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

*Ronald D. Rotunda*, **Indictability of the President** (1998)[[1]](#footnote-1)

*Kenneth Starr was a well-respected former federal circuit court judge and United States solicitor general in the George H.W. Bush administration when he was appointed by the panel of judge to take over the Whitewater investigation of President Bill Clinton in 1994. The Whitewater scandal grew out of an allegedly corrupt real estate deal from Clinton’s time as governor of Arkansas, but as the Starr investigation continued its scope grew to include other legal scandals involving the president and his immediate associates. Critically, that expanded criminal investigation intersected with an ongoing civil lawsuit that had been brought against Clinton by Paula Jones. Jones was pursuing a tort claim, asserting that the president had exposed his genitals to her and solicited sex from her when he was the governor of Arkansas and she was a state employee. During the course of that litigation, Clinton was deposed by Jones’ lawyers at the beginning of 1998 and denied under oath that he had had sexual relations with a White House intern, Monica Lewinsky. This false testimony was brought to the attention of the independent counsel, who concluded that it constituted perjury and obstruction of justice. At the end of 1998, shortly after Clinton reached a financial settlement in the Jones lawsuit, that testimony formed the basis of the president’s impeachment by the House of Representatives. He was not convicted in the Senate, and he served out the remainder of his term of office. In 1999, the president was found in civil contempt in a federal district court because of his misleading testimony, and he was stripped of his law license after leaving the Whites House.*

*In the spring of 1998, Starr began to consider how he should proceed if he determined that the president was guilty of one or more criminal acts, including but not limited to his testimony in the Jones lawsuit. Starr solicited a legal memo from Ronald Rotunda examining the question of whether a sitting president be indicted and criminal proceedings begun against him. Rotunda was a prominent constitutional law professor, who had worked with the Senate Watergate Committee during the Nixon administration and served as an advisor to the Starr investigation. The Department of Justice had concluded during the Watergate scandal that a sitting president could not be indicted, but Rotunda reached an opposite conclusion. In the end, Starr did not pursue an indictment of President Clinton but instead simply reported his findings to Congress. Several other individuals were convicted of various criminal offenses as a result of the investigation, however.*

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[T]he investigation is proceeding to the point that there is significant, credible, persuasive evidence that the President has been involved in various illegal activities in a conspiracy with others (in particular his wife), to tamper with witnesses, suborn perjury, commit perjury, hide or destroy incriminating documents, and obstruct justice.

If the President were any other official of the United States . . . I understand that the two Deputy Independent Counsel . . . have concluded that an indictment would be proper and would issue given the evidence before the Grand Jury. The Office of Independent Counsel is, in general, required to follow the Department of Justice regulations governing other federal prosecutors. To refuse to indict the President when the crimes are serious enough and the evidence strong enough that a Senator or Cabinet Secretary would be indicted would be inconsistent with the OIC’s obligations to exercise its prosecutorial discretion the same way that the Department of Justice attorneys exercise their discretion to refuse to indict.

Moreover, there is the apparent injustice that would result if the Grand Jury would seek to indict the various members of the conspiracy (e.g., Hillary Rodham Clinton) while refusing to indict the center of the conspiracy.

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First, it is interesting that democracies in other countries do not recognize a principle that an individual would be above the law and privileged to engage in criminal activities simply because he or she is the President, Premier, Prime Minister, Chief Executive, or Head of State. In fact, heads of state are not immune from criminal prosecutions even if we look at countries with a tradition of living under the rule of law that is much weaker than the tradition that exits in the United States. . . .

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These examples should not be surprising. As Chief Justice Marshall stated nearly two centuries ago, in *Marbury v. Madison* (1803), the case that has become the fountainhead of American constitutional law: “The government of the United States has emphatically termed a government of laws, and not of men.” . . .

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Our written Constitution has two specific sections that refer to what may be categorized as some type of “immunity” from the ordinary reach of the laws.

First, Senators and Representatives are “privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same . . . ,” except in cases of “Treason, Felony and Breach of the Peace. . . .”

The Privilege from Arrest Clause does *not* apply at all to criminal cases. It does not protect the Senator or Representative from service of process in a criminal case. It does not even protect the Senator or Representative from service of process in a civil case. In other words, this clause immunizes a Senator or Representative against a procedure that no longer exists – arrest in a *civil* case.

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The same clause of the Constitution contains the only other reference to a privilege or immunity from the criminal law. It provides that, “for any Speech or Debate in either House, they shall not be questioned in any other Place.”

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. . . . If the Framers of our Constitution had wanted to create some constitutional privilege to shield the President or any other member of the Executive Branch from criminal indictment (or to prevent certain officials from being indicted before they were impeached), they could have drafted such a privilege. They certainly know how to draft immunity language, for they drafted a very limited immunity for the federal legislature.

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There is only one impeachment clause in the Constitution. It does not purport to distinguish the impeachment of a federal judge from the Vice President, nor does it distinguish the impeachment of the Vice President from the President. . . .

. . . . This clause does not state that criminal prosecution must come after an impeachment, nor does it state that the refusal of the House to impeach (or the Senate to remove from office) would bar a subsequent criminal prosecution.

The available historical evidence as to the meaning of this clause is sparse. One can find various historical references that *assume* that impeachment would precede indictment, but these references, as Professor John Hart Ely concluded, “did not argue that the Constitution *required* that order.” Professor Ely, at the time, was a consultant to Archibald Cox, then the Watergate Special Prosecutor, when he made these comments and concluded that the Constitution does not require that impeachment and removal precede a criminal indictment, even of the President. . . .

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Consider, for example, the remarks of James Wilson, in the course of the Pennsylvania debates on the Constitution. He said: “far from being above the laws, he [the President] is amenable to them in is private character as a citizen, and in his public character by impeachment.” That quotation implies that the President can be criminally prosecuted like any other citizen, without regard to impeachment. Similarly, Iredell, in the course of the North Carolina debates on the Constitution, said: “If he [the President] commits any misdemeanor in office, he is impeachable . . . . If he commits any crime, he is punishable by the laws of his country, and in capital cases may be deprived of his life.”

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Consider also some remarks that Joseph Story made in his *Commentaries on the Constitution*:

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. In the exercise of his political powers he is to use his own discretion. . . .”

Some people focus on the phrase: “The president cannot, therefore, be liable to arrest, imprisonment, or detention. . . .” However, they forget to read the rest of the sentence, which gives him this immunity only when pursuing his official duties: “*while* he is in the discharge of the *duties of his office*. . . .” Obstruction of justice, witness tampering, destruction of documents, accepting pay-offs – none of this is part of the President’s official duties. . . .

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If public policy and the Constitution allow a private litigant to sue a sitting President for alleged acts that are not part of the President’s official duties (and are outside the parameters of those duties) – and that is what *Clinton v. Jones* (1997) squarely held – then one would think that an indictment is constitutional because the public interest in criminal cases is *greater than* the public interest in civil cases.

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No federal statutes recognize, or purport to recognize, any Presidential immunity from criminal indictment. Indeed, Congress has done quite the opposite: it has created an Independent Counsel statute for the express purpose of investigating alleged criminal activities of the President. In fact, it enacted this statute with a specific background of criminal allegations surrounding *this particular President*. And this particular President not only signed the law, he and his Attorney General lobbied for the law. . . .

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In the unlikely event that the defense of a civil suit (*e.g., Jones v. Clinton*) or the defense of a criminal case would prevent the President from performing his duties, the Executive Branch does not simply shut down. The Twenty Fifth Amendment, § 3, provides a procedure for the Executive Branch to continue to function “[w]henever the President transmits . . . his written declaration that is unable to discharge the powers and duties of his office. . . .” This procedure is clearly not limited to cases of illness.

One should also note that it is easy to make a claim that the Executive Branch will simply “shut down,” but that claim is difficult to accept. President Clinton, during the pendency of the *Jones* case, said repeatedly that the looming civil case was not affecting his duties as President. Nonetheless, while he was making those statements, the defense attorneys claimed that a delay was necessary because of the burdens on the President. . . . When attorneys cry “wolf” too often, they lose their credibility. . . .

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No legal precedent has ever concluded that the President is immune from the federal criminal laws. In fact, the cases have suggested the contrary.

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[I]n *Nixon v. Fitzgerald* (1982), the Supreme Court held that the President was *absolutely immune* from civil damages involving actions taken within his official duties, but also emphasized that this was “merely a private suit for damages” and that there is “a lesser public interest in actions for civil damages *than, for example, in criminal prosecutions*.” . . .

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Later, in *Clinton v. Jones*, the Court rejected any notion of Presidential immunity (even a temporary immunity) for the President who is sued by a private civil litigant for damages involving acts not within his Presidential duties. In that case, President Clinton’s “strongest argument” supporting his claim for immunity on a temporary basis, the Court said, was the claim that the President occupies a “unique office” and burdening him with litigation would violate the constitutional separation of powers and unduly interfere with the President’s performance of his official duties.

In language of remarkable breadth, the *Jones* Court repeatedly stated that no amount of this kind of burden would violate the Constitution. The President, the Court held: “errs in presuming that interactions with the Judicial Branch and the Executive, *even quite burdensome interactions*, necessarily rise to the level of constitutionally forbidden impairment of the Executive’s ability to perform its constitutionally mandated functions.” The opinion, which had no dissents, quoted with approval James Madison’s view that separation of powers “does not mean that the branches ‘ought to have no *partial agency* in, or no *countroul* over the acts of each other.’”

And, if that were not clear enough, Justice Stevens’ opinion added this clincher:

*The fact that a federal court’s exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution.*

The Court explained that it “has the authority to determine whether he has acted within the law.” And, “it is also settled that the President is subject to judicial process in appropriate circumstances.”

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President Nixon’s argument – that “any prosecutor and grand jury would have within their power the ability to cripple an entire branch of the national government” – is inapplicable here. Neither “any” prosecutor nor “any” grand jury cannot institute criminal charges against a sitting President. The Independent Counsel Act does not authorize anyone to institute charges; it only gives its authority to the Independent Counsel, who can only be appointed if the Attorney General (who serves as the discretion of the President) asks the Special Division [of the federal circuit court] for an appointment.

Nor can it be argued that an indictment would close down the entire Executive Branch of the Federal Government. The President can continue his duties, and “*a federal court’s exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution*.” If the President is indicted, the government will not shut down, any more than it shut down when the Court ruled that the President must answer a civil suit brought by Paula Jones.

President Clinton may well argue that a criminal indictment of the President would inevitably place the nation in turmoil and bring the entire government to a halt. Oddly enough, those same people argue that the solution is to impeach the President. Would not an impeachment place the nation in even more turmoil?

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If it is an unconstitutional for a federal grand jury, acting pursuant to the Independent Counsel statute to indict a President for engaging, in his private capacity, in serious violations of federal law, then it would be a gross abuse of the grand jury powers and a violation of federal statutory and constitutional law for that grand jury to investigate whether the President has committed any criminal law violations. But we know, after *Morrison v. Olson* (1988), that it is constitutional for the Independent Counsel to use the grand jury to investigate the President. The conclusion was implicit in the holding of *Morrison*. Hence it should be constitutional to indict a sitting President because it would not be constitutional to use the grand jury to investigate if it could not constitutionally indict.

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The purpose of the OIC investigation and the grand jury investigation is to determine whether the President has, or has not, engaged in serious crimes. If the grand jury cannot indict the President for such crimes, then it has no business investigating the President’s role in such crimes. Impeachment, after all, is an admittedly *noncriminal* proceeding. . . .

. . . . Grand Juries cannot be used as a short cut for the House of Representatives to collect information that otherwise would be difficult to secure. The OIC cannot use the grand jury to investigate alleged criminal activity by the President if an indictment (assuming that the evidence warranted it) is “merely an unexpected bare possibility.” The OIC (which sits in the shoes of the Attorney General) must have an open mind whether to seek an indictment, but it cannot have an open mind about this issue if it would be illegal or unconstitutional to indict the President.

In other words, if the statute creating the OIC and authorizing it to investigate the President and turn over relevant information to the House of Representatives does not authorize or permit the OIC to seek an indictment of the President, the statute is authorizing an abuse of the grand jury powers, an unconstitutional perversion of the Fifth Amendment, which created the grand jury. It is clearly improper to use the grand jury, a creature of the criminal process, to collect evidence for noncriminal purposes. It is unconstitutional to use the grand jury solely as a tool of a House impeachment inquiry to investigate in an area where it could not indict even if the evidence warranted an indictment.

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But, we know that it is constitutional for the Independent Counsel to investigate the President to determine if he should be indicted for criminal acts. That was what *Morrison v. Olson* was all about.

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These factors all buttress and lead to the same conclusion: it is proper, constitutional, and legal for a federal grand jury to indict a sitting President for serious criminal acts that are not part of, and are contrary to, the President’s official duties. In this country, no one, even President Clinton, is above the law.

This conclusion does not imply that a President must be required to serve an actual prison term before he leaves office. The defendant President could remain free pending his trial, and the trial court could defer any prison sentence until he leaves office. The defendant-President may petition the courts to exercise its discretion in appropriate cases. It is one thing for the President to petition the court to exercise its discretion; it is quite another for the President to announce that he is above the law and immune from criminal prosecution.

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Neither the criminal proceedings nor the impeachment proceedings will control the other. As Solicitor General Bork pointed out a quarter century ago: “Because the two processes have different objects, the considerations relevant to one may not be relevant to the other.” For that reason, neither conviction nor acquittal in one trial, though it may be persuasive, need automatically determine the result in the other trial.

And, the House or Senate may conclude that “a particular offense, though properly punishable in the courts, did not warrant” either impeachment or removal from office.

1. Excerpt taken from Ronald D. Rotunda, “Indictability of a President” (May 13, 1998), Records of Independent Counsels Kenneth Starr and Robert Ray, National Archives. [↑](#footnote-ref-1)