Prosecuting and Punishing Our Presidents

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Can a President be arrested, indicted, prosecuted, and punished? Although some believe that these possibilities are unconstitutional, even absurd, I demur. For a host of reasons, the presidency lacks immunities from criminal process and punishment. First, some constitutions from the Founding Era included express executive immunities, not relying upon shadowy inferences. This practice sheds light on how to best read our Constitution. Second, though James Madison sought the creation of express presidential privileges at the Philadelphia Convention, he failed. Third, during the ratification fight, many denied that the President would have special immunities of any sort, with some noting that presidents had fewer privileges than members of Congress. Fourth, a sitting President was arrested and essentially admitted his guilt, never asserting that the Constitution shielded him from arrest, prosecution, or punishment. Fifth, the Constitution supplies a constitutional solution when circumstances, including arrest or incarceration, incapacitate a sitting President. The "Acting President"—the Vice President—takes over, ensuring continuity and energy in the Executive. Lastly, the Constitution authorizes Congress to supply a statutory immunity. By ordinary law, Congress can grant immunities that the Constitution itself never accords. Further, it can curb, expand, or eliminate its grant as circumstances warrant. Because Congress can solve any difficulties that might arise from the arrest, prosecution, and punishment of our presidents, there is little need to infer or imagine a constitutional solution.

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> [S]uppose the President commits Murder in [the] Streets. [I]mpeach him[?] But You can only remove him from Office on impeachment. Why When he is no longer President, You can indict him. [B]ut in the Mean While he runs away. [B]ut I will put another case. [S]uppose he continues his Murders daily, and neither houses are sitting to impeach him. Oh! the People would rise and restrain him. [V]ery well You will allow the Mob to do what the legal Justice must abstain from.

—Senator William Maclay, arguing in 1789 that the President enjoys no immunity from criminal process and punishment.[1]

Introduction

Every generation or so, the nation confronts questions about crimes and the presidency. Occasionally, the concerns arise because a President's actual conduct naturally prompts questions about whether, when, and how chief executives may be prosecuted and punished. Other times a sense of disquiet floats to the surface of the national discourse because strident opponents convince themselves that the incumbent has crossed a red line—a criminal one—and then pivot to the prospect of their bête noire behind bars. And sometimes, we cannot tell the difference between rightful alarm and partisan sniping.

From the onset of his term, criminal accusations dogged Donald Trump. Opponents eagerly claimed that he committed obstruction of justice, bribery, solicitation of illegal campaign contributions from foreign nations, and income tax evasion. The obstruction charge related to his firing of FBI

1. William Maclay, The Diary of William Maclay, *reprinted in* THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 1, 168 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

Director James Comey and sundry acts to influence or halt the Robert Mueller investigation.[2] The bribery charge related to attempts to induce Ukraine to investigate Joseph Biden via the dangling of foreign aid and an Oval Office meet-and-greet.[3] The campaign finance violations concerned Trump's alleged attempt to entice Russia to release damaging information about Hillary Clinton and thereby bolster his 2016 presidential campaign.[4] Finally, some supposed that Trump may have committed tax and insurance fraud.[5]

The dreadful denouement of his Presidency raised the prospect of alarming scenarios that were previously unthinkable. In the wake of Joseph Biden's projected triumph in the Electoral College, President Trump insisted that massive voter fraud had wrongfully denied him his rightful victory.[6] He litigated such claims, bringing more than a dozen suits.[7] Each time he was a loser.[8] Mindful that suits might fail, some private advisors allegedly urged him to deploy the military and hold a new, fraud-free election.[9] Relatedly,

2. *See, e.g.*, John Cassidy, *The Mueller Report Is Clear: Donald Trump Repeatedly Tried to Obstruct Justice*, NEW YORKER (Apr. 18, 2019), https://www.newyorker.com/news/our-columnists/the-mueller-report-couldnt-be-more-clear-donald-trump-repeatedly-tried-to-obstruct-justice [https://perma.cc/NF5K-FWTQ]; Matt Ford, *Did President Trump Obstruct Justice?*, ATLANTIC (May 16, 2017), https://www.theatlantic.com/politics/archive/2017/05/trump-comey-obstruction-justice/526953 [https://perma.cc/HG2J-EV9D]; Ryan Goodman, *Did Trump Obstruct Justice?*, POLITICO MAG. (May 17, 2017), https://www.politico.com/magazine/story/2017/05/17/did-trump-obstruct-justice-215147 [https://perma.cc/3LV6-3TV3].

3. *See, e.g.*, Samuel Estreicher & Christopher Owens, *Did President Trump Commit the Federal Crime of Bribery?*, VERDICT, JUSTIA (Dec. 3, 2019), https://verdict.justia.com/2019/12/03/did-president-trump-commit-the-federal-crime-of-bribery [https://perma.cc/R7RF-2UH9].

4. *See, e.g.*, Bob Bauer, *The Failures of the Mueller Report's Campaign Finance Analysis*, JUST SECURITY (May 3, 2019), https://www.justsecurity.org/63920/the-failures-of-the-mueller-report-campaign-finance-analysis [https://perma.cc/6J7T-4FJJ].

5. Benjamin Weiser & William K. Rashbaum, *Trump Could Be Investigated for Tax Fraud, D.A. Says for First Time*, N.Y. TIMES (Dec. 11, 2020), https://www.nytimes.com/2020/09/21/nyregion/donald-trump-taxes-cyrus-vance.html [https://perma.cc/Y9XX-P49D].

6. Susan Milligan, *Trump Promotes Voter Fraud Claims in Unusual 45-Minute Video Address*, U.S. NEWS (Dec. 2, 2020), https://www.usnews.com/news/elections/articles/2020-12-02/trump-promotes-voter-fraud-claims-in-unusual-45-minute-video-address [https://perma.cc/RVW7-YANK].

7. Pete Williams & Nicole Via y Rada, *Trump's Election Fight Includes Over 50 Lawsuits. It's Not Going Well*, NBC NEWS (Dec. 10, 2020, 11:42 AM), https://www.nbcnews.com/politics/2020-election/trump-s-election-fight-includes-over-30-lawsuits-it-s-n1248289 [https://perma.cc/629L-TCYG].

8. *Id.*

9. Maggie Haberman & Zolan Kanno-Youngs, *Trump Weighed Naming Election Conspiracy Theorist as Special Counsel*, N.Y. TIMES (Jan. 18, 2021), https://www.nytimes.com/2020/12/19/us/politics/trump-sidney-powell-voter-fraud.html [https://perma.cc/VM7Y-TGTW].

Trump supposedly asserted that he might stay in the White House beyond the expiry of his term.[10]

His utterances and actions before the storming of the U.S. Capitol in January of 2021 led some to claim that he had committed crimes on the eve of his departure from office.[11] More than that, his acts (and especially the advice he may have received) raised the prospect that a President might foment or stage a coup to retain power. Anti-federalists had raised such concerns, with some pointing to the specter of a President at the head of the army, attempting to impose a despotism.[12] But that was perhaps the last time the possibility of a presidential coup was widely discussed.

President Trump's tenure elevated certain hard questions in unprecedented ways. Had he won reelection, one might wonder whether prosecutors would have targeted him for indictment or worse during his second term. Relatedly, one must ask whether the rather deliberate and refined impeachment process is the sole constitutional response to an incipient or completed presidential coup. How could an unhurried impeachment process help arrest or foil an ongoing, possibly bloody coup?

Because men, and women, are not angels,[13] the question of whether an incumbent President can be arrested, indicted, prosecuted, and punished will never go away. One can confidently predict that future presidents will face criminal investigations and that some prosecutors will be tempted to put the incumbent in the dock. The Constitution supplies no obvious answer to the question of presidential amenability to prosecution and punishment, leading some to regard it as a "tough . . . constitutional brainteaser."[14]

Let's tease ourselves with this puzzler, bearing in mind that this is an issue where "reasonable people can disagree."[15] The received wisdom is that an incumbent cannot be indicted, much less prosecuted, convicted, and punished. Such ordeals must await the incumbent's departure from office by resignation, efflux of term, or impeachment removal. That is the stance of the

10. Pamela Brown, Kevin Liptak & Jeremy Diamond, *'It's Turned Crazy': Inside the Scramble for Trump Pardons*, CNN (Dec. 22, 2020, 7:41 PM), https://www.cnn.com/2020/12/16/politics/donald-trump-pardons-lame-duck/index.html [https://perma.cc/TQ7T-8CXP].

11. David G. Savage, *How Likely Is It That Trump Will Face Criminal Prosecution After Leaving Office?*, L.A. TIMES (Jan. 9, 2021, 10:31 AM), https://www.latimes.com/politics/story/2021-01-09/trump-criminal-prosecution-after-leaving-office [https://perma.cc/LL7Y-S9BA] (discussing possible federal offenses of "seditious conspiracy" and tampering with ballots).

12. *See* Cato, No. 4 (Nov. 8, 1787), *reprinted in* 3 THE FOUNDER'S CONSTITUTION 499, 499–500 (Philip B. Kurland & Ralph Lerner eds., 1987) (expressing concern about the President's broad authority, including his power over the army and duration in office, which give the President "power and time sufficient to ruin his country").

13. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("If men were angels, no government would be necessary.").

14. CASS SUNSTEIN, IMPEACHMENT: A CITIZEN'S GUIDE 162 (2017).

15. Akhil R. Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, NEXUS, Spring 1997, at 11, 11.

Department of Justice, voiced in 1973[16] and 2000.[17] According to this view, an incumbent can never be put in the dock, and a rectangular jail cell will never serve as an ersatz Oval Office.

Last year, Justice Samuel Alito endorsed that orthodoxy, insisting that prosecuting an incumbent "is out of the question."[18] He said this in the context of *Trump v. Vance*,[19] a case involving a state grand jury subpoena for the President's personal records:

> If a sitting President were charged in New York County, would he be arrested and fingerprinted? . . . Could he be sent to Rikers Island or be required to post bail? . . . If the President were charged with a complicated offense requiring a long trial, would he have to put his Presidential responsibilities aside for weeks on end while sitting in a Manhattan courtroom? . . . Could he effectively carry out all his essential Presidential responsibilities after the trial day ended and at the same time adequately confer with his trial attorneys regarding his defense? . . . And if he were convicted, could he be imprisoned? Would aides be installed in a nearby cell?
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> This entire imagined scene is farcical.[20]

Justice Alito speaks for many eminent scholars, at least on this matter.[21]

Even as prosecution and punishment are apparently out of bounds, dogged, hard-nosed investigations are not. I would hazard a guess that almost every scholar presumes that officials can investigate incumbents for evidence of crimes. The investigations of Richard Nixon and Bill Clinton suggest as much. In 2020, the Supreme Court bypassed the question of whether a state grand jury could investigate President Trump, in part because lawyers conceded the point.[22] The concession suggests that the matter is hardly in

16. Memorandum on Amenability of the President, Vice President, and Other Civil Officers to Federal Criminal Prosecution While in Office from Robert G. Dixon, Jr., Assistant Att'y Gen., Off. of Legal Couns. 18–32 (Sept. 24, 1973) [hereinafter 1973 OLC Memo].

17. A Sitting President's Amenability to Indictment and Crim. Prosecution, 24 Op. O.L.C. 222, 222 (Oct. 16, 2000) [hereinafter 2000 OLC Opinion].

18. Trump v. Vance, 140 S. Ct. 2412, 2444 (2020) (Alito, J., dissenting).

19. 140 S. Ct. 2412 (2020).

20. *Id.* at 2445.

21. CHARLES L. BLACK, JR. & PHILIP BOBBITT, IMPEACHMENT: A HANDBOOK 111–12, 136 (2018) (arguing that prosecution is possible only after a President is no longer in office); SUNSTEIN, *supra* note 14, at 126, 154, 164 (2017) (same); Walter Dellinger, *Yes, You Can Indict the President*, N.Y. TIMES (Mar. 26, 2018), https://www.nytimes.com/2018/03/26/opinion/indict-president-trial.html [https://perma.cc/JEJ9-THXH] (same); Amar & Kalt, *supra* note 15 (same); Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL'Y REV. 53, 56 (1999) (same); Keith King, *Indicting the President: Can a Sitting President Be Criminally Indicted?*, 30 SW. U. L. REV. 417, 418 (2001) (same). *Cf.* 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, 68 (1992) (arguing that sitting presidents may be prosecuted).

22. *Trump v. Vance*, 140 S. Ct. at 2425.

dispute. Relatedly, many likely suppose that officials, federal and state, may announce their considered judgment that the President is guilty of crimes. For instance, Independent Counsel Kenneth Starr declared that President Clinton had committed federal offenses.[23] In 2019, Attorney General William Barr signaled that nothing precluded Special Counsel Robert Mueller from concluding that President Trump had committed crimes.[24] The "normative power of the actual"[25] is hard to resist, making it rather difficult to argue that it is somehow unconstitutional to probe and condemn a sitting President.

To sum up, the orthodoxy posits that officials can investigate the incumbent by digging far and wide for evidence of crimes, including by subpoenaing the incumbent. Further, they can denounce her as an inveterate criminal before the press, before committees of Congress, and in the pages of censorious reports. Before any indictment or prosecution, however, the incumbent must depart office either voluntarily (via resignation or conclusion of her term) or involuntarily (after an impeachment conviction and removal). In other words, the conventional view is that while prosecutors may brand the President a base criminal, they cannot make her an actual convict.

Based on constitutional text, structure, and history,[26] I call into question that which "is out of the question."[27] This Article argues that a sitting President may be arrested, indicted, prosecuted, and punished.[28] Part I

23. KENNETH W. STARR, REFERRAL FROM INDEPENDENT COUNSEL KENNETH W. STARR IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, SECTION 595(C), H.R. DOC. NO. 105-310, at 131–32, 165 (Sept. 11, 1998).

24. Li Zhou, *AG Barr's New Defense on Not Charging Trump with Obstruction: Mueller Never Decided*, VOX (May 1, 2019, 2:10 PM), https://www.vox.com/2019/5/1/18522458/bill-barr-mueller-report-trump-obstruction-of-justice [https://perma.cc/M6YE-4QZZ].

25. Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 71 (1965) ("There indeed exists what Felix Cohen characterized as 'the normative power of the actual': that which is law tends by its very existence to generate a sense of being also that which ought to be the law.").

26. The argument is broadly originalist in nature, relying upon arguments from text, structure, and history. It also discusses practice because some originalists argue that practice can liquidate (settle) the meaning of ambiguous constitutional text. *See generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (arguing that practice can elucidate the original meaning of ambiguous constitutional provisions).

27. *Trump v. Vance*, 140 S. Ct. at 2444 (Alito, J., dissenting).

28. Although much of what I say here is in tension with certain Supreme Court pronouncements with respect to executive privilege and executive immunity from civil damage suits, I will not discuss those adjacent issues, the cases, or their underlying rationales. *See* United States v. Nixon, 418 U.S. 683, 712 n.19 (1974) ("We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation . . . ."); *see also* Nixon v. Fitzgerald, 457 U.S. 731, 756–57 (1982) (holding that President Nixon was immune from a damages liability where his actions were "within the 'outer perimeter' of his official responsibility"). The Supreme Court has been willing to cabin those cases and their rationales when it sees fit. *See* Clinton v. Jones, 520 U.S. 681, 692–95 (1997) (holding that precedent only conferred civil immunity for conduct performed within a President's official capacity). Further, the claims made here are not meant to predict what the Supreme Court will pronounce should it face a case involving the prosecution of an incumbent. For my views on these adjacent matters, see Saikrishna

maintains that chief executives do not enjoy a host of implied, constitutionally grounded privileges and immunities. To be clear, I do not for a moment deny that there are sound policy rationales for sundry presidential protections. Rather, I deny that the Constitution itself grants any such screens, shields, or shelters. Along the way, I reveal salient particulars that cast doubt on the orthodoxy that insists on implied criminal shields for the President. First, the Constitution eschewed the example of some constitutions that granted express criminal law immunities to their chief executives. Second, though James Madison apparently sought to create express executive immunities at the Constitutional Convention, he was met with silence and indifference, perhaps suggesting that the delegates never meant to bestow any immunity against criminal prosecution. Third, it is a mistake to imagine that the Constitution implicitly grants the Executive a comprehensive immunity from criminal prosecution and punishment, one markedly broader than the extremely narrow civil arrest privilege that federal legislators enjoy. That is to say, we should not infer truly sweeping immunities for the leader of the second branch that dwarf the express protections for members of the first. Fourth, numerous Founders declared that presidents would have no privileges or immunities and would, therefore, be on the same plane as ordinary citizens. Finally, one sitting President was arrested for a minor crime and effectively admitted his guilt. That chief executive did not assert that as the sitting President, he was immune from arrest, charges, or punishment.

Part II responds to arguments that supposedly undercut the claim that a sitting President may be prosecuted and punished. First, nothing in the Constitution's impeachment provisions signals that impeachment of the President—or any other officer—must precede trial and punishment. Indeed, early statutes made clear that officers could be prosecuted and convicted while in office. Moreover, in our nation's history, a handful of federal officers were convicts before the House impeached them. Second, any presidential incapacitation that arises from prosecution and punishment is immaterial. When the President is incapacitated for any reason, the Vice President takes over as acting President,[29] a transition that ensures continuity, unity, and energy in the Executive. This unique constitutional backstop undercuts the structural argument that the President cannot be prosecuted, much less punished. Relatedly, arguments about presidential incapacity fail to draw distinctions amongst different crimes and across discrete phases of the criminal process, and, thus, fail to consider that some aspects of criminal procedure are hardly incapacitating. Third, popular participation in the selection of the President has no bearing on presidential immunity. Lastly,

Bangalore Prakash, *Not a Single Privilege Is Annexed to His Character: Necessary and Proper Executive Privileges and Immunities*, 2020 SUP. CT. REV. 229 (2021) (arguing that the Constitution does not grant other privileges and immunities to presidents).

29. U.S. CONST. art. II, § 1, cl. 6; *id.* amend. XXV.

despite reasonable fears of parochial state prosecutors hounding a sitting President, there is no categorical bar on state prosecutions of federal officers.

If one concludes that some presidential immunity from trial and punishment is valuable, even absolutely necessary, the Constitution supplies ample means to satisfy this preference, or so Part III argues. Congress can craft privileges and immunities for the office of the presidency that the Constitution itself did not ordain and establish. Using its necessary and proper power, Congress can conclude that sitting presidents ought to be spared search warrants, subpoenas, arrests, prosecutions, convictions, or punishments.[30] Or federal legislators could merely bar state prosecutions and punishments. Or they could permit prosecutions for violations of some federal laws and suspend others until the incumbent has left office. The advantage of concluding that Congress must supply any criminal immunity is that it is the institution best equipped to consider and balance all the relevant interests. It can better decide whether presidents ought to have blanket immunity, temporary shelter from prosecution, or partial protection from a subset of criminal laws. Further, legislators are best positioned to alter statutory shields as circumstances warrant.

Before we tackle this constitutional puzzler, one cautionary note. While some will read this Article as an attack on President Trump, he is not this Article's focus. Rather, I hope to articulate principles that were true of the Constitution from its inception. Discussing these issues in this context is hardly ideal, in part because many judgments are likely to be skewed by perceptions of our forty-fifth President. Though it may seem obtuse to some readers, I seek to reach legal conclusions without regard to him. My view is that constitutional readings ought not to be influenced by transient politics; hence it is wrong to favor fewer (or greater) presidential immunities based on the occupant of 1600 Pennsylvania Avenue. Writing in the current context has its undoubted perils because both the writer and the audience may not transcend their biases. But it also has its benefits because it serves to sharpen the inquiry. Real-world problems help us tackle abstract legal questions head-on. So, perhaps, we can exploit our discomfitures in the pursuit of better understanding our Constitution.

I. No Privileges or Immunities Against the Criminal Law

Do incumbents enjoy an implied constitutional immunity that shields them from arrest, prosecution, and punishment? There are compelling reasons why the orthodox view should be greeted with skepticism. As a matter of text, executive immunities exist when they are explicitly granted.

30. U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power To . . . make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.").

That is why several eighteenth-century constitutions expressly bestowed criminal immunities upon their chief executives. Indeed, given that the Constitution explicitly grants an extremely narrow civil arrest immunity to representatives and senators, it makes little sense to infer that the Constitution implicitly grants presidents an across-the-board immunity from arrest, prosecution, and punishment. As a matter of early history, many Founders denied that presidents would have special legal immunities. On the contrary, there was a widespread sense that the presidency was never placed above the law, either temporarily or otherwise. As a matter of constitutional structure, certain executive wrongdoing might demand immediate action, lest the Executive run amok while the drawn-out impeachment process lumbers toward its uncertain conclusion. Finally, although no President, sitting or otherwise, has yet sat at the defense table, much less been incarcerated, an incumbent was arrested and essentially admitted his guilt.

At the outset, it is useful to sketch the claim that I reject and the arguments usually adduced in its favor. The orthodox view is somewhat straightforward. One can investigate the President *ad infinitum*. Multiple investigations may proceed along parallel tracks: federal and state. Further, prosecutors and investigators can even brand the incumbent a "criminal" several times over. But this far and no further. No one can arrest the President, indict her, drag her into court, prosecute her, or punish her. The Constitution forbids these indignities and interferences.

The arguments for these considerable immunities somewhat overlap. To support their stance, proponents of presidential immunity cite several factors, namely dishonor, distraction, incapacitation, impeachment, and a popular imprimatur. To arrest the incumbent is to arrest the proper and smooth functioning of the Executive Branch. To indict her is to unacceptably discredit her and damage her ability to function as chief executive. To drag her to the bar of the court and prosecute her is to improperly degrade and distract her. A prosecution, in particular, would cast grave disrepute on the incumbent, diminishing her authority and compelling her to choose between solemn constitutional duties and her personal liberty and reputation. To punish her with jail time is to unconstitutionally oust her from office. Finally, and relatedly, impeachment is the constitutional mechanism specified for removal. No other lawful process can trigger a removal (or its functional equivalent) of the one constitutional officer who enjoys a nationwide popular cachet.[31]

On the peripheries of these claims is a good deal of uncertainty. Consider statutes of limitations. The Department of Justice's Office of Legal Counsel (OLC) believes that while the Constitution confers a temporary

31. *See* Amar & Kalt, *supra* note 15, at 12–13, 17–19, 21 n.6 (arguing that the criminal prosecution of a sitting President would be uniquely disabling to the country).

criminal immunity on the President, it does not also toll statutes of limitations.[32] This stance effectively means that presidents might never be prosecuted for some crimes because some statutes of limitations might expire while they were in office. Others claim that the statutes may be tolled, presumably by the courts, effectively reading the Constitution as granting the Judiciary the authority to preserve the possibility of a belated criminal trial.[33]

Another doubtful area is whether the Constitution establishes an absolute bar on arrests, prosecutions, and punishments or whether the supposed immunities are waivable. While the OLC has not taken a position on the matter, one commentator suggests that a President could renounce these immunities.[34] Other proponents of immunity may reject waivability, supposing that these shields exist to further the public weal and that the nation would be best served by non-waivable immunities. One might suppose that presidents must be focused on the public's business and cannot set aside their supposed constitutional shield in a bid to clear their names.[35]

In pondering presidential immunity, competing hunches are at play. First, there is an intuition that presidents, because they occupy a unique office, should receive uniquely favorable treatment. Such relief would be useful not so much to better their condition but instead to better *ours*. Chief executives work for all of us. They should enjoy special protections so that they can better serve We the People. Second, there is an offsetting intuition that, in America, no one is above the law, even temporarily. This intuition suggests that presidents should not enjoy any unusual dispensations, however exceptional their office. More precisely, perhaps we should not read the Constitution as granting the President immunity from prosecution and punishment because any such privileges seem inconsistent with the undoubted constitutional principles that presidents can do wrong and all officials can be held to account.

32. The Office of Legal Counsel suggests that Congress can enact special prolonged statutes of limitations for presidents. *See* 1973 OLC Memo, *supra* note 16, at 29 ("The policy regarding statutes of limitation is within legislative control.").

33. Amar & Kalt, *supra* note 15, at 16; *see* CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 40–41 (1974) (arguing that tolling the statute of limitations for presidential prosecution "could easily be attained by legitimate judicial techniques, but a simple Act of Congress could put the matter beyond doubt"). For a recent discussion of tolling, see Kevin Foley, *Availability of Tolling in a Presidential Prosecution*, 168 U. PA. L. REV. 1789, 1796, 1841–42 (2020), which assumes presidential immunity from prosecution and argues for Congress to create a tolling rule.

34. *See* Terry Eastland, *The Power to Control Prosecution*, NEXUS, Spring 1997, at 43, 49 ("[T]he President may be prosecuted *only to the extent he allows himself to be*." (emphasis in original)).

35. For an analogous point, consider the view that presidents must accept salaries even if they find them unnecessary because the Constitution not only requires Congress to supply a salary but also requires that presidents accept it. U.S. CONST. art. 2, § 1, cl. 7.

A. Constitutional Text

The first branch exercises the lion's share of the most far-reaching federal powers, including the war power, the authority to regulate commerce, and the powers to tax and spend.[36] The Constitution carefully delineates rather circumscribed privileges and immunities for those who wield these solemn authorities. Senators and representatives have three privileges and immunities. First, they are entitled to receive a salary from the Treasury.[37] This rule generates a measure of separation and independence from their states, which cannot pay them salaries.[38] Next, legislators are immune from arrest while in, going to, or coming from a legislative session.[39] This screen shields rather little, however. The Supreme Court has read this exception to signal that legislators are subject to arrest at all times for *any crime*, federal and state, including misdemeanors.[40] Relatedly, legislators can be tried, convicted, and jailed for crimes even as they continue to serve in Congress.[41] The result is that what appears at first blush to be a substantial privilege only encompasses civil arrests, a now obsolete category. Lastly, legislators cannot be called to account ("questioned") elsewhere for what they say in either chamber,[42] which amounts to an evidentiary privilege. In particular, what they say and do in either house cannot be used against them in legal proceedings outside the chambers.[43] This privilege is also limited because it fairly implies that what legislators say and do elsewhere may be held against them.

At the threshold, the claim that a sitting President enjoys an implied immunity from all arrests, prosecutions, and punishments stands as a horse of a rather different color. First, while the Constitution's express arrest immunity does not apply to crimes, the non-textual presidential immunity that conventional wisdom insists upon applies to every criminal matter. Moreover, the immunity applies to the entire criminal process, far beyond arrest. For incumbents, there can be no arrests, no trials, and no

36. *Id.* art. I, § 8, cls. 11, 3, 1.

37. *Id.* art. I, § 6.

38. Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501, 506 (2002).

39. U.S. CONST. art. I, § 6.

40. *See* Williamson v. United States, 207 U.S. 425, 438 (1908) (concluding that the exception for "treason, felony, and breach of the peace" was understood to apply to all crimes).

41. *See* JACK MASKELL, CONG. RSCH. SERV., STATUS OF A SENATOR WHO HAS BEEN INDICTED FOR OR CONVICTED OF A FELONY (Apr. 2, 2015) ("No rights or privileges are forfeited under the Constitution, statutory law, nor the Rules of the Senate merely upon an *indictment* . . . . Members of Congress do not automatically forfeit their offices even upon *conviction* . . . .").

42. U.S. CONST. art. I, § 6.

43. Tenney v. Brandhove, 341 U.S. 367, 372 (1951) (noting the privilege of legislators to be free from arrest or civil process for what they say or do in legislative proceedings).

punishments.[44] Finally, the supposed criminal immunity applies not only to major crimes, like murder and treason, but also to relatively trivial offenses, like reckless driving.[45]

Second, this implied, across-the-board criminal immunity is ultralong because it is not tied to a congressional session and its fringes. The modern assertion is that presidents enjoy a privilege not merely when Congress is in session but instead for their entire four-year term.[46] Of course, presidential immunity could extend for another four years should an incumbent secure a second term. And given the language of the Twenty-second Amendment, certain presidents could be immune from criminal prosecution for ten years.[47]

Further, in thinking about whether this supposed immunity is really "temporary," we must bear in mind that the original Constitution lacked presidential term limits.[48] Some Founding Era commentators predicted that presidents would serve for life, securing election repeatedly. They perhaps had in mind the New York Governor who in 1787 was in the midst of his fourth consecutive three-year term (he would go on to serve six consecutive terms).[49] Given that presidents could serve for life before the Twenty-second Amendment, presidents who committed crimes might, under the implied immunity theory, never be arrested, tried, or punished for their offenses.[50] In other words, those asserting that the original Constitution granted immunity from criminal prosecution and punishment must stomach the possibility that it was a foundational constitutional principle that presidents accused of crimes, including the foulest, could escape scot-free, never prosecuted much less penalized.

Third, the Constitution contains one express privilege for the Executive: Congress must supply a salary.[51] This compensation privilege partially tracks the salary protections for legislators and judges.[52] The presence of three

44. 2000 OLC Opinion, *supra* note 17, at 247–48, 251–55.

45. *See id.* at 230 (explaining the divergent nature of criminal proceedings for major and minor offenses but concluding that criminal process in general would be inappropriate).

46. *See id.* at 255–57 (arguing that the costs associated with waiting to prosecute until after a President is out of office are smaller than the costs associated with prosecuting a sitting President).

47. U.S. CONST. amend. XXII, § 1.

48. The Twenty-second Amendment, limiting presidents to two terms, was not ratified until 1951. TWENTY-SECOND AMENDMENT, ENCYC. BRITANNICA (Oct. 3, 2012), https://www.britannica.com/topic/Twenty-second-Amendment [https://perma.cc/AYS2-VQPC].

49. SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 52 (2015) (discussing New York Governor George Clinton).

50. U.S. CONST. amend. XXII.

51. *Id.* art. II, § 1, cl. 7.

52. Regarding federal judges, their salaries cannot be diminished while they are in office. *Id.* art. III, § 1. An incumbent President cannot have his compensation modified during his term. *Id.* art. II, § 1, cl. 7. For Congress, there were no restrictions on diminishment or enlargement. *Id.* art. I, § 6, cl. 1. That may have changed with the supposed passage of the Twenty-seventh Amendment in

express legislative privileges and one explicit executive privilege counsels against reading the Constitution as if it contained additional implicit privileges and immunities for members of Congress or the President. It certainly would be odd to conclude that presidents implicitly enjoy a far-reaching immunity from arrest, prosecution, and punishment (one that could last for decades at the Founding) when their legislative counterparts have a narrow civil arrest immunity tied to congressional sessions. To be sure, *expressio unius* is not an inexorable command. But we have good cause to give it weight here because we have sound reasons to conclude that the variations in privileges and immunities are meaningful. For instance, while all three branches have compensation privileges, each compensation clause has peculiar wording to reflect the sense that differing tenures and powers necessitated divergent privileges.[53]

Fourth, no constitutional text relating to the Executive hints at additional implied privileges and immunities. The grant of "executive power" in the Article II Vesting Clause confers authority over law execution, foreign affairs, and executive officers.[54] This Clause is an exceptionally poor vehicle for conveying privileges or immunities because powers are different in kind from privileges and immunities. There is a reason why legislative powers are listed in one section of Article I (Section 8) and legislative privileges and immunities in another (Section 6). Powers are distinct from privileges and immunities in the same way that individual rights are conceptually distinct from constitutional powers. Further, no other Article II provision can plausibly be read as conferring privileges or immunities—not the appointment power, the pardon power, or the treaty power.[55] Relatedly, no one ought to read provisions imposing duties, such as the Presidential Oath or the Faithful Execution Clauses, as if they covertly convey privileges and immunities.[56] Though constitutional duties may necessitate the grant of some powers to ensure their satisfaction, duties do not themselves convey powers or privileges. I should add that I am unaware of anyone from the Founding Era contending that the Vesting Clause, or for that matter any other clause of Article II, grants immunity from prosecution or otherwise. The arguments,

1992. *Id.* amend. XXVII (prohibiting "varying the compensation . . . of the Senators and Representatives" until an election intervened). For an argument against the idea that the Amendment is part of the Constitution, see Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 HARV. L. REV. 1220, 1283 (2019) (positing that synchronicity issues could suggest that the Twenty-seventh Amendment "is no amendment at all").

53. *See* Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501, 512–14 (2002) (explaining the asymmetry between the Presidential Compensation Clause and Judicial Compensation Clause based on differences in tenure).

54. U.S. CONST. art. II, § 1–3.

55. *Id.* art. II, § 2.

56. *Id.* art. II, §§ 1, 3.

such as they exist, are more structural in nature, resting on arguments about the Constitution's interstices.

In sum, we ought to be reluctant to infer or invent an astonishingly sweeping presidential immunity shielding the incumbent not only from arrest but also from trial and punishment because it would be far broader than the trivial arrest immunity that barely shields legislators. Relatedly, Article II conveys one limited executive privilege—a promised (but unspecified) salary.[57] When one juxtaposes this narrow, express salary privilege to Article I's grant of three privileges and immunities, it requires a leap to imagine that the Constitution implicitly grants presidents a complete immunity from arrest, prosecution, or punishment. Put another way, we should not read constitutional silence on presidential arrestability as if that muteness somehow heralded an unrivaled immunity from detention, trial, and punishment.

B. Early History

A perusal of history points to the same conclusion: presidents lack immunity from criminal trial, conviction, or punishment. Consider the criminal amenability of one set of precursors to the federal Executive: namely, state executives. Some state constitutions made crystal clear that their chief executives (and others) could be prosecuted and punished.

Maryland had a constitutional rule that "if any governor, chancellor, [or] judge . . . shall receive . . . any part of the profits of any [other] office . . . his . . . appointment . . . shall be void," and he "shall suffer the punishment for wilful and corrupt perjury" after "conviction in a court of law."[58] This was a narrow provision, designed to ensure that officers did not usurp funds due to other officers. But it did mention the Governor particularly. The Maryland constitution further declared that if "any person" bribed, or received a bribe, in connection with an appointment to any office (including the governorship), they would be "forever disqualified" from holding office "on conviction in a court of law."[59] This too suggested criminal amenability of the Governor, albeit with removal as the constitutional penalty. Similarly, North Carolina provided that the Governor, and others, could be "prosecuted" for constitutional violations, maladministration, or corruption upon "presentment of the grand-jury of any court of supreme jurisdiction."[60]

57. *Id.* art. II, § 1, cl. 7.

58. MD. CONST. of 1776, art. LIII.

59. *Id.* art. LIV.

60. N.C. CONST. of 1776, art. XXIII. These provisions from Maryland and North Carolina perhaps raise a question: Was gubernatorial amenability to ordinary prosecution a function of these special articles, meaning that governors could be prosecuted only when there was an express clause in a constitution? I think not. The point of these provisions was to establish *constitutional* rules for the conduct of many persons and officers, not just for governors. In other words, these rules were

Before the Constitution's creation, some states supplied express privileges for their executives. Quite a few guaranteed salaries.[61] But occasionally the privileges were broader still. For instance, the South Carolina Constitution of 1776 decreed that the new state "President" would have the privileges that the colonial assembly had previously accorded the Royal Governor.[62] This was an express incorporation of known privileges for the new Executive.

More crucially for our purposes, some state constitutions granted express criminal immunities. The 1776 Virginia Constitution provided that its Governor could be impeached only "when he is out of office."[63] The effect of this immunity may seem obscure to modern readers because we regard impeachment almost exclusively as a means of removing officers, at least at the federal level. But Virginia adopted the British impeachment framework. In Great Britain, an impeachment conviction could result in "pains" and "penalties" of the sort visited upon ordinary offenders.[64] So too in Virginia.[65] The result is that the provision granted a limited immunity from certain criminal processes: namely, the impeachment process. Whether Virginia meant to preclude *all* criminal punishment of its sitting chief executive is unclear.[66]

Delaware's 1776 constitution was similar. Article XXIII protected an incumbent chief executive (the "President") from impeachment, conviction, and any "pains and penalties" stemming from impeachment.[67] But the Article also provided that "*all officers* shall be removed on conviction of

meant to police certain behaviors and were not designed to create narrow pockets of gubernatorial amenability. Read in context, these provisions actually signaled that the Maryland and North Carolina constitutions contemplated that all officers, governors included, were amenable to criminal prosecution.

61. *See* PRAKASH, *supra* note 49, at 54 (discussing state governors and pay).

62. S.C. CONST. of 1776, art. XXXI.

63. VA. CONST. of 1776, art. XVI ("The Governor, *when he is out of office* . . . shall be impeachable by the House of Delegates." (emphasis added)).

64. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *259 ("[A]n impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law" that does not "inflict pains and penalties beyond or contrary to the common law."); *see also* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 78 (1973) ("Undoubtedly English impeachments were criminal . . . because conviction could be followed by death, imprisonment, or heavy fine.").

65. VA. CONST. of 1776, art. XVI (stating that persons found guilty on an impeachment charge may be "subjected to such pains or penalties as the law shall direct").

66. There are two ways of reading the Virginia provision. On the one hand, one might suppose that the constitutional provision barred *any prosecution* of sitting governors, whatever the forum. That is to say, neither impeachment nor any other criminal process could be thrust on governors. On the other hand, one might conclude that the Virginia provision merely barred impeachment of governors, thereby leaving open the possibility that ordinary prosecutors might criminally prosecute Virginia governors.

67. DEL. CONST. of 1776, art. XXIII.

misbehavior at common law."[68] This particular clause of Article XXIII arguably applied to the Governor because he was an "officer,"[69] meaning that the Delaware constitution contemplated prosecutions of sitting presidents. In any event, what is certain is that in Virginia and Delaware the chief executives had a special and express criminal immunity: namely, immunity from the impeachment process and its potential for penal sanctions.

Some foreign constitutions likewise granted textual immunities. The French Constitution of 1791 declared that the King was "inviolable."[70] But it also provided for two forms of abdication.[71] Express abdication consisted of a formal renunciation of the Crown.[72] Constructive abdication consisted of actions like fleeing the nation or putting himself at the head of an army.[73] Once a monarch abdicated, he was an ordinary citizen and could be prosecuted for his post-monarchical acts.[74] In the Polish–Lithuanian constitution of the same year, the Crown was deemed "sacred and inviolable" and could not be held "responsible to the nation" by any legal process.[75] Perhaps because the reformed Polish Crown was but a figurehead,[76] there was no perceived need for any exceptions to this express immunity.

Given the practice of expressly incorporating desired executive privileges and immunities, even for crowned monarchs, it would have been rather surprising if the subject did not come up in the Constitutional Convention. As discussed, the Framers incorporated an executive privilege concerning compensation. This was important because it prevented Congress from using salary as a means of extorting chief executives. In the colonies, governors received pay only if they first danced to the legislatures' tune, usually after signing bills.[77] According to Benjamin Franklin, salaries were

68. *Id.* (emphasis added).

69. If Delaware governors could be removed by a conviction for misbehavior, as the text certainly suggests, it would appear that governors could not be impeached but could be criminally prosecuted. This is the inverse of the rule that many find within the Federal Constitution.

70. CONST. OF FRANCE tit. III, ch. II, § I(I) (1791), *in* BENJAMIN FLOWER, THE FRENCH CONSTITUTION; WITH REMARKS ON SOME OF ITS PRINCIPAL ARTICLES 14, 37 (1792).

71. *Id.* § I(V)–(VII), at 38.

72. *See id*. (noting that the King could abdicate by not taking his oath after being invited to do so or by retracting it).

73. *See id.* § I(VI)–(VII), at 38–39 (noting that the King could abdicate the throne without a formal act, i.e., constructively, by putting himself at the head of the army or fleeing the kingdom).

74. *Id.* § I(VIII), at 39.

75. NEW CONSTITUTION OF THE GOVERNMENT OF POL., ESTABLISHED BY THE REVOLUTION, May 3, 1791, art. 23.

76. *See* 2 J.L. DE LOLME, THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT 389 (1784) (stating that nobles in Sweden, Denmark, and Poland have reduced their Sovereigns to "simple [p]residents over their [a]ssemblies").

77. GREAT ISSUES IN AMERICAN HISTORY: FROM SETTLEMENT TO REVOLUTION, 1584–1776, at 272 (Clarence L. Ver Steeg & Richard Hofstadter eds., 1969).

spent on "the Purchase of good Laws."[78] Under the Federal Constitution, such coercion is impossible because even the most obstructionist presidents have a guaranteed salary.

As it turns out, the delegates were presented with a golden opportunity to grant other needful executive privileges and immunities. Late in the Philadelphia Convention, as legislative privileges and immunities were before the delegates, James Madison apparently "suggested also the necessity of considering what privileges ought to be allowed to the Executive."[79] Madison, coming from Virginia, saw the need to take up the matter. He knew that Virginia and Delaware had some executive immunities related to the criminal process[80] and hoped for some to be granted to the new President. His comment on the "necessity" of taking up the subject for deliberation perhaps signaled that, in early September of 1787, the proposed Executive lacked criminal immunities, temporary or otherwise. Madison's plea fell on deaf ears. Besides a guaranteed salary, the delegates never discussed, much less voted upon, any executive privileges or immunities, suggesting that they never sought to grant any additional protections for the presidency. A guaranteed salary was the only executive privilege.

That is largely how people outside the Convention subsequently read the Constitution: there were no implied privileges or immunities for the Executive. This point was made in three contexts. First, several commentators observed that the presidency had fewer privileges than the British monarchy or, for that matter, than members of Congress.[81] Second, some persons noted that presidents had the same privileges as ordinary people and, thus, were not placed on a pedestal.[82] Third, a few merely observed that presidents had no special privileges.[83]

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78. EVARTS BOUTELL GREENE, THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA 175 (1898).

79. Journal of the Constitutional Convention (Sept. 4, 1787), *in* 4 THE WRITINGS OF JAMES MADISON 369 (Gaillard Hunt ed., 1903). Madison was not alone in thinking about executive immunities. Alexander Hamilton's plan from June of 1787 originally provided "[a]fter removal from office . . . The Governor," and perhaps others, "may be prosecuted in the ordinary course of law for any crime." Alexander Hamilton's Plan, June 18, *in* 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 253, 255 (Merrill Jensen ed., 1976). He apparently deleted this text before he gave his speech. *See id.* at 255 n.1 (noting that where the lines in the text were crossed through the words were "apparently deleted by Hamilton").

80. *See* THE FEDERALIST NO. 39, at 242 (James Madison) (Clinton Rossiter ed., 1961) (stating that "in Delaware and Virginia [the chief magistrate] is not impeachable till out of office").

81. *See Publicola*, STATE GAZETTE OF N.C., Mar. 27, *reprinted in* 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 493, 496 (John P. Kaminski et al. eds., 1986) (While the King can do no wrong and is "not amenable to the courts of justice," the President is impeachable "by the representatives of the people" and can "be tried for his crimes.").

82. *Id.*

83. *See An American Citizen I, On the Federal Government*, INDEP. GAZETTEER, Sept. 26–29, *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 138,

A number of the Constitution's warmest advocates drew a contrast with the British monarchy. While British sovereigns could "do no wrong," meaning they were immune from all judicial process (both impeachment and ordinary criminal trials),[84] the American President would be different. Seeking to refute the notion that the Constitution established a monarchy, "Americanus," a New Jerseyan supporter of the Constitution,[85] wrote an essay observing that while the king was "above the reach of all Courts of law" and was "sacred and inviolable," presidents would not be.[86] "[N]one of [these immunities] are vested in the President."[87] In Virginia, "A Freeholder" argued that presidents would not be monarchs because they could "be impeached and removed at any time; or . . . be indicted if the case should require it."[88] Both Federalists were discussing incumbents and their lack of immunities. After all, no former chief executive is ever "the President."

Another Federalist likewise stated that courts could exercise jurisdiction over presidents and, thus, presidents would not be monarchical. The President "is under the immediate controul of the constitution, which if he should presume to deviate from, he would be immediately arrested in his career and summoned to answer for his conduct before a federal court, where strict justice and equity would undoubtedly preside."[89] This advocate of the Constitution apparently concluded that presidents could be dragged into court and that they might face criminal charges.

One proponent drew a clever three-way comparison. "An American Citizen"—Tench Coxe—contrasted the British monarchy with the American presidency. While the King could do no wrong, presidents would be quite different: "*[h]is person is not so much protected as that of a member of the House of Representatives; for he may be proceeded against like any other man in the ordinary course of law.*"[90] Coxe, who later served as assistant to the Treasury Secretary, understood that presidents have fewer privileges and immunities than federal legislators. Moreover, he asserted that presidents "*may be proceeded against like any other man in the ordinary course of*

141 (Merrill Jensen et al. eds., 1976) (stating that the President "may be proceeded against like any other man in the ordinary course of law").

84. *Publicola*, *supra* note 81.

85. Americanus was John Stevens, Jr., from Hoboken, New Jersey. *See* 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION 171 (John P. Kaminski et al. eds., 2003).

86. *Americanus II*, N.Y. DAILY ADVERTISER, Nov. 23, 1787, *reprinted in* 19 *id.* at 287, 288–89.

87. *Id.*

88. *A Freeholder*, VA. INDEP. CHRON., Apr. 9, *reprinted in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION 719, 723 (John P. Kaminski et al. eds., 1990).

89. James Sullivan, *Cassius, X*, MASS. GAZETTE, Dec. 21, 1787, *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 38 (Paul Leicester Ford ed., Brooklyn, N.Y. Hist. Printing Club 1892).

90. *An American Citizen I*, *supra* note 83, at 138, 141 (emphasis in original).

law,"[91] meaning they could be arrested, tried, and punished. In other words, when presidents violated the law, they could be held responsible like anyone else, i.e., by ordinary civil and criminal process.

Others emphasized Coxe's last point that presidents were on the same plane as ordinary people. Pennsylvanian James Wilson asked:

> Does even the first magistrate of the United States draw to himself a single privilege or security that does not extend to every person throughout the United States? Is there a single distinction attached to him, in this system, more than there is to the lowest officer in the republic?[92]

These were rhetorical questions. Presidents would enjoy no unique privileges or immunities concerning the application of the law. Similarly, a Marylander wrote that significant executive authority was vested in "a single man, the representative of the people, chosen once in four years, and enjoying no privilege, as an individual, more than his fellow-citizens."[93] In North Carolina, James Iredell assured that:

> No man is better than his fellow-citizens, nor can pretend to any superiority over the meanest man in the country. If the President does a single act by which the people are prejudiced, he is punishable himself, and no other man merely to screen him. If he commits any misdemeanor in office, he is impeachable, removable from office, and incapacitated to hold any office of honor, trust, or profit. If he commits any crime, he is punishable by the laws of his country, and in capital cases may be deprived of his life.[94]

Though Anti-federalists were eager to underscore the Constitution's many monarchical elements, one agreed that presidents were no more privileged than ordinary citizens. *The Federal Farmer* observed that presidents would have "no rights, but in common with the people."[95] In other words, though

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91. *Id.* (emphasis in original).

92. James Wilson, Pa. Delegate to the Const. Convention, Remarks Before the Const. Ratifying Convention of Pa. (Dec. 12, 1787), *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 523 (Jonathan Elliot ed., Washington, 1836) [hereinafter DEBATES ON THE CONSTITUTION].

93. *An Annapolitan*, ANNAPOLIS MD. GAZETTE, Jan. 31, 1788, *reprinted in* 11 DOCUMENTARY HISTORY OF THE RATIFICATION 218, 220 (John P. Kaminski et al. eds., 2015).

94. DEBATES ON THE CONSTITUTION, *supra* note 92, at 109. *See also* Marcus III, NORFOLK AND PORTSMOUTH J., Mar. 5, *reprinted in* 16 DOCUMENTARY HISTORY OF THE RATIFICATION 322 (John P. Kaminski et al. eds., 1986) ("[H]e is not exempt from a trial, if he should be guilty, or supposed guilty, of [treason] or any other offence."). "Marcus" was a pseudonym for James Iredell. JAMES IREDELL, ENCYC. BRITANNICA (Oct. 16, 2020), https://www.britannica.com/biography/James-Iredell [https://perma.cc/Y7RU-64BL].

95. Federal Farmer, An Additional Number of Letters to the Republican, Letter XIV, Jan. 17, 1788, *reprinted in* 17 DOCUMENTARY HISTORY OF THE RATIFICATION 325, 332 (John P. Kaminski et al. eds., 1995).

endowed with momentous powers, presidents had no more privileges than did ordinary citizens.

Finally, a few just said the President had no privileges. James Wilson, quoted earlier, also said that though the President is "placed high, and is possessed of power, far from being contemptible; yet not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment."[96] The President was subject to the laws and bereft of even a "*single privilege*." Addressing all three branches, one New Yorker rubbished charges of an aristocracy, noting there were no subterfuges regarding powers and privileges: "The Constitution plainly, openly, and without disguise tells us the titles, offices, powers, and privileges of these 'chief agents,' and the purposes of their appointment. What snake in the grass is there here?"[97] In other words, constitutional officers only enjoyed express privileges (granted "plainly, openly, and without disguise"). Reading this, one might well conclude that because the Constitution granted no privileges plainly and openly concerning the criminal process, none were conveyed to any branch.

In sum, Federalists repeatedly described the presidency as lacking implicit privileges or immunities. Although Anti-federalists saw a monarchy in the presidency and criticized it in a host of ways, they did not respond to Federalists by insisting that the Constitution conveyed a host of privileges and immunities to chief executives. Indeed, some opponents of the Constitution agreed with Federalists that the presidency lacked implied shields and protections. Despite sharp disagreements on other matters, there seemed to be none on this point—at least at this stage.

Under the new government, this view continued to be voiced. For instance, in 1789, some said the President could be "put to Gaol for Debt,"[98] a comment that fairly implied that presidents had no privileges from criminal prosecution. After all, if a President could be sent to debtor's prison, he surely could be imprisoned for crimes. Picking up the more general point, Senator William Grayson of Virginia was adamant that the "President was not above the law," arguing that presidents likely would be sued and that they might be

96. James Wilson, Pa. Del. to the Const. Convention, Remarks Before the Const. Ratifying Convention of Pa. (Dec. 4, 1787), *in* 1 COLLECTED WORKS OF JAMES WILSON 210, 236 (Kermit L. Hall & Mark David Hall eds., 2007) (emphasis omitted).

97. Letter from New York, Oct. 24 & 31, 1787, *reprinted in* 3 DOCUMENTARY HISTORY OF THE RATIFICATION 380, 382 (Merrill Jensen et al. eds., 1978).

98. The Notes of John Adams (July 15, 1789), *reprinted in* 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE CONSTITUTION OF THE UNITED STATES: THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 446 (Kenneth R. Bowling & Helen E. Veit eds., 1998) (quoting Oliver Ellsworth, Conn. Delegate to the Const. Convention, Remarks During the Debate on the Foreign Affs. Act [HR-8]).

prosecuted for murder.[99] He thought it particularly absurd to suppose that judicial writs should issue in the President's name, as some Senators proposed. If this happened, the nation might witness this incongruous indictment: "The Jurors of our Lord the President, present that the President committed Murder."[100] His argument was entirely premised on his belief that presidents were subject to the criminal process.

A decade later, Senator Charles Pinckney observed that the Framers carefully specified privileges because they feared abuse:

> Let us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect. . . . No privilege of this kind was intended for your Executive . . . . The Convention . . . well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more.[101]

Pinckney could speak from experience; he had been a delegate to the Constitutional Convention. Because he was from South Carolina, perhaps he knew of the grant of executive privileges in that state's 1776 constitution.

In any event, the Senator had it right. Privileges and immunities were not left to shadowy implication to be inferred by readers. Save for a guaranteed salary, the American President has no other privileges and, hence, had fewer privileges and immunities than did members of Congress. The Constitution had eschewed the examples of Delaware, Virginia, South Carolina, Poland, and France by creating a limited criminal shield for Congress (the Speech and Debate Clause) and none for the chief executive.

C. Constitutional Structure

After the Constitution's creation, some in Congress regarded sitting presidents as objects of reverence. Such legislators favored truly spectacular presidential immunities. One senator supposedly said that no one could touch a single hair on the President's head.[102] Another said the President was "a kind of sacred person,"[103] meaning unreachable by the ordinary courts. A third said the President was not "subject to any process whatever[,] could

99. *Id.* (quoting William Grayson, Va. Delegate to the Const. Convention, Remarks During the Debate on the Foreign Affs. Act [HR-8]).

100. *Id.* (quoting William Grayson, Va. Delegate to the Const. Convention, Remarks During the Debate on the Foreign Affs. Act [HR-8]).

101. Senator Charles Pinckney, Remarks Before the United States Senate (Mar. 5, 1800), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, app. A, 384, 385 (Max Farrand ed., 1911).

102. *See, e.g.*, Maclay, *supra* note 1, at 112 (noting a senator's claim that "[i]t is sacrilege to touch a hair [on the President's] head").

103. *Id.* at 167.

have no action whatever brought against him[,] and was above the power of all judges, justices, etc."[104] Presidents were only subject to one form of judicial process: the impeachment process.

Such pronouncements led Pennsylvanian William Maclay to wonder what would happen in the case of a murderous president: "Suppose the President committed murder in the street. Impeach him? . . . But [suppose] . . . he runs away. But I will put up another case. Suppose he continues his murders daily, and neither House is sitting to impeach him."[105]

Senator Maclay's queries never received satisfactory responses. That was true in 1789, and it remains the case to this day.

Maclay made several perceptive points. First, if no one can arrest a president, the latter might never face punishment if she fled before any impeachment. Consider a modified version of his hypothetical: The House impeaches the President for treason. On the eve of an expected Senate conviction and removal, to be followed by a regular criminal trial, the President heads overseas, ostensibly for a "fact-finding trip." Everyone knows the real reason—the President does not want to be arrested, tried, and punished.

Second, if a sitting President cannot be arrested, he might continue to commit nefarious acts while the nation anxiously waited for an elaborate and time-consuming impeachment process to stammer to a conclusion. Concluding that presidents cannot be arrested means that presidents can act with impunity for weeks or months as the impeachment process ambles away.

Third, if the House is not sitting when a President commits crimes, it cannot disinter the creaky impeachment machinery. We must remember that in earlier eras neither chamber was sitting for the entire year. In 1790, for instance, Congress met for less than 200 days.[106] Again, under the theory of presidential immunity from the criminal process, an incumbent may continue her wrongdoing with absolutely no check—not even the possibility of arrest—during the months Congress is out of session. Moreover, there is no constitutional mechanism for calling Congress back early, save for the President's power to summon the chambers on "extraordinary [o]ccasions."[107] Needless to say, the President will not summon Congress when she is accused of serious misdeeds, much less when she seeks to overthrow the established order. In the meantime, until a delayed and

104. *Id.* at 167 (noting such arguments and adding, "[f]or what, said they, would you put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government?").

105. *Id.* at 167.

106. *1st to 9th Congs. (1789–1807)*, OFF. OF HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Session-Dates/1-9/ [https://perma.cc/JLJ8-2TV3].

107. U.S. CONST. art. II, § 3.

protracted impeachment comes to its close, nothing may be done to halt the criminal acts of a President.

Even worse, there is a further parade of horribles that Senator Maclay failed to mention, a sad procession that casts doubt on the claim that presidents have immunity from criminal process and punishment. Suppose the incumbent orders her servile aides to arrest hundreds of representatives and senators.[108] The Constitution provides that the chambers must have quorums to act.[109] Without a quorum, neither chamber may take any constitutional act, save for attempting to round up members to secure a quorum.[110] The preclusion of quorums would wholly block any attempt to impeach in the House and, thereafter, to remove via conviction in the Senate. Knowing this, a President hell-bent on power likely would arrest her strongest adversaries, and the only ones who apparently have any chance of lawfully halting her vile measures: namely, members of Congress.

Indeed, a cunning President might arrest no more than fifty-one senators and thereby incapacitate the impeachment system. No Senate quorum means no Senate trial. No Senate trial means no removal from office. And under the logic of those who infer an unstated presidential immunity from arrest, prosecution, and punishment, incapacitating the Senate means that there exists no lawful means of incapacitating the rogue. While under our responsible Constitution a President certainly can "do wrong," apparently nothing official could be done to halt her wrongs, no matter how wicked, unless members of Congress managed to escape her clutches.

In the face of the President who incapacitates Congress, society cannot be utterly hamstrung while she goes about committing wrongs, heinous or otherwise. Surely other authorities can arrest and incapacitate her. Suppose a general, faithful to the Constitution, confronts a usurping President and halts the President's attempts to arrest federal legislators. Must the loyal general do no more than free the arrested senators and representatives and release her commander in chief, thereby permitting the latter to commit more mayhem? Surely the dutiful general should be able to detain the President and see that she is tried, possibly in the ordinary courts. It cannot be that the wicked President may continue her coup as the nation awaits a House impeachment and a Senate trial that may never occur.

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108. Presidents might have sinister or sound reasons for arresting federal legislators. The sinister reasons are obvious; namely, members pose a threat to attempts to consolidate power and arresting them incapacitates them. For sound reasons, look no further than the Civil War and the potential need to incapacitate members of Congress before they commit more acts of treason and sabotage the effort to crush their rebel compatriots.

109. U.S. CONST. art. I, § 5 ("[A] Majority of each [chamber] shall constitute a Quorum to do Business . . . .").

110. *See id.* (providing chambers "may be authorized to compel the [a]ttendance of absent [m]embers").

Finally, the absence of quorums in one or both chambers hardly exhausts the profound difficulties. Senator Maclay assumed that murder is an impeachable offense. But this is hardly evident. In particular, we must wrestle with the possibility that though a President has committed criminal offenses, and may continue to do so, a large enough cohort of either chamber may conclude that such crimes are not impeachable because they are not "high Crimes and Misdemeanors."[111] During the Clinton impeachment, some of his defenders insisted that only official acts were impeachable offenses.[112] This would exclude assaults and murders, at least when done in a private capacity. If many crimes, dreadful or otherwise, are not impeachable because the President committed them in his personal capacity, then it follows that the President cannot be removed and may continue to commit such crimes with impunity for the duration of his term.

These scenarios might seem farfetched. At least they did until late 2020. As noted earlier, after Joseph Biden seemed the projected winner, President Trump asserted that he was the victim of massive voter fraud.[113] Some advisors urged him to use the military and hold a new election.[114] For his part, Trump hinted that he might try to stay in office beyond January 20, 2021.[115] The latter possibility may have been a trial balloon designed to gauge popular support within his base for the idea. The greater the popular backing of the idea, the more it becomes a plausible option worth mulling.

Was Trump singular in considering such dark possibilities? Time will tell. What is clear is that as society becomes increasingly polarized along partisan lines it is easier to imagine the worst of the other side and to believe that the winners must have cheated in some way. We might well witness other losing presidents complain that their partisan opponents stole their elections, and we might see greater public support for the use of official resources—the military in particular—to vindicate the claim that an election was stolen and to prop up the supposed victor.

Any interpretation of the Constitution that demands impeachment and removal before arrest and prosecution of a President makes it possible for a chief executive to continue to violate the law, including criminal laws, and to continue to subvert the Constitution. The arrest of a sitting President serves two distinct purposes: to ensure presence at trial and to incapacitate someone who might commit further crimes and constitutional wrongs. Of course, incapacitation is impossible if the criminal justice system must await a protracted House impeachment and Senate trial that might never occur or,

111. U.S. CONST. art. II, § 4.

112. H. COMM. ON THE JUDICIARY, IMPEACHMENT OF WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 105-830, at 203–05 (1998) (minority view).

113. Milligan, *supra* note 6.

114. Haberman & Kanno-Youngs, *supra* note 9.

115. Brown et al., *supra* note 10.

worse yet, might result in an acquittal of someone guilty of crimes but not impeachable offenses.

If I am right, what are we to make of the statements from a few Founding Era senators that courts could not issue any process to presidents and that presidents were sacred and untouchable? Of course, I believe they were mistaken. But why they were mistaken is interesting and revealing.

They were wrong because they extrapolated from a now-obscure interpretation of the Constitution. These senators read the Constitution, perceived a limited monarchy, and then inferred that presidents must be above all judicial process save for the impeachment. They were hardly alone in espying a monarch; many people observed that the presidency resembled a monarchy, including Thomas Jefferson,[116] John Adams,[117] several Anti-federalists,[118] and even foreigners.[119] The vesting of considerable powers—veto, treaty, appointment, pardon, military command, and others—in a single person naturally brought to mind a monarchy. We overlook the resemblance because we forget that elective monarchies were a common species of monarchy in the eighteenth century and because we are unfamiliar with the categories of mixed monarchies and mixed republics.[120] Montesquieu himself said that England was a "republic, disguised under the form of a monarchy."[121] This sounds jarring to our ears.

The senators' mistake was building indiscriminately upon the Constitution's many monarchical elements. They were hardly alone. The "monarchical" party in Congress pursued a grand title for the President (his Highness),[122] wanted presidents listed in the enacting clauses of statutes (be it enacted by the President, with Congress),[123] and sought to have judicial writs issued in the President's name (George Washington hereby commands

116. *See* Letter from Thomas Jefferson to John Adams (Nov. 13, 1787) *in* 12 THE PAPERS OF THOMAS JEFFERSON, 7 AUGUST 1787 TO 31 MARCH 1788, at 351 (Julian P. Boyd ed., 1955) ("Their President seems a bad edition of a Polish King.").

117. Letter from John Adams to Roger Sherman (July 18, 1789), FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Adams/99-02-02-0682 [https://perma.cc/5DJF-C698].

118. 3 DEBATES ON THE CONSTITUTION, *supra* note 92, at 58, 485.

119. Letter from John Adams to William Tudor (June 28, 1789), *in* DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 16 CORRESPONDENCE: FIRST SESSION, JUNE–AUGUST 1789, at 870–71 (Charlene Bangs Bickford et al. eds., 2004) (quoting the Prince of Orange making this claim in French).

120. *See generally* William E. Scheuerman, *American Kingship? Monarchical Origins of Modern Presidentialism*, 37 POLITY 24 (Jan. 2005) (supporting the idea that mixed monarchies were a somewhat commonly understood phenomena in Europe during the relevant time period).

121. 1 THE COMPLETE WORKS OF M. DE MONTESQUIEU 88 (printed for T. Evans & W. Davis, 1777).

122. Maclay, *supra* note 1, at 25–26.

123. *Id.* at 16–17, 19.

you to attend court).[124] The House rejected these attempts to make the system even more monarchical. But that did not stop the movement, as the Supreme Court unilaterally decided to have judicial process issue in the name of George Washington.[125] In any event, the point is that there was a struggle between different conceptions of the Constitution. As Thomas Jefferson put it years later:

> Where a constitution, like ours, wears a mixed aspect of monarchy and republicanism, it's citizens will naturally divide into two classes of sentiment . . . . Some will consider it as an elective monarchy which had better be made hereditary, and therefore endeavor to lead towards that all the forms and principles of it's administration.[126]

Jefferson was right. In the early years, some saw more monarchy in the Constitution than was warranted and sought to add to the Constitution's monarchical elements.

Modern advocates of presidential immunity never expressly invoke monarchy. They would run away from any association. Moreover, they do not make the sort of sweeping statements that senators made in 1789; they do not claim the President has complete immunity from judicial or congressional process. But elements of the modern case for implied immunity echo the assertions that an unabashed monarchist would make. For instance, the OLC has argued that the President "is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus in both foreign and domestic affairs."[127] I consider related claims at length in Part II. For present purposes, note that the assertion is somewhat redolent of a monarchy. Not the bicycle monarchs of modern Europe, mind you, but the powerful kings of the eighteenth century. The claim is that because presidents are icons of the nation they also must be "inviolable." This is an inference too far. Though the presidency surely resembles a monarchy, neither the office, nor its transient occupants, are sacrosanct. Presidents are not sacred persons.[128]

124. *Id.* at 166–67.

125. Rule 4, 2 U.S. (2 Dall.) 399, 400 (1791).

126. Letter from Thomas Jefferson to James Sullivan (Feb. 9, 1797), *in* 29 THE PAPERS OF THOMAS JEFFERSON, 1 MARCH 1796 TO 31 DECEMBER 1797, at 289 (Barbara B. Oberg ed., 2002).

127. 1973 OLC Memo, *supra* note 16, at 30.

128. In other work, I have argued that presidents may pardon themselves because the Pardon Clause covers all federal offenses and because presidents are certainly capable of committing such offenses, either before becoming President or while in office. *See* PRAKASH, *supra* note 49, at 108 (providing textual and structural constitutional arguments to support Presidential self-pardons).

Though my claims here do not logically conflict with my previous assertion about self-pardons, some clarifying points are requisite and helpful. First, any self-pardon would bar federal prosecution of the relevant offenses, even after the President left office. Second, some presidents will choose not to pardon themselves because any such pardon will seem an admission of guilt. In other words, if the President is innocent, why the need for a self-pardon? Third, some presidents may prefer a trial because it puts their claims of innocence to the test and (hopefully) demonstrates that they

D. Practice

New York and New Jersey indicted Vice President Aaron Burr for killing Alexander Hamilton, but Burr was never tried for these crimes.[129] In an orchestrated move, Vice President Spiro Agnew pled "no contest" to federal crimes at the precise moment he resigned.[130] But the Department of Justice already had concluded that a Vice President could be tried while in office.[131]

No one has yet indicted, much less prosecuted and convicted, a sitting President. Some might believe that this practice of abstention is important as a matter of originalist methodology[132] or otherwise. They might contend that there is an established practice of not arresting, indicting, or prosecuting our presidents, one that we ought to accept as a form of common law.

The difficulty with such claims is that one can discover and describe any number of patterns. Those favoring truly sweeping immunity might take the argument to its extreme, asserting that practice establishes that presidents can never be prosecuted, *even after leaving office*. It would seem that no President has ever been prosecuted, either while in office or after having left.[133] Contrariwise, those favoring presidential amenability might infer a rather different lesson by drawing a different circle. They might argue that all of our federal officers, executive and judicial, are amenable to the reach of the criminal law, at least in their private capacity. That is the lesson of Aaron Burr, Spiro Agnew, and federal judges, some of whom were prosecuted and jailed while in office.[134] In other words, by expanding the category of officers, they can say that practice clearly favors their conception of presidential accountability. My point is that there may be no neutral or natural way of describing practices. What counts for the numerator (the number of

actually are innocent. Some may want their day in court. Fourth, self-pardons may never bar prosecution for state offenses, for the Pardon Clause does not extend to state offenses. This means that presidents have absolutely no power over a subset of potential prosecutions. Lastly, if forced to choose between my assertion about self-pardons and my detailed arguments for the lack of immunity from federal prosecution, I am more confident of the arguments I make here.

129. DAVID O. STEWART, AMERICAN EMPEROR: AARON BURR'S CHALLENGE TO JEFFERSON'S AMERICA 47, 50, 77 (2011).

130. Ben A. Franklin, *Agnew Plea Ends 65 Days of Insisting on Innocence*, N.Y. TIMES, Oct. 11, 1973, at A1, https://www.nytimes.com/1973/10/11/archives/agnew-plea-ends-65-days-of-insisting-on-innocence-agnews-plea-of-no.html [https://perma.cc/YJ3N-AFSZ].

131. ROBERT H. BORK, SAVING JUSTICE: WATERGATE, THE SATURDAY NIGHT MASSACRE, AND OTHER ADVENTURES OF A SOLICITOR GENERAL 64 (2013).

132. *See generally* Baude, *supra* note 26 (arguing that practice can elucidate the original meaning of ambiguous constitutional provisions).

133. On his last day in office, President Bill Clinton agreed to what amounted to a plea deal with Robert Ray. *Mr. Clinton's Last Deal*, N.Y. TIMES (Jan. 20, 2001), https://www.nytimes.com/2001/01/20/opinion/mr-clinton-s-last-deal.html [https://perma.cc/K5CY-9UQS]. But he was not prosecuted, and the plea deal eliminated any such possibility. *Id.*

134. Subpart II(A) will discuss this practice in greater detail.

crimes) and the denominator (the relevant officer pool) is often in the eye of the beholder.

Moreover, we should put little weight on the absence of specific practices of arresting or prosecuting. Some practices are unprecedented until they are not.[135] And, as contrary practices accumulate, that which seemed exceptional may become routine. We have particular reasons for discounting the apparent absence of certain practices vis-à-vis presidents in particular. One reason is that a set of prosecutors most likely to have jurisdiction over sitting presidents—U.S. attorneys—serves at the President's pleasure. Subordinates are rather unlikely to hound their superiors. Furthermore, I suppose that most presidents have done nothing criminal, making it difficult to draw inferences from the absence of arrests or prosecutions. When you have prosecutors beholden to the targets and a small sample size of malfeasance, one should not expect a rich history of arrests and prosecutions.

In any event, we may belatedly discover that sitting presidents have had a few brushes with crime and punishment. A few years ago, the *Washington Post* recounted how a sitting President was arrested and taken to a police station, posted a bond, and failed to contest his guilt.[136] In 1872, a Black police officer, William H. West, arrested President Ulysses S. Grant for speeding in his carriage.[137] Then, as now, reckless driving imperils innocent bystanders. The day before the actual arrest, West had merely stopped the President.[138] After Grant asked what was amiss, something every speeder does in the hopes that feigning innocence will somehow confuse the police, Officer West replied, "I want to inform you, Mr. President, that you are violating the law by speeding along this street."[139] In that first brush with the law, Grant received no more than an admonition. The next day, Grant sped again, and Officer West halted him once more.[140] West apparently said, "I am very sorry, Mr. President, to have to do it, for you are the chief of the nation . . . but duty is duty, sir, and I will have to place you under arrest."[141] "All right," said Grant, "where do you want me to go with you?"[142] West

135. For instance, before *Zivotovsky v. Kerry*, the Court had apparently never held that the President could ignore a statute of Congress in the field of foreign affairs. 576 U.S. 1, 61 (2015) (Roberts, C.J., dissenting).

136. Michael S. Rosenwald, *The Police Officer Who Arrested a President*, WASH. POST (Dec. 16, 2018, 7:00 PM), https://www.washingtonpost.com/history/2018/12/16/police-officer-who-arrested-president/ [https://perma.cc/CGT8-8PJQ].

137. *Only Policeman Who Ever Arrested a President*, SUNDAY STAR, Sept. 27, 1908, pt. 4, at 2, https://chroniclingamerica.loc.gov/lccn/sn83045462/1908-09-27/ed-1/seq-46/ [https://perma.cc/QEC3-CCJ4] [hereinafter SUNDAY STAR].

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

drove Grant's carriage to the police station, and Grant posted twenty dollars in collateral for the next day's court appearance.[143] The President's compatriots, each of whom was also guilty, also posted collateral.[144] In today's money, this would amount to north of $400.[145] But President Grant did not appear the next day, likely because he was guilty and thought it better to forfeit the collateral.[146]

The champions of presidential immunity have yet to address President Grant's run-in with the police, his arrest, and what I would regard as his de facto guilty plea. They have not attempted to fit the episode into their theory of presidential immunity from arrest, trial, and punishment. Officer West's respectful but firm treatment, and President Grant's willing acceptance of it, are highly pertinent. The man known as "Unconditional Surrender"[147] wholly surrendered to West. Grant's submission signaled a welcome willingness to honor a familiar principle: every American is equal before the law. President Grant did not hide behind his title and position, resist arrest, or even contest his obvious guilt. It would have been galling and absurd had Grant declared that he could not be bothered to go to the police station because, after all, he had to conduct the nation's business. A President engrossed in the idle and dangerous amusement of racing carriages on city streets simply could not be seen to moan that an arrest and a trip to the police station would distract from his official calling.

* * *

There are many sound reasons to reject the claim of presidential immunity from the criminal process. Textually, executive immunities exist when they are specifically granted, as was true in many constitutions of the era. In the absence of such immunities, executives were subject to criminal law. Relatedly, it makes little sense to infer a sweeping immunity from any criminal process, especially an immunity that dwarfs the extremely narrow shields expressly granted to members of the first branch. As a matter of early history, many denied that presidents had unique legal immunities. Instead, many observed that our Executive, however powerful, was never placed above the law, either temporarily or otherwise. Unlike the British monarch, American presidents did not enjoy the protection of the legal fiction that they could do no wrong. As a matter of structure, as Senator Maclay pointed out

143. *Id.*

144. *Id.*

145. *See Value of $20 from 1872 to 2021*, CPI INFLATION CALCULATOR (2021), https://www.in2013dollars.com/us/inflation/1872?amount=20 [https://perma.cc/ZU6D-F79T] (producing a calculation that "$20 in 1872 is equivalent in purchasing power to about $448.47 today").

146. *Id.*

147. *See e.g.*, ALBERT MARTIN, UNCONDITIONAL SURRENDER: U.S. GRANT AND THE CIVIL WAR (1994).

in the First Congress, certain forms of executive wrongdoing might necessitate an immediate response, lest the Executive run wild while a plodding impeachment process lumbers toward an uncertain conclusion. From the perspective of practice, a sitting President has been arrested, and arguably punished, thereby establishing a precedent for presidential amenability to the criminal law. President Grant's laudable behavior reflects an eminently sensible (and correct) reading of the Constitution. Our powerful presidents are just like us; they too lack constitutional immunities relating to ordinary criminal process.

II. Refuting the Cases for Criminal Privileges and Immunities

A straightforward reading of the Constitution—that presidents do not enjoy a constitutional immunity from criminal prosecution and punishment—best coheres with text, structure, history, and practice. But I have yet to give the many counterarguments their full due. First is the notion that even if Article II does not grant any special privileges, Article I does. In particular, some might suppose that the impeachment clauses of Article I mandate a sequence: impeachment and removal first, followed by criminal sanction. Second, a few insist that presidents must have some immunities or else their office cannot function the way the Constitution supposes it must. Per Joseph Story, immunity is "necessarily implied from the nature of [the Executive's] functions."[148] Third, perhaps the nationwide election of presidents and the expectations of the American people justify some immunity. Lastly, perhaps the unhappy prospect of partisan and parochial state prosecutors persecuting the chief magistrate of the United States forces us to recognize a narrow immunity against *state* prosecutions and punishments.

A. The Judgment Clause Imposes an Impeachment-First Sequence

Article II, Section 4 announces which officers may be impeached and the permissible grounds of impeachment.[149] Provisions in Article I lay out the process.[150] One may be relevant to the sequencing of impeachment and ordinary prosecutions:

148. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563 (1833).

149. U.S. CONST. art. II, § 4 ("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.").

150. *Id.* art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President . . . is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.").

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.[151]

Some might imagine that this Judgment Clause signals that a criminal process against an impeachable officer can commence only after House impeachment and Senate trial, conviction, and removal. Indeed, Publius noted that presidents may be impeached, tried, and removed, and be "afterwards" subject to the "ordinary course of law."[152]

No one doubts that the Constitution contains provisions imposing a sequence. Under Article V, amendments must be proposed and sent to the states before the latter may ratify them.[153] Similarly, per the Presentment Clause, a President cannot veto a bill in advance of its presentment.[154] And though the Constitution does not declare as much, everyone understands that House impeachment must precede Senate trial.

To read the Judgment Clause as if it mandated a particular order of proceedings is to misread it. The Clause does not demand a sequence akin to the nursery rhyme's lesson of "first comes love, then comes marriage, and then comes baby in the baby carriage." Rather, the Clause signals that principles of double jeopardy do not attach to impeachment proceedings. Hence, while a Senate conviction does not bar a criminal prosecution, a Senate conviction is hardly a necessary precursor for criminal proceedings. More generally, a criminal prosecution might *precede* a House impeachment or, for that matter, Senate trial, conviction, and removal.

Reading the Clause as imposing a sequence may require us to suppose that an officer who is *acquitted* by the Senate *can never be tried in the ordinary courts*. The Judgment Clause provides that "the Party convicted" is "liable and subject to Indictment, Trial, Judgment and Punishment."[155] In other words, we might have to suppose that the double jeopardy exception only applies to people *convicted*, at least as a matter of the text. That is, if the Senate does not "convict[]," then "the Party" is, by negative implication, *not*

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151. *Id.* art. I, § 3, cl. 7.

152. THE FEDERALIST NO. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also id.* NO. 65, at 399 ("After having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law.").

153. U.S. CONST. art. V.

154. *Id.* art. I, § 7, cl. 2. Recently there was speculation about whether the Senate could consider impeachment articles before the House delivered them to the Senate. The Constitution does not directly address the issue. What is clear, however, is that the Senate cannot conduct an impeachment trial without a House impeachment.

155. *Id.* art. 1, § 3, cl. 7.

"liable" to prosecution because her acquittal in the Senate has a preclusive effect on any criminal proceedings.

Further, suppose enough senators conclude that, though an officer impeached by the House has committed several felonies, the offenses are not impeachable because they do not constitute "high crimes and misdemeanors."[156] In that case, the officer–felon could not be removed via impeachment and, therefore, would forever evade prosecution and punishment, even after she left office. After all, the officer would not have been "convicted," and, therefore, would not be "liable" to prosecution. Needless to say, this is a bizarre result because it suggests that certain guilty officers can never be criminally prosecuted.[157]

Early Congresses bypassed all these absurdities, repeatedly concluding that the Clause imposed no impeachment-first rule. Legislators enacted laws making clear that sitting officers could be prosecuted. Indeed, Congress repeatedly decreed that a conviction would trigger a *statutory* removal from office, thereby rendering it manifest that incumbents could be prosecuted.

In the 1789 Treasury Act, Congress declared that officers who violated certain provisions would be "guilty of a high misdemeanor," would have to pay a three-thousand-dollar penalty, and "shall upon conviction be removed from office, and forever thereafter incapable of holding any office."[158] Similarly, a tax act provided that "officer[s] of the customs . . . . convicted" of taking bribes would "be forever disabled from holding any office of trust or profit under the United States."[159] Another act stated that port collectors and surveyors convicted of filing false reports or misappropriating funds would be "rendered incapable of serving in any office of trust or profit under the United States."[160] A similar law ousted tax collectors who colluded to evade the spirit taxes or embezzled funds.[161] Finally, and most tellingly, an act provided that federal "judges" convicted of bribery may be "fined and imprisoned" and "shall forever be disqualified to hold any office of honour, trust, or profit under the United States."[162] In these acts, Congress made clear that sitting officers could be tried and that courts would oust those found

156. *See supra* text accompanying notes 111–112.

157. Some state constitutions made clear that regular prosecution was possible even after an impeachment acquittal. *See* PA. CONST. of 1790, art. IV, § 3 (noting that the "governor, and all other civil officers . . . whether convicted or acquitted" shall be subject to criminal prosecution).

158. Act of Sept. 2, 1789, ch. 12 § 8, 1 Stat. 65, 67 (amended 1791).

159. Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46 (repealed 1790).

160. Act of Sept. 1, 1789, ch. 11, § 34, 1 Stat. 55, 64–65 (repealed 1793).

161. Act of Mar. 3, 1791, ch. 15, § 49, 1 Stat. 199, 210 (repealed 1802) (The "officer shall forfeit his office, and shall be disqualified for holding any other office under the United States.").

162. Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117 (repealed 1875). For a discussion of why this statute is consistent with good behavior tenure, see generally Saikrishna Prakash & Steve Smith, *How to Remove a Federal Judge*, 116 YALE. L.J. 72 (2006).

guilty. By signing these acts, the first President must have regarded these provisions as constitutional.

As a matter of more recent practice, ordinary courts have convicted federal officers before impeachment and removal. While on the bench, Circuit Judge Otto Kerner was convicted of mail fraud.[163] Before the Senate ousted District Judge Harry Claiborne, he was found guilty of tax evasion.[164] District Judge Walter Nixon was languishing in jail, incarcerated for perjury, before the House impeached him and the Senate convicted him.[165] And Samuel Kent was convicted of obstruction of justice while serving as a district judge.[166] To date, the Senate has not convicted a sitting executive officer, likely because presidents fired malfeasant subordinates or because such wrongdoers had the good sense to resign.[167] Despite the absence of such a case, no scholar that I am aware of doubts that civil executive officers, other than the President, can be convicted and punished before impeachment.

Because there is but one Judgment Clause applicable to *all* civil officers, we have little reason to read the Clause as if it created a special rule for some subset of those officers. Just as the power to "regulate commerce" should have the same scope when it comes to interstate, foreign, and Indian commerce,[168] so too the Judgment Clause should prescribe the same rules for presidents and every other civil officer of the United States. We should not read that unitary Judgment Clause as if it mandated dual sequencing rules: one made-to-order for presidents and one for everyone else.

If I am right, what are we to make of Alexander Hamilton's claim that *after* impeachment, presidents are liable to prosecution? He was right. The President, like every other officer, *can be prosecuted* after impeachment and removal. But that is not the same thing as saying that presidents could be prosecuted *only* after impeachment and conviction. I doubt that we should

163. United States v. Isaacs, 493 F.2d 1124, 1131 (7th Cir. 1974).

164. United States v. Claiborne, 765 F.2d 784, 788 (9th Cir. 1985).

165. Nixon v. United States, 506 U.S. 224, 226–28 (1993).

166. Press Release, U.S. Dep't of Justice, U.S. District Court Judge Sentenced to 33 Months in Prison for Obstruction of Justice (May 11, 2009), https://www.justice.gov/opa/pr/us-district-court-judge-sentenced-33-months-prison-obstruction-justice [https://perma.cc/4HYD-5PRT].

167. The House has only impeached four executives, one after he left office (William Belknap, former Secretary of War) and three while in office (Andrew Johnson, Bill Clinton, and Donald Trump). *See List of Individuals Impeached by the House of Representatives*, OFF. OF HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Impeachment/Impeachment-List/ [https://perma.cc/U5HG-KEDL]. The other three refused to resign and in each case the Senate failed to convict. *Id.* Belknap, however, resigned before his impeachment, hoping to stave off the humiliation. H. JOURNAL, 45th Cong., 1st Sess. 904 (1876).

168. Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1149 (2003). *But see generally* Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175 (2003) (arguing that there is nothing amiss with regarding the commerce power differently across the three branches of commerce).

read Publius as declaring that presidents can be prosecuted *only* after impeachment and removal.[169]

Further, I question whether Hamilton much thought about sequencing. In context, this makes sense. His chief point related to double jeopardy, not sequencing. Moreover, because the Judgment Clause mentions impeachment first and criminal prosecution second, that ordering may cause some to hastily assume that there is a mandatory sequence. But if a commentator's focus is not on the particular matter of sequencing, any comments on the ordering of process are the product of casual thinking.

In sum, the Judgment Clause's peculiar language may have led some astray. Oddly it has misled them only in the case of the President. Some may read this generic text as if it created a special presidential rule to reflect a special office. But though the presidency is exceptional, there is no warrant for reading one text and discovering within it two radically divergent rules: one for a unique office and one for every other civil officer.

B. An Extraordinary Officer Must Enjoy Exceptional Protections

If the Judgment Clause does not mandate a sequence for presidents (or otherwise) perhaps the nature of the office mandates special treatment for the presidency. The best argument for a unique presidential immunity is structural and rests on intuitions that did not spring to the mind of President Grant as Officer West arrested him on the streets of Washington. Giving voice to some such hunches, Joseph Story argued,

> There are other incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.[170]

What Justice Story said might be thought to apply *a fortiori* to criminal cases.

In fact, a careful reading of Justice Story perhaps suggests the opposite—that the case for "incidental" immunity is most strong in "civil cases" and, therefore, *less weighty* in other contexts like impeachment and criminal proceedings.[171] In the eighteenth and nineteenth centuries, people

169. *See supra* note 152 and accompanying text.

170. STORY, *supra* note 148, § 1563.

171. *Id.*

could be arrested in civil cases.[172] So perhaps Story did not mean for his claim to apply to criminal prosecutions. If so, Story read the Constitution as granting presidents an immunity similar to the one it expressly grants legislators. There is a certain intuitive appeal to this interpretation. After all, the case for discovering immunity in criminal cases is weaker than in civil cases, at least in one sense. In a civil case, one or more persons seek to vindicate their personal rights. In contrast, in a criminal case the government seeks to vindicate far weightier societal interests.

Story's claim suffers from further ambiguities. The phrase "while he is in the discharge of the duties of his office" could mean that a *sitting President can never be arrested, imprisoned, or detained*. This is the broadest reading of Story, one that advocates of immunity are eager to espouse. Yet he likely meant no more than that a President, while engaged in official duties, cannot be arrested, imprisoned, or detained in civil cases. There was no reason to mention the official-duty qualifier if Story meant to argue for a categorical rule against arrest, etc. That would leave open the distinct possibility that arrest, imprisonment, or detention may occur when the President is not acting to "discharge . . . the duties of his office"—that is, whenever she acts in her private capacity. That exactly describes President Grant's arrest. At the time, Grant was in no way "discharg[ing] the duties of his office." He was drag racing. Relatedly, to say that the President possesses an "official inviolability" may only mean that she is immune from arrest, trial, and sanction when the underlying acts are *official* ones. When a President commits wrongs in her private capacity, her "official inviolability" is irrelevant. Again, because Grant was not fulfilling his official duties as he sped along the streets of Washington, he could be arrested and punished.

Whatever one should make of Justice Story's assertions, Professors Akhil Amar and Brian Kalt have built on them and applied them to ordinary crimes.[173] In a nuanced argument, Amar and Kalt argue that the presidency is an exceptional office and, therefore, must enjoy protections not afforded to federal judges and other federal executives.[174] The presidency is unique because one person controls an entire branch, whereas Congress and the courts can function even if one, two, or dozens of officers are incapacitated in some way.[175] Moreover, prosecution (and of course punishment) would "hijack[]" her time, diverting her from her executive responsibilities.[176]

172. *See* WILLIAM G. MYER, FEDERAL DECISIONS: CASES ARGUED AND DETERMINED IN THE SUPREME, CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES 271 (1886) (noting that civil actions for debt in federal court subjected the defendants to imprisonment).

173. *See generally* Amar & Kalt, *supra* note 15 (arguing that the criminal prosecution of a sitting President would be uniquely disabling to the country).

174. *Id.* at 12–13.

175. *Id.* at 12.

176. *Id.*

Lastly, the presidency is a full-time job, requiring vigilance and constant attention.[177] The President is on call "24 hours a day, 365 days a year."[178] As Amar has said elsewhere, the presidency "never sleeps."[179] In contrast, the courts are routinely out of session, and Congress often seems to slumber even when nominally in session. What may be completely fitting for members of the other branches—criminal prosecution while in office—is entirely inappropriate for our unique Presidents.

For its part, the OLC has made several arguments, some of which overlap with those of Amar and Kalt. First, the stigma from prosecution would compromise a President's ability to satisfy her high constitutional obligations.[180] Second, the burden of preparing a defense would hamper her ability to fulfill her constitutional duties.[181] Third, incarceration would render it impossible to satisfy her duties.[182] Finally, the "Constitution specifies" impeachment, not prosecution, as "a mechanism for accusing a sitting President of wrongdoing."[183]

1. Disgrace, Distraction, and Incapacitation: A Wholesale Approach.— Let me take up the arguments that prosecutions and punishments would discredit, distract, and disable the Executive. While President Grant seems to have been hardly bothered by his arrest—he supposedly smiled when stopped the second time by Officer West—no one should doubt that other arrests, prosecutions, and incarcerations might be disruptive, even incapacitating. [184] But the relevant question is whether the Executive can function when the President has been indicted, prosecuted, convicted, or jailed. Can the second branch continue to generate the needful energy, attention, and focus? Yes.

The OLC argues that the disgrace of indictment and prosecution "threaten[s] the President's ability to act as the Nation's leader in the domestic and foreign spheres."[185] The stigma that comes from an indictment and prosecution is real. But I rather doubt the claim that the Constitution protects against presidential dishonor or shame. Justice Ruth Bader Ginsburg may remark that an incumbent "has no consistency about him" and is a "faker."[186] The Speaker of the House may say that a President is trying to

177. *Id.*

178. *Id.* at 13.

179. Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995).

180. 2000 OLC Opinion, *supra* note 17, at 246.

181. *Id.*

182. *Id.*

183. *Id.*

184. SUNDAY STAR, *supra* note 137, at 2.

185. 2000 OLC Opinion, *supra* note 17, at 249.

186. Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a 'Faker,' He Says She Should Resign*, CNN (July 13, 2016, 7:45 AM), https://www.cnn.com/2016/07/12/politics/justice-ruth-

"shred the Constitution"[187] or that he is "ethically unfit, intellectually unfit, curiosity-wise unfit" for the presidency.[188] She may even say that when "you get into a tinkle contest with a skunk, you get tinkle all over you."[189] But neither the Justice nor the Speaker would have unconstitutionally stigmatized the chief executive. If appalling utterances made by high officials, whether true or not, are constitutionally permissible even though they will sap a President's ability to lead, indictment or prosecution cannot be per se unconstitutional. Of course, all are aware that presidents occasionally act in rather shameful ways. Yet no one supposes that they have violated the Constitution because their disgraceful acts and utterances made it more difficult for them to "act as the Nation's leader in the domestic and foreign spheres."[190]

Much the same can be said about distraction. Incumbents do not enjoy a constitutional right to be free from distractions. The Supreme Court confirmed as much in *Clinton v. Jones*.[191] The distraction that necessarily arises from being the subject of a civil complaint, one that is chock-full of sordid allegations, is not constitutionally suspect, much less forbidden.[192] Plaintiffs can sue the President for sexual harassment, deprivation of constitutional rights, conspiracy to violate constitutional rights, defamation, and, presumably, a host of other civil wrongs.[193] While President, Donald Trump was the subject of many private suits, including suits alleging defamation, sexual assault, and receipt of foreign emoluments.[194] If that level

bader-ginsburg-donald-trump-faker/index.html [https://perma.cc/5DV6-46GQ]. To be clear, these remarks were made before the election of Donald Trump.

187. Jacob Pramuk, *Pelosi and Schumer Say Trump Is Trying to 'Shred the Constitution' with Emergency Declaration*, CNBC (Feb. 14, 2019, 12:53 PM), https://www.cnbc.com/2019/02/15/pelosi-and-schumer-criticize-trump-national-emergency-declaration.html [https://perma.cc/MK2T-SZEN].

188. Joe Heim, *Nancy Pelosi on Impeaching Trump: 'He's Just Not Worth It'*, WASH. POST MAG. (Mar. 11, 2019), https://www.washingtonpost.com/news/magazine/wp/2019/03/11/feature/nancy-pelosi-on-impeaching-president-trump-hes-just-not-worth-it/ [https://perma.cc/4AFG-742L].

189. Avery Anapol, *Pelosi Introduces World to New Idiom: 'Tinkle Contest with a Skunk'*, THE HILL (Dec. 11, 2018, 3:55 PM), https://thehill.com/homenews/house/420857-pelosi-introduces-world-to-new-idiom-tickle-contest-with-a-skunk [https://perma.cc/WLN7-BDEL].

190. 2000 OLC Opinion, *supra* note 17, at 249.

191. 520 U.S. 681, 681 (1997).

192. *Id.* at 705 n.40.

193. *Id.* at 685–86.

194. In response to E. Jean Carroll's accusation that President Trump raped her in the 1990s, Trump accused Carroll of lying. She then sued him for defamation. *See* Jennifer Peltz, *Trump Lawyers Ask for Halt in Suit from Woman Alleging Rape*, ABC NEWS (Mar. 4, 2020, 12:24 PM), https://abcnews.go.com/US/wireStory/trump-lawyers-halt-suit-woman-alleging-rape-69391310 [https://perma.cc/Z4VZ-UDV8] (noting the charges Carroll filed against Trump); *see also* Alexandra Hutzler, *Donald Trump Still Faces Dozens of Ongoing Lawsuits, Investigations After His Impeachment Trial*, NEWSWEEK (Jan. 24, 2020, 1:30 PM), https://www.newsweek.com/trump-still-faces-dozens-investigations-lawsuits-after-impeachment-1483925 [https://perma.cc/85H6-BLZR]

of disruption does not generate immunities, it is hard to see why prosecution is always unconstitutional merely because it too will distract.

Incapacitation is a genuine and weightier concern. I take incapacitation to mean that the incumbent cannot function or serve as President. Further, I understand the claim to be that the Constitution implicitly prohibits federal and state institutions from disabling the incumbent. It forbids such actions because presidential incapacitation effectively neutralizes the Executive Branch. It brings the most energetic branch, "the active principle in all governments,"[195] to a dead stop.

Yet our Constitution supplies a complete solution to incapacitation, one not requiring us to conjure up an implied, all-encompassing criminal immunity. The original Framers (and subsequent ones) knew the presidency was a truly special institution. It was so exceptional that they provided unique rules to ensure continuity in the office: "In case of Removal of the President from Office, or his Death, Resignation, or Inability to discharge the Powers and Duties of said Office, the same shall devolve on the Vice President."[196] If the President cannot perform the office due to "inability," the Vice President shall be President (the office transfers).[197] The Twenty-fifth Amendment created a concrete mechanism for judging incapacity, whereby the Vice President and the cabinet, acting together, may declare a President disabled.[198] That Amendment also clarified that when the President is "unable to discharge the powers and duties of his office," the Vice President is but the "Acting President."[199] In contrast, the other two branches lack rules of automatic succession upon death, removal, resignation, or inability.[200] They are less special, at least in this respect.

For our purposes, the essential point is that if a sitting President cannot serve because she is being prosecuted or, worse yet, being punished, the Vice President takes over. More specifically, whenever the "President is unable to discharge the powers and duties of his office," the Vice President takes over

(explaining that the President is currently subject to investigations and suits alleging, inter alia, employment of undocumented workers, abuse of nonprofit funds, receipt of emoluments, failure to disclose his tax returns, campaign finance violations, abuse of charitable assets, insurance and tax fraud, conflicts of interest and foreign influence, and abuse of the White House security clearance system); *Trump Investigation Guide: Impeachment, Inquiries, Lawsuits*, BLOOMBERG (Dec. 13, 2019), https://www.bloomberg.com/graphics/trump-investigations/ [https://perma.cc/P9QP-KZBT] (explaining additional suits against the President for defamation, assault, and payment of "hush money" to adult film actress Stormy Daniels).

195. *See* PRAKASH, *supra* note 49, at 64.

196. U.S. CONST. art. II, § 1, cl. 6.

197. *Id.*

198. *Id.* art. II, § 1, cl. 6; *id.* amend. XXV, § 4.

199. *Id.* amend. XXV.

200. When there is a vacancy in the House or Senate, state executives may call elections. U.S. CONST. art. I, § 2, cl. 5; *id.* amend. XVII. Vacancies in the Judiciary are subject to the ordinary rules relating to appointments. U.S. CONST. art. II, § 2, cl. 2.

as acting President. To be sure, nothing in the text signifies that prosecution and incarceration necessarily incapacitates a presidency. But, of course, the Constitution never precisely specifies what constitutes inability. There is no catalog of conditions that limit the reach of the phrase "unable to discharge" the office, most likely because the Framers of the original Constitution and the Twenty-fifth Amendment wished to cover a host of situations without specifying each and every one. Furthermore, because the Constitution never identifies conditions that are not disabling, it never declares that prosecution and incarceration *are irrelevant for purposes of determining inability*. Hence, if every indictment, prosecution, or punishment is as debilitating as advocates of immunity are apt to claim, then such acts render presidents unable to discharge their duties.[201]

The Vice President, serving as acting President, satisfies all the desiderata that advocates of presidential immunity identify. The acting President can provide the attention that a President may be unable to supply while under the shadow of prosecution or punishment. The acting President is typically elected in a national process and can be said to have a national constituency.[202] And, finally, the acting President is also unique in that when the Vice President serves as "Acting President," he unilaterally directs an entire branch. The unitary Executive lives on with the Vice President enjoying command and control. Without any need for extraordinary, sweeping, and doubtful immunities, the Executive already has exactly what Justice Story demanded: continuity. No matter the criminal law burdens placed on a sitting President, the Executive continues uninterrupted, always having "the power to perform [its functions], without any obstruction or impediment whatsoever."[203]

In other words, the Framers had the foresight to provide a solution to the problems that Amar, Kalt, and the OLC rightly identify.[204] Because the difficulties they catalog are wholly solved by two constitutional provisions, their arguments for implied immunity lose their efficacy. If you think the incumbent is unique, rather than the office, then you have reason to shield

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201. To be clear, I believe that incarceration could constitute presidential inability. Presidents held in captivity may be unable to perform the job of President. *See* Lyman Trumbull, *Presidential Inability*, 133 N. AM. REV. 417, 420 (1881) (finding that capture by enemy in time of war constitutes "inability"); Benjamin Butler, *Presidential Inability*, 133 N. AM. REV. 428, 428–29 (1881) (same). *See also* AIR FORCE ONE (Beacon Pictures, Columbia Pictures & Radiant Productions 1997) (arguing that the cabinet can deem the President incapable when he is under duress on a hijacked Air Force One).

202. *See* U.S. CONST. art. II, § 1, cl. 1–3 (setting forth the presidential and vice-presidential election process). Under the original Constitution, vice presidents typically garnered the second highest number of electoral votes. *Id.* art. II, § 1, cl. 3. In the modern era, candidates for the vice presidency need a majority of votes from the electors or a majority of senators. *Id.* amend. XII.

203. STORY, *supra* note 148, § 1563.

204. Amar & Kalt, *supra* note 15, at 11–13.

him or her. Of course, the Constitution contains no express rule protecting any particular incumbent. If, however, you insist that the *office* is unique, the Constitution creates a fail-safe to ensure continuity of executive government. The office remains filled, unique, national, and all-consuming even if the actual President is in a courtroom facing a criminal trial. The office's powers and duties endure, and certain exercises of those powers by the acting President can yield earth-shattering consequences or serve to save the Constitution. Hence, the Executive Branch will never sleep, even if the President faces prosecution or, worse yet, is in jail as a result of a criminal conviction.

The OLC sought to parry the provisions' clarifying power by saying that impeachment was the means of adjudicating presidential wrongdoing and by claiming that the Twenty-fifth Amendment "should not be understood *sub silentio* to withdraw a previously established immunity and authorize the imprisonment of a sitting President."[205] But this claim misunderstands the contours of the Constitution. Again, the impeachment provisions in no way decree that sitting officers cannot be prosecuted or punished while in office. We have known this for centuries, ever since the First Congress provided that sitting officers could be prosecuted. Furthermore, the *original Constitution* (and not merely the Twenty-fifth Amendment) had a provision for presidential "inability,"[206] and, hence, supplied the means for ensuring the focus and continuity in the Executive that the OLC believes is crucial. Finally, to say that the Constitution "previously established [an] immunity" for the incumbent that the Twenty-fifth Amendment could not implicitly withdraw is to assume the conclusion. The very question in dispute is whether the original Constitution granted the President a unique immunity from prosecution and punishment. The OLC cannot dogmatically insist that the succession provisions have no bearing on the question of immunity. After all, they defeat the functional claim that without criminal immunity the Executive will be hamstrung. Absent that claim, the argument for presidential immunity is markedly weaker.

Indeed, champions of immunity have long had difficulty making sense of presidential inability in the context of incarceration, making claims that abound in contradictions. Consider Robert Bork's argument. Bork served as Solicitor General during the Nixon Administration and argued that though a sitting Vice President could be prosecuted, a sitting President could not.[207] In a book reflecting upon his Watergate years, Bork said this:

> If a president could be indicted and forced to stand trial before being impeached and convicted, he would not officially be incapacitated to

205. 2000 OLC Opinion, *supra* note 17, at 249.

206. U.S. CONST. art. II, § 1, cl. 6.

207. BORK, *supra* note 131, at 64–65.

> the point where the Twenty-fifth Amendment would apply, but he nevertheless would be effectively removed from heading the executive branch, impermissibly undermining its capacity to perform its constitutionally assigned functions.[208]

Bork went on to ridicule a draft OLC memo that suggested an incarcerated President might be able to "run the executive branch from his jail cell," asserting that it was so "preposterous" that he insisted they remove it.[209]

In saying all this, Bork controverted himself. If, as Bork argued, a President is "effectively removed" whenever he is forced to defend himself in a criminal trial, then he is likewise "officially incapacitated." Likewise, if a President cannot run his branch from "his jail cell," as Bork insists, the incumbent is "officially incapacitated." Given Bork's descriptions of the consequences of trial and incarceration, the Constitution's inability provisions would fully apply. Like the OLC, Bork could not fathom that the rules for an acting President wholly solve the evils he identified and make his inferences of sweeping presidential immunity wholly unnecessary.

In sum, considerations of constitutional structure that might seem to suggest the pressing necessity of inferring criminal immunities utterly lose their force once we recognize that such contrived immunities are *superfluous*. All that we need from the Executive—unity, decisiveness, energy—can come from the unitary Executive under the vigorous leadership of the acting President. The Constitution established a complete solution to the legitimate concerns of Justice Story, Professors Amar and Kalt, and the OLC.

2. Disgrace, Distraction, and Incapacitation: A Stage by Stage Approach.—The conventional wisdom that a President can be investigated and branded a criminal but cannot be arrested, prosecuted, or punished has a certain simplicity that makes it easy to adopt and implement. It blends clarity with a protective sweep. Administrability is a useful trait.

But some of the factors that supposedly favor immunity—diversion, ignominy, and incapacitation—do not apply with equal force to each stage of the criminal process. There are meaningful differences that distinguish indictment, trial, and punishment. Likewise, there are significant distinctions between jailable offenses and lesser crimes. In asserting that some of the arguments against presidential amenability to the criminal law are less persuasive as applied to particular phases, I set aside my principal claim that the presidency utterly lacks constitutional privileges and immunities concerning the application of the criminal law.

208. *Id.* at 64.
209. *Id.* at 65.

a. Investigations and Informal Accusations.—To my knowledge, no one argues that federal and state law enforcement officials are constitutionally barred from investigating the President or from publicly announcing their view that the incumbent has committed crimes. In part, the absence of such argumentation may reflect the water that has cascaded under the bridge. Over the past half-century, we have had criminal investigations of Richard Nixon, Bill Clinton, and Donald Trump. I do not believe that anyone associated with the first two presidents claimed that the Constitution implicitly barred the criminal investigation of an incumbent.[210] Such a claim becomes harder to make as the investigations pile up.

Moreover, in the case of Bill Clinton, Kenneth Starr concluded (albeit in a secret report to the House) that the President had committed obstruction of justice and perjury.[211] The House's speedy public release of the Report perhaps indicated that representatives did not believe that something in the Constitution barred official accusations of serious criminal wrongdoing.[212] More recently, Attorney General Bill Barr signaled that no Department of Justice policy prohibited a statement about presidential lawbreaking.[213] Hence, Robert Mueller was free to brand President Trump a criminal even if he could not indict or prosecute him.

Now investigation and informal accusation might incapacitate especially sensitive presidents who cannot bear the glare of manic speculation and denunciation. But in the main, stinging charges will not paralyze presidents. Politics "ain't bean bag" but is rather a blood sport.[214] Most presidents can withstand ferocious scrutiny, unfair insinuations, and worse.

210. In *Trump v. Vance*, President Trump's lawyers argued before the district court that a sitting president could not be investigated by a state. *See* Memorandum of Law in Support of Plaintiff's Emergency Motion for a Temporary Restraining Order and a Preliminary Injunction at 3, Trump v. Vance, 481 F. Supp. 3d 161 (S.D.N.Y. 2020) (No. 1:19-CV-8694-VM), 2019 WL 5557333 ("No State can criminally investigate" a sitting President.). But in the Supreme Court, the President's lawyers conceded that criminal investigations were constitutional. *Trump v. Vance*, 140 S. Ct. at 2425.

211. Peter Baker & Susan Schmidt, *Starr Submits Report to House*, WASH. POST (Sept. 10, 1998), https://www.washingtonpost.com/politics/clinton-impeachment/starr-submits-report-house/ [https://perma.cc/3MTX-Z2QK].

212. *See id.* (noting that Congress agreed to release the Report the day after members received it).

213. Letter from Att'y Gen. William Barr to the House and Senate Judiciary Comms. (Mar. 24, 2019), https://www.justice.gov/archives/ag/page/file/1147981/download [https://perma.cc/E6V6-7DLT].

214. The phrase comes from a nineteenth-century novel in which a character uttered the phrase to underscore that politics can be extremely rough. He was distinguishing politics from an idle amusement involving the tossing of bags full of beans. *See Politics Ain't Beanbag*, POLITICAL DICTIONARY (2020), https://politicaldictionary.com/words/politics-aint-beanbag/ [https://perma.cc/6QH9-77VG].

Diversion and ignominy pose more serious issues. Presidents publicly investigated and accused will certainly divert their gaze from their public duties. They may fret about their public standing. Their power and influence rest somewhat on their reputation, and an investigation and accusation will normally diminish that standing, at least to some extent. Further, incumbents will be anxious about the aftermath of an investigation: namely, the possibility of impeachment and criminal prosecution. Finally, investigations and accusations will envelop the incumbent in a cloud of infamy. As far as we know, every recent investigation of an incumbent was disclosed to the world, thus making them undeniable spectacles and generating all sorts of fevered conjecture.

Now the possible distraction and disrepute that come from an impeachment investigation are implied in the constitutional scheme. But the diversion and opprobrium that come from a criminal investigation that might yield a future prosecution may not be. Concerning indictments, the OLC has argued that distraction and ignominy are factors *against* the constitutionality of indictment.[215] Yet if the OLC is right, then one must at least consider whether the diversion and ignominy that come from a public criminal investigation and public accusation should bar investigations and accusations made outside the impeachment context. Perhaps official investigations and accusations are constitutional only in the context of impeachment, lest the President be diverted and tarred by rumors, leaks, and public charges of criminality. For instance, if a state investigator were to probe whether the President violated some state law, one might argue that if the alleged violation is not an impeachable offense, then the state inquiry ought to be halted in its tracks. It distracts the President and diminishes his public standing.

I do not endorse the idea that the Constitution bars non-impeachment investigations and accusations. Far from it. My only point is that many of the considerations that led the OLC (and scholars) to conclude a President cannot be indicted apply, at least to some extent, to earlier stages in the criminal process. Indeed, it may be that proponents of presidential immunity would have come to a different conclusion about whether presidents can be investigated and accused of a crime had it considered the matter in the 1950s or 1960s, i.e., before Watergate and all that has come since.

b. Indictment.—The supposed constitutional bar on indicting a President suffers from a different problem—one pushing in the opposite direction. In 1973, the OLC said:

> Given the realities of modern politics and mass media, and the delicacy of the political relationships which surround the Presidency

215. 1973 OLC Memo, *supra* note 16, at 28–31.

> both foreign and domestic, there would be a Russian roulette aspect to the course of indicting the President but postponing the trial, hoping in the meantime that the power to govern could survive.[216]

Such a course would jeopardize "the power to govern, and the symbolism on which so much of his real authority rests."[217]

In making these claims, the OLC overshoots its mark and conflates matters. At the outset, an indictment does not burden the President's *legal* "power to govern" as the chief executive. Even after a mortifying indictment, he has the same constitutional powers. He can continue to pardon, veto bills, appoint to office, command the military, and supervise the bureaucracy.

Further, while an incumbent is certainly a practical symbol of the federal government, the Constitution does not exactly render the President a symbol of the United States. In 1789, Congress quickly readopted an existing seal (a symbol), one that lacked the President's likeness.[218] In any event, as alluded to earlier, this argument about symbolism wrongfully imbues a perceived and popular symbol with constitutional immunities. The fact that the incumbent comes to mind when many people contemplate the government of the United States is no argument for reading the Constitution as if it conveyed implied immunities.

More importantly, any diminution of a capacity to persuade, either domestically or internationally, does not matter. A reduced ability to prevail in Congress, or make a treaty, is of no constitutional moment. So, while a President's "real authority" (meaning practical influence and power) is certainly a function of his reputation, it is not unconstitutional to diminish the practical authority attributable to his ability to sway others. Presidents are entitled to exercise their constitutional authority, but not to a world that leaves their practical influence undiminished, much less to a world that maximizes their practical authority. Critics of George Washington did not violate the Constitution when they denounced him as an "embryo-Caesar" and a "King George IV."[219] Likewise, a prosecutor who procures a grand-jury indictment has not thereby breached the Constitution.

The OLC must surely know this. After all, if public investigations and accusations are permissible means through which to cast a cloud on the incumbent, divert her, and diminish her "real authority," then one must question what incremental obloquy and distraction arises from an indictment. From the general public's perspective, I believe no additional shame arises from indictment. If the President is publicly investigated and accused by a prosecutor, the damage is done. From the vantage of informed observers, a

216. 1973 OLC Memo, *supra* note 16, at 31.

217. *Id.*

218. Act of Sept. 15, 1789, ch. 14 § 3, 1 Stat. 68, 68 (amended 1799).

219. PRAKASH, *supra* note 49, at 27.

grand jury indictment seems somewhat inconsequential. Knowledgeable members of the public appreciate what Chief Judge Sol Wachtler of the New York Court of Appeals knew: a grand jury would "indict a ham sandwich" at the behest of a skilled prosecutor.[220] So, educated observers are unlikely to be moved by the distinct act of indictment.

Perhaps that is why some scholars, like Laurence Tribe and Walter Dellinger, believe that it is constitutionally permissible for a grand jury to indict a President.[221] Professor Tribe believes that, as a practical matter, a Vice President who succeeds a President would find it harder to pardon someone who was indicted while in office.[222] Professor Dellinger argues that if you can name a President as an unindicted co-conspirator, as was true of Richard Nixon, there is no reason why you cannot indict the incumbent.[223] The incremental dishonor is negligible. Dellinger further observes that an indictment would preclude the elapse of the typical five-year statute of limitations for federal crimes. In other words, without an indictment (or a waiver), the statute of limitations might run and thereby prevent a prosecution.[224]

Dellinger's second point is powerful. The OLC admits that without a statutory modification by Congress and states, statutes of limitation might expire. This makes delay in criminal adjudication particularly awkward because a delay will often render prosecution impossible. Because this is a flaw in the argument for delayed prosecution, Amar and Kalt have a solution: toll the statutes of limitations.[225] But this makes immunity more palatable at the cost of making the claim of immunity more implausible. We must not only infer an immunity but also discover a constitutional modification of all

220. E.R. Shipp, *Grand Juries: Acquittals Set Off Criticism*, N.Y. TIMES, June 23, 1987, at B1, https://www.nytimes.com/1987/06/23/nyregion/grand-juries-acquittals-set-off-criticism.html [https://perma.cc/UNV9-XS7M].

221. *See* Laurence H. Tribe, *Yes, the Constitution Allows Indictment of the President*, LAWFARE (Dec. 20, 2018, 11:55 AM), https://www.lawfareblog.com/yes-constitution-allows-indictment-president [https://perma.cc/DAN2-8WB8] (suggesting that while presidents may need to be shielded from state prosecutions or federal civil charges, the justifications for those immunities disappear "when the indictment is returned by a federal grand jury . . . ."); *see also* Walter Dellinger, *Yes, You Can Indict the President*, N.Y. TIMES (Mar. 26, 2018), https://www.nytimes.com/2018/03/26/opinion/indict-president-trial.html [https://perma.cc/E9SY-WHBY] (noting that while "[a] sitting president should not be required to submit to a criminal trial," this should not "preclude a grand jury from indicting a president when the facts and the law warrant").

222. *See* Tribe, *supra* note 221 (noting "vice presidents, who must then serve out the disgraced president's term, [cannot] be confidently counted on to pardon their predecessors.").

223. *See* Walter Dellinger, *Indicting a President Is Not Foreclosed: The Complex History*, LAWFARE (June 18, 2018, 7:00 AM), https://www.lawfareblog.com/indicting-president-not-foreclosed-complex-history [https://perma.cc/R485-2EQL] ("The fact that it is permissible to name a sitting president as unindicted co-conspirator, moreover, tends significantly to undermine the only argument against indicting a sitting president.").

224. *Id.*

225. Amar & Kalt, *supra* note 15, at 16.

statutes of limitations—federal and state. The more intricate and detailed an implied structural feature, the less conceivable it will appear. A rule of implied immunity, coupled with implied tolling, is sufficiently complex that we should be dubious. Certainly, none of those early senators who treated the presidency as sacred and above all ordinary process simultaneously claimed that the Constitution implicitly tolled statutes of limitations.

In sum, the OLC's position that indictment constitutes a red line is rather puzzling. Given the practical need to indict—the need to meet statutes of limitations—and the seeming lack of any additional distraction and obloquy, I see no sound reason to prohibit grand jury indictments.

c. Arrest.—We need not eschew prosecution merely because we dread arrest. Although arrest is often part of the criminal process, it is not requisite for a trial. As my colleague Rachel Harmon has observed, a criminal summons is sufficient to exercise jurisdiction over an accused.[226] Hence, if a prosecutor believes that a sitting President ought to be tried, she can bypass arrest and request a court to issue a summons.

Of course, as argued earlier, in some cases, an arrest may seem indispensably necessary. We have had many presidents dedicated to the rule of law. But a system is made in anticipation of saints and scoundrels. The group of enterprising and ambitious men and women likely to become President contains a subset, however small, who yearn for power and lust to maintain it. When Senator Maclay hypothesized daily presidential homicides, John Adams apparently asserted that the crowned heads of Europe never committed murder. To which, Maclay drolly responded: "Very true, in the retail way, Charles IX of France excepted. They generally do these things on a great scale."[227] If a President is on a crime spree, causing alarm and mayhem, then incarceration pending trial (either criminal or impeachment) should be welcomed rather than dreaded.

That raises the question: Does the Constitution forbid the arrest of a President? We have seen that neither Officer West nor President Grant assumed as much. Nonetheless, the argument against arrest is that the incumbent will have a difficult time serving as President while under arrest. Of course, this is true.

Yet does that make arrest per se unconstitutional? The answer is not obvious. If the President is arrested and detained for but a few hours, one may wonder whether something is constitutionally amiss. After all, a President forced to testify in a civil or criminal case is unable to attend to his official duties while testifying. Yet I doubt whether anyone would say that the President is truly incapacitated during such a period.

226. Rachel Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 333–35 (2016).

227. Maclay, *supra* note 1, at 167.

Consider, for a moment, some practices of early presidents. President Washington took two months-long tours of the North and South.[228] While away in the South, the "cabinet officers essentially ran the government."[229] They could, however, recall him "if any serious and important cases" required his "personal" attention.[230] During this tour, the cabinet borrowed funds overseas, sent commissioners to tribes, and protested to the British about arms supplies.[231] At least these tours constituted official business—Washington gathered information about, among other things, political sentiments. He could not say the same for the more than a year (estimated to be 434 days) he spent at Mt. Vernon, hundreds of miles away from the capital.[232] John Adams imitated his predecessor, at least in this respect. Adams spent much of his presidency in Quincy, Massachusetts.[233] During both Presidents' sojourns, neither one (nor anyone else) invoked the "inability" provision of Article II.

During the trial of Aaron Burr, Chief Justice John Marshall said that the demands of the presidency were "not unremitting."[234] Perhaps he had in mind Adams and his trips to Quincy. If President Adams could escape and take something of a respite from the press of executive business, then it was facetious to say that a President was too busy to comply with a subpoena for letters.[235] Though Thomas Jefferson complained that judges might "bandy him from pillar to post,"[236] he too must have known that his attention flagged when he left the Capital. He denied it, of course, taking umbrage at his cousin's remark: If in claiming that the President's work was "not unremitting," Marshall "alludes to our [Jefferson's] annual retirement from

228. 5 THE DIARIES OF GEORGE WASHINGTON 460, 497 (Donald Jackson & Dorothy Twohig eds., 1979); 6 THE DIARIES OF GEORGE WASHINGTON 96–98 (Donald Jackson & Dorothy Twohig eds., 1979).

229. SHIRLEY ANNE WARSHAW, POWERSHARING: WHITE HOUSE-CABINET RELATIONS IN THE MODERN PRESIDENCY 16 (1996).

230. Letter from George Washington to the Secretaries, Apr. 4, 1791, *reprinted in* 20 THE PAPERS OF THOMAS JEFFERSON 141, 142 (Julian P. Boyd ed., 1992).

231. PRAKASH, *supra* note 49, at 60.

232. FREDERIC TABER COOPER, RIDER'S WASHINGTON: A GUIDE BOOK FOR TRAVELERS 494 (1924). To be clear, these 434 days constituted Washington's time at Mt. Vernon over his two terms.

233. *See* JOHN PATRICK DIGGINS, JOHN ADAMS 138–39 (Arthur M. Schlesinger, Jr. ed., 2003) (describing Adams spending from early summer of 1798 to November in Quincy and describing a separate period in 1799 where Adams spent as much time in Quincy as he did in the executive mansion).

234. United States v. Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14692d).

235. *See* DIGGINS, *supra* note 233, at 139 (noting that Adams received great amounts of executive mail in Quincy). But it seems rather likely that some matters were not sent to him because an immediate decision was required. One might also suppose that less important items were also never sent to Massachusetts. Adams in Quincy could not have served the same way he could in Philadelphia.

236. Letter from Thomas Jefferson to George Hay (June 20, 1807), *reprinted in* 10 THE WORKS OF THOMAS JEFFERSON 403, 404 (Paul Leicester Ford ed., 1905).

the seat of government, . . . he should be told that . . . the public business . . . goes on as unremittingly there, as if we were at the seat of government."[237] This claim has as much truth as a teenager's insistence that she does homework as well (nay better!) while watching videos of cute puppies.

Today, technology enables incumbents to more faithfully execute their office while outside the Capital, either from America's most remote corners or in far-off lands. With internet access and phone calls, the entire apparatus of the Executive Branch can accompany the President wherever she might go or find herself. For instance, the OLC has concluded that bills can be presented and returned electronically while the President is overseas or otherwise.[238]

If the period of detention is particularly short or if the jailor grants internet and phone access, a modern incumbent's ability to serve as chief executive would be far more meaningful than Washington's capacity to serve as he journeyed through the Deep South. While one "incapacity" is involuntary and the other voluntary, that distinction seems irrelevant. The question is whether the Constitution tolerates some disruption of a President. And the answer seems yes, in three respects. First, even if prolonged incapacitation of the Executive is unconstitutional, brief periods of incapacitation might not violate Article II. Second, with modern technology, incarceration might not be as incapacitating as some suppose. Third, as I have discussed at great length, the complete incapacitation of a President is not unconstitutional given the provisions that permit the Vice President to serve as acting President.

d. Prosecution.—Learned Hand once said that a civil lawsuit should be "dread[ed] . . . beyond almost anything else short of sickness and death."[239] Criminal trials generally will be more engrossing and onerous and therefore they exceed illness even if they do not quite approach death. The OLC has argued that "criminal litigation uniquely requires the President's personal time and energy, and will inevitably entail a considerable . . . degree of mental preoccupation."[240] This intuition makes sense because the opprobrium from a criminal conviction is generally worse than the disgrace that would come from losing a civil case. The greater mental fixation on a criminal trial is also a reflection of possible consequences, like jail time or worse.

237. *Id.* at 405.

238. Memorandum from Jonathan G. Cedarbaum, Deputy Assistant Att'y Gen., to the Exec. Off. of the President (May 3, 2011), https://www.justice.gov/file/18366/download [https://perma.cc/Y2LC-JAZ7].

239. Linda Greenhouse, *On 'Stirring Up Litigation'*, N.Y. TIMES, June 12, 1985, at B8, https://www.nytimes.com/1985/06/12/us/supreme-court-on-stirring-up-litigation.html [https://perma.cc/JZF5-VPHB].

240. 2000 OLC Opinion, *supra* note 17, at 254 (emphasis omitted).

But these general observations are not universally true. Within the category of criminal prosecutions, some will distract more than others. A President who barrels down Constitution Avenue in a Porsche 911 and is charged with reckless driving may not be much bothered, as the Grant encounter with Officer West suggests. A President charged with homicide, however, likely will be distracted by the courtroom drama and its lead-up. And some presidents, like the last one, have a preternatural ability to seem undisturbed in the face of numerous suits.

Relatedly, some adverse civil judgments are far more damaging and damning than certain criminal convictions. A conviction for criminal tax evasion pales beside a verdict for a plaintiff in a civil wrongful death suit. A guilty verdict in a perjury trial does not hold a candle to an award of damages to a sexual assault victim. Concerning such civil actions, the President's attention often will be focused like a laser beam. My point is that because we tolerate all manner of distraction and reputational damage from civil suits and judgments, treating criminal prosecutions as per se unconstitutional is neither necessary nor sufficient—at least if our concern is distraction.

Delaying prosecution also may warp the outcomes of any eventual criminal trials, in the sense that delay may "make it more difficult for the ultimate prosecution to succeed."[241] The reason for permitting criminal investigations and civil adjudications to proceed while the President is in office—the sensible fear that the passage of time will erode memories and disintegrate evidence—applies equally to the delay of criminal trials. A trial will be fairer and more accurate if the accused is tried soon after the alleged crime, a consideration that disfavors the claim that presidents should be immune for as much as ten years. Another way of putting the point is that the longer we delay a criminal trial, sometimes for almost a decade, the more we create the possibility that the guilty may escape punishment and the innocent may, perhaps, be punished due to faulty memories or decaying evidence.

e. Sentencing and Punishment.—If protracted incarceration is particularly problematic because it effectively removes the incumbent from office, then the punishment phase marks the most powerful context for concluding that the Constitution supplies some form of immunity. But even here, the case is far from airtight. A guilty verdict does not immediately, or invariably, require incarceration.

First, one could delay sentencing. While the Constitution requires a speedy trial, there does not appear to be a right to swift sentencing.[242] So, sentencing might be postponed after conviction. Perhaps a sentence could be set only after the incumbent has left office.

241. *Id.* at 256.

242. U.S. CONST. amend. VI.

Second, even after sentencing one could delay its actual imposition. If scholars and judges are particularly concerned about incarceration (or worse), those particular punishments can be delayed without necessarily postponing the trial of the offense. Or, put another way, the Constitution can be read to permit trials (and all that precedes them) but simultaneously bar any serious punishment of an incumbent until he or she is no longer in office.

Third, not all guilty verdicts yield imprisonment. The Federal Criminal Code, Title 18, contains some fine-only crimes.[243] The state codes have similar provisions. For instance, Virginia has misdemeanor offenses that are fine-only.[244] Again, if incarceration alone poses unique constitutional difficulties, then inflicting criminal fines will not be unconstitutional.

Once we understand that jail time is not an immediate or necessary concomitant of a guilty verdict (or a plea), we can better see that criminal *adjudication* is not per se problematic. Or at least it is not if the particular concern is presidential incapacitation due to imprisonment.

In drawing distinctions across the phases of the criminal process, I do not mean to detract from my general assertion that the Constitution imposes no bar to indicting, prosecuting, or punishing a President. Rather, this discussion merely seeks to demonstrate that many of the concerns raised by the OLC are overblown and, further, that the OLC systematically downplays similarities with civil adjudication. Is an indictment necessarily more distracting and damaging than a prolonged criminal investigation and an official declaration of guilt? I do not believe so. Are criminal trials uniquely engrossing and, therefore, diverting? Again, no. Finally, is criminal punishment more invariably incapacitating than the imposition of a civil fine or the award of damages? Of course not.

Now the OLC would respond by insisting that because the criminal process is generally more distracting, frightening, and incapacitating, we ought to discover within the Constitution a general rule of immunity and disdain a more fine-tuned, contextually sensitive approach. The OLC said this in 2000, citing *Clinton v. Jones*: "a categorical rule against indictment or criminal prosecution is most consistent with the constitutional structure, rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President."[245]

The desire for a categorical rule can take us in one of two directions: full immunity or full amenability. Such a distinction hardly uniquely favors OLC's conclusion. Moreover, in conceding the constitutionality of intrusive investigations and distracting official accusations of guilt, the OLC has

243. *See, e.g.*, 18 U.S.C. § 1723.

244. VA. CODE ANN. § 18.2–11 (1990).

245. 2000 OLC Opinion, *supra* note 17, at 254.

adopted a more contextual approach. Why stop there? Why not conduct a more sensitive consideration of whether indictment or trial is truly so damaging, especially in light of the weighty interests furthered by both? Finally, *Clinton v. Jones* must be laid alongside *United States v. Nixon*.[246] In *Nixon*, the Court approached a question—executive privilege—in a highly nuanced way and eschewed categorical rules. The Court sanctified executive privilege in a general way before concluding it could be overcome in the context of a grand jury proceeding. Not content with that distinction, the Court also noted that the case did not involve national security materials, Congress, or a civil proceeding.[247] The Court thereby invited lawyers and lower courts to draw ever more fine distinctions about executive privilege across a variety of contexts.

Though my principal claim is that presidents lack immunity from prosecution and punishment, I would be content if this discussion triggers a reappraisal of the OLC's blanket approach. Scholars, lawyers, and judges ought to reevaluate whether an absolute bar on indictments serves any real purpose. Likewise, they ought to reconsider the supposedly deleterious effects of prosecution and consider them alongside the undoubted benefits of a speedy, more contemporaneous trial. Finally, one must admit that sentencing, by itself, is never incapacitating and that criminal punishment need not be.

C. The People's President Must Enjoy Peculiar Protections

In 2000, the OLC put weight on the countrywide, popular election of presidents. Presidents are made via the "'only national election'"[248] and "elected by the people as a whole."[249] To permit the prosecution of an incumbent "would confer upon a jury of twelve the power, in effect, to overturn [a] national election."[250] While the Vice President would take over, the public wants the President at the "helm," not an acting President.[251] The better route is impeachment because the entire nation is likewise represented in Congress.[252] The claim has an appealing symmetry.

No one doubts that American presidents are chosen in a coast-to-coast contest. Nonetheless, the OLC's efforts to transform a nationwide imprimatur

246. 418 U.S. 683 (1974).

247. *Id.* at 706, 712 n.19.

248. 2000 OLC Opinion, *supra* note 17, at 231 (quoting Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Off. of Legal Counsel 32 (Sept. 24, 1973)).

249. *Id.* at 258.

250. *Id.* at 231. *See also id*. at 246 (noting that the entire nation elects the President), 249 (saying people intended the President to be "at the helm"), 258 (saying that "people as a whole" elected the President). Amar and Kalt briefly touch upon this point. Amar & Kalt, *supra* note 15, at 12.

251. 2000 OLC Opinion, *supra* note 17, at 249.

252. *Id.* at 231.

into a presidential shield overlook certain facts and overplay others. First, not all presidents are elected in a nationwide election. Outside of a Michigan district, no one elected Gerald Ford.[253] More importantly, no one elected Ford to serve as President, much less Vice President. Richard Nixon selected him in the wake of the resignation of Spiro Agnew.[254] Yet Ford would have benefitted from the executive protection that presidential immunizers press upon us.

Second, not all of our presidents have received a majority of the popular vote. These presidents cannot be said to have been elected by the people, at least in the colloquial sense. Since the OLC wrote in 2000, both George W. Bush and Donald J. Trump became President without securing a majority of the national vote.[255] These two candidates won enough a majority of the presidential electors, something necessary and sufficient to become President.[256] Do such presidents lack immunity because they do not have the backing of a popular majority? Does constitutional immunity turn on the popular vote?

Third, the voters, and their expectations, are something of a side issue. Of course, the electors (and the voting public) are focused on the presidential contestants and far less concerned about the abilities, stances, and character of the vice-presidential candidates. But even though voters and electors focus on presidential candidates and treat vice-presidential aspirants mostly as an afterthought, both voters and electors cast their ballots against a constitutional backdrop. If the Constitution provides that the Vice President takes over when the President is unable to discharge her duties, then the people should know that the Vice President will be the legitimate "acting president" when the actual President is deemed incapacitated. So, while voters may prefer the actual President, the acting President must sometimes suffice when it comes to the presidency. Voters may not prefer an Acting President Spiro Agnew, Dan Quayle, or Al Gore, but that is what they will get if the President is "unable to discharge" the office to which she was elected, including the situation where she is prosecuted or imprisoned.

253. *See Gerald R. Ford Timeline*, GERALD R. FORD PRESIDENTIAL FOUND., https://geraldrfordfoundation.org/gerald-r-ford-timeline/ [https://perma.cc/SE2C-GNJY] (noting that Ford was elected to his "first term as a U.S. Congressman from Grand Rapids, receiving 60.5% of the vote" on November 2, 1948).

254. *See* Scott Bomboy, *Gerald Ford's Unique Role in American History*, NAT'L CONST. CTR. (July 14, 2021), https://constitutioncenter.org/blog/gerald-fords-unique-role-in-american-history [https://perma.cc/6ZZG-NXP9] (explaining that Ford was appointed Vice President by President Richard Nixon to replace Spiro Agnew, who had previously resigned, and then Ford became President after Nixon resigned).

255. Tara Law, *These Presidents Won the Electoral College — But Not the Popular Vote*, TIME (May 15, 2019, 4:58 PM), https://time.com/5579161/presidents-elected-electoral-college/ [https://perma.cc/5CJF-5HVP].

256. U.S. CONST. art II, § 1, cl. 3.

Most fundamentally, nothing in the Constitution requires the familiar popular contest.[257] The system we have is an artifact of independent decisions made by state legislatures to have their state electors selected by popular vote rather than by another process.[258] It is a mistake to imbue discretionary (if extremely durable) state legislative preferences with constitutional consequences for the presidency. That is to say, presidents should not be regarded as having criminal immunities merely because of choices made by the several states. The powers and privileges of presidents do not turn on the vagaries of state legislative choices.

With equal justification, one might insist that impeachment cannot serve as the sole means of adjudicating the criminal culpability of presidents because, after all, no President has ever been removed from office for her alleged high crimes and misdemeanors. This would be to imbue our current predicament—the feebleness of the impeachment mechanism as applied to presidents—with portentous constitutional consequences. That too would be a mistake. I certainly do not believe that because impeaching a sitting President seems utterly futile, presidents must be amenable to the criminal process as a second-best substitute. My point is that presidents are amenable to prosecution and punishment without regard to whether states use popular elections to select their presidential electors or whether impeachment stands as a viable means of ousting chief executives.

D. Federalism and Prosecuting the Federal Executive

However convincing the case that presidents lack criminal immunities, some may be particularly unnerved by the prospect of *state* prosecution. Some may suppose that there must be immunity from at least state criminal process, lest provincial prosecutors harass our federal chief executives. Indeed, *McCulloch v. Maryland*[259] suggested that while the Union can regulate states, a state cannot control the Union: "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 . . . ."[260]

Yet in truth, *McCulloch* never established any such principle.[261] The parts continue to have the means of hampering the whole, at least in some respects. As noted earlier, two states indicted a Vice President, causing him

257. *See id.*

258. *See generally* NAT'L ASS'N OF SEC'YS OF STATE, SUMMARY: STATE LAWS REGARDING PRESIDENTIAL ELECTORS (Nov. 2016), https://www.nass.org/sites/default/files/surveys/2017-08/research-state-laws-pres-electors-nov16.pdf [https://perma.cc/TG6W-44NK] (describing each state's elector selection process).

259. 17 U.S. (4 Wheat.) 316 (1819).

260. *Id.* at 435–36.

261. The opinion conspicuously punted on the question of whether a nondiscriminatory state tax on the bank's property would be constitutional. *Id.* at 436.

to flee. Aaron Burr never intimated that his status as a federal officer precluded any state prosecution. In 1973, the OLC admitted that sitting vice presidents could be prosecuted by federal or state officers, citing Burr's example.[262] The same was true for all the other high officers of the United States, including departmental secretaries, senators, representatives, and judges. The one exception was the President, said the OLC.[263]

One aspect of the case for a presidential exception rests on intuition: if we permitted state prosecution, we might witness vindictive or partisan prosecutions. But the possibility of an abuse of power is no powerful argument against the power's existence because all powers may be misused. As Justice Story pointed out long ago, "It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse."[264]

Even were we to ignore this sound advice, the sheer absence of any attempt to prosecute presidents, what to speak of *partisan* persecutions, perhaps gives the lie to the fear. Despite centuries of partisan heat directed at presidents, each of whom occupied the most prominent office in the land, and many of whom took the most public and controversial acts, no state or local prosecutor has attempted to prosecute them. Even Abraham Lincoln never faced state charges despite his unprecedented and controversial wartime acts.

The Supreme Court's case from the 2019 term perhaps confirms a reluctance to draw federalism distinctions. New York has been investigating Donald Trump's finances, with an eye to potential bank and insurance fraud. Though Trump sought to quash a subpoena for his financial records, the Court rejected the claim.[265] The Court concluded that a sitting President may assert the normal state law defenses to an investigation and subpoena.[266] His unique position as head of the federal Executive Branch seems to matter but little. If that was true of state grand jury subpoenas, the Court might likewise conclude that state criminal proceedings, of whatever sort, are not uniquely troubling. In an appropriate case, the Justices might yet conclude that state officials can do whatever federal prosecutors and courts may do.

Moreover, as discussed in Part III, there is a perfectly satisfactory solution to the specter of state prosecution. Besides the ability to shift into federal court some state criminal prosecutions of federal officers,[267] Congress can solve the menace of state persecution of presidents. If representatives and senators are sufficiently fearful of what may materialize when state

262. 1973 OLC Memo, *supra* note 16, at 33.

263. *Id.* at 30, 32.

264. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 344 (1816).

265. Trump v. Vance, 140 S. Ct. 2412, 2431 (2020).

266. *Id.* at 2419.

267. 28 U.S.C. § 1442(a) (2012).

prosecutors pursue presidents, Congress can legislate all the necessary protections against state criminal process and prosecutions.

Having said all this, I admit that different intuitions come into play when the parts do something that affects, and potentially disturbs, the whole. Accordingly, some may be convinced that while the Constitution does not establish a blanket immunity from prosecution and punishment, the case for immunity from *state* prosecution is more persuasive. I would regard that stance, one favoring a limited immunity from state criminal process only, as a welcome change from the tendency to conjure up comprehensive criminal protections for presidents.

* * *

Traditional tools of constitutional interpretation give little reason to suppose that the Constitution grants immunity from prosecution and punishment. Hence, the claim made over the past fifty years by executive officials that presidents are uniquely immune from criminal process, prosecution, and punishment has little grounding. Before the Constitution's ratification, no one said that it granted the presidency special immunities, temporary or otherwise. Moreover, to my knowledge, no early President claimed such protections. And the Constitution's text contains nary a hint that our presidents have special criminal immunities of whatever sort. Though the original presidency was unique and enjoyed considerable powers, it did not come freighted with a far-reaching, implicit immunity from criminal prosecutions and penalties.

If we wish to credit the claim that the President cannot be prosecuted or punished, the best argument perhaps rests upon changed conceptions about the presidency's place in American life—upon the notion of our imperial, living presidency. The Founders' energetic Executive has become positively frenetic. Those who favor some, or all, of what the modern presidency has become—a war-declarer, a lawmaker, and a tribune of the people—may suppose that whatever meager dispensations the original presidency possessed, far greater shields are the needs of the hour. They may conceive that with vaster powers and responsibilities must come grander privileges and immunities. But they should not imagine that the original Constitution commanded any of that.

III. Statutory Solutions for Perceived Problems

Some will regard my interpretation of the Constitution as implausible, even alarming. Prosecuting a President may seem a horrific prospect; jailing a sitting President may seem bonkers. Some will prophesize that once we declare that our presidents lack criminal immunity, parochial and partisan prosecutors will emerge from the woodwork to attack our presidents. It will be open season on our pitiable presidents.

Fortunately, Congress can fully address such apprehension and alarm. Nothing precludes Congress from creating immunities the Constitution itself never established. An existing example of such a statute would be the Servicemembers Civil Relief Act, an act that creates various civil dispensations for members of the armed forces.[268] Such laws have early antecedents.[269]

Congress has a range of options. For instance, it might bar indictments because legislators conclude that they unduly tar the president and hobble her ability to function. Perhaps Congress might go further and bar that which the OLC concedes is constitutional: namely, investigation and (informal) official accusation of a sitting President. If Congress is concerned about maximizing the "real authority" of the President "to govern,"[270] a bar on official investigations would do more to preserve that authority. It would better safeguard an undoubted symbol of the United States.

As far as arrest goes, Congress could regulate that as well, reserving it for the most heinous offenses, state and federal. This would bar a situation where an Officer West arrests a President for a minor offense. Or Congress might decide that arrest is altogether forbidden. Since I believe that arrest is sometimes appropriate, I would disagree with the policy choice even as I conclude that Congress can make it.

Another option consists of adopting that which the OLC believes is already part of the Constitution. In particular, Congress could grant an immunity from federal and state indictment and prosecution—one that lasts until presidents leave office. Congress might simultaneously toll all existing statutes of limitations. This would ensure that presidents do not escape punishment merely because the statutes of limitation have run while they enjoyed a statutory immunity from indictment and prosecution.

Congress could enact more targeted immunities. It could permit some prosecutions, say for non-jailable offenses, but bar prosecutions that might yield jail time. This would blend partial presidential amenability with a degree of immunity. Some legislators may conclude that we have nothing to fear from certain forms of criminal accountability; Grant's implicit admission of guilt certainly suggests as much. Relatedly, if legislators believe that adjudication of guilt is necessary because adjudication deters, or because of fears that evidence will scatter and memories dissipate, then they can grant

268. Servicemember Civil Relief Act, Pub. L. No. 108-89, 117 Stat. 2836 (2003).

269. *See, e.g.*, Act of May 28, 1798, ch. 47, § 14, 1 Stat. 558, 560 (privates cannot be arrested for debts); Act of Mar. 16, 1802, ch. 9, § 23, 2 Stat. 132, 136–37 (non-commissioned officers cannot be arrested for debts under $20). Other statutes gave officers immunity for enforcing federal laws. Act of July 31, 1789, ch. 5 § 27, 1 Stat. 29, 43–44 (providing that enforcement of the Federal Revenue Act stands as a defense against any action or suit); Act of Aug. 4, 1790, ch. 35, § 51, 1 Stat. 145, 170 (same); Act of Mar. 3, 1791, ch. 15, § 42, 1 Stat. 199, 209 (same).

270. 1973 OLC Memo, *supra* note 16, at 31.

relevant protections. In particular, Congress can delay sentencing or punishment. Indeed, members might believe that the impeachment process will benefit from an earlier criminal trial, especially because representatives and senators may become more fully aware of presidential wrongdoing.

If legislators are deeply troubled about the possibility of unhealthy recriminations after a President leaves office and hope to avoid a cycle of retaliatory prosecutions, they may wish to bar successor administrations from prosecuting (or persecuting) former chief magistrates. This would grant former presidents a far-reaching immunity, one designed to prevent vengeful persecution. It would also make the prospect of stepping down from office less worrisome because incumbents would not cling to office in a bid to avoid prosecution and punishment.[271]

Finally, if the specter of provincialism is uniquely troubling, Congress may bar attempts of the parts to burden or harass an instrument of the whole. By law, it could dictate that *states* can never indict or prosecute presidents for their official or private acts. Such a federal statute might even preclude state prosecution of former presidents.

The range of combinations is limitless. Any such federal statutes would be constitutional under the Necessary and Proper Clause insofar as Congress concludes that statutory privileges, immunities, and exceptions are advantageous in safeguarding and implementing presidential and other constitutional powers.

Statutory solutions are superior. As compared to a constitutionally grounded immunity, statutes are easier to enact and repeal. If it subsequently appears that the genuine problem is not persecution of our presidents but their perceived criminality while in office, Congress can inter its statutory shields. Alternatively, if a minor tweak is needed here or there, Congress can readily fine-tune its law, broadening it in one area and contracting it in another.

The more general point that should not be lost is that the existence of some problem does not require us to cast about for a *constitutional* solution. Other than a presidential salary, Congress does not have to fund the Executive Branch,[272] and, without funds, that Branch would wither and die. But that reality does not warrant a conclusion that the presidency has an

271. *See* Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 830 (2006) (explaining that the prospect of prosecution makes some leaders fight rather hard to stay in power). Some foreign states supply immunity for their ex-presidents. *See Immunity from Prosecution for Former Presidents in Selected Jurisdictions*, LIBR. OF CONG. (Oct. 2017), https://tile.loc.gov/storage-services/service/ll/llglrd/2017299063/2017299063.pdf [https://perma.cc/VTP7-AQJ4] (noting that Chile's President cannot be "deprive[d] of his freedom, except in the case of a flagrant crime").

272. *Cf*. Charles L. Black Jr., *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS. 87, 89 (1976) ("'To what state could Congress, without violating the Constitution, reduce the President?' I arrived at a picture of a man living in a modest apartment, with perhaps one secretary to answer mail.")

implied constitutional right to funds sufficient to run the Executive Branch. The same is true for the courts. They too have guaranteed salaries,[273] and they too lack a guaranteed budget for their Branch.

Similarly, the perception that an incumbent President's amenability to arrest, conviction, and punishment is a profound problem to be solved does not justify the leap that presidents enjoy constitutional immunity from all three. If people are unsatisfied (or unimpressed) with the Constitution's express solution for incapacitation—the acting President takes over[274]—Congress may solve the perceived problem.

Conclusion

Judge Robert Bork, writing of his experience arguing for executive immunity, made something of an admission against interest: "[W]e had to create the law out of policy and the structure of the government."[275] That has ever been a problem in this area. Advocates of presidential immunity, including originalists like Bork, identify a perceived problem—presidential amenability to the criminal law—and then search for a constitutional solution.[276] In the process, they "create" constitutional law, relying on deeply felt intuitions.

There are three difficulties with this understandable impulse. First, there is an express constitutional provision that adequately handles the problem of a President paralyzed by concern about criminal liability or incapacitated because she finds herself in jail: the Vice President serves as the acting President.[277] This meets the need for an Executive Branch directed by one powerful person in whom the Constitution vests "the [E]xecutive Power"[278] and a host of fundamental duties.

Second, Congress can solve any problems that the Constitution leaves unaddressed. If there is a consensus that the President should not be distracted or incapacitated by the criminal process, Congress can enact laws that bar some or all prosecutions and punishments of a sitting President. Again, there is no need to infer a sweeping constitutional immunity.

Third, it is wrong to refashion constitutional law based on shifting perceptions. Today we may believe that our honorable presidents must have immunity; tomorrow, we may conclude that our rogue executives should be

273. U.S. CONST. art. III, § 1.

274. U.S. CONST. art. II, § 1, cl. 6.

275. BORK, *supra* note 131, at 64.

276. *See* SUNSTEIN, *supra* note 14, at 162 (noting that "we cannot be absolutely sure that the current Supreme Court would allow lawsuits against a sitting president").

277. U.S. CONST. art. II, § 1, cl. 6.; *id.* amend. XXV, § 1.

278. U.S. CONST. art. II, § 1, cl. 1.

immediately prosecuted. Such transient attitudes, ones that too often track perceptions of the current incumbent, are no way to read the Constitution.

In this case, the well-intentioned hope of some—that presidents should carry out their great constitutional functions without harassing prosecutions and incapacitating punishments—has led to the belated discovery of a criminal immunity never intended or granted. We should resist the temptation to allow this deep faith in the perfection of the Constitution[279]—that it solves every one of the problems we perceive or invent—to trump constitutional text, structure, and history. Although presidents are exceptional actors on the constitutional stage and in the life of the nation, they do not have truly exceptional, if tacit, criminal shields. Great powers do not always come with great immunities.

279. Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 356, 396 (1981).