การฟ้องคดีอาญาประธานาธิบดีในขณะที่ดำรงตำแหน่ง
Indicting a Sitting President

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แอนดูรว์ ดี. มาสติน*
Andrew D. Mastin

บทคัดย่อ

บทความนี้จะได้พิจารณาถึงคำถามที่ว่าประธานาธิบดีซึ่งอยู่ในตำแหน่งสามารถที่จะถูกฟ้องร้องในคดีอาญาได้หรือไม่ ในการตอบคำถามนี้ผู้เขียนได้พิจารณาจากตัวบทของรัฐธรรมนูญแห่งสหรัฐอเมริกาและการตู้เย็นกันในทางความคิดเห็นซึ่งปรากฏอยู่ในเอกสารการร่างและการให้สัตยาบันรัฐธรรมนูญดังกล่าว ประการที่ 2 ผู้เขียนได้พิจารณาจากคำพิพากษาของศาลที่เกี่ยวข้องในประเด็นนี้ รายการที่ 3 ผู้เขียนได้วิเคราะห์ถึงเอกสารของกระทรวงยุติธรรมสหรัฐอเมริกาและอัยการสูงสุดของสหรัฐซึ่งปฏิบัติหน้าที่อยู่โดยได้แสดงความเห็นเกี่ยวกับความเป็นไปได้ในการฟ้องร้องประธานาธิบดี และประการสุดท้ายผู้เขียนได้คำนึงถึงข้อพิจารณาในทางปฏิบัติเกี่ยวกับการฟ้องร้องประธานธิบดีซึ่งกำลังดำรงตำแหน่งอยู่ ผู้เขียนพบว่าไม่มีแนวทางปฏิบัติหรือแนวคำพิพากษาหรือกฎหมายใดๆ ที่ห้ามการฟ้องคดีอาญาดังกล่าว การฟ้องคดีเช่นว่านั้นอาจจะสามารถทำได้ด้วยความระมัดระวังในสถานการณ์ที่เหมาะสม

คำสำคัญ: ประธานาธิบดีสหรัฐอเมริกา, การฟ้องคดีอาญา, รัฐธรรมนูญสหรัฐอเมริกา กระทรวงยุติธรรมสหรัฐอเมริกา, สนักงานที่ปรึกษากฎหมายแห่งสหรัฐอเมริกา

Abstract

This article addresses the question of whether a sitting U.S. president may be charged with a crime while in office. In examining this question, the author first considers the text of the Unites States Constitution and the debates surrounding its drafting and ratification. Second, the author examines relevant court decisions regarding this question. Third, the author analyzes memoranda prepared by the United States Department of Justice's Office of Legal Counsel, as well as other government attorneys acting in an official capacity, who have opined about the possibility of indicting the president. Finally, the author addresses practical considerations regarding the indictment of a sitting president.

* Faculty member at Thomas Aquinas School of Law Assumption University

The author concludes that there is no controlling precedent, legal or otherwise, that precludes such an indictment, and that indictment might be warranted in appropriate circumstances.

Keywords: U.S. President, criminal indictment, U.S. Constitution, U.S. Department of Justice, Office of Legal Counsel

1. Introduction

On August 21, 2018, Michael Cohen was indicted in United States Federal Court for the Southern District of New York. He was charged with, among other things, felony campaign finance violations, to which he pled guilty. President Donald J. Trump was identified as a co-conspirator in those violations, but was not indicted.[1]

Later, Special Counsel Robert Mueller issued a report at the conclusion of a nearly two-year investigation into Russia's interference in the 2016 U.S. presidential election, and the possible complicity of the Trump campaign in those efforts. Among other things, Mueller's report identified ten specific instances in which President Trump may have committed obstruction of justice.[2] However, as in the *U.S. v. Cohen* case, Mr. Mueller did not indict President Trump.

The mere fact that President Trump was not indicted in either of these circumstances does not, however, answer the question of whether, as the sitting president of the United States, he *could* be indicted. The prosecutors in the *Cohen* case offered no explanation of their decision not to indict the president, even though the sole defendant in the case pled guilty and thus legally admitted that the criminal offenses charged in the indictment had occurred. Mr. Mueller, on the other hand, cited the opinion of the U.S. Department of Justice's Office of Legal Counsel declaring that it is the policy of the Department of Justice that a sitting president may not be indicted. On this basis,

[1] United States v. Cohen, 18 Crim. 602 (S.D.N.Y 2018) (indictment available at https://www.documentcloud.org/documents/4779697-Michael-Cohen-Charging-Documents.html) (last visited on Aug. 22, 2019). President Trump is identified in the indictment as "Individual 1."

[2] Report on the Investigation into Russian Interference in the 2016 Presidential Election ("Mueller Report"), Vol. II at 2-7.

he compiled evidence of possible criminal offenses, but declined to make a determination regarding whether the president committed any crimes.

This article will address the OLC opinion and its legal basis, as well as constitutional and other legal and practical considerations, in an effort to answer the question of whether a sitting U.S. president may be charged with a crime while in office.

2. The Constitution

The text of the United States Constitution contains no dispositive answer to the question of whether a president can be criminally indicted while in office. The drafters of the Constitution were certainly not oblivious to the concern that a person elected to the position of president, the chief executive officer of the newly-created federal government, might use that office for corrupt purposes, or otherwise violate the law while in office. For example, during the debates on the Constitution, George Mason argued that the power to grant pardons given to the president under Article II was too broad, because the president could use it to pardon people for committing crimes the president himself directed them to commit. He worried that the president "might screen from punishment those whom he has secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt."[3] James Madison countered that the remedy for such abuse of power lay in the power to impeach the president given to Congress in Article I: "There is one security in this case to which gentlemen may not have adverted: If the President be connected in any suspicious manner with any persons, and there be grounds to believe he will shelter himself; the House of Representatives can impeach him. They can remove him if found guilty."[4]

Thus, the drafters of the Constitution appear to have viewed impeachment as the principal method of addressing possible illegal acts by the president. The impeachment process consists of two steps. The first is a vote in the House of Representatives (one of

[3] Joseph Conner, Power of the Pardon, HistoryNet.com (April 2018) (available at https://www.historynet.com/power-of-the-presidential-pardon.html) (last visited on Aug. 22, 2019).

[4] Powers of the President (18 June 1788), reprinted in Founders Online (available at https://founders.archives.gov/documents/Madison/01-11-02-0097) (last visited on Aug. 22, 2019).

the two houses of the U.S. Legislature) to impeach the president or other executive officer. The first mention of impeachment in the Constitution occurs in Article I, Section 2, which states that "The House of Representatives . . . shall have the sole Power of Impeachment."[5]A vote to impeach is not a conclusive act against that officer, but rather a formal accusation of misconduct serious enough to warrant removal from office, including criminal conduct. It is thus analogous to an indictment in a criminal proceeding. To become effective, articles of impeachment must be passed by a simple majority of those present and voting.

The second part of the impeachment process entails a trial in the Senate (the other house of the U.S. Legislature). This portion of the process is analogous to a criminal trial, with all the members of the Senate acting as a panel of judges. Article I, Section 3 of the Constitution states that "The Senate shall have sole power to try all Impeachments. . . . When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present."[6] Thus, the Senate hears the evidence and legal arguments and decides whether to convict the executive officer of the charges contained in the articles of impeachment.

Finally, Article II, Section 4, states that "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."[7] Thus, criminal acts are specifically identified as a basis for impeachment, conviction and removal from office. The drafters of the Constitution clearly intended that a president accused of criminal conduct could be impeached. However, impeachment was not intended solely, or even primarily, to address criminal conduct. In *The Federalist*, Alexander Hamilton described impeachable offenses as arising from "the misconduct of public men, or in other words from the abuse or violation of some public trust."[8] Such offenses are "*political*, as they relate chiefly to injuries to the society itself."[9]

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[5] U.S. Const., Art. I, Sec. 2.

[6] Ibid., Art. I, Sec. 3.

[7] Ibid., Art. II, Sec. 4.

[8] Alexander Hamilton, The Federalist No. 65.

[9] Ibid.

In practice, impeachment has rarely focused on criminal conduct, but has instead been employed to address abuses of power, behavior incompatible with the duties of office, and misuse of public office for improper purposes or for personal gain.[10] Less than one-third of the articles of impeachment passed by the House alleged a violation of a criminal statute, or described the alleged misconduct as "criminal" in nature.[11] Moreover, there have been instances in which Congress declined to impeach a federal officer for criminal conduct. For example, the House Judiciary Committee rejected a proposed article of impeachment against President Richard Nixon alleging that he had committed tax fraud, on the grounds that the allegation "related to the President's private conduct, not to an abuse of his authority as President."[12]

In his report, Special Counsel Mueller emphasized that Congress has the ability to determine if the president obstructed justice, a criminal offense. Although the report abstained from charging the president with any crimes, it laid out a blueprint for Congress to follow if lawmakers wanted to pursue further inquiry. The report thus endorsed the view that an impeachment inquiry in the House is the preferred means of addressing potential criminal conduct by the president. Mr. Mueller wrote, "The conclusion that Congress may apply obstruction laws to the President's corrupt exercise of the powers of office accords with our constitutional system of checks and balances and the principle that no person is above the law."[13]

However, while impeachment may have been the preferred procedure, it was never intended as the sole remedy for addressing criminal behavior by an officer of the executive branch. The text of the Constitution contains no provision stating, or even implying, that a president can only be impeached for criminal conduct, and not indicted

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[10] Staff of the Impeachment Inquiry, Committee on the Judiciary, U.S. House of Representatives, Constitutional Grounds for Presidential Impeachment, 93d Conf. 2d Sess. (1974) (available at https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/1974 ImpeachmentInquiryReport.pdf) (last visited on Aug. 22, 2019).

[11] Jared Cole and Todd Garvey, "Impeachment and Removal," Congressional Research Service, Report No. R44260 (Oct. 29, 2015) (available at https://fas.org/sgp/crs/misc/R44260. pdf) (last visited on Aug. 22, 2019).

[12] Ibid.

[13] Mueller Report, supra, Vol. II at 7.

in a criminal court. In fact, the Constitution provides the exact opposite. Article I, Section 3 states:

> 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.[14]

Thus, the Constitution makes clear that a president is not immune from criminal indictment and prosecution. The question left unresolved by the text of the Constitution is therefore *when* such an indictment may be brought against the president or other executive officer. The language of Section 3 could be read to suggest that impeachment *must* precede any criminal prosecution. A president may be impeached and, if convicted, may then face indictment and prosecution in criminal court. Thus, one possible interpretation of Section 3 is that it mandates the sequence in which these events constitutionally must occur: impeachment comes first, followed by criminal prosecution.

However, a more persuasive interpretation of this passage is that it simply defines the limited consequences of impeachment by the House and conviction by the Senate, and makes clear that further punishment may be still imposed in a separate criminal proceeding without violating the prohibition against double jeopardy (that is, being prosecuted twice for the same alleged criminal offense). Accordingly, Section 3 first states that the consequences of conviction on articles of impeachment are limited to: (1) removal from office, and (2) disqualification from holding any other executive office of the United States in the future, and thus shall not include any criminal penalties (such as imprisonment or monetary fines) or other sanctions. It then goes on to state that an executive officer who has been impeached and convicted is, however, not immune from such criminal penalties, which may be pursued and imposed in a separate legal proceeding without implicating double jeopardy. Under this interpretation, Section 3 does not address the proper sequence of these separate events, and thus says nothing at all about whether a criminal indictment must follow, or may instead precede, an impeachment proceeding.

In a speech before Congress during the impeachment proceedings against Supreme Court Justice Samuel Chase, Luther Martin, who had been a member of the

[14] Op. cit.

Constitutional Convention that drafted the constitution, stated that Section 3 was designed to overcome a claim of double jeopardy rather than to require that impeachment precede any criminal proceedings.[15] This interpretation of Section 3 also finds support in two memoranda prepared by the Office of Legal Counsel ("OLC") of the U.S. Department of Justice, which are discussed in detail in Section 3 of this article, *infra*. The OLC is a consultative legal body within the Justice Department that provides legal advice to various parts of the executive branch, including the office of the U.S. Attorney General. The OLC's 1973 memorandum states that "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."[16] The OLC's 2000 memorandum states that "the plain terms of the [Impeachment] Clause do not impose such a general bar to indictment or criminal trial prior to impeachment and therefore do not, by themselves, preclude the criminal prosecution of a sitting President."[17] Additionally, a Department of Justice memorandum prepared for Leon Jaworski, the special prosecutor who led the investigation into the administration of President Richard Nixon regarding the scandal that became known as Watergate, stated that "there is nothing in the language or legislative history of the Constitution that bars indictment of a sitting President . . . ."[18]

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[15] Annals of Congress, 8th Congress, 2d Sess., at 432.

[16] Memorandum Regarding Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office (Sep. 24, 1973) ("1973 OLC Memo") at 7 (available at https://assets.documentcloud.org/documents/4517361/092473.pdf) (last visited Aug. 27, 2019). The memo was signed by Robert Dixon, who was the head of the OLC at the time.

[17] "A Sitting President's Amenability to Indictment and Criminal Prosecution," Memorandum Opinion of the Office of Legal Counsel for the Attorney General (Oct. 16, 2000) ("2000 OLC Memo") at 2 (available at https://assets.documentcloud.org/documents/4517371/2000-OLC-Memo.pdf) (last visited on Aug. 27, 2019).

[18] Department of Justice Memorandum from Carl Feldbaum, George Frampton, Gerald Goldman and Peter Rient to Leon Jaworski (Feb. 12, 1974) ("Jaworski Memo") at 10 (available at https://assets.documentcloud.org/documents/4517363/Feb-74-Jaworski-Memo.pdf) (last visited on Aug. 20, 2019).

If an incumbent president were tried and convicted of a crime, this would not end his presidency. As the United States Department of Justice stated in a legal brief filed with the Supreme Court in *In re Agnew*, "it is clear from history that a criminal indictment, or even trial and conviction, does not, standing alone, effect the removal of an impeachable federal officer."[19] The president would still have to be impeached by the House and convicted by the Senate to be removed from office. While it may be true that a president who has been convicted of a crime would suffer an enormous loss of standing and political influence, and could not thereafter run the country effectively, there is nothing in the text of the Constitution that explicitly forbids this result. Furthermore, it seems likely that a successful criminal prosecution of the president resulting in a conviction would spur, perhaps even force, an otherwise reluctant or recalcitrant Congress to begin impeachment proceedings against that president.

Ultimately, however, nothing in the text of the Constitution decisively answers the question of whether a sitting president can be indicted while still in office, or only after leaving office, whether through impeachment, resignation, the loss of a re-election bid, or the expiration of their term. We must therefore look to other sources of authority in effort to resolve this question.

3. Court Precedents

There is no Supreme Court decision directly addressing the issue of whether a president can be criminally indicted while in office. However, several decisions have at least considered the question of whether the president, by virtue of his office, is immune from the ordinary legal process of judicial proceedings. The Court's reasoning in these decisions lends support to the idea that criminal prosecution of the president is possible.

First, in *United States v. Lee*,[20] the Supreme Court articulated a powerful rejection of the idea that the president should be entitled to immunity from the law:

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[19] Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, In re Agnew, Civil Case no. 73-965 (D.Md. 1973) ("Agnew Brief") at 11-12 (available at https://assets.documentcloud.org/documents/4517362/Agnew-Filing.pdf) (last visited Aug. 27, 2019).

[20] 106 U.S. 196 (1882).

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.[21]

Although the case did not address the question of criminal prosecution, the Court's declaration that no government official may violate the law with impunity suggests that a president who engages in criminal misconduct should not be immune from the legal consequences of such behavior, including indictment and prosecution. In subsequent decisions, the Court has repeatedly reaffirmed the idea that no one, not even the president, is above the law.[22]

Almost a century after its decision in *Lee*, the Supreme Court in *United States v. Nixon*[23] considered a motion by President Richard Nixon to quash a subpoena issued by the Watergate Special Prosecutor in a criminal case involving defendants other than the president. The subpoena directed the president to produce certain tape recordings and documents in his custody or control that concerned his conversations with aides and advisers. The president's motion to quash the subpoena asserted that he was immune from criminal process and possessed an absolute privilege to withhold the tapes and documents on the grounds of confidentiality.[24]

In assessing the President's constitutional claim of privilege, the Court found that the president had a legitimate interest in maintaining the confidentiality of communications made and received in the course of performing his responsibilities, but concluded that the privilege based on that interest was not absolute.[25] The Court held that the President's interest in maintaining the confidentiality of his communications was outweighed by "The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal

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[21] Ibid. at 220.

[22] See, e.g., United States v. United Mine Workers of America, 330 U.S. 258, 343 (1947); Malone v. Bowdoin, 369 U.S. 643, 651 (1962) (Douglas J., dissenting); Johnson v. Powell, 393 U.S. 920 (1968); Branzburg v. Hayes, 408 U.S. 655, 699 (1972); Gravel v. United States, 408 U.S. 606, 615 (1972).

[23] 418 U.S. 683 (1974).

[24] Ibid. at 686, 703.

[25] Ibid. at 705-12.

prosecutions."[26] The Court opined that "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts."[27]

In evaluating the competing interests involved in the case, the Court weighed the President's constitutional interest in confidentiality against the nation's "historic commitment to the rule of law" and the need for "the fair administration of criminal justice" and concluded that "the legitimate needs of the judicial process may outweigh Presidential privilege." [28] The Court determined that the president's interest in confidentiality would not be substantially impaired by requiring the president to comply with a subpoena, and considered it quite unlikely that the failure to recognize an absolute privilege for confidential presidential communications against criminal trial subpoenas would undermine the president's constitutional interest in the confidentiality of such communications: "[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution."[29]

The Court ultimately concluded that the President's generalized interest in confidentiality did not suffice to justify a privilege from all criminal subpoenas. In this particular context, therefore, it found that the president was not immune from ordinary criminal process, and must comply with the subpoena at issue.

Although President Nixon himself was not indicted in the underlying action in which the subpoena was issued, he was named in the indictment as an unindicted co-conspirator, which is itself an allegation of criminal misconduct on his part. The case thus squarely raised the question of whether it was appropriate to identify the president as an unindicted co-conspirator. The District Court held that it was,[30] and the Department of Justice defended this ruling on appeal, as is discussed in detail in Section 3 of this article, *infra*. The Supreme Court, however, not only did not decide whether a president could

[26] Ibid. at 707.

[27] Ibid. at 709.

[28] Ibid. at 707-08, 713.

[29] Ibid. at 712.

[30] United States v. Mitchell, 377 F. Supp. 1362 (D.D.C. 1974).

be indicted, it ultimately did not even address the question of whether the president could be identified as a co-conspirator. Nonetheless, no subsequent court decision or Department of Justice court filing has ever taken the position that it is impermissible to name the president as an unindicted co-conspirator.

While there is no precedent regarding the propriety of a criminal case against the president, in *Clinton v. Jones*[31] the Supreme Court declined to grant a sitting president immunity to a civil suit challenging the legality of a President's unofficial conduct. The Court held that President Clinton was not immune from a civil lawsuit while in office, and could not stay the case from proceeding until after the completion of his term.

In the underlying action that led to the *Clinton v. Jones* decision, the plaintiff sought to recover compensatory and punitive damages for alleged misconduct by President Clinton that took place before he assumed federal office. The district court denied the President's motion to dismiss the action based on a constitutional claim of temporary immunity and held that discovery should go forward, but granted a stay of the trial until after the President left office. The court of appeals affirmed the denial of the motion to dismiss, but vacated the order staying the trial. The Supreme Court affirmed, permitting the civil proceedings to go forward against the President while he still held office.

The Supreme Court agreed with President Clinton that the doctrine of separation of powers places limits on the federal judiciary's authority to interfere with the Executive Branch, but concluded that the principles of separation of powers would not be violated by allowing a civil lawsuit to proceed against an incumbent president.[32] The Court rejected the President's argument that the litigation would burden him in ways that would hamper the performance of his official duties. It found that the burdens were likely to be manageable, given "the relatively narrow compass of the issues raised in this particular case," which appeared "highly unlikely to occupy any substantial amount of petitioner's time."[33]

The Court went on to opine that "even quite burdensome interactions" between the judicial and executive branches do not "necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated

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[31] 520 U.S. 681 (1997).

[32] Ibid. at 697-99.

[33] Ibid. at 702. Indeed, Ms. Jones' claims were ultimately dismissed without a trial.

functions."[34] The Court further stated: "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."[35] The Court observed that courts frequently adjudicate civil suits challenging the legality of official presidential actions, and stated that the burden imposed on a president's time and energy by a private civil lawsuit "surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions."[36]

The Supreme Court also ruled that the district court had abused its discretion by invoking its equitable powers to delay any trial in the action until after the President left office. The Court stated that such a "lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial," in particular the concern that delay "would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party."[37] With regard to scheduling and the burdens on the president's time, the Court found "no reason to assume that the district courts will be either unable to accommodate the President's needs or unfaithful to the tradition — especially in matters involving national security — of giving 'the utmost deference to Presidential responsibilities.'"[38] The Court thus concluded that a stay of any trial until the end of the President's term in office was not supported by equitable principles.

Because *Clinton v. Jones* involved a civil, rather than a criminal, action, it is unclear whether the Supreme Court would apply the same reasoning if confronted with a criminal indictment against a sitting president. However, the language in the Court's opinion that a federal court's imposition of significant burdens on the time and attention of the Chief Executive's through the exercise of its traditional jurisdiction is insufficient to establish a violation of the Constitution, and that even "quite burdensome" demands on the president's time and attention do not necessarily amount to an unconstitutional impairment of his ability to perform his duties, leaves open the possibility that the Court might permit a criminal case to proceed, depending on all the relevant circumstances.

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[34] Ibid. at 692.

[35] Ibid. at 703.

[36] Ibid. at 705.

[37] Ibid. at 707-08.

[38] Ibid. at 709 (quoting U.S. v. Nixon, 418 U.S. at 710-11).

The difference between the burdens imposed on litigants in civil and criminal actions is only one of degree, not of category. A criminal trial might be more likely to require the personal attendance of the president than a civil matter, but criminal trials are usually shorter than civil actions.

Moreover, the same concerns regarding the consequences of delay articulated by the Court, including the loss of evidence, dimming of memory and the possible death of witnesses, apply with equal force to a criminal proceeding. A rule that a president cannot be indicted while in office, or that he can be indicted but not tried until after the expiration of his term, would run the same risk of prejudice and miscarriage of justice.

4. The Office of Legal Counsel's Memoranda, Other Legal Opinions, and the Policy of the U.S. Department of Justice

In the absence of guidance from the Constitution or the courts, the Department of Justice has formulated its own policies regarding the indictment of a president for criminal misconduct. In all, attorneys working for the federal government in one capacity or another have addressed the question of criminally indicting a sitting president, or other high-ranking member of the executive branch, on six separate occasions, both in internal memoranda and in legal briefs filed in litigation before federal courts. The first of these instances resulted in a memorandum prepared by the OLC and issued on September 24, 1973, during the investigation into the administration of President Richard Nixon regarding the break-in at the Democratic National Committee's suite at the Watergate Hotel.[39] The second was a legal brief submitted at almost the same time to the U.S. District Court for the District of Maryland on behalf of the United States by then-Solicitor General Robert Bork in the case of *In re Agnew*, which argued that the vice president (but not the president) could be indicted while in office.[40]

The third instance was a memorandum written in 1974 by four federal prosecutors working on the Watergate Special Prosecutors Force within the U.S. Department of Justice for Special Prosecutor Leon Jaworski, who was leading the investigation into the Nixon Administration.[41] The fourth was the reply brief filed in the Supreme Court on June 21,

[39] 1973 OLC Memo, supra.

[40] Agnew Brief, supra.

[41] Jaworski Memo, supra.

1974 by the United States in the case of *U.S. v. Nixon*.[42] The fifth is a memorandum authored in 1998 by Ronald Rotunda, a professor of constitutional law at the University of Illinois, who at that time was employed by Kenneth Starr's Office of the Independent Counsel, which was investigating President Clinton.[43] The sixth and most recent of these analyses is an OLC opinion from the year 2000, reviewing and reaffirming the OLC's 1973 memorandum.[44]

Four of these opinions were authored by attorneys working directly for the executive branch, who ultimately answered to the president. Perhaps not coincidentally, each of these four opinions concludes that a sitting president cannot be indicted in criminal court. The two remaining opinions, on the other hand, conclude that the president *can* be indicted. Once again, context may explain this contrary conclusion: both were authored by independent counsel involved in investigations that sought to impeach and/or indict the president. The Jaworski Memo was produced as part of the Watergate probe that uncovered substantial evidence of a criminal conspiracy and cover-up, and ultimately forced President Nixon's resignation;[45] and the Rotunda Memo was produced as part of the probe that began as an investigation into alleged financial improprieties in the Whitewater real estate development deal, in which Mr. Starr's office doggedly pursued a wide-ranging and ever-changing variety of allegations against President Clinton and ultimately succeeded in getting him impeached for lying under oath to Congress (although he was acquitted).[46] This article will consider each of these six legal analyses in chronological order.

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[42] Reply Brief for the United States, United States v. Nixon, No. 73-1766 (U.S.) (Jun. 21, 1974) (available at https://assets.documentcloud.org/documents/4517368/US-v-Nixon-Reply-Brief.pdf) ("Reply Brief") (last visited Aug. 27, 2019).

[43] Memorandum from Ronald Rotunda to Kenneth Starr Regarding Indictability of the President (May 13, 1998) ("Rotunda Memo") (available at https://assets.documentcloud.org/documents/4517370/Rotunda-Memo.pdf) (last visited Aug. 20, 2019).

[44] 2000 OLC Memo, supra.

[45] See generally Bernstein, C. & Woodward, B. (1974), All the President's Men (New York, NY: Simon & Schuster); Colodny, L. & Gettlin, R. (1991), Silent Coup (New York, NY: St. Martin's Press).

[46] See generally Gormley, K. (2011), The Death of American Virtue: Clinton v. Starr (New York, NY: Broadway Books).

A. The 1973 OLC Memo

1973 OLC Memo examines the text of the Constitution and finds no answer regarding the appropriateness of indicting a sitting president. It observes that the Constitution provides very limited immunity from criminal prosecution for members of Congress, but none whatsoever for the president.[47] The memorandum also analyzes the debates that occurred during the drafting and ratification of the Constitution and finds that they suggest the president is subject to the law like any other citizen, but notes that they never explicitly discuss the criminal prosecution of a president while in office.[48]

Lacking any clear Constitutional authority, the OLC then turns to practical considerations, and considers what approach would best serve the national interest. An indictment while in office would seriously tarnish the reputation of the "symbolic head of the nation."[49] In addition, "only the president can receive and continuously discharge the popular mandate expressed quadrennially in the presidential election," making an interruption of his term in office by an indictment or trial "politically and constitutionally a traumatic event."[50]

As discussed in Section 1 of this article, *supra*, the 1973 OLC Memo notes that impeachment is the first line of defense against presidential misconduct. "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."[51] The memo opines that "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."[52] The memo also states: "A necessity to defend a criminal trial and to attend court in connection with it, however, would interfere with the President's unique official duties, most of which cannot be performed by anyone else."[53]

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[47] 1973 OLC Memo, supra, at 18.

[48] Ibid. at 19-20.

[49] Ibid. at 30.

[50] Ibid. at 32.

[51] Ibid. at 29.

[52] Ibid. at 28.

[53] Ibid.

The memo thus argues that a criminal prosecution — or worse yet, conviction and imprisonment — would be functionally equivalent to removing the president from office, and could thus become a short-cut for impeachment.

The 1973 OLC Memo then considers an alternative possibility: indicting a sitting president, but staying any further proceedings until he was no longer in office.[54] Unlike putting the president on trial in a criminal court, this would not result in "physical interference" with the president's official duties. Moreover, this approach would have the significant benefit of tolling any statute of limitations applicable to the crimes alleged against the president, which might otherwise expire while he remained in office, effectively rendering the president immune from prosecution and hence above the law. Nevertheless, the memo concludes that this approach is untenable due to the severe reputational damage an indictment would inflict on the president: "an indictment hanging over the President while he remains in office would damage the institution of the Presidency virtually to the same extent as an actual conviction."[55] In the view of the memo's authors, "The spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination."[56]

The argument that a criminal indictment against the president would result in crippling reputational damage, however, appears to be substantially overstated. The reputational harm to a president from being impeached is surely no less severe than that from indictment, yet the Constitution explicitly allows the president to be impeached while in office. Two sitting presidents (Andrew Johnson and Bill Clinton) continued to serve as president while facing impeachment, and both were able to carry out their duties as president. The functioning of the government was not unsustainably impaired, nor was the president's reputation irreparably harmed: President Clinton ran for and won re-election.

B. The *Agnew* Brief

In the *Agnew* case, lawyers for Vice President Spiro Agnew asserted that if a president cannot be indicted while in office, that same immunity should apply to the vice president. The legal memorandum authored by Solicitor General Bork on behalf of

[54] Ibid. at 29.

[55] Ibid.

[56] Ibid. at 30.

the United States in opposition to that argument was filed in Federal District Court only 11 days after the 1973 OLC Memo was completed. It assumed (without specifically referencing the prior document) that the conclusions of the OLC Memo were correct with respect to the president, but argued that they nonetheless do not apply to the vice president.[57] Mr. Bork pointed out that while the government cannot function effectively without a president, "There have been many occasions in our history when the nation lacked a Vice President, and yet suffered no ill consequences."[58] He also noted that Aaron Burr, the nation's third vice president, "was subject to simultaneous indictment in two states while in office, yet he continued to exercise his constitutional duties until the expiration of his term."[59]

Mr. Bork argued that "The framers of the Constitution could not have contemplated prosecution of an incumbent president because they vested in him complete power over the execution of the laws, which includes, of course, the power to control prosecutions."[60] In his view, this meant it would be absurd to indict a sitting president because he would effectively be prosecuting himself. He also argued that the president's power to grant pardons for any offenses, *except* in cases of impeachment, suggests that the president must be removed from office by impeachment and conviction, and thus deprived of the power to pardon himself, before he may be criminally indicted.[61] In contrast, he noted that:

> A Vice President, of course, has no power either to control prosecutions or to grant pardons. The functions of the Vice Presidency are thus not at all inconsistent with the conclusion that an incumbent may be prosecuted and convicted while still in office.[62]

Mr. Bork also considered it important that "The issuance of an indictment, if any, would in the meantime toll the statute of limitations and preserve the matter for

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[57] Agnew Brief, supra.

[58] Ibid. at 18.

[59] Ibid. at 12.

[60] Ibid. at 20.

[61] Ibid.

[62] Ibid.

subsequent judicial resolution."[63] Of course, this exact same consideration applies to the potential indictment of an incumbent president, yet the contemporaneous OLC memo came to the opposite conclusion with respect to indicting a sitting president. The *Agnew* Memo essentially explained the difference in outcomes by concluding that while the demands of the presidency and the importance of the office preclude subjecting the chief executive to the criminal process, no such importance attaches to the office of the vice president.

C. The Jaworski Memo

The memorandum prepared for special prosecutor Leon Jaworski during the Watergate investigation was written by four federal prosecutors working for the Department of Justice. They argued in favor of pursuing the criminal prosecution of a president independently from, and without regard to, any separate impeachment proceedings. The memo's authors took note of earlier official expressions of opinion and policy regarding the indictment of a president, including the 1973 OLC Memo and the *Agnew* Brief, but found there was no conflict between these separate analyses:

> As we understand it, the conclusions regarding indictment of an incumbent President reached by the Department of Justice, the U.S. Attorney's office, and this office, are all consistent: there is nothing in the language or legislative history of the Constitution that bars indictment of a sitting president, but there are a number of 'policy' factors that weigh heavily against it.[64]

The Jaworski Memo's authors then proceeded to argue that under the circumstances of the Watergate scandal, which in their view had created a crisis of public confidence in the integrity of the justice system, the various factors militating in favor of indicting the president (such as the interests of justice, the need to fight corruption and to demonstrate that no one, no matter how powerful, was above the law) outweighed the policy arguments against doing so.[65] They took the view that the president's guilt in a criminal matter should not be determined by the political process of impeachment,

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[63] Ibid.at 2.

[64] Jaworski Memo, supra, at 10.

[65] Ibid. at 4-17.

where party members loyal to the president might refuse to convict him for partisan political reasons, regardless of guilt.[66]

> The memo drew a distinction between impeachment and criminal proceedings: Impeachment is an avowedly "political" process by which the people's representatives can remove a sitting President before the end of his term based on a "political" judgment about his fitness to govern. Although the matter is subject to debate, Congress' judgment about impeachment, in our view, is meant to respond to considerations that may or may not include and, in any event, are not limited to whether the President has committed a crime. The Constitution, in other words, does not require that a felony have been committed for conviction upon impeachment, nor does it demand that a felon be ousted from office. In contrast, our criminal justice process exists, and is universally perceived to exist, for a different purpose, entailing a different standard: to prosecute crimes with reference to an apolitical code applied objectively to all citizens.[67]

They further opined that leaving the determination of the president's criminal guilt or innocence to the political process of impeachment would be an abdication of their duties as federal prosecutors.[68] The authors stated, however, that "the quantum of proof we believe should be required to support" an indictment of a sitting president is quite high: "the evidence of the President's guilt [should] be direct, clear, and compelling, and that it admit of no misinterpretation."[69]

The Jaworski Memo concluded that allowing the political considerations inherent in the impeachment process intrude into the criminal prosecution of a president would be "to confuse the functions of law enforcement and of impeachment, and the result would be further to undermine public confidence in the integrity of the legal process."[70] The memo's authors further asserted that there was "overwhelming public support for committing the decision of the President's criminal guilt or innocence to the traditional

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[66] Ibid. at 5-8.

[67] Ibid. at 5-6.

[68] Ibid. at 7-8.

[69] Ibid. at 13.

[70] Ibid. at 6-7.

processes of law enforcement."[71] Ultimately, however, Mr. Jaworski elected not to indict President Nixon, but instead named him as an unindicted co-conspirator in a criminal action filed against several of the president's close associates.

D. The Reply Brief in *U.S. v. Nixon*

Mr. Jaworski's decision to name President Nixon as an unindicted co-conspirator prompted a legal challenge by the president seeking to expunge his name from the criminal indictment. The president's attorneys took the position that he could not be indicted, and that it was therefore improper to name him in any capacity in the indictment, since identifying him as an unindicted co-conspirator was equivalent to alleging that he had committed criminal acts. The U.S. District Court for the District of Columbia refused to strike the president's name from the complaint, and the president pursued an appeal of this decision all the way to the Supreme Court. The matter was heard in tandem with the president's appeal against a separate District Court decision requiring the president to comply with a subpoena to produce evidence in the same underlying criminal proceeding.

In a reply brief filed with the Supreme Court by the United States, attorneys from the Department of Justice defended the District Court's ruling allowing the president to be named in the indictment. Contrary to the position taken by the United States in its brief in *In re Agnew*, they rejected President Nixon's basic premise that a sitting president could not be indicted, stating: "It is an open and substantial question whether an incumbent President is subject to indictment."[72] They argued in favor of the possibility of indicting the president, stating:

> Resort to constitutional interpretation, history and policy does not provide a definitive answer to the question of whether a sitting President enjoys absolute immunity from the ordinary processes of the criminal law. What we believe is clear is that nothing in the text of the Constitution, or in its history — including close

[71] Ibid. at 2.

[72] Reply Brief, supra, at 24. In the Agnew Brief, Solicitor General Bork asserted that "Almost all legal commentators agree . . . that an incumbent president must be removed from office through conviction upon an impeachment before being subject to the criminal process." Agnew Brief at 17.

> scrutiny of the background of relevant constitutional provisions and the intent of the Framers — imposes any bar to the indictment of an incumbent President.[73]

The authors ultimately concluded that it was unnecessary for the Supreme Court to resolve that question in order to decide whether President Nixon could be named as an unindicted co-conspirator.[74]

The reply brief asserted that the special prosecutor elected not to indict the president based on practical considerations, but that exercise of prosecutorial discretion in no way supported the conclusion that the president enjoyed immunity from indictment, and still less from being named as a co-conspirator:

> Although it is by no means clear that a President is immune from indictment prior to impeachment, conviction and removal from office, the practical arguments in favor of that proposition cannot fairly be stretched to confer immunity on the President from being identified as an *unindicted* co-conspirator, when it is necessary to do so in connection with criminal proceedings against persons unquestionably liable to indictment.[75]

The reply brief argues that it is critical to identify the president as one of the participants in the alleged criminal conspiracy: "the identification of each co-conspirator — regardless of station — is a prerequisite to making his declarations in furtherance of the conspiracy admissible against the other conspirators."[76] It was also "required here to outline the full range of the alleged conspiracy."[77] Moreover, even if the president could not be indicted, "the mere fact that an official has a personal immunity from prosecution does not bar the prosecution from alleging and proving his complicity as part of a case against persons who have no such immunity."[78] It would be unfair to those other defendants "to blunt the sweep of the evidence artificially by excluding one person, however prominent and important, while identifying all others."[79]

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[73] Ibid. at 24.

[74] Ibid.

[75] Ibid. at 11 (emphasis original).

[76] Ibid. at 8.

[77] Ibid. at 11.

[78] Ibid. at 20.

[79] Ibid.

The Reply Brief acknowledged that "the naming of an incumbent President as an unindicted criminal co-conspirator is a grave and solemn step and may cause public as well as private anguish."[80] But it argued that "such consequences are an inevitable part of the judicial process and do not justify prior judicial screening or complete silence."[81] The brief's authors rejected the argument that allowing the president to be named in a criminal indictment would set a dangerous precedent that could be exploited in the future as a political weapon to undermine a sitting president, asserting "that grand juries are ordinarily responsible and that, in the public market place of ideas, the people can be trusted to assess the worth of charges and counter-charges."[82] They argued that "there is little reason to fear either that grand juries will accuse an incumbent President maliciously, or that, if they do, their charges will receive credit they do not deserve."[83] Although the brief did not explicitly address the point, the argument that it is appropriate, and at times necessary, to name an incumbent president as an unindicted co-conspirator significantly weakens one of the main rationales for categorically precluding the indictment of a president — namely, that the reputational harm it would cause to the president would severely undermine his administration.

E. The Rotunda Memo

The next attorney to consider the question of presidential indictment in any official capacity was Professor Rotunda, who in May 1998 prepared a memorandum for the office of independent counsel Kenneth Starr, which was investigating President Clinton. Of the six legal analyses discussed in this article, the Rotunda Memo carries the least weight as an official government precedent. For one thing, Prof. Rotunda's status at the time of its authorship is unclear. He begins his memo by stating that he is responding to a question posed by Mr. Starr, but the memo (which is printed on Prof. Rotunda's personal letterhead) identifies him as a professor of law at the University of Illinois and does not indicate whether he held any

[80] Ibid. at 23.

[81] Ibid. at 20-21.

[82] Ibid. at 23 (citation omitted).

[83] Ibid. The Supreme Court ultimately did not rule on the propriety of naming the president as an unindicted co-conspirator. It ordered the president to respond to the criminal subpoena by producing the Watergate tapes, and dismissed the president's petition for certiorari in the companion case as having been improvidently granted.

official government position or role in Mr. Starr's probe.[84] There is also no indication that his opinion underwent any review by other members of Mr. Starr's team, by attorneys in the Department of Justice, or by other government officials.

The Rotunda Memo concluded that President Clinton could be criminally indicted. The key passage in the memo's conclusion stated that "it is proper, constitutional, and legal for a federal grand jury to indict a sitting President for serious criminal acts that are not part of, and are contrary to, the president's official duties."[85] Prof. Rotunda also contended that the president was subject to criminal prosecution while in office, but noted that "it may be the case that he cannot be imprisoned (assuming that he is convicted and that imprisonment is the appropriate punishment) until after he leaves that office."[86]

Prof. Rotunda observed that "the U.S. Supreme Court has repeatedly reaffirmed the state[ment] that no one is 'above the law.'"[87] He further contended that the statute creating the Office of the Independent Counsel, which had been upheld as constitutional by the Supreme Court, made no sense if the Independent Counsel lacked the power to indict the president.[88] He also asserted that the allegations being examined in the Whitewater investigation did not involve Clinton's conduct as president: "witness tampering, document destruction, perjury, subornation of perjury, obstruction of justice, conspiracy, and illegal pay-offs . . . in no way relate to President Clinton's official duties" and "are contrary to the President's official responsibility to take care that the law be faithfully executed."[89] Therefore, it would not amount to an unconstitutional usurpation of Congress' impeachment powers for a prosecutor to pursue them in criminal court.

Intriguingly, whereas in the *Agnew* Brief Mr. Bork cited the 25th Amendment to the U.S. Constitution, which allows for the temporary removal of a disabled president, as

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[84] Rotunda memo, supra, at 1. Presumably, he was paid for his work as an outside consultant.

[85] Ibid. at 55.

[86] Ibid. at 1.

[87] Ibid. at 3.

[88] Ibid. at 11.

[89] Ibid. at 2. It is noteworthy that the potential criminal charges against President Trump involve many of these same alleged offenses, including obstruction of justice, witness tampering and subornation of perjury.

weighing against the indictment of a sitting president because it demonstrates that the nation must have a capable president at all times, Mr. Rotunda cited the 25th Amendment in support of his conclusion that a president *could* be indicted — since a mechanism exists to replace the president, and a temporary disability would not incapacitate an entire branch of the government, criminal indictment of the president while in office would not constitute a significant disruption.[90]

F. The 2000 OLC Memo

In 2000, 27 years after issuing its initial memorandum, the OLC reexamined the question of indicting a sitting president. By this time, the U.S. Supreme Court had issued two significant decisions indicating that the president is not immune from entanglement in the justice system. As discussed in Section 2 of this article, *supra*, *U.S. v. Nixon* required President Nixon to produce tape recordings to prosecutors in a criminal proceeding involving other defendants, and *Clinton v. Jones* held that President Clinton could not stay a sexual-harassment lawsuit naming him as defendant until the end of his term. Nevertheless, the OLC found the decisions of the Court in these cases "largely consistent with the Department's 1973 determinations" and reaffirmed its original conclusion that an incumbent president was not subject to criminal indictment.[91]

The 2000 OLC memo undertakes a thorough analysis of whether a president can be indicted and prosecuted while serving in office. It expands upon the opinion expressed in the earlier memo that a criminal prosecution of the president would effectively be equivalent to removing him from office without an impeachment proceeding, stating:

> The Framers considered who should possess the extraordinary power of deciding whether to initiate a proceeding that could remove the President . . . and placed that responsibility in the elected officials of Congress. It would be inconsistent with that carefully considered judgment to permit an unelected grand jury and

[90] Agnew Brief at 18; Rotunda Memo at 33.

[91] 2000 OLC Memo, supra, at 17. Curiously, the 2000 OLC Memo treats the earlier 1973 OLC Memo, which is only an internal DOJ advisory opinion, as the main precedent controlling this question, and also extensively discusses and analyzes the Agnew Brief filed with the District Court, but relegates the carefully reasoned policy set forth in the brief filed with the Supreme Court in U.S. v. Nixon to a footnote. Id. at 16-17, n.14

prosecutor effectively to "remove" a President by bringing criminal charges against him while he remains in office.[92]

However, one significant flaw in the logic of the 2000 OLC Memo is that, as discussed in Section 1 of this article, *supra*, a criminal indictment of a sitting president would not actually result in his removal from office. Even if the president were to be convicted in a criminal proceeding, he would remain in office unless impeached by the House and convicted by the Senate. Thus, a criminal prosecution would *not* usurp the Constitutional prerogative of removing the president that is uniquely bestowed upon the legislative branch — though it certainly might serve to trigger the legislature to undertake the process and reach that ultimate result.

The policy basis of the OLC's position on the possible indictment of a president, as articulated in the 2000 OLC Memo, is relatively straightforward. The OLC argues that the executive branch would be incapacitated by a criminal prosecution, concluding 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."[93] The OLC concluded that prosecution of the president by the Department of Justice could potentially create a separation of powers conflict with Congress, since the DOJ is part of the executive branch and the Constitution assigns oversight of the executive to the legislature. Apart from this passing reference to separation of powers and constitutional principles, however, the 2000 OLC Memo mostly focuses on pragmatic, not constitutional, considerations. The main thrust of the memo is that such a prosecution would be a distraction from the president's obligations and responsibilities as head of the executive branch, and might prevent him from adequately performing his job.

The pragmatic argument underpinning the 2000 OLC Memo — that the indictment of a sitting president would simply be too disruptive to the effective functioning of the government — is ultimately not a particularly persuasive one. After all, the Constitution permits a sitting president to be impeached. Surely the impeachment process is at least as disruptive to the presidency, if not much more so, than a criminal prosecution, especially since the former may result in the ouster of the president from office, while the latter does not. The memo gives scant consideration to the option of indicting the president, but postponing trial until after the conclusion of his term. If the primary

[92] 2000 OLC Memo, supra, at 37.

[93] Ibid. at 39.

concern is to avoid distractions that take the president's time and attention away from the duties of his office, this approach would minimize such disruption because the president would not be required to attend trial or engage in any type of defense prior to the end of his term. Moreover, allowing indictment (but not prosecution) of an incumbent president would avoid the problem of a president escaping all liability for criminal conduct simply because DOJ policy forbade him from being indicted while in office, and the statute of limitations expired before the end of his term.

The only reason offered in the 2000 OLC Memo for precluding the possibility of indicting a president, but postponing prosecution while he remains in office, is that naming the president in an indictment would result in "stigma and opprobrium."[94] However, the notion that mere reputational harm can prevent the normal functioning of the criminal justice system appears contrary to the Supreme Court's ruling in *Clinton v. Jones*, which set such a high bar for presidential immunity from the normal process of litigation that the Court unanimously agreed that the president was not protected from undergoing a civil trial while in office. Moreover, reputational harm seems an inadequate basis for precluding an indictment in light of the government's position that a president can be identified as an unindicted co-conspirator, as it forcefully argued in the Reply Brief filed in *U.S. v. Nixon*.[95] The degree of difference in harm to a president's reputation from being named as a defendant in a criminal indictment, as compared to being named as an unindicted co-conspirator, seems vanishingly small. Thus, permitting the president to be indicted as a defendant would avoid any statute of limitations problems at barely any greater cost to his reputation.

The OLC's primary focus on pragmatic concerns in articulating its policy against indicting a sitting president suggests that the policy is not legally mandated, but instead is merely a practical accommodation that takes into consideration the pressures on the president and the country's need for an attentive and fully-focused commander in chief. If the OLC policy is not dictated by the Constitution or based on the law, but instead rests only on practical considerations, then the policy would not apply where other, more compelling factors outweigh those considerations.

For example, it is not difficult to imagine that circumstances might arise in which the need to address and curtail criminal misconduct by the president becomes a more

[94] Ibid. at 37-39.

[95] See Section 3.D, supra.

important practical priority to sustain the functioning of the government than shielding the president from "distractions." Such would surely be the case if the president was involved in rampant corruption, or was using the office of the presidency to operate (and shield from law enforcement) an ongoing criminal enterprise, and yet was not impeached because his political party controlled Congress and refused to act out of party loyalty, or (worse yet) because key members of the Legislature were themselves participants in the corruption or criminal scheme. Allowing such behavior to continue unchallenged would be far more disruptive to the effective functioning of the government than prosecuting the president for such crimes.

Furthermore, the OLC policy does not in itself constitute law. It is only an advisory opinion issued by an agency of the executive branch. The OLC's opinion is an interpretation of the law, one that, as discussed above, a federal prosecutor might feel compelled to disregard in the appropriate circumstances. If the president has committed acts that violate a criminal statute enacted by Congress, and that statute authorizes the prosecution of individuals who violate the law's provisions, there is no compelling legal reason to grant the president (and only the president) immunity from such prosecution. An act of the legislature must prevail over the advisory opinion of an executive branch agency if there is a conflict between the two.

Finally, because the OLC policy applies specifically to the federal Department of Justice, it is also possible that state attorneys general could indict the president and pursue criminal prosecutions in state courts even if the federal government refrained from taking action. If federal prosecutors failed to hold the president to the same legal standard as any other citizen, despite evidence of presidential misconduct, state attorneys general could charge the president with a crime under state law, provided they had sufficient evidence linking the president's misconduct to their particular jurisdiction.

5. Conclusion

Under existing constitutional and court precedents, there is no final answer to the question of whether a president may be indicted while in office. In the view of the author, however, it should be when the circumstances warrant such an action. Impeachment may have been intended as the principal remedy in the event of criminal misconduct by the president, but it was never intended as the sole remedy. The Constitution explicitly states that federal officers may be put on trial in the criminal courts for criminal

misconduct. If the president's political party controls both houses of Congress and the legislators simply refuse to impeach a president from their own party, despite obvious evidence of criminal misconduct, there should be an alternative course to impeachment available to hold the president accountable. Similarly, the House may decline to impeach the president based on behavior that is criminal, but not obviously political in nature, contending that impeachment should be reserved for political misconduct. There must be some other avenue of redress available to avoid granting the president impunity from criminal sanction.

The drafters of the Constitution made clear, and many courts have since confirmed, that no one, including the president, is above the law. If Congress will not act, it should be permissible for a prosecutor to file charges in criminal court. The founders may not have intended this approach, but they also did not foresee the rise of political parties and the extreme partisanship that this development engendered. They expected that Congress would be independent from the executive branch and would "jealously guard" their powers as a rival branch of government, not act as a complicit ally when the same party was ascendant in both the legislature and the executive branches. The original intent that the legislature would serve as a check on the executive has therefore been modified to apply only when those two branches are controlled by different parties. When they are in the hands of the same party, there is effectively no oversight, and impeachment becomes impossible.

Under these circumstances, it may be necessary for the third branch — the judiciary — to serve as the crucial check on executive abuses. But the judiciary can only perform this function if a prosecutor is permitted to bring a criminal action before the court. At the very least, it should be possible to indict a sitting president, even if a trial on those charges must remain stayed until the president has completed his term in office. To hold otherwise would allow the president to "run out the clock" on criminal liability merely by staying in office; indeed, such a policy might actually give a president suspected of criminal misconduct an incentive to run for re-election, merely to stay in office and prevent prosecution, and thus exhaust any applicable statute of limitations. This would have the practical result of placing the president above the law, an outcome entirely inconsistent with precedent and the founders' intent.