AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Immunity from Judicial Processes

*Randolph D. Moss*, **A Sitting President’s Amenability to Indictment and Criminal Prosecution** (2000)[[1]](#footnote-1)

*At the tail end of the administration of President Bill Clinton, the Office of Legal Counsel was moved to reevaluate the conclusions that Department of Justice officials had reached during the Richard Nixon presidency on whether a sitting president could be indicted or criminally prosecuted. The Nixon-era Department of Justice had concluded that the president could not properly be indicted prior to his departure from office, but a long investigation by independent counsel Kenneth Starr into various alleged misdeeds by President Clinton raised the issue once again. In January 1999, President Clinton was tried by the U.S. Senate on articles of impeachment relating to obstruction of justice but was not convicted. There was still some possibility, however, that the independent counsel could seek a criminal indictment of the president (indeed, the independent counsel’s office had already concluded that a sitting president could be criminally prosecuted). On the eve of the 2000 elections to select President Clinton’s successor, the Office of Legal Counsel reaffirmed the Department of Justice’s official opinion that the president could not be constitutionally subjected to criminal prosecution.*

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Since the Department set forth its constitutional analysis in 1973**,** the Supreme Court has decided three cases that are relevant to whether a sitting President may be subject to indictment or criminal prosecution. . . .

None of these cases directly addresses the questions whether a sitting President may be indicted, prosecuted, or imprisoned. We would therefore hesitate before concluding that judicial statements made in the context of these distinct constitutional disputes would suffice to undermine the Department's previous resolution of the precise constitutional question addressed here. In any event, however, we conclude that these precedents are largely consistent with the Department's 1973 determinations that (1)the proper doctrinal analysis requires a balancing between the responsibilities of the President as the sole head of the executive branch against the important governmental purposes supporting the indictment and criminal prosecution of a sitting President; and (2) the proper balance supports recognition of a temporary immunity from such criminal process while the President remains in office. . . .

*In United States v. Nixon* (1974)*,* the Court considered a motion byPresident Nixon to quash a third-party subpoena *duces tecum* directing the President to produce certain tape recordings and documents concerning his conversations with aides and advisers. . . .

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The assessment of these competing interests led the Court to conclude that "the legitimate needs of the judicial process may outweigh Presidential privilege," and it therefore determined that it was "necessary to resolve those competing interests in a manner that preserves the essential functions of each branch." Here, the Court weighed the President's constitutional interest in confidentiality, against the nation's "historic commitment to the rule of law," and the requirement of "the fair administration of criminal justice." The Court ultimately concluded that the President's generalized interest in confidentiality did not suffice to justify a privilege from all criminal subpoenas, although it noted that a different analysis might apply to a privilege based on national security interests.

In *Nixon v. Fitzgerald* (1982)*,* the Supreme Court considered a claim byformer President Nixon that he enjoyed an absolute immunity from a former government employee's suit for damages for President Nixon's allegedly unlawful official conduct while in office. The Court endorsed a rule of absolute immunity, concluding that such immunity is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported byour history."

The Court reviewed various statements bythe Framers and early commentators, finding them consistent with the conclusion that the Constitution was adopted on the assumption that the President would enjoy an immunity from damages liability for his official actions. The Court once again rejected the contention that the textual grant of a privilege to members of Congress in Article I, Section 6precluded the recognition of an implicit privilege on behalf of the President.

But as in *United States v. Nixon,* the Court found that "the most compelling arguments arise from the Constitution's separation of powers and the Judiciary's historic understanding of that doctrine," It emphasized that "[t]he President occupies a unique position in the constitutional scheme **. . .** as the chief constitutional officer of the Executive Branch.” Although other government officials enjoy only qualified immunity from civil liability for their official actions, "[b]ecause of the singular importance of the President's duties, diversion of his energies byconcern with private lawsuits would raise unique risks to the effective functioning of government." . . . The Court concluded that the constitutional interest in ensuring the President's ability to perform his constitutional functions outweighed the competing interest in permitting civil actions for unlawful official conduct to proceed.

*In Clinton v. Jones* (1997)*,* the Court declined to extend the immunity recognized in *Fitzgerald* to civil suits challenging the legality of a President's unofficial conduct. . . .

In considering the President's claim of a temporary immunity from suit, the Court first distinguished *Nixon v. Fitzgerald,* maintaining that "[t]he principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct." The point of immunity for official conduct, the Court explained, is to "enabl[e] such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability." But "[t]his reasoning provides no support for an immunity *for unofficial conduct."* . . .

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We believe that these precedents, *United States v. Nixon, Nixon v. Fitzgerald,* and *Clinton v. Jones,* are consistent with the Department's analysis and conclusion in 1973**.** The cases embrace the methodology, applied in the OLCmemorandum, of constitutional balancing. That is, they balance the constitutional interests underlying a claim of presidential immunity against the governmental interests in rejecting that immunity. And, notwithstanding *Clinton's* conclusion that *civil* litigation regarding the President's unofficial conduct would not unduly interfere with his ability to perform his constitutionally assigned functions, we believe that *Clinton* and the other cases do not undermine our earlier conclusion that the burdensof *criminal* litigation would be so intrusive as to violate the separation of powers.

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First, the Constitution specifies a mechanism for accusing a sitting President of wrongdoing and removing him from office. While the impeachment process might also, of course, hinder the President's performance of his duties, the process may be initiated and maintained only bypolitically accountable legislative officials. Supplementing this constitutionally prescribed process bypermitting the indictment and criminal prosecution of a sitting president would place into the hands of a single prosecutor and grand jury the practical power to interfere with the ability of a popularly elected President to carry out his constitutional functions.

Second, "[t]he President occupies a unique position in the constitutional scheme." As the court explained, "Article II, §1 of the Constitution provides that '[t]he executive Power shall be vested in a President of the United States **. . . .'** This grant of authority establishes the President as the chief constitutional officer of the Executive branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." In addition to the grant of executive power, other provisions of Article II make clear the broad scope and important nature of the powers entrusted to the President. The President is charged to "take Care that the Laws be faithfully executed." He and the Vice President are the only officials elected bythe entire nation. He is the sole official for whose temporary disability the Constitution expressly provides procedures to remedy. He is the Commander in Chief of the Army and the Navy. He has the power to grant reprieves and pardons for offenses against the United States. He has the power to negotiate treaties and to receive Ambassadors and other public ministers. He is the sole representative to foreign nations. He appoints all of the "Judges of the supreme Court" and the principal officers of the government. He is the only constitutional officer empowered to require opinions from the heads of departments, and to recommend legislation to the Congress. And he exercises a constitutional role in the enactment of legislation through the presentation requirement and veto power.

Moreover, the practical demands on the individual who occupies the Office of the President, particularly in the modem era, are enormous. President Washington wrote that "[t]he duties of my Office . . . at all times . . . require an unremitting attention," In the two centuries since the Washington Administration, the demands of government, and thus of the President's duties, have grown exponentially. . . . In times of peace or war, prosperity or economic crisis, and tranquility or unrest, the President plays an unparalleled role in the execution of the laws, the conduct of foreign relations, and the defense of the Nation. . . .The burdens imposed on a sitting President bythe initiation of criminal proceedings (whether for official or unofficial wrongdoing) therefore must be assessed in light of the Court's "long recogni[tion of] the 'unique position in the constitutional scheme' that this office occupies."

Given the unique powers granted to and obligations imposed upon the President, we think it is clear that a sitting President may not constitutionally be imprisoned. The physical confinement of the chief executive following a valid conviction would indisputably preclude the executive branch from performing its constitutionally assigned functions. . . .

. . . . But the possibility of Vice-Presidential succession "hardly constitutes an argument in favor of allowing other branches to take actions that would disable the sitting President." To rationalize the President's imprisonment on the ground that he can be succeeded byan "Acting" replacement, moreover, is to give insufficient weight to the people's considered choice as to whom they wish to serve as their chief executive, and to the availability of a politically accountable process of impeachment and removal from office for a President who has engaged in serious criminal misconduct. While the executive branch would continue to function (albeit after a period of serious dislocation), it would still not do so as the people intended, with their elected President at the helm. Thus, we conclude 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.

Putting aside the possibility of criminal confinement during his term in office, the severity of the burden imposed upon the President bythe stigma arising both from the initiation of a criminal prosecution and also from the need-to respond to such charges through the judicial process would seriously interfere with his ability to carry out his constitutionally assigned functions. . . .

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The magnitude of this stigma and suspicion, and its likely effect on presidential respect and stature both here and abroad, cannot fairly be analogized to that caused byinitiation of a private civil action. A civil complaint filed bya private person is understood as reflecting one person's allegations, filed in court upon payment of a filing fee. A criminal indictment, bycontrast, is a public rather than private allegation of wrongdoing reflecting the official judgment of a grand jury acting under the general supervision of the District Court. Thus, both the ease and public meaning of a civil filing differ substantially from those of a criminal indictment. . . . Initiation of a criminal proceeding against a sitting President is likely to pose a far greater threat than does civil litigation of severely damaging the President's standing and credibility in the national and international communities. . . .

. . . . The constitutional provisions governing criminal prosecutions make clear the Framers' belief that an individual's mental and physical involvement and assistance in the preparation of his defense both before and during any criminal trial would be intense, no less so for the President than for any other defendant. The Constitution contemplates the defendant's attendance at trial and, indeed, secures his right to be present byensuring his right to confront witnesses who appear at the trial. . . . The Constitution also guarantees the defendant a right to counsel, which is itself premised on the defendant's ability to communicate with such counsel and assist in the preparation of his own defense. These protections stand in stark contrast to the Constitution's relative silence as to the rights of parties in civil proceedings, and they underscore the unique mental and physical burdens that would be placed on a President facing criminal charges and attempting to fend off conviction and punishment. These burdens inhere not merely in the actual trial itself, but also in the substantial preparation a criminal trial demands.

It cannot be said of a felony criminal trial, as the Court said of the civil action before it in *Clinton v. Jones,* that such a proceeding, "if properly managed by the District Court, **. . .** [is] highlyunlikely to occupy any substantial amount of petitioner's time." . . .

. . . . For the President to maintain the kind of effective defense the Constitution contemplates, his personal appearance throughout the duration of a criminal trial could be essential. Yet the Department has consistently viewed the requirement that a sitting President personally appear at a trial at a particular time and place in response to judicial process to raise substantial separation of powers concerns.

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In sum, unlike private civil actions for damages . . .criminal litigation uniquely requires the President's *personal* time and energy, and will inevitably entail a considerable if not overwhelming degree of mental preoccupation. Indictment also exposes the President to an official pronouncement that there is probable cause to believe he committed a criminal act, impairing his credibility in carrying out his constitutional responsibilities to "take Care that the Laws be faithfully executed," and to speak as the "sole organ" of the United States in dealing with foreign nations. . . . These physical and mental burdens imposed byan indictment and criminal prosecution of a sitting President are of an entirely different magnitude than those imposed bythe types of judicial process previously upheld bythe Court.

It is conceivable that, in a particular set of circumstances, a particular criminal charge will not in fact require so much time and energy of a sitting President so as materially to impede the capacity of the executive branch to perform its constitutionally assigned functions. It would be perilous, however, to make a judgment in advance as to whether a particular criminal prosecution would be a case of this sort. Thus 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.

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Recognizing an immunity from prosecution for a sitting President would not preclude such prosecution once the President's term is over or he is otherwise removed from office byresignation or impeachment. The relevant question, therefore, is the nature and strength of any governmental interests in *immediate* prosecution and punishment.

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. . . . [I]t is our considered view that, when balanced against the overwhelming cost and substantial interference with the functioning of an entire branch of government, these potential costs of delay, while significant, are not controlling. In the constitutional balance, the potential for prejudice caused bydelay fails to provide an "overriding need" sufficient to overcome the justification for temporary immunity from criminal prosecution.

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. . . . While in some circumstances an impeachment and subsequent Senate trial might interfere with the President's exercise of his constitutional responsibilities in ways somewhat akin to a criminal prosecution, "this is a risk expressly contemplated bythe Constitution, and it is a necessary incident of the impeachment process." In other words, the Framers themselves specifically determined that the public interest in immediately removing a sitting President whose continuation in office poses a threat to the Nation's welfare outweighs the public interest in avoiding the Executive burdens incident thereto.

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In 1973**,** the Department of Justice concluded that the indictment and criminal prosecution of a sitting President would unduly interfere with the ability of the executive branch to perform its constitutionally assigned duties, and would thus violate the constitutional separation of powers. No court has addressed this question directly, but the judicial precedents that bear on the continuing validity of our constitutional analysis are consistent with both the analytic approach taken and the conclusions reached. Our view remains that a sitting President is constitutionally immune from indictment and criminal prosecution.

1. Excerpt taken from Randolph D. Moss, “A Sitting President’s Amenability to Indictment and Criminal Prosecution” 24 *Op. Off. Legal Counsel* 222 (2000). [↑](#footnote-ref-1)