see United States v. Poindexter, No. 88-0080-01, 1990 U.S. Dist. LEXIS 2881 (D.D.C. Mar. 21, 1990); David Johnston, *Poindexter Loses Fight for Reagan Notes*, N.Y. TIMES, Mar. 22, 1990, at A20.

lic.¹⁹³ Rulings (2) and (3) were both made over vigorous objection,¹⁹⁴ but former President Reagan complied without seeking appellate review.¹⁹⁵

This lengthy history provides a solid basis for predicting what would happen if the President became the subject of a criminal prosecution: the courts would extend every possible procedural protection and would amply protect the officeholder against vexation. Since there are presumably many more situations in which it might be plausibly claimed that the President has relevant evidence than ones in which it might be plausibly claimed that the President has committed a crime, the case for testimonial immunity is—from the point of view of safeguarding against harassment—stronger than the case for criminal immunity. That the courts have been able to reach appropriate accommodations in the testimonial context strongly supports the view that they would be able to do so in the criminal context.

2. *Self-Protection*

The President has ample resources for self-defense including rich legal resources, a unique ability to mobilize public opinion, and unparalleled control over prosecutorial decisions. As a practical matter, it is far more likely that an ill-inclined President could launch a harassing investigation of a judge who had rendered unfavorable rulings, or of a senator or governor perceived as a potential rival, than that one of these officeholders could instigate an unfounded investigation of the President.¹⁹⁶ That existing prosecutorial power has not been abused, and is apparently subject to adequate political checks when seen to be abused,¹⁹⁷ is good empirical evidence of the weakness of the harassment objection as applied to the President.

193. See *United States v. Poindexter*, 732 F. Supp. 165 (D.D.C. 1990); *United States v. Poindexter*, 732 F. Supp. at 144-45, 155-59 (D.D.C. 1990).

194. See David Johnston, *Reagan Asks Court to Kill Subpoena*, N.Y. TIMES, Dec. 7, 1989, at A27. See generally Anthony Lewis, *Not by Divine Right*, N.Y. TIMES, Mar. 16, 1990, at A35 (praising rulings in light of history and because "the royal view of the Presidency has been rejected by the courts once again").

195. See David Johnston, *Reagan Testifies He Did Not Order Any Illegal Acts*, N.Y. TIMES, Feb. 23, 1990, at A1. In mid-1992, former President Ronald Reagan also met voluntarily with the Iran-Contra special prosecutor for an all-day private interview that was transcribed by a court reporter. See N.Y. TIMES, Oct. 10, 1992, at A6. Similarly, Vice President George Bush submitted without objection to a deposition by the Iran-Contra independent counsel in mid-1988. See *Bush's Deposition Was Videotaped, Lawyer Says*, N.Y. TIMES, Jan. 3, 1993, at A17.

196. Further, even in that event, the President would have legal protections that the other officeholders would not. See *infra* part IV.B.2.

197. See *supra* text accompanying notes 58, 80, & 87.

3. *Future Statutory and Judicial Protection*

Quite apart from the safeguards already created by the judiciary in the testimonial context, any future President under indictment would benefit from unique legal safeguards against harassment.

A federal investigation of the President would in all likelihood take place under the independent counsel statute,¹⁹⁸ which has procedures for preliminary review by the Attorney General that are designed to reduce the chances of ill-founded inquisitions.¹⁹⁹ If the concern is with harassment by state prosecutors,²⁰⁰ Congress could easily amend the law to make this statutory route the exclusive means of investigating any suspected presidential crimes, state as well as federal, or, alternatively, to provide for the tolling of state prosecutions during the President's term of office.²⁰¹

Even if Congress did not choose this course and even if we continue to assume the worst case from the harassment standpoint—namely a meritless prosecution commenced by state authorities—there seems little

198. 28 U.S.C. § 595 (1987). See N.Y. TIMES, Dec. 11, 1992, at A32 (President-elect Clinton announces support for re-enactment of special counsel statute, making re-enactment a "virtual certainty").

199. Moreover, according to the Supreme Court in *Morrison v. Olson*, 487 U.S. 654 (1988), "the Act does give the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel." *Id.* at 696. However, this view—conveniently adopted to reduce the status of the office of independent counsel in the face of a separation-of-powers attack—has been cogently criticized as inconsistent with the purpose of the statute itself, and politically unrealistic. See Carter, *supra* note 7, at 113-16. The Court had better grounds for decision available, see, e.g., Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069 (1990), and should have rested on them. A variety of viewpoints on the case are collected in a symposium concerning it in Symposium, *Morrison v. Olson: Addressing the Constitutionality of the Independent Counsel Statute*, 38 AM. U. L. REV. 255 (1989); see also Steven G. Calebresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1167 & n.62 (1992) ("[T]he Supreme Court's current caselaw on congressional power to deprive the President of control over the executive department is hopelessly contradictory," veering between formalist and functionalist approaches.).

200. In this regard, it is worth recalling that, as the *Donovan* case demonstrated, see *In re Application of Donovan*, 601 F. Supp. 574, 579 (S.D.N.Y. 1985), there is no existing barrier to states indicting federal officials. See *Whitehead v. Senkowski*, 943 F.2d 230, 236 (2d Cir. 1991) (dismissing federal habeas corpus petition of federal agent charged by New York with fraud and grand larceny: "Contrary to Whitehead's assertion, the state is not without power to prosecute federal officials from the outset"); 1 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 0.6[5], at 249 (2d ed. 1985) ("Federal officials are not immune from state criminal prosecutions for violating a valid criminal law of the state."). Yet there seems to have been no widespread abuse of the power.

201. Either statute would seem clearly constitutional in light of the authorities discussed *infra* in note 202. See also MOORE, *supra* note 200, at 251 (where appellate review by Supreme Court inadequate to protect federal interest, Congress may do so by providing for removal or exclusive federal jurisdiction.)

doubt that the President would have the benefit of (1) the federal removal statute²⁰² and (2) access to the federal courts to enjoin the vexatious proceedings.²⁰³

To be sure, the pursuit of these legal remedies might require some portion of the President's attention, but the defense of impeachment proceedings may well require no less—and, in the cases meriting serious concern, that is likely to be the alternative.²⁰⁴

202. 28 U.S.C. § 1442(a)(1) (1982) (providing that any officer of United States may remove to federal court a prosecution commenced in state court "for any act under color of such office"). The Supreme Court has long stressed the key role of this statute in assuring the vigorous functioning of the federal government. *See, e.g.,* *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969) (statute should be broadly construed); *Tennessee v. Davis*, 100 U.S. 257, 263 (1880) (statute constitutional even if alleged crime is violation of state law, since otherwise federal government unable to defend its existence against the states); *see also* E.W.M. Mackey, *Removal of Criminal Causes From State Courts to Federal Courts*, 1 CRIM. L. MAG. REP. 141, 142-46, 161-70 (1880) (arguing this position).

While the Court in *Mesa v. California*, 489 U.S. 121 (1989) (no removal of state traffic prosecutions where defendants pleaded no connection to federal office), might be said to have shown some disposition to halt expansion of the statute, it wrote a very narrow opinion, as the concurrence emphasized and the winning attorney recognized. *See* Kenneth S. Rosenblatt, *Removal of Criminal Prosecutions of Federal Officials: Returning to the Original Intent of Congress*, 29 SANTA CLARA L. REV. 21, 86-87 (1989). In light of the historic deference of the courts to the convenience of the President, *see supra* note 165, it is highly likely that removal would be upheld virtually anytime the President sought it.

However, Congress is always free to make assurance doubly sure by enacting an appropriate amendment to the removal statute. Since it would be designed to protect the unassailable federal interest in assuring a functioning Presidency, such a statute would undoubtedly be held constitutional, whether the Court employed the expansive theory of protective jurisdiction deployed by some leading federal courts scholars or the more restrained version advocated in an excellent re-examination of the subject, Scott A. Rosenberg, Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933, 939, 959-64 (1982) (summarizing theories). *Cf. Mesa v. California*, 489 U.S. at 137-38 (declining to adopt protective jurisdiction theory on facts presented). *See generally In re Application of Donovan*, 601 F. Supp. 574, 580 (S.D.N.Y. 1985) (acknowledging that "the indictment of a Cabinet officer interferes with the administration and operation of the executive branch of the federal government," but holding that removal statute as presently written does not provide for removal on that ground.).

203. The Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971), while stating a general presumption against federal court injunctive interference with state criminal proceedings, nonetheless reaffirmed the traditional exception for bad-faith, harassing prosecutions, *id.* at 47-49, and added, "Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be." *Id.* at 54. While the success rate of litigants seeking to establish bad faith has been virtually nil in the years since, and there has as yet been no clear Court description of what might be meant by "unusual situations calling for federal intervention," *see* 17A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 4255, at 253 (2d ed. 1988) (reviewing post-*Younger* cases), an allegedly harassing state criminal prosecution of a President would seem to fall comfortably within both exceptions.

204. *See supra* text accompanying notes 132-33. It is worth noting in this regard that an impeachment resolution is one of highest privilege on the floor of the House of Representatives—meaning that, notwithstanding any other pending business, any Representative with the floor may set the machinery in motion at any time. *See* LEWIS DESCHLER & WILLIAM H.

C. The Intrusiveness Objection

This objection differs from the harassment objection in focusing on the chilling effect resulting from potential prosecutions, as opposed to the disruptive effect of actual prosecutions. The claim is that, intimidated by the prospects of criminal liability, the officeholder would be deterred from the energetic pursuit of duty.

Richard Nixon made a very similar argument in support of the position that his tapes should be guarded by an absolute privilege, and the Court's response is equally applicable to the present context. The *Nixon* Court did not hold that nothing is privileged; it simply held that not everything is privileged. It rejected a claim of absolute privilege "based only on the generalized interest in confidentiality," but specifically left it open to the President to claim particular privileges, notably for our purposes the "state secrets privilege"²⁰⁵ as articulated in *United States v. Reynolds*.²⁰⁶

The determination of the applicability of that privilege rests in turn on a case-by-case balancing of the need for disclosure against the importance of the interest asserted by the demanding party.²⁰⁷ Some cases are so obviously at the core of executive functioning that further inquiry is precluded; one example, said the *Reynolds* court, is a breach of contract action by an alleged spy.²⁰⁸ There is no reason to doubt that the same ruling would properly be made if we imagine a criminal fraud action launched against the President for failure to pay the spy.²⁰⁹ On the other hand, if the President killed the spy in the Oval Office as a result of a heated dispute over the season's prospects for the Washington Redskins, a court should reach the opposite conclusion since only the most ephemeral of public purposes would be served by a holding that the President had immunity in that context.²¹⁰

BROWN, PROCEDURE IN THE U.S. HOUSE OF REPRESENTATIVES, ch. 14, §§ 2.2, 2.5; *see also id.* § 5.7.

205. *See* *United States v. Nixon*, 418 U.S. 683, 712-15 & n.21 (1974).

206. 345 U.S. 1, 8-12 (1953).

207. *See id.* at 11.

208. *See id.* at 11 & n.26 (citing *Totten v. United States*, 92 U.S. 105 (1875)).

209. There would be ample legal materials available to guide this ruling since, in a wide variety of contexts, the courts considering questions of civil immunity have weighed how central the challenged action is to the appropriate discharge of the officeholder's function, and then tailored the immunity accordingly. *See supra* text accompanying notes 114-15.

210. Compare Howard Schechter, Note, *Immunity of Presidential Aides from Criminal Prosecution*, 57 GEO. WASH. L. REV. 779, 797-98 (1989) (except in rare cases, neither President nor aides should have absolute criminal immunity, but judge should "perform a balancing test based on the action taken in light of both the need to have an effective and efficient functioning executive and the societal interest involved").

The argument advanced here is simply that the President is amenable to prosecution and has no "generalized" criminal immunity. But there might well be a particular substantive privilege in a specific case if there is some concrete reason to believe that the various objections considered in this Part are actual rather than theoretical.²¹¹ This would be the criminal analogue of the "totality of the circumstances" civil immunity recognized for state governors in *Scheuer v. Rhodes*.²¹² To be sure, any such formulation leaves a zone of uncertainty, but as the courts have recognized in similar contexts, there is no empirical support for the intuitively unlikely proposition that this will chill the vigor with which public servants discharge their duties.²¹³

Conclusion

Legal decisionmakers should reject the position that the President should have a blanket immunity from criminal prosecutions. The argument in favor of immunity is inconsistent with the history, structure, and underlying philosophy of our government, at odds with precedent, and unjustified by practical considerations. To the extent that the belief is not a legal one,²¹⁴ achieving political adulthood requires "We the People" to accept the responsibility of discarding it.²¹⁵

211. Cf. Carter, *supra* note 12, at 1398 n.216 (distinguishing amenability to suit and standard of liability in actions against executive branch officials).

212. 416 U.S. 232, 247-48 (1974) (described *supra* note 113).

213. See *United States v. Nixon*, 418 U.S. 683, 712 & n.20 (1974) ("[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.") (citing *Clark v. United States*, 289 U.S. 1, 13, 16 (1933) (Cardozo, J., for a unanimous Court) (despite theoretical possibility of chilling candor, privilege against intrusion into jury deliberations subject to case-by-case exceptions to investigate wrongdoing; "The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice."); see also *United States v. Gillock*, 445 U.S. 360, 373 (1980) (While allowing federal prosecutors to use evidence of state legislator's official acts "may have some minimal impact on the exercise of his legislative function," the Court will not "impair the legitimate interest of the Federal Government in enforcing its criminal statutes [for] only speculative benefit to the state legislative process.")).

214. See *supra* text accompanying notes 14-16.

215. See Interview of Akhil R. Amar by Vicki Quade, *Who Governs America?*, HUM. RTS. Q., Summer 1991, at 31 ("The only way for the people to become responsible is to give them responsibility. . . . It's a little bit like a teenager. At some point, you've got to give the teenager some responsibility [so] he or she . . . will become an adult."); cf. SIGMUND FREUD, INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS 418-19 (James Strachey ed., 1989) (describing children's development tasks in freeing themselves from parents).