

PRESIDENTIAL POWERS, IMMUNITIES, AND PARDONS

ALBERTO R. GONZALES*

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INTRODUCTION

Special Counsel Robert Mueller is conducting an investigation into Russia's interference in the 2016 presidential election and the possible coordination and cooperation with the Donald Trump presidential campaign.¹ The investigation has raised numerous legal questions with serious political and legal implications.² Chief among them is whether a sitting President can be indicted and prosecuted for criminal wrongdoing.³ A related question is whether and to what extent, in the event of an official

* Former Counsel to the President and the United States Attorney General under the George W. Bush Administration; Dean and Doyle Rogers Distinguished Professor of Law, Belmont University College of Law. Special thanks to Dean H. Adams (Juris Doctor Candidate, 2020, Belmont University College of Law) for his assistance and contributions to this Article. I also appreciate the help of the editorial staff of the *Washington University Law Review*.

1. See OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, *ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS 1* (2017), <https://assets.documentcloud.org/documents/3254237/Russia-Hack-Report.pdf> [<https://perma.cc/4KRQ-8ZT2>].

2. David Alan Sklansky with Sharon Driscoll, *Espionage, Hacking, and New Indictments: An Update on the Mueller Investigation*, STAN. L. SCH.: LEGAL AGGREGATE (July 20, 2018), <https://law.stanford.edu/2018/07/20/espionage-hacking-and-new-indictments-an-update-on-the-mueller-investigation> [<https://perma.cc/KKB6-VJEQ>].

3. Salvador Rizzo, *Can the President Be Indicted or Subpoenaed?*, WASH. POST (May 22, 2018), <https://www.washingtonpost.com/news/fact-checker/wp/2018/05/22/can-the-president-be-indicted-or-subpoenaed/> [<https://perma.cc/3JSB-YE4T>].

investigation, a sitting President can be compelled to provide evidence—in the form of oral and written testimony, as well as documentary evidence.⁴ Finally, assuming there is potential criminal liability, does a sitting President have the power to issue a self-pardon?⁵ These are relatively novel questions in the law, and it is not surprising there is little guidance from the courts given the reluctance by most judges to weigh in on potentially serious political questions.⁶

This Article intends to clarify some of the more difficult legal issues in our nation's separation of powers jurisprudence. In order to afford the President the flexibility and discretion necessary to discharge presidential duties, the courts are almost certainly going to recognize total immunity from the criminal process for the President with respect to official conduct.⁷ The treatment of unofficial conduct is less predictable.⁸ Based on precedent and our nation's founding principles of equal justice and fairness, the courts are likely to hold that a sitting President is not above the law and thus does not enjoy immunity from criminal prosecution for unofficial acts or conduct unrelated to his or her fitness to hold office.⁹ However, because of separation of powers considerations, the courts are likely to require deferral of any such prosecution until the President no longer holds office.¹⁰ Although not as clear, constitutional considerations would likely also require deferral of any investigation or indictment, at least those requiring

4. This question was partly addressed in *United States v. Nixon*, 418 U.S. 683, 706 (1974), but the Court did not reach the issue of compelling a President to respond to subpoenas ad testificandum—the production of oral testimony.

5. See Jonathan Turley, *Opinion: Does Trump Have Total Power to Pardon? He Just Might*, THE HILL (July 24, 2017, 8:00 AM), <http://thehill.com/blogs/pundits-blog/the-administration/343408-opinion-does-trump-have-complete-power-to-pardon-he> [<https://perma.cc/E9DK-JFCR>]; *contra* Laurence H. Tribe, Richard Painter, & Norman Eisen, *No, Trump Can't Pardon Himself. The Constitution Tells Us So.*, WASH. POST (July 21, 2017), https://www.washingtonpost.com/opinions/no-trump-cant-pardon-himself-the-constitution-tells-us-so/2017/07/21/f3445d74-6e49-11e7-b9e2-2056e768a7e5_story.html [<https://perma.cc/HH88-MLJR>].

6. This reluctance relates in part to the doctrine that courts should not resolve issues that are purely political in nature. See generally Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908 (2015); *but see* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

7. See *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982) (holding that the President is absolutely immune from civil damages suits arising from official presidential conduct).

8. In terms of civil liability for unofficial conduct, a sitting President is not immune from litigation while in office. *Clinton v. Jones*, 520 U.S. 681, 694–95 (1997).

9. *United States v. Lee*, 106 U.S. 196, 220 (1882) (“No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.”).

10. See *infra* Part I.

the direct and material participation of the President.¹¹ On the other hand, the President can be compelled to produce certain documentary evidence when doing so is necessary and would otherwise be unavailable in connection with a criminal investigation.¹² The argument for presidential immunity with respect to production of evidence is stronger, though likely not absolute, with respect to oral testimony.¹³ Nonetheless, mindful of the President's duties, the courts are likely to afford the President great latitude in the time, place, and manner of providing oral testimony.¹⁴ Finally, there is nothing in the Constitution that expressly prohibits or limits the President from issuing a self-pardon.¹⁵

I. PRESIDENTIAL IMMUNITY

Our nation was founded on the principle of the rule of law. This means that the law is applied equally to every person, and no person is above the law.¹⁶ This is one of the foundational tenets of our system of government, a belief so basic to Americans, so ingrained in our culture, as to be beyond question or serious disagreement.¹⁷ Justice demands that people be held accountable for their actions.¹⁸ Indeed, one could argue that the failure to prosecute someone in the face of evidence of criminal activity—including an incumbent President—would undermine confidence in our government institutions and seriously impair the integrity of the criminal justice process.¹⁹ For these reasons, it may appear obvious that a President who

11. Akhil Reed Amar, *On Prosecuting Presidents*, 27 HOFSTRA L. REV. 671, 676 (1999) (“The question is not whether a President is accountable to law and to the country—but how, when, and by whom.”). Furthermore, a congressional statute could potentially affect the timing calculation of indictment. *See infra* Section I.D.

12. *United States v. Nixon*, 418 U.S. 683, 713 (1974).

13. *See* TODD GARVEY, CONG. RESEARCH SERV., LSB10130, COMPELLING PRESIDENTIAL COMPLIANCE WITH A JUDICIAL SUBPOENA 2–3 (2018) [hereinafter CRS REPORT], <https://fas.org/sgp/crs/misc/LSB10130.pdf> [<https://perma.cc/7A8S-FPBX>].

14. *Clinton v. Jones*, 520 U.S. 681, 691–92 (1997); *see also infra* Part II.

15. *See infra* Part III.

16. THE FEDERALIST NO. 51 (James Madison) (“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.”).

17. *See* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2240 (2018) (“[T]he idea that even the President is not above the law” is “indispensable to a working constitutional democracy . . .”).

18. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (the United States is a “government of laws, and not of men”); Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L.Q. 7, 46 (1992).

19. Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277, 1280 (2018).

engages in wrongdoing can be subject to criminal prosecution. It is worth noting, though, that in our nation's long history of remarkable yet imperfect Presidents, none have ever been prosecuted while in office for a crime.²⁰

A. *Distinguishing Official and Unofficial Conduct*

Common sense supported by the weight of history tells us that every President will have to make controversial decisions while in office.²¹ Those decisions flowing either directly or indirectly from the President's duties and responsibilities under the Constitution and laws of the United States typically qualify as "official acts."²² Some official decisions will be unpopular; still others will give rise to claims of illegality.

Imposing criminal liability upon a sitting President who acts in good faith, often on the advice of government lawyers, could have a chilling effect on the President's decision-making.²³ It could paralyze a President from undertaking controversial measures that he or she considers necessary to serve American interests.²⁴ Guarding against this paralysis is arguably more important to the welfare of our nation than imposing criminal liability to conduct that rarely occurs, especially when there are other adequate means to hold a President accountable.²⁵ In other words, the interest in punishing official presidential actions that are taken in good faith but which some may view as violating the law nevertheless does not outweigh the significant burden that even attempted criminal prosecution would impose on the office of the President.²⁶

20. See Adam Liptak, *A Constitutional Puzzle: Can the President Be Indicted?* N.Y. TIMES (May 29, 2017), <https://www.nytimes.com/2017/05/29/us/politics/a-constitutional-puzzle-can-the-president-be-indicted.html> [<https://perma.cc/B4H4-PDFR>]. President Richard Nixon was named a co-conspirator but never indicted. Anthony Ripley, *Jury Named Nixon a Co-Conspirator but Didn't Indict*, N.Y. TIMES, June 7, 1974, at 73.

21. Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1459 (2009).

22. See *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982) (recognizing civil immunity for official acts, being those "within the 'outer perimeter' of [the President's] official responsibility.>").

23. Consider, e.g., *id.* at 751–56.

24. *Id.* at 752 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)) (President needs to "deal fearlessly and impartially with" his official duties).

25. See *id.* at 757 ("A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive."); see *infra* Section I.E.

26. See Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2157 (1998) (contending that "[t]he indictment of a President would be a disabling experience for the government as a whole").

Additionally, no President can effectively govern or make necessary personnel decisions if subordinates within the executive branch have the power to judge, second-guess, or challenge the President's authority and decision-making in an official capacity.²⁷ Watergate Special Prosecutor Leon Jaworski disagrees, arguing that the government in practice is supervised through executive departments and agencies without direct presidential supervision.²⁸ While true to a degree, our constitutional structure of separation of powers places the ultimate power and responsibility of the executive branch in the hands of the President,²⁹ and he or she must be able to govern without fear of retaliation or insubordination by other executive branch officials, including prosecutors at the Justice Department.³⁰

In the case of *Nixon v. Fitzgerald*, the Supreme Court of the United States held that a sitting President enjoys complete immunity from civil liability for actions taken while in office, reasoning that the President must be able to make decisions and take actions for our country without fear of civil liability.³¹ Based on this precedent, courts will likely recognize absolute immunity from federal criminal process in connection with the President's official conduct, which extends to "all acts within the 'outer perimeter' of [the President's] official responsibility."³²

Fitzgerald itself acknowledges a key textual issue with any argument supporting presidential immunity: the Constitution contains no express grant of immunity from liability for the President for either official or unofficial conduct.³³ The absence of an express grant of executive immunity was significant to Professor Ronald Rotunda, who in 1998, wrote to Independent Counsel Kenneth W. Starr that the Constitution explicitly grants limited immunity to lawmakers for certain actions.³⁴ "If the Framers of our Constitution had wanted to create some constitutional privilege to

27. *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (preserving the President's right to execute his constitutional duties without impermissible interference by the independent counsel).

28. Stephen M. Griffin, *Presidential Immunity from Criminal Process: Amateur Hour at the Department of Justice*, 5 WIDENER L. SYMP. J. 49, 61 (2000).

29. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

30. Kavanaugh, *supra* note 26, at 2157–58.

31. *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982).

32. *Id.*

33. Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C. L. REV. 879, 928 (1985).

34. RONALD D. ROTUNDA, MEMORANDUM, RE: INDICTABILITY OF THE PRESIDENT 16–18 (1998) [hereinafter ROTUNDA MEMO], <https://www.nytimes.com/interactive/2017/07/22/us/document-Savage-NYT-FOIA-Starr-memo-presidential.html> (discussing the arrest clause and speech-or-debate clause).

shield the President,” he argued, “they could have drafted such a privilege.”³⁵ With due respect to Professor Rotunda, our Supreme Court jurisprudence includes many examples where the Court has found an implied grant of constitutional authority.³⁶ In *Fitzgerald*, the Supreme Court found an implied grant of immunity with respect to official conduct. Thus, the mere absence of an express grant of immunity to the President in the Constitution does not foreclose the possibility that some form of immunity from the criminal process exists. What is yet unknown—and what this Article addresses—is the type and scope of any such immunity or protection.

Although the President may be “on duty” twenty-four hours a day, he or she does not engage in official acts twenty-four hours a day.³⁷ As part of daily living, some conduct is inevitably going to be personal and unrelated to the duties of the office.³⁸ For example, when the President plays golf with siblings, clears cedar bush on private property, or goes horseback riding with long-time friends, he or she is not acting in an official capacity.³⁹ Furthermore, no one can credibly argue that murdering a political rival or assaulting a media critic would constitute an official duty.⁴⁰ Likewise, if the President were to lie to federal prosecutors to protect a family member or political ally, or take other similar actions to obstruct a legitimate federal investigation, such conduct would, and should, be characterized as unofficial.⁴¹ While effective governance may depend on the courts’

35. *Id.* at 18.

36. *See, e.g.*, *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (power to regulate immigration recognized as “being an incident of sovereignty belonging to the government of the United States”); *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 379 (1819) (power of Congress to incorporate a bank “was not required [to] be expressed in the text of the constitution; it might safely be left to implication”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

37. Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11, 13 (1997).

38. *See* René Reyes, *Do Even Presidents Have Private Lives?: The Case for Executive Privacy as a Right Independent of Executive Privilege*, 17 KAN. J.L. & PUB. POL’Y 477, 508 (2008) (arguing the President should enjoy greater privacy rights for conduct unrelated to official duties).

39. *See generally* GEORGE W. BUSH, 41: A PORTRAIT OF MY FATHER (2014) (recounting the public and private life of his father, President George H. W. Bush); Ryan Reiterman, *Obama’s Final Tally: 333 Rounds of Golf as POTUS*, GOLF CHANNEL (Jan. 20, 2017, 8:05 PM), <https://www.golfchannel.com/article/golf-central-blog/obamas-final-tally-333-rounds-golf-potus/> [<https://perma.cc/4TMW-4A6X>].

40. *Fitzgerald*, 457 U.S. at 755 (official duties are those “acts in performance of particular functions of [the President’s] office”).

41. *Consider, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 686 (1997) (defining actions by President Bill Clinton prior to being elected as unofficial).

recognition of absolute immunity for official government actions, the same need does not exist with respect to unofficial conduct.

In the Supreme Court case of *Clinton v. Jones* involving personal conduct by then Arkansas Governor Bill Clinton, the Court held that a sitting President can be subjected to a civil proceeding in federal court and to civil liability for unofficial actions, such as those taken before assuming office.⁴² In part, the decision in *Jones* depended on the fact that the conduct at issue was committed before President Clinton took office; for this reason, the Court classified the conduct as “unofficial acts.”⁴³ It is unclear whether the Court intended to signal that all conduct prior to taking office were “unofficial acts,” while all conduct in office were “official acts.”⁴⁴ Did the Court leave open the possibility that certain conduct, by its very nature, could still be an unofficial act even when committed by a sitting President?

On the one hand, one could argue that every presidential action or decision, whether large or small, personal, political, or policy-driven, is an “official act.”⁴⁵ Whatever the nature of the activity or motivation may be, every activity or conduct would necessarily divert the President’s time and attention from the business of the people, including those that might appear personal or unofficial. On the other hand, there are clearly certain actions which by their very nature would be commonly understood to be unrelated to the President’s official duties.⁴⁶

The distinction between official and unofficial acts was significant to Professor Rotunda, who wrote that “it is proper, constitutional, and legal for a federal grand jury to indict a sitting President for serious criminal acts that are not part of, and are contrary to, the President’s *official* duties.”⁴⁷ Admittedly, depending on the circumstances, it may be difficult to determine whether conduct is official or unofficial.⁴⁸ Any test based on the

42. *Id.* at 692–94.

43. *Id.* at 692, 695.

44. *Id.* at 692–93.

45. However, such a definition, if applied broadly enough, could effectively immunize the President from any number of activities not closely related to his or her official duties.

46. For example, private moments between a President and spouse and between a President and the President’s children are likely to be viewed as unofficial, and conduct before assuming office is very likely to be labelled categorically unofficial. *See Jones*, 520 U.S. at 686.

47. ROTUNDA MEMO, *supra* note 34, at 55 (emphasis added).

48. It should be noted that the dividing line between official and unofficial conduct has to do with the nature and functions of the Presidential office and is not dependent on alleged harms or crimes. For example, former President Bill Clinton was named in a civil complaint that accused him of conspiring to commit securities fraud. *In re Global Crossing, Ltd.*, 314 F. Supp. 2d 172, 173 (S.D.N.Y. 2003). The district court held that the former President’s actions were official conduct and granted his motion to dismiss, reasoning that conduct will not be deemed unofficial “merely by reciting that official acts were part of an unlawful conspiracy”). *Id.* at 175.

character or nature of the President's conduct requires prosecutors and juries to discern intent and motive, and places judges in the untenable position of having to second-guess the Commander-in-Chief and Chief Executive of the United States.⁴⁹ While distinguishing official and unofficial conduct may prove too difficult for a comprehensive bright-line test, a judge in any case might simply conclude, "I don't know where the ultimate line should be drawn between official and unofficial acts, but it does not matter here. Clearly, killing someone or lying to federal prosecutors to protect a family member are not official acts. I don't have to draw the line for all cases, I just have to draw it for this case." Courts frequently engage in this kind of fact-specific determination.⁵⁰

A test based on when the conduct occurred appears easier to administer.⁵¹ On balance, however, the right approach to determining official and unofficial conduct should examine the nature of the conduct as opposed to the timing of the conduct.⁵² To hold otherwise would result in a de facto grant of immunity for all acts, official and unofficial, during a President's term in office.⁵³

In determining what crimes the President could be liable for, Special Prosecutor Jaworski was prepared to recognize an exception for "ordinary violent crime[s,]" such as murder.⁵⁴ Such crimes clearly fall outside the

Some commentators note that official conduct can nonetheless implicate other constitutional principles that further limit the "outer perimeter" of official conduct, such as the Fifth Amendment's prohibition on animus in governmental action. See Douglas B. McKechnie, *@POTUS: Rethinking Presidential Immunity in the Time of Twitter*, 72 U. MIAMI L. REV. 1, 19, 22–24 (2017). However, these theories can lead to constitutional tests that are difficult and arbitrary to implement in practice.

49. See Freedman, *supra* note 18, at 47–48 (describing the functional approach the Court often uses to determine the scope of immunity and official conduct).

50. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 533 (1989)) (First Amendment and privacy rights cases require "relying on limited principles that sweep no more broadly than the appropriate context of the instant case"); *Shaw v. Reno*, 509 U.S. 630, 649 (1993) ("We hold only that, on the facts of this case, appellants have stated a claim sufficient to defeat the state appellees' motion to dismiss."); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) ("We hold only that the course of conduct engaged in by the prosecutor in this case . . . did not violate the Due Process Clause of the Fourteenth Amendment.").

51. Such a test would categorically deem all conduct prior to assuming office "unofficial conduct." See *Jones*, 520 U.S. at 686 (emphasizing that the conduct at issue "occurred before [the President] was elected to that office").

52. See *Forrester v. White*, 484 U.S. 219, 224 (1988) (The Court "examine[s] the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and . . . seek[s] to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.").

53. As this Article contends, no person is above the law. A categorical and permanent immunity for *all* conduct in which a sitting President engages would place the President above the law; therefore, a temporal test fails to comport with the rule of law and is rejected.

54. *Griffin*, *supra* note 49, at 59–60.

scope of the President's official duties. Using this reasoning, juries and judges should be capable of discerning official conduct from non-official conduct based on common sense and practice. Some cases will be obvious, others not so. For example, if the presidential conduct at issue is supported by an express or implied grant of authority in the Constitution or by statute, based on legal advice by government lawyers, or grounded on court precedent, then the conduct would fit squarely within the safe harbor of presidential immunity protection.⁵⁵ Ultimately, there is a material difference between official and unofficial acts, and holding the President accountable for unofficial acts is consistent with our notions of fairness and accountability.

B. The Timing of Prosecution for Unofficial Criminal Conduct

Assuming the President is subject to criminal process for unofficial acts, can a President be investigated, indicted, and prosecuted for such conduct while in office, or should such prosecution be deferred until the President no longer holds office? In *Clinton v. Jones*, the Court concluded that the burdens of defending against civil litigation in federal court would not unduly encumber the President in discharging the duties of the office on behalf of the American people.⁵⁶ The Court's conclusion has been the subject of some debate.⁵⁷ Even accepting as true the Court's reasoning with regard to civil litigation, the burdens are significantly different and more serious in the criminal justice context due to the risk of incarceration or loss of civil liberties.⁵⁸ Admittedly, if a private party can sue a sitting President for unofficial acts, then one could argue that an indictment and prosecution is constitutional because the public interest in criminal cases are generally greater.⁵⁹ Such an argument, however, fails to consider the wide gamut of competing interests at issue with regard to prosecuting a sitting President.

55. See *Nixon v. Fitzgerald*, 457 U.S. 731, 755 (1982) (quoting *Spalding v. Vilas*, 161 U.S. 483, 498 (1896) ("privilege extends to all matters 'committed by law to [an official's] control or supervision'").

56. *Jones*, 520 U.S. at 705.

57. See, e.g., Adam Liptak, *Trump's Precedent for Claiming Immunity? Clinton v. Jones*, N.Y. TIMES, April 3, 2017, at A10 (noting the debate between scholars and President Trump's administration as to scope of executive immunity).

58. RANDOLPH D. MOSS, OFFICE OF LEGAL COUNSEL, MEMORANDUM, A SITTING PRESIDENT'S AMENABILITY TO INDICTMENT AND CRIMINAL PROSECUTION, 24 OP. O.L.C. 222, 251-52 (2000) [hereinafter "2000 OLC MEMO"].

59. *Fitzgerald*, 457 U.S. at 754.

The government's official position is set out by the Office of Legal Counsel in the Department of Justice (the "OLC") in two legal opinions, one published in 1973, and the other published in 2000.⁶⁰ In the latter opinion, the OLC opined "that the indictment and criminal prosecution of a sitting President would unduly interfere with the ability of the executive branch to perform its constitutionally assigned duties."⁶¹ This conclusion reaffirmed the OLC's understanding, expressed in the earlier opinion, and reinforces this Article's determination that the President's official acts are subject to total immunity.⁶²

The two OLC opinions make clear that allowing the prosecution of a sitting President, even for unofficial acts, would violate separation of powers by essentially giving the judiciary the power through the criminal justice process to dictate the President's schedule and priorities—a power that in extreme cases could effectually constitute a de facto removal of the sitting President.⁶³ Allowing a federal prosecutor and grand jury to indict and try the President gives them a position of control over a branch of government that was never contemplated by our Founders.⁶⁴

The President is certainly unique in our constitutional structure, unlike any other public official in the extent of control of one branch of our federal government.⁶⁵ In the "Bork Brief"—a memorandum of law filed by Solicitor General Robert H. Bork—Mr. Bork argued that Vice President Spiro Agnew was subject to criminal prosecution but that the President was not subject to such criminal prosecution because of his unique constitutional role.⁶⁶ It must be noted that any investigation of a President is almost certain

60. ROBERT G. DIXON, OFFICE OF LEGAL COUNSEL, MEMORANDUM, AMENABILITY OF THE PRESIDENT, VICE PRESIDENT AND OTHER CIVIL OFFICERS TO FEDERAL CRIMINAL PROSECUTION WHILE IN OFFICE (1973) [hereinafter "1973 OLC MEMO"]; 2000 OLC MEMO, *supra* note 58.

61. 2000 OLC MEMO, *supra* note 58.

62. 1973 OLC MEMO, *supra* note 60, at 32.

63. See *Clinton v. Jones*, 520 U.S. 681, 691–92 (1997) (explaining that amenability to civil suit does not preclude need to "accommodate [the President's] busy schedule"); see also *id.* at 713 (Breyer, J., concurring) (reasoning that interference with President's duties equivalent to interference with schedule of entire Congress or Judiciary). The President has arguably the most complex, significant, and time-sensitive duties of any federal officer under the constitutional scheme. Kavanaugh, *supra* note 21, at 1459–60.

64. See THE FEDERALIST NO. 47 (James Madison) ("The judges can exercise no executive prerogative, though they are shoots from the executive stock . . .").

65. See *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) ("The President occupies a unique position in the constitutional scheme.").

66. Robert H. Bork, Memorandum, In Re Proceedings of The Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew Vice President of the United States, Case Number Civil 73-965 (D. Md. 1973) [hereinafter BORK BRIEF]. This source was made available in Eric M. Freedman, *On Protecting Accountability*, 27 HOFSTRA L. REV. 677, 775 (1999).

to become public; the media scrutiny alone will place a great deal of stress on the White House. Depending on the circumstances and the methods employed by investigators and prosecutors, an investigation and indictment could be very distracting for a sitting President.⁶⁷

Some commentators argue that a criminal proceeding implicating the President is no more disruptive to the work of the government than impeachment proceedings.⁶⁸ Thus, they assert there is no reason that a criminal prosecution would or should constitute an improper disruption or removal from office in violation of separation of powers.⁶⁹ This assertion is undercut by the fact that impeachment is expressly contemplated in the Constitution as a means to remove a President.⁷⁰ In fact, as every first-year law student learns, other than the procedures set out in the Twenty-Fifth Amendment to our Constitution, impeachment is the only method explicitly included in the Constitution as a means to remove a President from office.⁷¹ On the other hand, at least one former Department of Justice official believes that since Vice President Aaron Burr was indicted while in office for conspiracy to create an independent country in the southwestern United States,⁷² there should be no different rules for a President.⁷³ But anyone with direct knowledge of the role and responsibilities of a Vice President can appreciate the possible different treatment because of the vast difference between serving as President and serving as Vice President.⁷⁴

Given the present highly politicized environment in Washington, D.C.,⁷⁵ an indictment and prosecution of a sitting President would likely result in a major and potentially lengthy disruption of an entire branch of government.⁷⁶ In recognition of the unique role of the President as head of the executive branch, any prosecution of a sitting President in connection with unofficial acts should be deferred until such time as the President no

67. Kavanaugh, *supra* note 21, at 1461 (“Even the lesser burdens of a criminal investigation—including preparing for questions by criminal investigators—are time-consuming and distracting.”).

68. Freedman, *supra* note 66, at 707.

69. *Id.*

70. U.S. CONST. art II, § 4.

71. See CALVIN R. MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 371 (5th ed. 2016).

72. See generally CHARLES F. HOBSON, *FEDERAL JUDICIAL CENTER, THE AARON BURR TREASON TRIAL* (2006).

73. Brianna Biggiani, *Designs for Immunity: A Comparison of the Criminal Prosecution of United States Presidents & Italian Prime Ministers*, 14 *CARDOZO J. INT’L & COMP. L.* 209, 234 (2006).

74. Kavanaugh, *supra* note 21, at 1459.

75. See Avery Anapol, *Ted Olson: Trump Turmoil ‘Beyond Normal’*, *THE HILL* (Mar. 26, 2018, 3:42 PM), <https://thehill.com/homenews/administration/380330-gop-attorney-who-turned-down-offer-to-join-trump-legal-team-rips> [<https://perma.cc/92NB-FJN5>].

76. Amar & Kalt, *supra* note 37, at 12.

longer holds office.⁷⁷ While investigation and indictment would be of great interest to the public and Congress, if such actions require the direct and material participation of the President, they should likewise be deferred unless such actions have been specifically authorized by Congress.⁷⁸

In rejecting this proposition, one commentator suggests that the national public would not necessarily suffer following the successful prosecution of the President because the presidency could still be conducted from a jail cell.⁷⁹ Yes, the President would still be physically able to discharge the duties of the office. However, images of the leader of the free world operating from prison would undoubtedly diminish the stature of the office and undercut this nation's reputation and standing in the world.⁸⁰ It would likely embolden our enemies.

Other scholars remind us that there are multiple remedies to fill the vacuum created by an incapacitated President, such as presidential succession, delegations of power, and replacement under the Twenty-Fifth Amendment of the Constitution.⁸¹ They posit that our Founders anticipated irregular changes or interruptions in the office of the President and put in place contingencies to respond to such vacancies.⁸² The Rotunda Memo argues that the Twenty-Fifth Amendment, which allows for temporary replacement of a President who is unable to carry out the duties of the office, provides a mechanism that would keep the executive branch operational if the President were on trial.⁸³

The Twenty-Fifth Amendment was intended to apply to situations where the President is “unable to discharge the powers and duties of the office” because of some inability.⁸⁴ The amendment does not define “unable to

77. Kavanaugh, *supra* note 26, at 2157.

78. *Id.* at 2157–58.

79. Freedman, *supra* note 66, at 708 (“[I]t may indeed be possible to conduct the Presidency from a jail cell.”).

80. See 2000 OLC MEMO, *supra* note 58, at 250–51; but see *Examining the Extent to Which a Sitting President Should Be Subject to Indictment or Other Compulsory Criminal Process: Hearing Before Subcomm. on the Constitution, Federalism, and Prop. Rights of the S. Comm. on the Judiciary*, 105th Cong. 24 (1998) [hereinafter “1998 Subcomm. Hearing”] (statement of Eric M. Freedman, calling “the jail issue . . . largely a bogeyman”).

81. See, e.g., David Chaiken, *US Presidents Are Not Immune from Criminal Prosecution*, LAW360 (Aug. 1, 2017, 1:44 PM), <https://www.law360.com/articles/950167/us-presidents-are-not-immune-from-criminal-prosecution>.

82. See, e.g., Freedman, *supra* note 18, at 55–56.

83. ROTUNDA MEMO, *supra* note 34, at 33.

84. “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,

discharge” or “inability,” and so provides flexibility to the constitutional decision makers at a time of crisis in terms of reasons for removal.⁸⁵ One must concede that the language of the amendment appears broad enough to (1) allow an imprisoned President to voluntarily transfer power and (2) allow the constitutional decision makers—if they deemed it necessary—to forcibly remove the President should he or she be imprisoned while in office.⁸⁶ Technically, however, the President would not be disabled or unable to discharge the powers and duties of the office. Whether the framers of the Twenty-Fifth Amendment intended it to apply to cases where imprisonment has impeded but not entirely precluded the President’s ability to discharge the powers and duties of the office remains a legitimate question.⁸⁷

The OLC opinions recognize a “temporary immunity” from liability.⁸⁸ The concept of a temporary immunity from liability is not one commonly used or found in the law.⁸⁹ For that matter, use of the term “immunity” has

§ 3.

85. See Freedman, *supra* note 18, at 51–59. Freedman argues that the Twenty-Fifth Amendment is a practically limitless method of presidential removal, contingent upon little more than procedural requirements and a sufficient congressional vote. *Id.* at 54–56. However, Freedman’s argument has yet to be seen in history since each use of the Twenty-Fifth Amendment removal power has been exercised for the purposes of removing a President for physical disability. See Symposium, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 *FORDHAM L. REV.* 918, 926–27 (2017); see also *THE HERITAGE GUIDE TO THE CONSTITUTION* 431 (Edwin Meese III et al. eds., 2005).

86. The Constitutional text provides that:

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 the President pro tempore of the Senate and the Speaker of the House of Representatives 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.

U.S. CONST. amend. XXV, § 4.

Professor Freedman argues that such a narrow interpretation of inability is more applicable with regard to section four than section three. Freedman, *supra* note 18, at 55.

87. See 1998 Subcomm. Hearing, *supra* note 80, at 207 (statement of Professor Susan Low Bloch) (contending that the 25th Amendment is not appropriate when the President is imprisoned yet otherwise physically and mentally competent).

88. 2000 OLC MEMO, *supra* note 58, at 238. The 1973 OLC Memo recognizes the concept of deferral of prosecution; however, it is discussed in the context of indictment during the President’s term and *deferral* of prosecution until after office. 1973 OLC MEMO, *supra* note 60, at 29. Although the 1973 OLC Memo acknowledges that, in theory, such a process could “minimiz[e] direct interruption of official duties,” it ultimately rejects the idea, reasoning that a lingering indictment “would damage the institution of the Presidency virtually to the same extent as an actual conviction.” *Id.*

89. Examples of courts recognizing a temporary immunity are, admittedly, few and unrelated. See, e.g., *Iron Bear v. Jones*, 32 N.W.2d 125, 129 (Neb. 1948) (failure to execute a prisoner on day scheduled creates only temporary immunity from execution until new date is scheduled); *In re Herron*, 73 A. 599, 599 (N.J. 1909) (temporary immunity from execution for “mentally deranged” prisoner until

caused some confusion among commentators.⁹⁰ The OLC opinions unequivocally conclude that a sitting President enjoys total and complete immunity from liability in connection with official actions.⁹¹ Furthermore, the OLC opinions are consistent with the position that any criminal liability of the President for *unofficial* actions should also be temporarily stayed or deferred until the President no longer holds office.⁹² Technically, there is no immunity for the President for unlawful unofficial conduct, which squares with the principle that no man is above the law.⁹³ The end result under the OLC opinions is that the President is accountable for his or her unlawful unofficial conduct, but not subject to prosecution until after he or she has left office.⁹⁴ In this important respect, the OLC opinions and this Article are in total agreement.

One former federal prosecutor has publicly questioned the impartiality and quality of the legal work of the OLC, observing that OLC memoranda are not traditional legal analyses and arguing that because the lawyers in the OLC serve the executive branch, they are inherently biased.⁹⁵ The fact remains, however, that OLC opinions represent the formal legal position of the entire Justice Department and are binding upon all Department of Justice prosecutors unless and until an opinion is withdrawn by the OLC or countermanded by the President or Attorney General.⁹⁶ Those who question the impartiality of the lawyers in the OLC fail to appreciate that the Attorney General is charged by statute to provide legal advice to the executive branch,

the prisoner recovers sanity); *J.W. Field Co. v. Franklin*, 499 A.2d 251, 258 (N.J. Super. Ct. App. 1985) (temporary immunity against certain builder's remedy suits while municipality revises ordinances); *Goot v. Bd. of Educ.*, 440 N.Y.S.2d 403, 405 (N.Y. App. Div. 1981) (upholding state statute providing temporary immunity from civil suits for soldiers on active duty).

90. See generally Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 702 (1995) (distinguishing between "permanent" and "temporary" immunity in civil suits). While the Supreme Court ultimately decided not to defer litigation in *Jones*, see *Clinton v. Jones*, 520 U.S. 681 (1997), Amar and Katyal's argument remains helpful in distinguishing permanent immunity from the type of "temporary immunity from such criminal process" that the 2000 OLC Memo proposed. See 2000 OLC MEMO, *supra* note 58, at 238. Certainly, the idea of permanent immunity for unofficial criminal conduct most strongly offends the rule of law. However, a temporary "immunity"—what this Article refers to as "deferment"—places the President under the rule of law in such a way as to hold him or her accountable without destroying deeply rooted notions of separation of powers and constitutional executive obligations.

91. 2000 OLC MEMO, *supra* note 58, at 222 ("[I]ndictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions.").

92. *Id.* at 238 (recognizing "a temporary immunity from such criminal process while the President remains in office.").

93. See *United States v. Lee*, 106 U.S. 196, 261 (1882).

94. See 2000 OLC MEMO, *supra* note 58, at 238.

95. Chaiken, *supra* note 81.

96. Office of Legal Counsel, General Functions, 28 C.F.R. § 0.25 (2017).

and has delegated this statutorily-provided authority to the lawyers in the OLC.⁹⁷

How the Supreme Court would ultimately answer this question of presidential immunity and possible deferment of prosecution is unclear. Both Special Prosecutor Jaworski and Independent Counsel Starr reportedly concluded that a sitting President could be indicted and prosecuted for unofficial acts.⁹⁸ It appears that their determinations were based largely on the origins of their statutory authority from Congress.⁹⁹ Although a congressional statute cannot override the constitutional protections and rights of a President, courts will give weight to formal congressional actions when determining the scope of presidential power and authorities.¹⁰⁰ In the case of the Russia investigation, for example, the authority of Special Counsel Mueller flows directly from that of the Department of Justice and Deputy Attorney General.¹⁰¹ Consequently, Special Counsel Mueller is bound by the operative Justice Department views as to whether a sitting President can be prosecuted while in office. Based on the few relevant court decisions and the views of the Justice Department,¹⁰² the courts are likely to conclude that the President of the United States can be criminally liable for unofficial acts but cannot be prosecuted until after leaving office because of separation of powers concerns.¹⁰³

Deferring an investigation or indictment could be problematic.¹⁰⁴ On the one hand, delaying the investigation increases the risk that evidence is lost,

97. 28 U.S.C. §§ 510–513 (2017); Office of Legal Counsel, General Functions, 28 C.F.R. § 0.25 (2017).

98. See ROTUNDA MEMO, *supra* note 34, at 55 (concluding that independent counsel Starr had the constitutional authority to indict and prosecute President Bill Clinton); CARL B. FELDBAUM, ET AL., STAFF MEMORANDUM TO LEON JAWORSKI 20 (1974) [hereinafter JAWORSKI STAFF MEMO] (concluding that the Grand Jury had probable cause and authority to indict President Nixon), *available in* Freedman, *supra* note 66, at 728–49.

99. See ROTUNDA MEMO, *supra* note 34, at 2 (“Nor do I consider whether the President could be indicted if there were no Independent Counsel statute.”).

100. See Kavanaugh, *supra* note 26, at 2157.

101. OFFICE OF THE DEPUTY ATTORNEY GENERAL, APPOINTMENT OF SPECIAL COUNSEL TO INVESTIGATE RUSSIAN INTERFERENCE WITH THE 2016 PRESIDENTIAL ELECTION AND RELATED MATTERS, ORDER No. 3915-2017 (2017).

102. See 2000 OLC MEMO, *supra* note 58, at 238 (recognizing a “temporary immunity”); see generally *Clinton v. Jones*, 520 U.S. 681 (1997) (no immunity from civil damages suits for unofficial acts); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (absolute immunity from civil damages suits for official conduct); *United States v. Nixon*, 418 U.S. 683 (1974) (qualified immunity for compliance with subpoena *duces tecum*).

103. Amar & Kalt, *supra* note 37, at 11.

104. When pressing questions of constitutional law come before the Court, especially those concerning separation of powers and the President, they often grant certiorari on an expedited basis. See, e.g., *United States v. Nixon*, 418 U.S. at 687 (Supreme Court recognizing “the public importance of the issues presented and the need for their prompt resolution”). However, in a case where the question is

destroyed, or grows stale. Witnesses may die or become unavailable.¹⁰⁵ Memories become weaker over time.¹⁰⁶ Additionally, delaying an investigation may deny Congress information relevant to assessing whether impeachment and removal is warranted.¹⁰⁷

On the other hand, an investigation and subsequent indictment is likely to disrupt the work of the White House and divert the President's attention.¹⁰⁸ Arguably, the indictment of a sitting President would usurp the role of the House of Representatives under the Constitution to bring charges against a President for high crimes and misdemeanors.¹⁰⁹ Any investigation by state prosecutors will implicate federalism concerns, as discussed below. Therefore, unless Congress passes a statute authorizing an investigation of a sitting President for unofficial acts,¹¹⁰ the arguments for proceeding with an investigation and possible indictment do not carry significant weight when compared to the significant burden on the office of the President that would result.¹¹¹

whether the sitting President can be indicted or prosecuted, the question is not whether the President is guilty but whether such criminal process may proceed. Thus, the Court could promptly answer the preliminary question and then determine—as this Article argues—that criminal process should be deferred until the President is no longer in office.

105. *Barker v. Wingo*, 407 U.S. 514, 521 (1972). Note, however, the unique situation in *Barker*. The defendant was indicted on September 15, 1958, for the death of an elderly couple on July 20th earlier that year. *Id.* at 516. During the course of the criminal proceedings, the prosecution obtained a total of 16 continuances, and the defendant was tried a total of six times, before being found guilty for the murder of one victim during the fifth trial and guilty for murdering the other victim at the sixth trial in December 1962—almost four and a half years after the murder. *Id.* at 516–17. The Supreme Court held that the defendant “was not deprived of his due process right to a speedy trial.” *Id.* at 536. The Court reasoned that “any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case” *Id.* at 522. In fact, the Court explained “that deprivation of the right may work to the accused’s advantage” and thus “does not per se prejudice the accused’s ability to defend himself.” *Id.* at 521.

106. See generally Graham M. Davies, *Contamination of Witness Memory in Theory and Practice*, 35 MED. SCI. & L. 95 (1995) (reviewing research literature on witness contamination and its effect on memory).

107. See Kavanaugh, *supra* note 26, at 2156 (“[A]ny information gathered with respect to executive branch officials that could reflect negatively on their fitness for office should be disclosed to Congress”).

108. In addition to the disruptive nature of such an investigation and indictment, the highly politicized nature of such an investigation and indictment would likely call into question the Special Counsel’s motives in bringing charges. See *id.* at 2157.

109. “The House of Representatives . . . shall have the sole Power of Impeachment.” U.S. CONST. art. I, § 2, cl. 5.

110. See, e.g., Kavanaugh, *supra* note 26, at 2157 (proposing statutory language for Congress to temporarily immunize the President from investigation and indictment in order to address structural and functional concerns attendant on investigation and indictment of a sitting President).

111. Thus, the courts are likely to require that any investigation or indictment requiring or involving the President’s direct and material participation be stayed. See 2000 OLC MEMO, *supra* note 58, at 238.

A final but related question is whether the President can be prosecuted while in office for crimes committed before becoming President. Such conduct would, of course, constitute an unofficial act.¹¹² Unlike for civil offenses, the weight of authority suggests the President cannot be prosecuted while in office for the reasons set forth above. Deferring criminal liability for conduct as a private citizen may seem inconsistent with the imposition of civil liability on a President for conduct prior to assuming office.¹¹³ The differing treatment is justified by the nature of the criminal proceedings and may be attributable to the additional time and attention a criminal trial would require of the President.¹¹⁴ Of course, the analysis might be different if Congress were to pass legislation authorizing prosecution under these circumstances.¹¹⁵ Finally, irrespective of the President's liability while in office, the President could be prosecuted for such crimes after leaving office.

C. Federalism Concerns: State Prosecution of a Sitting President

The question of presidential immunity and the deferment of prosecution also raises federalism-type considerations. If a President can be prosecuted for unofficial acts by federal prosecutors, then state and local prosecutors would, theoretically, have similar authority with respect to presidential unofficial conduct in violation of state and local laws.¹¹⁶ States have a strong public interest in prosecuting criminal wrongdoing by anyone in their jurisdiction, including wrongdoing by the President. It is not hard to imagine a local or state prosecutor bringing criminal charges against an unpopular President in order to advance his or her own political career.¹¹⁷ Having to defend against these kinds of shenanigans would undoubtedly distract the President from the business of the American people.¹¹⁸

112. See, e.g., *Clinton v. Jones*, 520 U.S. 681, 686 (1997) (“[I]t is perfectly clear that the alleged misconduct of petitioner was unrelated to any of his official duties as President of the United States and, indeed, occurred before he was elected to that office.”).

113. See *id.* at 694–95.

114. 2000 OLC MEMO, *supra* note 58, at 229.

115. Kavanaugh, *supra* note 21, at 1461.

116. See Jed Handelsman Shugerman, *Trump Can't Escape the States*, SLATE (July 21, 2017, 2:09 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/no_matter_who_he_fires_or_pardons_trump_won_t_be_able_to_escape_state_attorneys.html [<http://perma.cc/ME2A-4HLL>].

117. See Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, and the System That Protects Them*, HUFFINGTON POST (Aug. 1, 2013, 2:18 PM), https://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html [<http://perma.cc/S25W-NZ>] (updated Dec. 6, 2017) (discussing prosecutorial misconduct in the United States).

118. Amar & Kalt, *supra* note 37, at 14.

One opponent of temporary immunity and prosecution deferral has noted that “the state courts have uniformly ruled that officers who are subject to impeachment are also subject to indictment while still in office, and that states in fact regularly bring criminal proceedings against their officeholders.”¹¹⁹ While true, this argument fails to recognize the federalism issues inherent in a state prosecution of a *federal* officeholder.¹²⁰ Further, this argument fails to acknowledge that states are separate sovereigns with their own unique constitutional schemes.¹²¹ In Texas, for example, the state Attorney General is a constitutional officer elected statewide, separately from the Governor.¹²² Unlike the U.S. Attorney General who is appointed by the President and serves in the President’s cabinet,¹²³ the Texas Attorney General is not part of the Governor’s cabinet or staff, and is not expected to carry out the Governor’s law enforcement priorities and policies.¹²⁴ Therefore, relying on the decisions of state courts with respect to the prosecution of state executive branch officials is neither relevant nor helpful in determining whether the President is or should be immune from federal prosecution.

The New York state investigations against the President pending at the time of publication of this Article place front and center the question of whether a state may prosecute a sitting President.¹²⁵ No state has ever attempted directly to do so.¹²⁶ The closest example is when Vice President Aaron Burr was indicted by two states in 1804.¹²⁷ However, as noted elsewhere, there is a serious difference between the role and responsibilities

119. Freedman, *supra* note 66, at 699.

120. *See, e.g.*, Freedman, *supra* note 18, at 38 n.90 (listing several state prosecutions of state officeholders).

121. *See, e.g.*, Jeffrey Omar Usman, *The Game is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee State Constitution*, 77 TENN. L. REV. 57, 96–104 (2009).

122. TEX. CONST. art. IV, §§ 1–2; *but see* TENN. CODE ANN. § 8-6-101 (2018) (Tennessee Attorney General appointed by Supreme Court).

123. U.S. CONST. art. II, § 2, cl. 1; 28 U.S.C. § 503 (2017).

124. TEX. CONST. art. IV, § 22.

125. *See* Natasha Bertrand, *New York Prosecutors May Pose a Bigger Threat to Trump Than Mueller*, THE ATLANTIC (Aug. 24, 2018), <https://www.theatlantic.com/politics/archive/2018/08/new-york-prosecutors-allen-weisselberg-trump/568516/> [https://perma.cc/G3QG-58KS].

126. Garrett Epps, *The Only Way to Find Out If the President Can Be Indicted*, THE ATLANTIC (May 23, 2018), <https://www.theatlantic.com/ideas/archive/2018/05/presidential-indictment/560957/> [http://perma.cc/V9T9-RBT8].

127. *See* United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (the Burr treason trial); United States v. Burr, 25 F. Cas. 187, 190 (C.C.D. Va. 1807) (the Burr misdemeanor trial); *see also* BORK BRIEF, *supra* note 66, at 12.

of the President and the Vice President and how they are treated in our constitutional structure.¹²⁸

Scholars Akhil Reed Amar and Brian C. Kalt argue that the Supreme Court case of *McCulloch v. Maryland* stands for the proposition that states cannot use their power to obstruct the duties of federal agents.¹²⁹ In *McCulloch*, Chief Justice Marshall concluded that state officials may not obstruct the “measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole.”¹³⁰ At issue here is the concern that one part of the United States would have the power to derail the entire functioning of the nation as a whole.¹³¹

As with the other issues considered in this Article, there is no judicial precedent on the question of state prosecution of a sitting President.¹³² Nevertheless, based on the arguments supporting total federal immunity for official conduct, the President almost certainly enjoys total immunity from state prosecution in connection with official conduct.¹³³ Furthermore, because of federalism concerns, any and all state prosecutions against a sitting President for unofficial conduct will likely be stayed or deferred until the President no longer holds office.¹³⁴ Any state investigation or indictment directly requiring the President’s time and attention would likely also not be permitted. In concluding that a President is immune from state prosecution while in office, Amar and Kalt rely on a structural argument, specifically that the criminal prosecution of a sitting President would divert the

128. See Amar & Kalt, *supra* note 37, at 12–14; see also Symposium, *supra* note 85, at 926 (“Prior to the Twenty-Fifth Amendment’s ratification, the country was without a Vice President on many different occasions, the length of these vacancies totaling over thirty-seven years.”).

129. Amar & Kalt, *supra* note 37, at 13–14; see also Keith King, *Indicting the President: Can a Sitting President Be Criminally Indicted?*, 30 Sw. U.L. REV. 417, 424–25 (2001).

130. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435–36 (1819).

131. Amar & Kalt, *supra* note 37, at 13–16. Recall that the privilege is tied to the “performance of particular functions of [the President’s] office” and not the President’s private interests. *Nixon v. Fitzgerald*, 457 U.S. 731, 755 (1982). See Amar & Kalt, *supra* note 37, at 14 (“[T]his privilege is not designed to protect the President’s personal interests (although it does, temporarily), but rather the public interest of the People . . .”). Of course, the same reasoning would not apply to any of the President’s private organizations or businesses since none hold federal office.

132. Perhaps the closest historical case, other than the Burr trials, was that of President Nixon who was named an *unindicted* co-conspirator. See Liptak, *supra* note 20.

133. See Amar & Kalt, *supra* note 37, at 13–16.

134. See Amar, *supra* note 11, at 671 (reiterating the conclusion that “a sitting President is constitutionally immune from ordinary criminal prosecution—state or federal—but is of course subject to ordinary prosecution the instant he leaves office”).

President from his or her constitutional duties.¹³⁵ Of course, this obstruction would occur regardless of whether the prosecution is by state or federal authorities.¹³⁶ However, because federalism concerns would no longer exist once the President leaves office, the states would then be free to prosecute.¹³⁷

D. Confronting the Statute of Limitations Problem

There remains the worrisome complication of the running of the statute of limitations and the possibility that by “running out the clock,” a President could effectively escape accountability.¹³⁸ The 1973 OLC Opinion addresses this issue:

In suggesting that an impeachment proceeding is the only appropriate way to deal with a President while in office, we realize that there are

135. Amar & Kalt, *supra* note 37, at 13–16.

136. *Id.*

137. As of the publication of this Article, President Donald Trump has been named in a state defamation lawsuit by former “The Apprentice” contestant, Ms. Summer Zervos. Tyler Pager, *Lawyers for Trump back in Court, Fighting Another Defamation Suit*, N.Y. TIMES, Oct. 18, 2018, at A28. However, the authority to sue the sitting President in state court for civil matters based on the President’s unofficial conduct is unknown. While *Jones* held that sitting presidents are not immune from civil suits brought in federal court during their term for conduct unrelated to their official duties, Justice Stevens left undecided whether the same conclusion would be reached in a state court. *Clinton v. Jones*, 520 U.S. 681, 691–92 (1997). In dictum, Justice Stevens reasoned that if Ms. Jones had brought her case in state court, then she would “presumably rely on federalism and comity concerns, as well as the interest in protecting federal officials from possible local prejudice that underlies the authority to remove certain cases brought against federal officers from a state to a federal court.” *Id.* Justice Stevens’s federalism consideration finds grounding in *McCullough*, discussed *supra*, based on the notion that states may not interfere with legitimate federal objectives. *See generally* *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). However, one problem with a federalism argument in this context is that the state takes a more neutral role in civil litigation than it does when acting as prosecutor in a criminal case. In other words, the state is less actively interfering with the President’s objectives when serving as a mere forum for the hearing of private complaints. Furthermore, by downplaying the probability of civil suits against a sitting President, Justice Stevens rejected President Clinton’s immunity argument that a “deluge” of litigation in federal court for unofficial presidential conduct would “engulf the Presidency,” thereby disrupting the President’s official duties. *Jones*, 520 U.S. at 701–02. Thus, having been rejected in the context of private civil litigation in federal court, state courts may find it easier to reject immunity with respect to state civil litigation. However, it also appears that civil litigation involving the sitting President is more common today than when *Jones* was decided. *See, e.g.*, Matt Viser, *Trump Has Been Sued 134 Times in Federal Court Since Inauguration*, BOSTON GLOBE (May 5, 2017), <https://www.bostonglobe.com/news/politics/2017/05/05/trump-has-been-sued-times-federal-court-since-inauguration-day/E4AqZBYaKYHtzwfQ3k9hdM/story.html> [<https://perma.cc/HQB4-CBCG>].

On balance, while concerns over separation of powers and federalism may be different, the *Jones* decision could well carry significant weight in a state proceeding faced with this issue. With that said, the analysis might be different if Congress passes a statute that gives jurisdiction to state courts to hear such cases or otherwise provides immunity.

138. *See* Kavanaugh, *supra* note 26, at 2157; *see also* Kavanaugh, *supra* note 21, at 1462 n.32.

certain drawbacks, such as the running of a statute of limitations while the President is in office, thus preventing any trial for such offenses. In this difficult area all courses of action have costs and we recognize that a situation of the type just mentioned could cause a complete hiatus in criminal liability. We doubt, however, that this gap in the law is sufficient to overcome the arguments against subjecting a President to indictment and criminal trial while in office.¹³⁹

Similar to the 1973 OLC Opinion, the 2000 OLC Opinion concludes that the statute of limitations concern is not one of “significant constitutional weight” when compared to the significant burdens that indictment and prosecution would impose on the office of the President.¹⁴⁰ The opinion goes on to suggest that Congress could enact a special tolling provision for this scenario.¹⁴¹ Congress has never done so, likely believing that the need for such legislation is so remote as to not be worth the effort to try to pass it.¹⁴² Justice Brett Kavanaugh proposed such a provision in a 1998 article. “The President of the United States,” he wrote, “is not subject to indictment or information under the laws of the United States while he serves as President. The statute of limitations for any offense against the United States

139. 1973 OLC MEMO, *supra* note 60, at 32.

140. 2000 OLC MEMO, *supra* note 58, at 256.

141. *Id.*

142. See Kavanaugh, *supra* note 26, at 2157. Prior to the final Senate vote on Justice Brett Kavanaugh’s appointment to the Supreme Court, Senator Susan Collins provided a statement on her evaluation of Justice Kavanaugh and mentioned that his proposal of statutory language to temporarily shield the President from prosecution “suggests that [Kavanaugh] believes that the President does not have such protection currently.” Abigail Abrams, *Here’s Sen. Susan Collins’ Full Speech About Voting to Confirm Kavanaugh*, TIME (Oct. 5, 2018), <http://time.com/5417444/susan-collins-kavanaugh-vote-transcript/> [<https://perma.cc/67MT-HWB6>] (providing a transcript of Senator Collins’s statement). Senator Collins further stated that she had spoken at length with the then-D.C. Circuit Judge on two separate occasions regarding his judicial views on various topics. *Id.* While Justice Kavanaugh’s statements during those private conversations cannot be verified, a thorough reading of his articles suggests that he held a much different view—that the Independent Counsel Statute’s grant of vast prosecutorial power created uncertainty as to whether the counsel could prosecute the President, precipitating the need for a statutory amendment to address the ambiguity and clear any doubt. See Kavanaugh, *supra* note 26, at 2135 (enumerating “[s]everal ‘problems’ with the statute, including its authorization of the ‘independent counsel [to] investigate matters beyond the initial grant of jurisdiction’”). Thus, Justice Kavanaugh’s concern was with the ambiguity of the Independent Counsel Statute, not with the Constitution. Leaving little doubt as to his position, Kavanaugh concluded that the Constitution itself proscribes judicial prosecution of a sitting President: “Thus, as the Constitution suggests, the decision about the President while he is in office should be made where all great national political judgments in our country should be made—in the Congress of the United States.” *Id.* at 2159.

committed by the President shall be tolled while he serves as President.”¹⁴³ States could also pass a similar tolling statute.¹⁴⁴

E. The Constitution’s Answer: Congressional Impeachment

Although a President who engages in unlawful unofficial conduct may not be subject to prosecution until leaving office, the President is always subject to impeachment under Article II, Section 4 of the Constitution.¹⁴⁵ This political process is available to members in Congress who, for reasons of fairness, believe it is essential that the President be held accountable for wrongdoing while in office.¹⁴⁶ Conduct that appears to be aimed at obstructing the search for truth, such as making false statements to investigators, are the types of high crimes and misdemeanors that may constitute grounds for impeachment and removal.¹⁴⁷ If the House of Representatives feels strongly enough, members may certainly try to impeach the President for unofficial acts that appear to be criminal in nature.¹⁴⁸ Impeachment is a rare occurrence—but, as discussed above, the alternative of prosecuting a sitting President raises serious separation of powers issues by placing the power to decide who is President into the hands of the judiciary.¹⁴⁹ Even some commentators who believe that a sitting President can be prosecuted in office agree that, as a matter of prudence, it is preferable to first allow Congress to study the matter as a basis for

143. Kavanaugh, *supra* note 26, at 2157.

144. Of course, practically speaking, only a few jurisdictions would likely see the need to pass such a statute (e.g., the District of Columbia, Virginia, Maryland, and perhaps New York).

145. “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. CONST. art. II, § 4.

146. Alexander Hamilton illustrated the grave yet necessary task prescribed to Congress:

A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subject of [the Senate’s] jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they related chiefly to injuries done immediately to the society itself.

THE FEDERALIST NO. 65 (Alexander Hamilton).

147. See Hemel & Posner, *supra* note 19, at 1306 (surveying several congressional opinions that President Clinton’s obstruction of justice was impeachable).

148. U.S. CONST. art. II, § 4; see generally 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 8.10 (5th ed. 2012).

149. See 1998 Subcomm. Hearing, *supra* note 80, at 6 (statement of Senator Robert G. Torricelli) (“In my own interpretation, it would seem to me to mean that offenses by a President of the United States are to the body public in its entirety, and therefore need to be judged not as narrow abuses against the criminal law but against the body politic, sitting in judgment the U.S. Senate.”).

impeachment and removal proceedings before advancing with a criminal prosecution.¹⁵⁰ This is not to suggest that the President could avoid criminal liability altogether if impeached. Under Article I, Section 3 of the Constitution, once impeached by the House, convicted by the Senate, and removed from office, a former President can be subject to indictment, trial, judgment, and punishment according to law.¹⁵¹

Some may worry that, if the President cannot be prosecuted for wrongdoings committed while in office, then there is nothing to prevent him or her from committing such acts. To the contrary, several mechanisms exist to discourage the President from engaging in what would be criminal behavior, including: checks and balances by other federal branches of government, prosecution after leaving office, state sovereign power afforded by the U.S. Constitution, media scrutiny and attention, the President's desire to preserve his or her reputation in history, and the desire to win re-election.¹⁵²

II. PRODUCTION OF EVIDENCE

Even when a President is not the direct target or subject of a criminal investigation, he or she may have information that is relevant to the inquiry.¹⁵³ There are numerous historical examples of presidents voluntarily providing evidence to assist in an investigation; in other instances, their

150. See, e.g., *id.* at 3–4 (statement of Senator John Ashcroft) (claiming that the sitting President is subject to prosecution but that “prudence dictates that a prosecutor should defer to Congress when impeachment is an option”).

151. U.S. CONST. art I, § 3.

152. See generally Ronald Brownstein, *The Formidable Checks and Balances Imposing on President Trump*, THE ATLANTIC (Feb. 16, 2017), <https://www.theatlantic.com/politics/archive/2017/02/trump-constraints-opposition/516825/> [<https://perma.cc/J838-GQ4A>].

153. This Article's discussion proceeds in Part II on an assumption that the President's production of evidence takes place in a context where he or she is a nonparty witness and not the “target” of an investigation. See Kavanaugh, *supra* note 26, at 2157 (noting that such investigations would be highly politicized); see also Liptak, *supra* note 20 (President Nixon named as unindicted co-conspirator). This distinction is important in two ways. First, it distinguishes between the President testifying as a nonparty witness and the President testifying as a criminal defendant, the latter of which is a topic more closely related to the discussion of presidential immunity from investigation, indictment, and prosecution. See *supra* Part I. Second, it recognizes the potential Fifth Amendment rights that the President would have against self-incrimination vis-à-vis the compelled production of incriminating evidence. See generally Leonard G. Ratner, *Executive Privilege, Self Incrimination, and the Separation of Powers Illusion*, 22 UCLA L. Rev. 92 (1974) (thoroughly examining the implications of *United States v. Nixon* on Fourth, Fifth, and Sixth Amendment rights). Since the question is whether a court can *compel* the President to testify or otherwise produce evidence, it is further assumed that in order for this constitutional question to be resolved, the President would assert all rights in his or her favor, challenging a subpoena until the Supreme Court grants certiorari to review the issue.

participation has been motivated by the threat of subpoena.¹⁵⁴ However, there is little judicial precedent that answers the question of whether a President who *refuses* to provide evidence can be compelled to do so and under what circumstances.

During his criminal trial for conspiracy in 1807, Vice President Burr asserted that President Jefferson had a letter in his possession that would exculpate Burr from these charges.¹⁵⁵ Over the President's objections, Chief Justice John Marshall rejected arguments that a sitting President was not subject to compulsory process, and he issued a subpoena to the President, directing that he turn over the letter.¹⁵⁶ President Jefferson turned over the letter to the government, but his act was largely voluntary in that he retained control over when, where, and how he would produce the letter, to which Chief Justice Marshall acquiesced.¹⁵⁷

Similarly, in 1998, Independent Counsel Ken Starr directed a grand jury to issue a subpoena to President Clinton for testimony relating to the Whitewater and Lewinsky investigations.¹⁵⁸ The subpoena prompted negotiations between Starr and the President's legal team, and resulted in the President's agreeing to testify voluntarily before the grand jury, rather than under legal compulsion. In exchange, Starr agreed to withdraw the subpoena.¹⁵⁹

While the 1973 OLC Opinion and the 2000 OLC Opinion appear to draw a clear line against criminal prosecution of a sitting President, the opinions do not directly address other types of criminal process, such as compelled oral testimony. The 1973 OLC Opinion discusses the fact that President Jefferson did not want to appear in person in the Burr Trial, but it does not conclude that he did not have to.¹⁶⁰ It simply points out that the courts have always given great deference to the President's time and schedule.¹⁶¹ The

154. See 1 ROTUNDA & NOWAK, *supra* note 148, at § 7.1 (listing 16 voluntary and involuntary appearances of Presidents before courts as witnesses).

155. *Id.* at 1000.

156. *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807).

157. John C. Yoo, *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 MINN. L. REV. 1435, 1452–53 (1999). The nature of the Jefferson subpoena is significant. While some commentators suggest that the subpoena was a subpoena ad testificandum for oral testimony, it was most likely a subpoena duces tecum for the production of a letter. *Id.* at 1447. If this is true, it significantly weakens any argument claiming that the Burr case is dispositive of the current issue of a sitting President's compelled oral testimony.

158. 1 ROTUNDA & NOWAK, *supra* note 148, at § 7.1(c)(viii).

159. Peter Baker & Susan Schmidt, *Clinton Agrees to Testify on Videotape for Starr*, WASH. POST, July 30, 1998, at A1, <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/starr073098.htm> [<https://perma.cc/S56B-B7GW>].

160. 1973 OLC MEMO, *supra* note 60, at 22.

161. *Id.*

2000 OLC Opinion goes further still, speaking about the U.S. Supreme Court Case of *United States v. Nixon* and constitutional balancing.¹⁶² Nowhere do either of the two OLC opinions say explicitly that the President is immune from all criminal process.

The Congressional Research Service (CRS) works exclusively for Congress and provides policy and legal analyses to committees and members of both the House and Senate. The CRS is viewed as nonpartisan, and its work is considered credible by members from both major political parties. In May 2018, the CRS released a memorandum entitled “Compelling Presidential Compliance with a Judicial Subpoena” (the “CRS Report”), which examines the history of presidents responding to judicial subpoenas and various cases relating to presidential immunity from compulsory process.¹⁶³ The CRS Report concluded that the applicable judicial cases establish two important principles:

First, with regard to accountability, it is clear that the President is not absolutely immune from all judicial compulsory process. The Court has “unequivocally and emphatically endorsed” the principle that the President may be made to comply with a criminal subpoena for documentary evidence, and that he is subject to civil proceedings for unofficial acts. Second, the President is not to be treated like any other official, thus the Constitution prevents the courts from subjecting the President to judicial requirements that impede him from carrying out his Article II duties in violation of the separation of powers. For this reason, the President is not subject to civil suits for damages in cases arising from his official acts.¹⁶⁴

The balancing approach embraced by the CRS is consistent with the views of former Solicitor General Ted Olson.¹⁶⁵ After reminding us that there is no precedent on the issue, Mr. Olson explains that although the President is unique, he is not above the law—that is, sometimes the President must comply with judicial process.¹⁶⁶ Regarding a request for oral testimony, Olson speaks in terms of a presumption privilege:

162. 2000 OLC MEMO, *supra* note 58, at 241.

163. CRS REPORT, *supra* note 13, at 1–2.

164. *Id.* at 3.

165. Theodore B. Olson, *Mueller v. Trump*, WEEKLY STANDARD, May 18, 2018, <https://www.weeklystandard.com/theodore-b-olson/mueller-v-trump> [<https://perma.cc/FHH5-UJHP>].

166. *Id.*

While the President's presumptive privilege against compulsive testimony would be entitled to considerable deference, that claim could be overcome if the prosecutor makes a strong case showing that he must have specific essential evidence that is not procurable from other sources and that he is not simply engaged in a fishing expedition.¹⁶⁷

If a President can be compelled to provide testimony in a civil case, then surely one might argue that the President can be compelled to do so in more serious proceedings, such as criminal trials, which often implicate matters of greater public interest than private damage claims.¹⁶⁸ Furthermore, because discovery often takes more time in civil cases than criminal cases, some commenters claim that *Jones* should be dispositive on the issue of providing evidence in a criminal case because civil cases often take more time than criminal cases in terms of discovery.¹⁶⁹ However, it is important to note (as does the CRS Report) that while permitting the civil suit to proceed in *Jones*, the Court there clearly avoided the question of compelled presidential testimony.¹⁷⁰

On May 17, 2018, Professor Ryan Goodman interviewed Professor Douglas W. Kmiec, the former Assistant Attorney General and head of the OLC, concerning an unpublished OLC opinion (the "1988 OLC Opinion") that appears to be at odds with the CRS Report's conclusion that a President may sometimes be subject to criminal process.¹⁷¹ Professor Kmiec stated that the 1988 OLC Opinion, cited in footnote 29 of the 2000 OLC Opinion, stood for the proposition that the President was immune from all criminal process, including both direct prosecution, and the compelled production of documents and oral testimony.¹⁷² In his interview with Professor Goodman, Professor Kmiec explains that the

OLC has concluded that a sitting President may not be indicted and is immune from criminal process, including a subpoena. When

167. *Id.*

168. *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982) ("When judicial action is needed to serve broad public interests—as when the Court acts . . . to vindicate the public interest in an ongoing criminal prosecution . . . —the exercise of jurisdiction has been held warranted.").

169. Chaiken, *supra* note 81.

170. *Clinton v. Jones*, 520 U.S. 681, 691–92 (1997); CRS REPORT, *supra* note 13, at 3.

171. *See* Douglas W. Kmiec & Ryan Goodman, *The Missing Justice Dep't Memo on Whether a President Can Be Subpoenaed to Testify in a Criminal Case*, JUST SECURITY (May 17, 2018), <https://www.justsecurity.org/56398/kmiec-memo-missing-office-legal-counsel-opinion-President-subpoenaed-testify-criminal-case/> [<https://perma.cc/CY33-W82K>].

172. *Id.*; *see* 2000 OLC MEMO, *supra* note 58, at 253 n.29.

Assistant Attorney General Moss in the 2000 opinion refers to immunity from “indictment and prosecution,” I believe him to be using the word “prosecution” to include all the regular means of prosecution – e.g, demands for testimony documentation, etc.¹⁷³

With respect, Professor Kmiec’s assertion is questionable for the following reasons. First, this assertion would appear to be contradicted by *Nixon v. Fitzgerald*, where the Court affirmed that the separation of powers does not require presidential immunity from all compulsory judicial process.¹⁷⁴ That case clearly informs us that a President can be compelled to produce documentary evidence.¹⁷⁵ Second, even if Professor Kmiec’s interpretation of the 1988 OLC Opinion were accurate, the opinion would only reflect the formal position of the Justice Department until it was preempted or withdrawn; the 2000 OLC Opinion would clearly override the 1988 OLC Opinion and be the operative Department of Justice guidance on this question today.¹⁷⁶ At best, the 1988 OLC Opinion may be read to mean that although the President is immune from prosecution, he or she is not necessarily totally immune from the production of evidence based upon the vital need for information in connection with a criminal proceeding.

One point is fairly certain—courts draw a clear line of distinction between providing documents and giving oral testimony.¹⁷⁷ There appears to be less protection for a President from having to provide written documents relevant to a criminal investigation.¹⁷⁸ We know from *United States v. Nixon* that under certain limited circumstances, the President can be compelled to turn over documentary evidence essential in a criminal prosecution.¹⁷⁹

173. Kmiec & Goodman, *supra* note 171.

174. *United States v. Nixon*, 418 U.S. 683, 706 (1974).

175. *See generally id.*

176. *See* OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE, MEMORANDUM, RE: BEST PRACTICES FOR OLC LEGAL ADVICE AND WRITTEN OPINIONS 2 (2010).

177. *See* CRS REPORT, *supra* note 13, at 2 (“[T]he formal executive branch position has drawn a clear distinction between judicial subpoenas for documents and those for testimony.”). Note the difference in treatment between President Nixon’s compelled subpoena duces tecum, which required him to turn over the tapes and relinquish all control of them until the conclusion of an in camera inspection, *United States v. Nixon*, 418 U.S. at 706, and President Clinton’s compelled oral deposition, which gave deference to the President in deciding the time and place of the videotaped testimony, *Clinton v. Jones*, 520 U.S. 681, 691–92 (1997).

178. This is due largely in part to concerns about the President’s ability to tend to his or her official duties. It arguably takes less of the President’s time to relinquish documents than it does to appear in person and testify, which would also involve the time to prepare for oral testimony. *See* Rhonda Wasserman, *The Subpoena Power: Penroyer’s Last Vestige*, 74 MINN. L. REV. 37, 95 (1989).

179. *United States v. Nixon*, 418 U.S. at 713.

In reviewing case law, opinions from the Justice Department, and writings from commentators and former government officials, it appears that with respect to the production of documents, the courts will likely apply a balancing test, one that balances the needs for justice against the needs of the President to discharge presidential duties and faithfully execute the law.¹⁸⁰ It seems certain that the President, under certain circumstances, will be required to provide documentary testimony when the testimony is relevant, necessary, and otherwise unavailable.¹⁸¹ Even then, however, he or she may refuse to provide documentary evidence by asserting executive privilege based on legitimate national security, diplomatic, or military concerns.¹⁸² Whether a President can be compelled to provide oral testimony presents a more difficult question; in large part, this is due to the significant time and attention the President would need to expend in order to prepare for and give oral testimony—time when the President is forced to step away from his or her constitutionally-assigned duties.¹⁸³

In criminal cases where oral testimony is sought from the President, the prosecution must overcome a heightened burden of need and relevance, demonstrating to the court that the evidence is necessary and unavailable elsewhere. However, even in those situations where the prosecution meets a heightened burden, given the serious duties of the President, the courts will likely afford the President great latitude and discretion with respect to the time, place, and manner of providing such oral testimony.¹⁸⁴ For example, the President would most likely not be required to give testimony in court or before a grand jury.¹⁸⁵ Given the demands of his or her schedule, the President would also likely be allowed to provide written answers to

180. See *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982) (courts “must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch”); *United States v. Nixon*, 418 U.S. at 711–12 (1974) (weighing “the importance of the general privilege of confidentiality of Presidential communications in performance of the President’s responsibilities against the inroads of such a privilege on the fair administration of criminal justice”); 2000 OLC MEMO, *supra* note 58, at 226 (quoting 1973 OLC MEMO, *supra* note 60, at 24) (courts should “find the proper balance between the normal functions of the courts and the special responsibilities and functions of the Presidency”); CRS REPORT, *supra* note 13, at 2 (case law “reflect[s] a delicate balancing of two countervailing principles: accountability . . . and executive branch independence”); Olson, *supra* note 165 (describing a presumptive privilege that can be overcome by a strong showing of relevance and need).

181. See Olson, *supra* note 165.

182. See *United States v. Nixon*, 418 U.S. at 706.

183. Such time and attention are generally “required to prepare for trial, including the time required to meet with counsel, travel to and from the courthouse, and testify or wait to testify. Almost all of the burdens a nonparty witness bears are universal.” Wasserman, *supra* note 178, at 95.

184. *Clinton v. Jones*, 520 U.S. 681, 691–92 (1997).

185. See *id.*

interrogatories or give a taped interview or deposition from the White House.¹⁸⁶

Finally, we must remember that while the President may be immune from criminal prosecution while in office—and enjoy some immunity with respect to providing evidence—the President is not immune from impeachment.¹⁸⁷ Consequently, if the President provides evidence, he or she must be truthful or else risk a perjury offense.¹⁸⁸ As noted earlier, lying before a grand jury or before federal prosecutors is the type of high crime and misdemeanor that might support charges of impeachment and subsequent removal from office.¹⁸⁹

III. PRESIDENTIAL SELF-PARDONS

As of the publication of this Article, President Trump has demonstrated little hesitation to exercise his constitutional power of clemency.¹⁹⁰ In connection with periodic reports that he is preparing to grant a large number of additional pardons, speculation abounds about whether a President has the authority to issue a self-pardon.¹⁹¹ Although this is a question that has not been squarely addressed in our courts,¹⁹² many scholars and historians believe such an attempted exercise of power is inconsistent with the traditions of United States law and our founding principles.¹⁹³

186. See Kavanaugh, *supra* note 21, at 1460 (“Having seen first-hand how complex and difficult that job is, I believe it vital that the President be able to focus on his never-ending tasks with as few distractions as possible.”).

187. Amar & Kalt, *supra* note 37, at 18–20.

188. *Perjury*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The act or an instance of a person’s deliberately making material false or misleading statements while under oath.”).

189. U.S. CONST. art. II, § 4; see generally Hemel & Posner, *supra* note 19.

190. See, e.g., @realDonaldTrump, TWITTER (June 4, 2018, 5:35 AM), <https://twitter.com/realdonaldtrump/status/1003616210922147841?lang=en> [<https://perma.cc/4RRG-PDXW>] (“As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do that when I have done nothing wrong?”); John Wagner, *Trump Says He Has ‘Absolute Right’ to Pardon Himself of Federal Crimes but Denies Any Wrongdoing*, WASH. POST (June 4, 2018), https://www.washingtonpost.com/politics/trump-says-he-has-absolute-right-to-pardon-himself-of-federal-crimes-but-denies-any-wrongdoing/2018/06/04/3d78348c-67dd-11e8-bea7-c8eb28bc52b1_story.html [<https://perma.cc/X7UU-Y97W>].

191. See Adam Liptak, *How Far Can Trump Go in Issuing Pardons?*, N.Y. TIMES (May 31, 2018), <https://www.nytimes.com/2018/05/31/us/politics/pardons-trump.html>, [<https://perma.cc/7RTC-89A9>].

192. Cf. Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 199 (1999).

193. See Tribe, Painter & Eisen, *supra* note 5 (arguing that a self-pardon would violate the Constitution’s “broad precept against self-dealing”).

Clemency is an “act of grace” by the sovereign.¹⁹⁴ The federal pardon power lies exclusively with the President, and Article II, Section 2 of the Constitution expressly limits that power in only two regards: (1) the pardonable offense must be a federal law offense, and (2) the pardon power cannot be used in cases of impeachment.¹⁹⁵ Importantly, the Constitution does not speak to self-pardons. Since the Constitution expressly limits the pardon power in certain ways but does not expressly forbid self-pardons, the courts may well conclude that a President has the power to grant a self-pardon. The text of the Constitution simply allows no other reasonable conclusion—there is no bar to self-pardons.¹⁹⁶ As such, it is immaterial whether a self-pardon is issued for criminal conduct before or after assuming office.¹⁹⁷

Those who share the opposing view argue that a self-pardon places the President above the law.¹⁹⁸ Finding no express support in the words of the Constitution, critics retreat to the old adage that “no man should be the judge in his own case.”¹⁹⁹ However, if the law does not prohibit the practice, then arguably the President does not place himself above the law with a self-pardon, just as no one else is placed above the law when they receive a pardon from the Chief Executive.²⁰⁰ In these instances, the recipient of the pardon escapes the usual consequences of criminal wrongdoing that are imposed by law. Furthermore, when granting a pardon, the President is not acting as a judge to adjudicate guilt or innocence. A judge has no authority to grant a pardon; the pardon power is an executive power, one expressly reserved to the Chief Executive.²⁰¹

194. *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833); see Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 804 (1996).

195. “[H]e shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.” U.S. CONST. art. II, § 2, cl. 1.

196. See Turley, *supra* note 5 (nothing textually bars the President from pardoning himself); *contra* Kalt, *supra* note 194, at 782 (arguing for the unconstitutionality of self-pardons).

197. Kalt, *supra* note 194, at 780 (“Pardons can be granted at any time after a crime has been committed . . .”).

198. *Id.* at 809.

199. See, e.g., MARY C. LAWTON, MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL, *Presidential or Legislative Pardon of the President*, 1 SUPP. OP. O.L.C. 370, 370 (1974), <https://www.justice.gov/file/20856/download> (“Under the fundamental rule that no one may be a judge in his own case, the President cannot pardon himself.”); Kalt, *supra* note 194, at 809.

200. See Kalt, *supra* note 194, at 788 (contending that power to pardon does not place the President above the law).

201. See Turley, *supra* note 5 (President acts in a political, not judicial, capacity when granting pardons).

Article II, Section 3 of the Constitution requires the President to take care that the laws be faithfully executed.²⁰² Some opponents of self-pardons contend that Section 3 establishes a trust with the American people that is violated if the President grants a self-pardon.²⁰³ But if in granting a self-pardon the President violates the trust of the American people, then he or she arguably violates that trust each time a pardon is granted to someone who has taken an oath to faithfully execute the laws of the United States but has then failed to faithfully follow the law.²⁰⁴ So long as the President does not grant a pardon for a non-federal offense or in cases of impeachment, the President is arguably faithfully executing the law.²⁰⁵

Our Founders fought a revolutionary war to escape the tyranny of a British king. They established a government in which power is intentionally dispersed between three co-equal branches.²⁰⁶ The suggestion that in drafting a constitution they intended to vest power in the Chief Executive to pardon himself from criminal abuses of power seems counterintuitive. However, having just experienced the unfettered discretion of a king, they surely must have been sensitive to the potential abuse of the pardon power.²⁰⁷ The Founders could have easily drafted the Constitution to prohibit self-pardons; perhaps they did not do so because they viewed the possibility of a self-pardon to be so absurd that they did not think it worth addressing.²⁰⁸ Alternatively, it is possible that they believed all wrongdoing

202. U.S. CONST. art. II, § 3.

203. See Jed Shugerman & Ethan J. Leib, *This Overlooked Part of the Constitution Could Stop Trump from Abusing His Pardon Power*, WASH. POST (Mar. 14, 2018), https://www.washingtonpost.com/opinions/this-overlooked-part-of-the-constitution-could-stop-trump-from-abusing-his-pardon-power/2018/03/14/265b045a-26dd-11e8-874b-d517e912f125_story.html [https://perma.cc/UNW6-MXDQ] (arguing President would violate duty to faithfully execute the laws by issuing a self-pardon).

204. See Scott Ingram, *Presidents, Politics, and Pardons: Washington's Original (Mis?) Use of the Pardon Power*, 8 WAKE FOREST J.L. & POL'Y 259, 317 (2018) (arguing that “[w]e need to scrutinize pardons more thoroughly to understand their motivations”). Ingram argues that the pardon power as used in American presidential practice has rarely been used for one reason alone. See *id.* Furthermore, Ingram contends that among the motivations, policy is often paramount—but that such policy considerations are not necessarily a misuse of the pardon power, for “[i]t is better to have a pardon policy than to randomly award policies for no reason.” *Id.* While Ingram does not mention self-pardons in his article, his historical analysis suggests that popular concern for self-pardons is not so much driven by morality as it is politics: “What Washington’s pardon practice tells us is that pardons have always been tinged with political considerations.” *Id.* at 316.

205. Nida & Spiro, *supra* note 192, at 220 (“Therefore, the President may exercise the pardon power for anyone—including himself—except in cases of impeachment.”).

206. THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether or one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”).

207. See Kalt, *supra* note 194, at 782–84 (describing the English roots and royal abuses of the pardon power).

208. *Id.* at 782–83.

by a President should be addressed through the political process of impeachment, which falls outside the scope of the pardon power.²⁰⁹

How the courts would rule on the legality of a self-pardon is unclear. It would depend in large measure on how judges understand their role in interpreting the Constitution and on their views of the scope of presidential immunity.²¹⁰ If the President commits a federal crime, issues a self-pardon, and either resigns or is impeached, the President effectively escapes federal criminal liability for the offense.²¹¹ This may seem unfair, but being forced to forfeit the office of the presidency is itself a serious penalty.²¹² Many historians and scholars would likely judge a self-pardon with contempt, and the former President would still be subject to state criminal liability. Whatever the legal authority, a self-pardon would send tremors throughout Congress and likely unsettle many law-abiding Americans.²¹³ While the President may have the power to self-pardon, this is almost certainly a circumstance where it would be wiser not to test the limits of executive power.

CONCLUSION

At the conclusion of his investigation, Special Counsel Robert Mueller will likely present his findings and recommendations to his supervisor, the Deputy Attorney General.²¹⁴ If the Special Counsel concludes the evidence supports a finding that the President engaged in criminal wrongdoing outside his official duties, the Justice Department will have to determine whether or not to stand with the previous OLC conclusions that a criminal

209. At the Constitutional Convention, Edmund Randolph moved to “except in cases of treason” from the pardon power because “[t]he President may himself be guilty.” Records of the Federal Convention (Sept. 15, 1787), in 4 THE FOUNDERS’ CONSTITUTION 5 (Philip B. Kurland & Ralph Lerner eds., 2000). James Wilson opposed the motion, arguing that the impeachment power provided a sufficient process by which such presidential abuses could be kept in check. *Id.* Ultimately, Randolph’s motion lost by a vote of 8-2, and the language was omitted. *Id.*

210. The Court has exhibited a wide range of opinions on presidential immunity. Compare *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982) (absolute civil damages immunity for official conduct), with *Clinton v. Jones*, 520 U.S. 681, 694–95 (1997) (no civil damages immunity for unofficial conduct).

211. See *infra* Appendix A.

212. See *Granting Pardon to Richard Nixon*, 39 Fed. Reg. 32601 (Sept. 18, 1974) (President Ford choosing not to further expose former President Nixon “to further punishment and degradation” after he had “already paid the unprecedented penalty of relinquishing the highest elective office of the United States”).

213. Due to the potential outcry, one scholar has proposed a constitutional amendment to exclude use of the pardon power “for the President’s Spouse, Children, Siblings, Parents, or Self.” Nida & Spiro, *supra* note 192, at 221.

214. 28 C.F.R. § 600.6–8 (2018).

prosecution must be deferred until the President no longer holds office.²¹⁵ It is possible, assuming the facts support it, that the Department will modify its legal conclusion and allow Special Counsel Mueller to prosecute the President under the theory that while a President cannot be prosecuted for erroneous decisions when exercising clear presidential authority or performing official acts,²¹⁶ a President can be subject to criminal liability for unofficial acts—actions while in office that are unrelated to presidential duties and that are motivated by personal or political gain.²¹⁷ It is also possible that leadership in the Department of Justice will conclude, as did Mr. Jaworski and Mr. Starr,²¹⁸ that a sitting President can be prosecuted for unofficial acts, and yet, like Jaworski and Starr, decide first to let congressional impeachment proceedings play out as the more prudent and appropriate course.²¹⁹

Undoubtedly, any indictment would be challenged by the President based on the reasons articulated in previous OLC opinions.²²⁰ A legal challenge based on conduct arguably not associated with political fitness would place the courts in the difficult role of evaluating and potentially second-guessing actions, decisions, and statements historically reserved to the discretion and political judgment of the elected branches. As discussed earlier, one can predict the difficulty in formulating a clear rule to determine the dividing line between unofficial acts subject to prosecution and those that are not because they constitute official acts.²²¹ The outcome of such a constitutional battle is unclear; however, unelected judges would be wise to tread carefully since their involvement could set the nation on a path that

215. 2000 OLC MEMO, *supra* note 58, at 238.

216. This is the primary theory underlying the Supreme Court decision in *Fitzgerald*, granting absolute immunity for civil damages suits to the President for official conduct. *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982).

217. See *Clinton v. Jones*, 520 U.S. 681, 685–86 (1997) (President Clinton’s conduct prior to entering office “unrelated to any of his official duties as President of the United States”).

218. It should be noted that Special Prosecutor Jaworski and Independent Counsel Starr operated under a different statutory scheme than that of the current investigation by Special Counsel Mueller. These different legal scenarios likely affected their conclusions. See, e.g., ROTUNDA MEMO, *supra* note 33, at 2 (“Nor do I consider whether the President could be indicted if there were no Independent Counsel statute.”).

219. JAWORSKI STAFF MEMO, *supra* note 100, at 20; ROTUNDA MEMO, *supra* note 34, at 55.

220. For example, the President might argue that the burden of responding to criminal process is much greater than participating in civil litigation and thus constitutes an unconstitutional disruption of his duties. See 2000 OLC MEMO, *supra* note 58, at 260 (reaffirming the OLC’s position stated in the 1973 OLC Memo that “indictment and criminal prosecution of a sitting President would unduly interfere with the ability of the executive branch to perform its constitutionally assigned duties”).

221. See *supra* Section I.A.

ends with the conviction and subsequent removal of a democratically-elected President.²²²

Even if the Department of Justice continues to stand behind its current position that it will defer prosecution for criminal unofficial conduct, there are legitimate reasons the Special Counsel should continue his investigation.²²³ The most obvious is that the Department of Justice may decide to prosecute the President once he is out of office. A better reason to continue the investigation is that other individuals not cloaked with the same immunity as the President may have engaged in wrongdoing.²²⁴ Indeed, there have already been several indictments and plea agreements—as well as a plea deal and conviction—arising out of the Special Counsel’s investigation.²²⁵

Importantly, whether or not a President can be prosecuted, compelled to provide evidence, or “self-pardoned,” we as a nation have to deal with the reality—based on the sworn testimony and more recent public statements of the heads of our intelligence community—that Russia interfered in the 2016 presidential election, and that they intend to interfere in future American elections.²²⁶ The protection of our national security demands that we understand fully the actions and methods of the Russian government, and we must hold this adversary accountable. For this reason alone, the

222. Amar & Kalt, *supra* note 37, at 12 (“If the President were prosecuted, the steward of *all* the People would be hijacked from his duties by an official of *few* (or none) of them.”).

223. In fact, President Donald Trump has reportedly made over two hundred arguments against Special Counsel Mueller’s Russia investigation. See Ryan Teague Beckwith, *Read the 209 Arguments President Trump Has Made Against the Mueller Investigation*, TIME, <http://time.com/5290531/donald-trump-robert-mueller-russia-investigation-arguments/> (last updated Aug. 14, 2018, 4:07 PM) [<https://perma.cc/4W7Y-X2U>].

224. Furthermore, Special Counsel Mueller has been “authorized to prosecute federal crimes arising from the investigation of these matters” as he “believes it is necessary and appropriate” OFFICE OF THE DEPUTY ATTORNEY GENERAL, APPOINTMENT OF SPECIAL COUNSEL TO INVESTIGATE RUSSIAN INTERFERENCE WITH THE 2016 PRESIDENTIAL ELECTION AND RELATED MATTERS, ORDER NO. 3915-2017 (2017). While there are legitimate reasons to conclude the investigation, if Mueller finds it necessary to continue the investigation, he continues to have the authorization to do so until he decides to conclude or is removed by the Attorney General for cause. See 28 C.F.R. § 600.7(d) (2018).

225. See generally Devlin Barrett, Matt Zapposky, Carol D. Leonnig & Shane Harris, *For Mueller, Pushing to Finish Parts of Russia Probe, Question of American Involvement Remains*, WASH. POST (July 14, 2018), https://www.washingtonpost.com/world/national-security/mueller-pushing-to-wrap-up-parts-of-russia-probe-faces-question-of-american-involvement/2018/07/14/4bdcef90-8786-1e8-8f6c-46cb43e3f306_story.html [<https://perma.cc/N5B9-4A8B>]; see also Sharon LaFraniere & Kenneth P. Vogel, *Manafort Agrees to Help Mueller as Part of Deal*, N.Y. TIMES, Sept. 14, 2018, at A1.

226. OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, *supra* note 1, at 1 (“We assess with high confidence that Russian President Vladimir Putin ordered an influence campaign in 2016 aimed at the US presidential election, the consistent goals of which were to undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency.”).

investigation by Special Counsel Mueller into Russian meddling in the 2016 election should be allowed to continue to its conclusion.

Finally, while the Special Counsel may not have the constitutional authority to prosecute a sitting President who commits a crime, the Department of Justice certainly has the power to refer the Special Counsel's findings and recommendations to Congress.²²⁷ If those findings include serious criminal wrongdoing arising out of unofficial acts, it remains to be seen whether Congress will hold the President accountable. The decision whether to impeach and remove a sitting President will provide the toughest test of our system of checks and balances since the days of Watergate.

227. See 28 U.S.C. § 516 (2017) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); see also 28 C.F.R. § 600.9 (2018).

APPENDIX A
Explanatory Hypotheticals

The following examples are hypothetical in nature only. Their purpose is to apply the conclusions of this Article to real-world scenarios. Assume that the President obstructs justice. Suppose further this act violates both state and federal laws. Finally, assume it is unofficial conduct. Based on the considerations and conclusions in this Article, here are six general scenarios and their respective outcomes:

The President resigns. Without the shield of a pardon, the former President would be completely exposed to criminal prosecution in both federal and state courts, and since double jeopardy does not preclude federal and state prosecutions for the same crime, the former President could be charged in both for the same offense.

The President does nothing. The President could not be prosecuted until out of office based on deferment. The President would be subject to impeachment and removal from office. The former President would then be completely exposed to criminal prosecution in both federal and state courts.

The President issues a self-pardon and stays in office. The President's pardon shields the President from criminal liability for federal crimes, but not for state crimes. However, any state prosecution would be deferred. The President would be subject to impeachment and removal from office. After removal or the end of the President's term in office, the former President could be prosecuted by state courts.

The President issues a self-pardon and resigns. Again, the former President would be immune from prosecution for federal crimes but not state crimes. State prosecutors could still indict and prosecute the President.

The House impeaches the President; the President issues a self-pardon; the Senate votes to remove. The President remains subject to removal from office. Here, the pardon is likely void and unconstitutional because it is being used in a case of impeachment. The President will be subject to prosecution in federal and state courts following removal.

The House impeaches; the Senate votes not to remove; the President issues a self-pardon. In this unlikely scenario, the President is impeached but is not successfully removed. After the failed Senate vote, the President issues a self-pardon. In this case, it could be argued that the impeachment event is over once the case becomes congressionally moot, that is, after an unsuccessful attempt by Congress to remove the President for the articles of impeachment voted against the President. Since impeachment proceedings are not indefinite (e.g., Clinton remained in office after the Senate failed to remove), they will end, and the President can arguably issue a self-pardon. Again, the President would remain exposed to state prosecution after the end of the term of office or earlier resignation.