AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 9: Liberalism Divided – Separation of Powers/Immunity from Judicial Processes

*Robert G. Dixon, Jr.*, **Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution while in Office** (1973)[[1]](#footnote-1)

*In the spring of 1973, the U.S. Senate began hearings into the scandal of a Republican-orchestrated break-in at the Democratic National Committee headquarters in the Watergate hotel complex in the summer before President Richard Nixon’s reelection in 1972. At roughly the same time, Archibald Cox was appointed to serve as special prosecutor overseeing the executive branch’s criminal investigation of the break-in and its cover-up. Meanwhile, the United States attorney was engaged in a federal corruption probe of state politics in Maryland and uncovered evidence of potential crimes by Vice President Spiro Agnew from his days as governor of the state. Spiro resigned from the vice presidency in the fall of 1973, and a year later Richard Nixon resigned from the presidency.*

*With those criminal investigations looming, Assistant Attorney General Richard G. Dixon, Jr. in the Office of Legal Counsel in the Department of Justice was tasked with authoring a legal opinion examining whether sitting civil officers – and particularly the president and vice president – could be subjected to criminal prosecution. Dixon concluded that the president would have to be impeached and removed from office before a criminal prosecution could be initiated, but that the vice president was not constitutionally immune from criminal judicial proceedings while in office. The Department of Justice has adhered to this constitutional position ever since.*

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Article I, section 3, clause 7 . . . does not say that a person subject to impeachment may be tried only after the completion of that process. Instead the constitutional provision uses the term “nevertheless.” The purpose of this clause thus is to permit criminal prosecution in spite of the prior adjudication by the Senate, i.e., to forestall a double jeopardy argument.

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The practical interpretation of the Constitution has been to the same effect. During the life of the Republican impeachment proceedings have been instituted only against 12 officers of the United States. In the same time, presumably scores, if not hundreds, of officers of the United States have been subject to criminal proceedings for offenses for which they could have been impeached.

It may be suggested that it is no answer to say that in most instances the officer presumably had resigned or been removed by the time he had been tried. If it really is the import of Article I, section 3, clause 7, that an officer of the United States may be subjected to criminal proceedings only after the conclusion of the impeachment procedure, the question of whether he is still in office at the time of the criminal trial can be viewed as immaterial. The constitutional text does not contain any express exception to that effect. Moreover, resignation or removal arguably does not terminate the impeachment power as a matter of law. . . . And yet it would seem to be an unreasonable interpretation of the Constitution to move from the latter proposition to the conclusion – necessary under the argument that impeachment must precede indictment – that an offending federal officer acquires a lifetime immunity against indictment unless the Congress takes time to impeach him.

There have been several instances of legislative actions envisaging the criminal prosecution of persons while still in office, and of the actual institution of criminal proceedings against federal officers while in office.

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In sum, the analysis of the text of the Constitution and its practical interpretation indicate that the Constitution does not require the termination of impeachment proceedings before an officer of the United States may be subjected to criminal proceedings. The caveat is that all of the [instances that could be given] concerned judges, who possess tenure under Article III only during “good behavior,” a provision not relevant to other officers. However, although this clause may be the basis for a congressional power to remove judges by processes other than impeachment, it is not directly responsive to the question whether impeachment must precede criminal indictment. . . .

The opposite conclusion, *viz*., that a person who is subject to impeachment is not subject to criminal prosecution prior to the termination of the impeachment proceedings would create serious practical difficulties in the administration of the criminal law. . . . [E]very criminal investigation and prosecution of persons employed by the United States would give rise to complex preliminary questions. These include, *first*, whether the suspect is or was an officer of the United States within the meaning of Article II, section 4 of the Constitution, and *second*, whether the offense is one for which he could be impeached. *Third*, there would arise troublesome corollary issues and questions in the field of conspiracies and with respect to the limitations of criminal proceedings. An interpretation of the Constitution which injects such complications not criminal proceedings is not likely to be a correct one. Indeed, impractical or self-defeating interpretations of constitutional texts must be avoided. The Framers were experiences and practical men. This fact, coupled with the purposive spirit of constitutional interpretation set by Chief Justice Marshall, has been the foundation for the endurance of our constitutional system for 186 years.

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. . . . The question therefore arises whether an immunity of the President from criminal proceedings can be justified on other grounds, in particular the consideration that the President’s subjection to the jurisdiction of the courts would be inconsistent with his position as head of the Executive branch.

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Any argument based on the position or independence of one of the three branches of the Government is subject to the qualification that the Constitution is not based on a theory of an airtight separation of powers, but rather on a system of checks and balances, or of blending the three powers. We must therefore proceed case-by-case and look to underlying purposes. This facet of any reasoning based on the doctrine of the separation of powers is necessarily stressed by those who oppose independence or immunity in a given instance. . . .

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In the *Burr* treason trial, Chief Justice Marshall at first concluded that since the President is the first magistrate of the United States, and not a King who can do no wrong, he was subject to the judicial subpoena power. In the *Burr* misdemeanor trial, however, which took place only a few months later, the Chief Justice had to qualify significantly his claim of the subpoena power over the President by conceding that the courts are not required “to proceed against the President as against an ordinary individual.” And by acquiescing in the privileges claimed by President Jefferson of not attending court in person and of withholding certain evidence for reasons of State, Chief Justice Marshall recognized that the power of the judiciary to subpoena the President is subject to limitations based on the needs of the Presidential office.

Marshall’s recognition of the special character of the Presidential office was expanded in *Kendall v. United States* (1838), where the Court seemed to deny that it had any jurisdiction over the President:

The executive power is vested in a president; and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeachment.

It is significant that this apparent total disclaimer of any judicial authority over the President was also qualified by adding the clause “so far as his powers are derived from the constitution.”

There have been countless examples in which courts have assumed jurisdiction to scrutinize the validity of Presidential action, such as proclamations, Executive orders, and even direct instructions by the President to his subordinates. . . .

Again, Attorney General Stanbery’s famous oral argument in *Mississippi v. Johnson* (1867) . . . is prefaced by the statement that the case made against President Johnson “is not made against him as an individual, as a natural person, for any acts he intends to do as Andrew Johnson the man, but altogether in his official capacity as President of the United States.” Hence, Attorney General Stanbery’s reasoning is presumably limited to the power of the courts to review official action of the President, and does not pertain to the question whether or not the courts lack the authority to deal with the President “the man” with respect to matters which have no relation to his official responsibility.

Thus it appears that under our constitutional plan it cannot be said either that the courts have the same jurisdiction over the President as if he were an ordinary citizen or that the President is absolutely immune from the jurisdiction of the courts in regard to any kind of claim. The proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and functions of the Presidency.

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It should be noted that it has been well established in civil matters that the courts lack jurisdiction to reexamine the exercise of discretion by an officer of the Executive branch. *Marbury v. Madison* (1803) . . . By the same token it would appear that the courts lack jurisdiction in criminal proceedings which have the effect of questioning the proper exercise of the President’s discretion. This conclusion, of course, would involve a lack of jurisdiction over the subject matter and not over the person.

The second reason for the institution of impeachment, viz., the trial of political men, presents more difficulties. The consideration here involved are that the ordinary courts may not be able to cope with powerful men, and second, that it will be difficult to assure a fair trial in criminal prosecutions of this type.

The consideration that the ordinary courts of law are unable to cope with powerful men arose in England where it presumably was valid in feudal time. In the conditions now prevailing in the United States, little weight is to be given to it as far as most officeholders are concerned.

We also note Alexander Hamilton’s point that in well-publicized cases involving high officers, it is virtually impossible to insure a fair trial. . . . Undoubtedly, the consideration of assuring a fair criminal trial for a President while in office would be extremely difficult. It might be impossible to impanel a neutral jury. To be sure there is a serious “fairness” problem whether a criminal trial precedes or follows impeachment. However, the latter unfairness is contemplated and accepted in the impeachment clause itself, thus suggesting that the difficulty in impaneling a neutral jury should not be viewed, in itself, an absolute bar to indictment of a public figure.

. . . . The Presidency, however, creates a special situation in view of the control of all criminal proceedings by the Attorney General who serves at the pleasure and normally subject to the direction of the President and the pardoning power vested in the President. Hence, it could be argued that a President’s status as a defendant in a criminal case would be repugnant to his office of Chief Executive, which includes the power to oversee prosecutions. In other words, just as a person cannot be judge in his own case, he cannot be prosecutor and defendant at the same time. This objection would lose some of its persuasiveness where, as in the Watergate case, the President delegates his prosecutorial functions to the Attorney General, who in turn delegates them to a Special Prosecutor. However, none of these delegations is, or legally can be, absolute or irrevocable.

Further, the problem of Executive privilege may create the appearance of so serious a conflict of interest as to make it appear improper that the President should be a defendant in a criminal case. If the President claims the privilege he would be accused of suppressing evidence unfavorable to him. If he fails to do so the charge would be that by making available evidence favorable to him he is prejudicing the ability of future Presidents to claim privilege. And even if all other hurdles are surmounted, he would still possess the pardoning power.

It has been indicated above that in the *Burr* case, President Jefferson claimed the privilege of not having to attend court in person. And it is generally recognized that high government officials are exempted from the duty to attend court in person in order to testify. This privilege would appear to be inconsistent with a criminal prosecution which necessarily requires the appearance of the defendant for pleas and trial, as a practical matter.

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A necessity to defend a criminal trial and to attend court in connection with it . . . would interfere with the President’s unique official duties, most of which cannot be performed by anyone else. It might be suggested that the same is true with the defense of impeachment proceedings; but this is a risk expressly contemplated by the Constitution, and is a necessary incident of the impeachment process. The Constitutional Convention was aware of this problem but rejected a proposal that the President should be suspended upon impeachment by the House until acquitted by the Senate.

During the past century the duties of the Presidency, however, have become so onerous that a President may not be able fully to discharge the powers and duties of his office if he had to defend a criminal prosecution. This might constitute an incapacitation so that under the provisions of the Twenty-Fifth Amendment, Sections 3 or 4, the Vice President becomes Acting President. The same would true, if a conviction on a criminal charge would result in incarceration. However, under our constitutional plan as outlined in Article I, sec. 3, only the Congress by the formal process of impeachment, and not a court by any process should be accorded the power to interrupt the Presidency or oust an incumbent.

This would suggest strongly that, in view of the unique aspects of the Office of the President, criminal proceedings against a President in office should not go beyond a point where they could result in so serious a physical interference with the President’s performance of his official duties that it would amount to an incapacitation. . . . The physical interference consideration, of course, would not be quite as serious regarding minor offenses leading to a short trial and fine. . . .

A possibility not yet mentioned is to indict a sitting President but defer further proceedings until he is no longer in office. From the standpoint of minimizing direct interruptions of official duties – and setting aside the question of the power to govern – this procedure might be a course to be considered. One consideration would be that this procedure would stop the running of the statute of limitations. It is uncertain whether a constitutional conclusion that the President could not be indicted while in office would be viewed as tolling the federal statutes of limitations. . . .

In *Mississippi v. Johnson* (1867), Attorney General Stanbery made the following statement:

It is not upon any peculiar immunity that the individual has who happens to be President; upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President.

This may be an overstatement, but surely it contains a kernel of truth, namely 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, both in foreign and domestic affairs. It is not to be forgotten that the modern Presidency, under whatever party, has had to assume a leadership role undreamed of in the eighteenth and early nineteenth centuries. The spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination.

Perhaps this thought is best tested by considering what would flow from the reverse conclusion, i.e., an attempted criminal trial of the President. A President after all is selected in a highly complex nationwide effort that involves most of the major socioeconomic and political forces of our whole society. Would it not be incongruous to bring him down, before the Congress has acted, by a jury of twelve, selected by chance “off the street” as Holmes put it? Surely the House and Senate, via impeachment, are more appropriate agencies for such a crucial task, made unavoidably political by the nature of the “defendant.”

The genius of the jury trial has been that it provides a forum of ordinary people to pass on matters generally within the experience or contemplation of ordinary, everyday life. Would it be fair to such an agency to give it responsibility for an unavoidably political judgment in the esoteric realm of the Nation’s top Executive?

In broader contest we must consider also the problem of fairness, and of accountability of the verdict. Given the passions and exposure that surround the most important office in the world, the American Presidency, would the country in general have faith in the impartiality and sound judgment of twelve jurors selected by chance out of a population of more than 200 million? . . . Even if there were an acquittal, would it be generally accepted and leave the President with effective power to govern?

A President who would face jury trial rather than resign could be expected to persist to the point of appealing an adverse verdict. The process could then drag out for months. By contrast the authorized process of impeachment is well-adapted to achieving a relatively speedy and final resolution by a nation-based Senate trial. The whole country is represented at the trial, there is no appeal from the verdict, and removal opens the way for placing the political system on a new and more healthy foundation.

. . . . Given the realities of modern policies and mass media, and the delicacy of the political relationships which surround the Presidency both foreign and domestic, there would be a Russian roulette aspect to the course of indicting the President but postponing trial, hoping in the meantime that the power to govern could survive.

A counter-argument which could be made is that the indictment alone should force a resignation, thus avoiding the trauma either of a trial during office, or an impeachment proceedings. This counter-argument, however, rests on a prediction concerning Presidential response which has no empirical foundation. The reasons underlying the Founding Fathers’ decision to reject the notion that a majority of the House of Representatives could suspend the President by impeaching him apply with equal force in a scheme that would permit a majority of a grand jury to force the resignation of a President. The resultant disturbance to our constitutional system would be equally enormous. Indeed, it would be more injudicious because the grand jury, a secret body, could interrupt Presidential succession without affording the incumbent the opportunity for a hearing to voice his defense.

A further factor relevant here is the President’s role as guardian and executor of the four-year popular mandate expressed in the most recent balloting for the Presidency. Under our developed constitutional order, the presidential election is the only national election, and there is no effective substitute for it. Different electorates and markedly different voting patterns produce the Senate and the House of Representatives. Because only the President can receive and continuously discharge the popular mandate expressed quadrennially in the presidential election, an interruption would be politically and constitutionally a traumatic event. The decision to terminate this mandate, therefore, is more fittingly handled by the Congress than by a jury, and such congressional power is founded in the Constitution.

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[A]lthough one cannot entirely be free from doubt in this unprecedented area, it is, nevertheless, concluded that the case for granting the Vice President immunity from criminal prosecution has not been made.

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1. Excerpt taken from Robert G. Dixon, Jr., “Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution while in Office” (1973) [↑](#footnote-ref-1)