



2019

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Recommended Citation

Maggio, Nicholas J. (2019) "The Emperor's New Clothes: An Intersection of Presidential Immunity and Criminal Accountability," *Touro Law Review*. Vol. 35 : No. 2 , Article 7.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol35/iss2/7>

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THE EMPEROR'S NEW CLOTHES: AN INTERSECTION OF PRESIDENTIAL IMMUNITY AND CRIMINAL ACCOUNTABILITY

*Nicholas J. Maggio**

I. INTRODUCTION

On August 21, 2018, President Donald Trump's former personal attorney, Michael Cohen, admitted in federal court that President Trump ordered him to pay two women during the 2016 campaign for the principal purpose of influencing the election.¹ This is a recent development that was exposed during the special counsel investigation into whether Russia interfered with the 2016 United States Presidential elections.

On March 22, 2019, the Special Counsel concluded the investigation into coordination between the Trump election campaign and Russian officials and, more specifically, whether President Trump obstructed justice by lying or withholding information during the ongoing investigation.² Attorney General William Barr submitted a summary of the report's principal conclusions to Congress on March 24, 2019. In pertinent part, the summary reads that "the investigation did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities."³ Further, the summary of the Special Counsel report reads

* I want to thank the remarkable staff of the Touro Law Review and the faculty of Jacob D. Fuchsberg Touro Law Center. The Touro Law Review staff has helped tremendously in editing this Note for publication. The faculty at Touro Law School has been kind enough to guide my writing for this Note. Without them, this would not be published.

¹ William K. Rashbaum et al., *Michael Cohen Says He Arranged Payments to Women at Trump's Direction*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/nyregion/michael-cohen-plea-deal-trump.html>.

² John Kruzel, *Read Attorney General William Barr's Summary of Special Counsel Robert Mueller's Report*, POLITIFACT (Mar. 24, 2019), <https://www.politifact.com/truth-o-meter/article/2019/mar/24/read-attorney-general-william-barrs-summary-specia/>.

³ *Id.* at 2.

that “[t]he Special Counsel therefore did not draw a conclusion—one way or the other—as to whether the examined conduct constituted obstruction.”⁴ Instead, Attorney General William Barr determined that “the evidence developed during the Special Counsel’s investigation is not sufficient to establish that the President committed an obstruction-of-justice offense.”⁵

However, the summary notes that the “Special Counsel also referred several matters to other offices for further action.”⁶ Prosecutors in the Southern District of New York are still working with Michael Cohen. Most notable about Mr. Cohen’s admission is that it directly implicates the President as a co-conspirator in a proven federal crime.⁷ Federal prosecutors handling Mr. Cohen’s case typically have the authority to indict any co-conspirators. However, it remains unclear whether a sitting United States president can be indicted.

The Department of Justice (“DOJ”) released a redacted version of the Special Counsel’s report to the public on April 18, 2019. It is nearly 450 pages and is divided into two volumes. The first volume “describes the factual results of the Special Counsel’s investigation of Russia’s interference in the 2016 presidential election and its interactions with the Trump Campaign.”⁸ The second volume “addresses the President’s actions towards the FBI’s investigation into Russia’s interference in the 2016 presidential election and related matters, and his actions towards the Special Counsel’s investigation.”⁹ The report details two ultimate conclusions. First, “while the investigation identified numerous links between individuals with ties to the Russian government and individuals associated with the Trump

⁴ *Id.* at 3.

⁵ *Id.* Worth noting is that William Barr wrote an unsolicited report on June 8, 2018 criticizing the Special Counsel investigation. In it, Barr argues that charging obstruction of justice without establishing an underlying crime requires a high bar. President Trump then nominated William Barr to be Attorney General. William Barr was confirmed. Barr’s summary of the Special Counsel report explains that part of his rationale for not charging the President with obstruction of justice is that fact that the Special Counsel did not establish an underlying crime.

⁶ *Id.*

⁷ Aaron Blake, *Michael Cohen’s Plea Deal is Very Bad for Trump*, WASH. POST (Aug. 21, 2018), https://www.washingtonpost.com/politics/2018/08/21/why-cohen-plea-deal-is-bad-trump-it-puts-him-very-close-an-actual-crime/?noredirect=on&utm_term=.d44a53a1ec1c (discussing Mr. Cohen’s pleading guilty to eight counts of financial crimes).

⁸ SPECIAL COUNSEL ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, vol. I, p.2 (2019), <https://www.justice.gov/storage/report.pdf> [hereinafter MUELLER REPORT].

⁹ *Id.* at vol. I, p.3.

Campaign, the evidence was not sufficient to support criminal charges” for coordination between the two entities.¹⁰ Second, the report reads that “[b]ecause [the Special Counsel] determined not to make a traditional prosecutorial judgment, [the Special Counsel] did not draw ultimate conclusions about the President’s conduct” as it relates to an obstruction of justice charge.¹¹ However, the reports makes clear that

At the same time, if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, we are unable to reach that judgment. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.¹²

Still, it is unclear whether the Constitution permits prosecutors to indict a sitting president. Normally, prosecutors can try to indict an alleged criminal offender after presenting sufficient evidence to a grand jury. Mueller decided not to indict President Trump on an obstruction of justice charge only after accepting the Office of Legal Counsel’s legal conclusions on indicting a sitting president.¹³ It appears that Mueller only accepted this view because of “the Special Counsel as an attorney in the Department of Justice and the framework of the Special Counsel regulations.”¹⁴

In 1973, the Department of Justice Office of Legal Counsel (“OLC”) issued a memo arguing that a sitting president could not be indicted.¹⁵ It reiterated this argument in 2000 after President Clinton’s sex scandal.¹⁶ The OLC contended that the nature of criminal proceedings, including the indictment process, would unduly interfere with the conduct of the president.¹⁷ The memos equated an indictment

¹⁰ *Id.* at vol. I, p.9.

¹¹ *Id.* at vol. II, p.8.

¹² *Id.* at vol. II, p.182.

¹³ *Id.* at vol. II, p.1.

¹⁴ *Id.*

¹⁵ U.S. DEP’T JUST.: OFFICE OF LEGAL COUNSEL, AMENABILITY OF THE PRESIDENT, VICE PRESIDENT AND OTHER CIVIL OFFICERS TO FEDERAL CRIMINAL PROSECUTION WHILE IN OFFICE (1973), <https://fas.org/irp/agency/doj/olc/092473.pdf> [hereinafter 1973 OLC Memo].

¹⁶ U.S. DEP’T JUST.: OFFICE OF LEGAL COUNSEL, A SITTING PRESIDENT’S AMENABILITY TO INDICTMENT AND CRIMINAL PROSECUTION (2000), <https://www.justice.gov/file/19351/download> [hereinafter 2000 OLC Memo].

¹⁷ *Id.*

to an incapacitation of the president.¹⁸ Accordingly, the memos concluded that indicting a sitting president would unconstitutionally impair the executive from executing his constitutional obligations.¹⁹

It remains uncertain whether these memos are official DOJ policies, despite the fact that the OLC argues that the DOJ is bound by the OLC's conclusions.²⁰ Robert Mueller, the head of the special investigation, followed these memos as they relate to bringing an indictment.²¹ Nevertheless, legal scholars disagree whether the memos are legally binding on prosecutors and the Special Counsel.²² For instance, the arguments set forth in these memos are not settled law as they are found in neither statutes nor case law. However, some legal scholars have concluded a sitting president may in fact be indicted.²³ No court, including the Supreme Court of the United States, has heard a case or ruled on whether a sitting president can be indicted.

This Note argues that prosecutors can indict a sitting president and that the Supreme Court should decide the constitutionality of the indictment in a subsequent appeal, despite the OLC's clear opposition to such prosecutorial action. The OLC memos should not preclude the nation's highest court from hearing this issue. Prosecutors should proceed with the indictment because the consequences of allowing a criminally inclined president to maintain executive power outweigh the bureaucratic inconveniences the OLC cites in its memos. The abhorrent offense to western notions of justice, accountability, and morality alone justify holding a criminal president liable for his criminal conduct.

Further, article 2, section 1, clause 6 of the United States Constitution provides the precedential conditions and procedures for

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Andrew Crespo, *Is Mueller Bound by OLC's Memos on Presidential Immunity?*, LAWFARE (July 25, 2017, 9:00 AM), <https://www.lawfareblog.com/mueller-bound-olcs-memos-presidential-immunity>; 9-27.000 - *Principles of Federal Prosecution*, U.S. DEP'T JUST., <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution> (last updated Feb. 2018).

²¹ MUELLER REPORT, *supra* note 8, at vol. I, p.1.

²² Crespo, *supra* note 20.

²³ Deanna Paul, *Nancy Pelosi says Trump Is Not Immune from Indictment. Some Legal Experts Agree.*, WASH. POST (Jan. 3, 2019), https://www.washingtonpost.com/politics/2019/01/03/nancy-pelosi-says-trump-is-not-immune-indictment-some-legal-experts-agree/?noredirect=on&utm_term=.93669aa9cd8a.

replacing a sitting president.²⁴ Specifically, the clause details that a president's "inability to discharge the powers and duties of said office" shall allow for a new officer to act as the president until the disability (*i.e.*, the interference with presidential duties because of a criminal prosecution) is removed or a new president is elected.²⁵ Clauses 3 and 4 of the 25th Amendment further clarify replacement procedures when a president can no longer discharge his duties.²⁶ Thus, if an indictment would interfere with the president's discharging his constitutional duties, administration officials should utilize the provisions already in place. Accordingly, the United States government should use the framework already in place.

This Note is divided into nine parts. Part II introduces applicable portions of the United States Constitution, as well as Congressional documents, that relate to removal and replacement of a president. Part III provides an overview of Supreme Court cases that examine presidential privilege from legal proceedings, such as civil and criminal lawsuits, depositions, and subpoenas. Part IV focuses exclusively on the 25th Amendment, its history, and the instances when presidents invoked the rights thereunder. Part V of this Note concentrates on Justice Kavanaugh's writings and interviews addressing presidential indictment. The author will further assess how Justice Kavanaugh might rule if the issue of indicting a sitting president came before the Supreme Court. Part VI lays out two OLC memos and an OLC opinion, its conclusions, its reasoning, and under what political climate the OLC wrote them. Part VII emphasizes the idea that an indictment against a sitting president is a disability, which allows an administration to invoke the procedures under the 25th Amendment. In Part VIII, the author argues that granting the president immunity from criminal indictments undercuts foundational notions of accountability and morality in western culture. Lastly, Part IX

²⁴ U.S. CONST. art. II, § 1, cl. 6 ("In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.").

²⁵ *Id.*

²⁶ U.S. CONST. amend. XXV, § 3 ("Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.").

concludes with a discussion on the philosophical, political, and societal reasons in favor of indicting a president for his criminal conduct while he is in office.

II. THE UNITED STATES CONSTITUTION

There are no constitutional provisions dealing with whether a sitting president can be criminally indicted, nor do the recorded discussions during the Constitutional Convention help clarify the issue.²⁷ Instead, the Constitution provides for the conditions under which a president may be removed from office.

Article 2, section 1, clause 6, of the Constitution reads, in relevant part: “In [c]ase of the . . . [i]nability to discharge the [p]owers and [d]uties of the said [o]ffice . . . the Congress may by [l]aw provide the [c]ase of [r]emoval.”²⁸ The records of the Federal Convention do not provide much clarity concerning how criminal indictments relate to this provision.²⁹ Most of the debate around the clause focuses on who is charged with appointing a replacement and who that officer might be.³⁰

Thus, the lack of constitutional text, statutes, and case law on the subject forces one to turn towards other sources of authority. Some early analysis of the Constitution highlights how our government allows for indictments of officials, in contrast to the English system.³¹ For instance, Patrick Henry, an American attorney and Founding Father, gave a speech suggesting that a president could be indicted while in office.³² Mr. Henry signified again, in a debate about adopting

²⁷ Eric M. Freedman, *The Law As King and the King As Law: Is A President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L.Q. 7, 15, 16 (1992) (“In a system of representative democracy, The Law is us. Subjecting our highest officeholder to The Law thus represents our collective determination to be responsible for our own destiny.”); *id.* at 68 (“Legal decisionmakers should reject the position that the President should have a blanket immunity from criminal prosecutions. The argument in favor of immunity is inconsistent with the history, structure, and underlying philosophy of our government, at odds with precedent, and unjustified by practical considerations.”).

²⁸ *Supra* note 24.

²⁹ *See generally* THE RECORDS OF THE FEDERAL CONVENTION (Max Farrand ed., 1911), <http://oll.libertyfund.org/titles/farrand-the-records-of-the-federal-convention-of-1787-3vols>.

³⁰ William Rawle, A View of the Constitution of the United States of America 125-26 (2d ed. 1829), <http://press-pubs.uchicago.edu/founders/documents/amendIIIs9.html>.

³¹ *Id.*

³² *Speech of Patrick Henry (June 5, 1788)*, AM. HIST., [http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/speech-of-patrick-henry-\(june-5-1788\).php](http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/speech-of-patrick-henry-(june-5-1788).php) (last visited Apr. 9, 2019) (“The Honorable Gentleman who presides, told us, that to prevent abuses in our

the federal constitution, that a president should not be immune from indictment.³³ Modern legal scholars recognize these founding figures' conclusions that a president should not enjoy immunity from indictment while in office.³⁴

Further, the Constitution contemplates holding a president subject to indictments. Specifically, article 1, section 3, clause 7 reads, in pertinent part, that “[j]udgment in [c]ases of [i]mpeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any [o]ffice of honor, [t]rust or [p]rofit under the United States . . . nevertheless, the [p]arty convicted shall nevertheless be liable and subject to [i]ndictment, [t]rial, [j]udgment, and [p]unishment according to [l]aw.”³⁵ The first sentence of this constitutional provision signifies that an impeached officer will not hold a future office. Authorities interpreting the latter part of the provision are scarce.

However, a basic linguistic analysis of this latter part of the provision's language lends itself to the conclusion that impeachment does not preclude indictment. After explaining the punishment for impeachment, the word “nevertheless” controls the following sentence. The word “nevertheless” conditions the entire article 1, section 3, clause 7. One could restate article 1, section 3, clause 7 to say that, while cases of impeachment may not extend beyond removal from office, the subject of impeachment is still liable to indictments, trials, judgments, and punishment. This is a forward-looking provision. That is to say, the provision contemplates one's liability after conviction. It is silent prior to conviction. Ultimately, article 1, section 3, clause 7 explains that an officer is still liable to instruments and procedures of a criminal trial. Moreover, one might reason that the Constitution explicitly makes the president an indictable officer.

Additionally, there is an argument to be made that an indictment can only follow a conviction of impeachment. After all,

Government, we will assemble in Convention, recall our delegated powers, and punish our servants for abusing the trust reposed in them. Oh, Sir, we should have fine times indeed, if to punish tyrants, it were only sufficient to assemble the people.”).

³³ THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 1827), <http://oll.libertyfund.org/titles/elliott-the-debates-in-the-several-state-conventions-vol-3>.

³⁴ Freedman, *supra* note 27, at 13-15, 68 (“Legal decisionmakers should reject the position that the President should have a blanket immunity from criminal prosecutions. The argument in favor of immunity is inconsistent with the history, structure, and underlying philosophy of our government, at odds with precedent, and unjustified by practical considerations.”).

³⁵ U.S. CONST. art. I, § 3, cl. 7.

part of the clause reads that “the [p]arty convicted” shall be “liable and subject to [i]ndictment.”³⁶ One could conclude that the past tense use of the word “convicted” means an indictment must wait until conviction of impeachment.

Yet, history reveals that a president may be impeached and not removed from office.³⁷ The clause does not talk about whether a president must be removed in order to be indicted. Thus, the clause allows for a convicted, yet sitting, president to be indicted.

Further, the United States House of Representatives (“House”) authorized Lewis Deschler, then a parliamentarian of the House, “to compile and prepare . . . precedents’ of the House for purposes of analysis.”³⁸ These compilations consist of 17 volumes, 33 chapters, and thousands of pages of analysis regarding congressional precedents on nearly every matter.³⁹ In 1976, Deschler reviewed House precedents from 1936 to 1973, and historically relevant documents in writing these volumes.⁴⁰ Chapter 14 of what are known as “Deschler’s Precedents” speaks about impeachment, its origins, historical context, and its aims.⁴¹

The impeachment section notes that “impeachment is not personal punishment,” but a “process which primarily functions to maintain constitutional government.”⁴² Deschler goes on to write how “impeachment does not immunize the officer from criminal liability for his wrongdoing.”⁴³ He cites two arguments that claim impeachment is separate from the purposes of criminal accountability.⁴⁴ Nowhere in Deschler’s Precedents does he claim that an indictment must follow impeachment proceedings or that a president is immunized from indictments while in office.

³⁶ *Id.*

³⁷ Peter Baker & Helen Dewar, *The Senate Acquits President Clinton*, WASH. POST (Feb. 13, 1999), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/impeach021399.htm>.

³⁸ *About Precedents of the U.S. House of Representatives*, GOV’T PRINTING OFF., https://www.gpo.gov/help/about_precedents_of_the_us_house_of_representatives.htm (last updated Mar. 6, 2018).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See generally LEWIS DESCHLER, DESCHLER’S PRECEDENTS ch. 14 (1976), <https://www.gpo.gov/fdsys/pkg/gpo-hprec-deschlers-v3/pdf/gpo-hprec-deschlers-v3.pdf>.

⁴² *Id.* at 2269.

⁴³ *Id.*

⁴⁴ *Id.*

Deschler attempts to divorce criminal accountability from impeachment and constitutional considerations as much as possible.⁴⁵ He references criminality as an inappropriate standard for an impeachable offense.⁴⁶ Deschler goes on to write how criminality is incompatible with the framers' intent and how criminal law serves a fundamentally different purpose from impeachment.⁴⁷ Thus, one should not look to impeachment provisions as precluding the criminal indictment of a president. Instead, one should consider basic notions of criminal law, policy, and moral implications, alongside the openness of the Constitution, for indictments. The provisions of the Constitution, as Deschler notes, are primarily concerned with maintaining a "constitutional government."⁴⁸

III. THE ROLE OF THE UNITED STATES SUPREME COURT

The United States Supreme Court has considered the boundaries of presidential immunity from criminal proceedings on one notable occasion. In 1974, the Supreme Court decided *United States v. Nixon*.⁴⁹ In *Nixon*, the Court held that a president would enjoy no privilege from producing relevant evidence in a criminal trial when citing only a general interest in confidentiality.⁵⁰ In fact, the Court recognized the existence of executive privilege, but decided it was a qualified, not absolute, privilege.⁵¹

In 1974, a grand jury indicted several individuals for crimes against the government, including conspiracy to defraud the United States and obstruction of justice.⁵² The indictment named President Richard Nixon as an unindicted co-conspirator.⁵³ The Special Prosecutor filed a subpoena requiring the production of evidence

⁴⁵ *Id.* at 2269, 2270 ("Impeachment and the criminal law serve fundamentally different purposes."); *id.* at 2269 ("The general applicability of the criminal law also makes it inappropriate as the standard for a process applicable to a highly specific situation such as removal of a President."); *id.* at 2270 ("A requirement of criminality would be incompatible with the intent of the framers to provide a mechanism broad enough to maintain the integrity of constitutional government.").

⁴⁶ *Id.* at 2269.

⁴⁷ *Id.* at 2269, 2270.

⁴⁸ *Id.* at 2270.

⁴⁹ *United States v. Nixon*, 418 U.S. 683 (1974).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 687.

⁵³ *Id.*

relating to precisely identified meetings with the President and other individuals.⁵⁴ President Nixon filed a motion to quash the subpoena based upon a formal claim of privilege.⁵⁵ The Supreme Court granted certiorari after the United States District Court for the District of Columbia denied the motion.⁵⁶

In its analysis, the Court offered several principles on presidential privilege from judicial proceedings such as complying with subpoenas, depositions, and giving testimony.⁵⁷ Most noteworthy, perhaps, is the Court's conclusion that "neither the doctrine of separation of powers, nor the need for confidentiality . . . can sustain an absolute, unqualified Presidential privilege of immunity from judicial process."⁵⁸ Among the justifications for this holding is the idea that such privilege would "plainly conflict with the function of courts under Art. III" in their constitutional duty to "do justice in criminal prosecutions."⁵⁹ Accordingly, the Court reasoned that "the needs of judicial process may outweigh Presidential privilege."⁶⁰

However, it appears that such needs do not include holding a president accountable for damages stemming from his official conduct. In 1982, the United States Supreme Court rendered its decision in *Nixon v. Fitzgerald*.⁶¹ There, the Court held that former President Nixon benefited from an absolute immunity to damages liability predicated on his official conduct (*i.e.*, approving of the government's asking Mr. Fitzgerald to resign).⁶² The Court further extended this privilege to the outer perimeter of the president's official responsibility.⁶³

An executive branch official sued Nixon and claimed he was demoted for exercising his First Amendment right to speak out about

⁵⁴ *Id.*

⁵⁵ *Id.* at 683 ("The District Court, after treating the subpoenaed material as presumptively privileged, concluded that the Special Prosecutor had made a sufficient showing to rebut the presumption and that the requirements of Rule 17(c) had been satisfied."); *id.* at 684. ("Neither the doctrine of separation of powers nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute unqualified presidential privilege of immunity from judicial process under all circumstances.")

⁵⁶ *Id.* at 689.

⁵⁷ *Id.*

⁵⁸ *Id.* at 706.

⁵⁹ *Id.* at 707.

⁶⁰ *Id.*

⁶¹ *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

⁶² *Id.*

⁶³ *Id.*

cost overruns within his department.⁶⁴ This occurred in the context of a reduction in size and funding of the Air Force.⁶⁵ Prior to the President's statement, Fitzgerald testified in Congress to unjustifiably high costs and difficulties concerning the Air Force's new aircrafts.⁶⁶ Consequently, the Air Force reassigned Fitzgerald shortly after giving this testimony.⁶⁷ According to the Court, this reassignment met resistance from Fitzgerald's supervising officials.⁶⁸ Nixon claimed personal responsibility for the actions against Fitzgerald.⁶⁹ Thus, Fitzgerald sought damages against Nixon.⁷⁰ However, President Nixon argued that he enjoyed a presidential immunity from a suit for actions taken during his official tenure.⁷¹ Both the district and circuit courts denied the President's claim.⁷² The United States Supreme Court granted certiorari.⁷³

In its decision, the Court reasoned that there is a public interest in "providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office."⁷⁴ A president would be an "easy target" for civil suits given the notoriety associated with the office.⁷⁵ Further, the tempers and contours associated with litigation could "distract a President from his public duties, to the detriment" of both the President and nation at large.⁷⁶ In sum, the Court found that a president is entitled to absolute immunity from a civil liability in a suit for damages predicated on his official actions.⁷⁷

Finally, the case of *Clinton v. Jones*⁷⁸ is the last prominent suit when considering the limits of presidential immunity from judicial proceedings. In *Jones*, Paula Jones sued then-President Bill Clinton.⁷⁹ Ms. Jones alleged that the President made "'abhorrent' sexual

⁶⁴ *Id.* at 734.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 738.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 749.

⁷⁴ *Id.* at 752 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)).

⁷⁵ *Id.* at 752.

⁷⁶ *Id.* at 752.

⁷⁷ *Id.* at 751.

⁷⁸ 520 U.S. 681 (1997).

⁷⁹ *Id.*

advances to her while he served as Governor of Arkansas.”⁸⁰ She further alleged that her rejection of those advances resulted in retaliatory punishment by her supervisors.⁸¹ The United States District Court for the Eastern District of Arkansas denied the President’s motion to dismiss but granted temporary immunity until he left office.⁸² The Eighth Circuit affirmed in part, reversed in part, and dismissed in part.⁸³ The Court granted the President’s petition for certiorari.⁸⁴ The Court held that the Constitution does not afford the President immunity from civil damages litigation stemming from events that occurred before he took office.⁸⁵

In its reasoning, the Court highlighted the difference between official and unofficial conduct.⁸⁶ The Court emphasized that immunity concerning official conduct only extends to functions of the office.⁸⁷ It is not concerned with the actor, but rather the “function performed.”⁸⁸

Justice Stevens, writing for the majority, remarked how historical evidence shows James Wilson, a participant in the Philadelphia Convention (where the Constitution was drafted), argued how the president is amenable to laws as a private citizen for his private conduct and a public officer by impeachment.⁸⁹ The Court acknowledged that this approach is consistent with the doctrine of presidential immunity and the claim in this case.⁹⁰

⁸⁰ *Id.* at 686 (internal quotation marks omitted).

⁸¹ *Id.* at 686.

⁸² *Id.* at 688.

⁸³ *Id.* at 682.

The Eighth Circuit affirmed the dismissal denial, but reversed the trial postponement as the “functional equivalent” of a grant of temporary immunity to which petitioner was not constitutionally entitled. The court explained that the President, like other officials, is subject to the same laws that apply to all citizens, that no case had been found in which an official was granted immunity from suit for his unofficial acts, and that the rationale for official immunity is inapposite where only personal, private conduct by a President is at issue. The court also rejected the argument that, unless immunity is available, the threat of judicial interference with the Executive Branch would violate separation of powers.

Id.

⁸⁴ *Id.* at 688.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 694.

⁸⁹ *Id.* at 696.

⁹⁰ *Id.*

Most important, perhaps, is the Court's conclusion that "the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties."⁹¹ In other words, the Court recognized that each branch is charged with specific duties. Further, the Court was sensitive to the role each branch plays in checking one another. However, the Court stood firm in the position that those checks should never detrimentally affect another branch's ability to perform its duties. In response to President Clinton's argument, the Court stressed that the vast and important duties of his office demanded his devotion and undivided attention for the public interest.⁹² The Court accepted this premise.⁹³

The Court disagreed with what followed from the separation-of-powers doctrine. Significantly, the Court wrote how the President erred in his conclusion that interactions between the judicial and executive branches rose to the level of unconstitutional impairment.⁹⁴ The Court referenced instances of presidents' effectively responding to court orders to provide video-taped testimony, give depositions, and comply with subpoenas.⁹⁵ Justice Stevens concluded that such interactions between the branches can "scarcely be thought a novelty."⁹⁶ Accordingly, the Court held that the Constitution does not grant a sitting President immunity from civil damages litigation arising from events that occurred before he took office.⁹⁷

The *Jones* case provides powerful precedent and reasoning to support holding a sitting president accountable under the law. While that case dealt particularly with civil litigation, many of the cited instances between the judicial and executive branches dealt with criminal proceedings.⁹⁸ The Court explicitly contemplated the president's amenability to criminally related judicial proceedings. It stands to reason that the Supreme Court could use much of that opinion's dicta and rulings to find similar liability concerning criminal trials for a sitting president.

⁹¹ *Id.* at 702.

⁹² *Id.* at 696.

⁹³ *Id.* at 698.

⁹⁴ *Id.* at 700.

⁹⁵ *Id.* at 703.

⁹⁶ *Id.* at 704.

⁹⁷ *Id.* at 710.

⁹⁸ *See generally id.*

Other Supreme Court cases offer guidance on how the Court might rule on presidential immunity from criminal liability while in office. For example, in *United States v. Lee*,⁹⁹ the Supreme Court wrote that “[n]o man in this country is so high that he is above the law. All officers of the Government, from the highest to the lowest, are creatures of the law, and are bound by it.”¹⁰⁰ The Court refused to grant blanket immunity from the law to government officials, no matter their position.¹⁰¹

In *Burton v. United States*,¹⁰² the Supreme Court held that a United States Senator may be criminally indicted for accepting compensation in which the United States is an interested party.¹⁰³ The Court reasoned that such a law neither offends the Constitution nor interferes with the legitimate authority of Congress.¹⁰⁴ Elected officials are amenable to criminal indictments.

The Court need not turn to the historical instances cited in *Jones* alone. Our Constitution provides tools and procedures for replacing a president under a host of circumstances. Specifically, the 25th Amendment stands as one final tool in removing a criminally inclined president if the Court finds a sitting president may not be indicted.

IV. INDICTMENT AS A DISABILITY

A. The 25th Amendment

The 25th Amendment assuages some concerns regarding the alleged harms to government that may arise from subjecting a

⁹⁹ 106 U.S. 196 (1882).

¹⁰⁰ *Id.* at 241.

¹⁰¹ Keith King, *Indicting the President: Can a Sitting President be Criminally Indicted?*, 30 SW. U. L. REV. 417 (2001).

¹⁰² 202 U.S. 344 (1906).

¹⁰³ *Id.* at 367.

There can be no reason why the Government may not, by legislation, protect each Department against such evils, indeed, against everything, from whatever source it proceeds, that tends or may tend to corruption of inefficiency in the management of public affairs. A Senator cannot claim immunity from legislation directed to that end, simply because he is a member of a body which does not own its existence to Congress, and with whose constitutional functions there can be no interference.

Id.

¹⁰⁴ *Id.*

president to criminal litigation. The 25th Amendment serves to clarify the order of succession and procedures for replacing a president. However, there is a lack of law or precedent that helps define when the amendment can be invoked. In relevant part, section 3 of the 25th Amendment reads:

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is *unable* to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.¹⁰⁵

Before passing the 25th Amendment, Congress consulted with legal scholars to determine what qualifies as an inability under the Constitution.¹⁰⁶ Congress also considered who should determine what a disability is.¹⁰⁷ Various letters from legal professionals argue that a disability encompasses both physical and mental inability to discharge the duties of the president.¹⁰⁸ Some letters contend that a disability should be defined as what the founders could have medically contemplated at the time.¹⁰⁹ However, others argue that it is a practical matter concerning whether the president is discharging the duties of his office.¹¹⁰

Only a small pool of presidents have had their powers removed under the 25th Amendment. In 1985, President Reagan penned a letter charging then-Vice President George H.W. Bush with executing presidential powers and duties.¹¹¹ This preceded President Reagan's

¹⁰⁵ U.S. CONST. art. II, § 1, cl. 6 (emphasis added.)

¹⁰⁶ H.R. COMM. ON THE JUDICIARY, 84TH CONG., PRESIDENTIAL INABILITY 6, 15 (Comm. Print. 1956), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1015&context=twentysifth_amendment_congressional_materials [hereinafter *Hearings*].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 15, 17, 18.

¹⁰⁹ *Id.* at 26.

¹¹⁰ *Id.* at 15, 18.

¹¹¹ Ronald Reagan, *Letter to the President Pro Tempore of the Senate and the Speaker of the House on the President's Resumption of His Powers and Duties Following Surgery*, AM. PRESIDENCY PROJECT (July 13, 1985), <https://www.presidency.ucsb.edu/documents/letter-the-president-pro-tempore-the-senate-and-the-speaker-the-house-the-presidents>.

impending surgery that would leave him temporarily incapacitated.¹¹² President Reagan resumed his powers shortly after his surgery.¹¹³ Similarly, in 2002, President George W. Bush penned a letter discharging his duties to the Vice President under the 25th Amendment.¹¹⁴ This letter also preceded a medical procedure that required sedation.¹¹⁵ President Bush discharged his duties again in 2007 before another routine medical procedure that required sedation.¹¹⁶ He resumed his powers shortly thereafter both times.¹¹⁷ The use of the 25th Amendment lends support to the idea that the Constitution provides for the replacement of a disabled president.

B. History of the 25th Amendment

History suggests that the 25th Amendment's 3rd and 4th clauses are reserved for medical incapacitation. Even in letters to Congress before drafting the Amendment, legal scholars argued that a disability could only be understood as the founders understood intellectual illness.¹¹⁸ Yet, others argued that the inability to discharge duties should extend to practical matters such as motor functions and tasks associated with those motor functions.¹¹⁹

Mental or physical impairments should trigger the 25th Amendment only when a president cannot effectively advocate for the interests of this nation. Imagine the officer who cannot walk but leads a country through a war and lifts the nation out of an economic depression.¹²⁰ Administration officials should not be concerned with disabilities that do not impair an officer's ability to produce a quality

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ George W. Bush, *Letter to Congressional Leaders on Temporary Transfer of the Powers and Duties of President of the United States*, AM. PRESIDENCY PROJECT (June 29, 2002), <https://www.presidency.ucsb.edu/documents/letter-congressional-leaders-temporary-transfer-the-powers-and-duties-president-the-united>.

¹¹⁵ *Id.*

¹¹⁶ George W. Bush, *Letter to Congressional Leaders on Resuming the Powers and Duties of the President of the United States*, AM. PRESIDENCY PROJECT (July 21, 2007), <https://www.presidency.ucsb.edu/documents/letter-congressional-leaders-the-temporary-transfer-the-powers-and-duties-the-president>.

¹¹⁷ *Id.*

¹¹⁸ *Hearings*, *supra* note 106.

¹¹⁹ *Id.*

¹²⁰ *Franklin D. Roosevelt- Key Events*, U. VA. MILLER CTR., <https://millercenter.org/president/franklin-d-roosevelt/key-events> (last visited Apr. 9, 2019).

work product.¹²¹ Such officials should be solely concerned with circumstances that afflict an officer's ability to effectively advocate for the interests of this nation. If a condition, either mental, physical, or legal,¹²² prevents a president from discharging his duties in any way, he should be considered disabled under the 25th Amendment.

An indictment can impair the president's ability to function in much the same way as an incapacitating operation. An arraignment follows an indictment which forces the individual to appear before a judge, enter a plea, and potentially lead to a jury trial. An indictment can lead to an arrest and imprisonment. An indictment can result in compliance with different court orders such as subpoenas, gag orders, and other judicial procedures. An individual is involuntarily held at a variety of locations and prohibited from enjoying fundamental rights such as speech and privacy when complying with the judicial process that attends an indictment. A president would not be able to effectively discharge his powers while complying with an indictment. Accordingly, bringing an indictment against a sitting president would fall within the circumstances contemplated by Congress and legal scholars surveyed for the scope of 25th Amendment.

Furthermore, there might be no greater disability than death. An inquiry into what an administration may accomplish under the stress caused from the passing of a sitting president could be gathered from the actions taken by the John F. Kennedy and Lyndon B. Johnson administrations. The achievements of those administrations serve as testaments to the idea that, even in death, the government can carry on in its duties.

In the wake of President John F. Kennedy's assassination, then-Vice President Lyndon B. Johnson assumed the office of President.¹²³ In fact, President Kennedy's assassination instigated a discussion in

¹²¹ Armond S Goldman et al., *What Was the Cause of Franklin Delano Roosevelt's Paralytic Illness?*, 11 J. MED. BIOGRAPHY 232 (2003), https://www.ehdp.com/out/jmb_2003_v11_p232-240.pdf

¹²² *Hearings*, *supra* note 106, at 14 ("These well established rules point to a definition of 'inability' which covers all cases in which the President is in fact unable to exercise a power which the public interest requires to be exercised. The cause and duration of the inability are immaterial—the question is one of fact."); *id.* at 18 ("Inability is a practical concept—an impairment such that the powers and duties cannot effectively be discharged.").

¹²³ Kent Germany, *Lyndon B. Johnson: Impact and Legacy*, U. VA. MILLER CTR., <https://millercenter.org/president/lbjohnson/impact-and-legacy> (last visited Apr. 9, 2019) [hereinafter *Johnson*].

Congress that culminated in the ratification of the 25th amendment.¹²⁴ Despite the unexpected death, President Johnson oversaw the passage of dramatic civil rights legislation encompassed within the Civil Rights Act of 1964 and budget reform in the Revenue Act of 1964.¹²⁵ Prior to his assassination, President Kennedy prioritized and pushed for enactment of these bills during his presidency.¹²⁶ Still, after his assassination and in the wake of such tragedy, the administration reorganized and urged sweeping government reformation.

History demonstrates that a government can continue to thrive in the absence of the elected president, and a president can still be effective while attending to legal proceedings. In December of 1998, the House introduced articles of impeachment against President Bill Clinton.¹²⁷ The Senate acquitted him in February of 1999.¹²⁸ Yet, President Clinton arguably had a presidency marked by domestic and foreign political achievements. He enjoyed a 68% approval rating and a 72% rating among Americans who believed he could be effective and lead successful foreign policy endeavors.¹²⁹ Moreover, after rallying the nation's support, President Clinton deployed troops to Serbia in March of 1999, a month after his impeachment proceeding.¹³⁰ This initiative successfully led Dictator Slobodan Milosevic to pull troops out of Kosovo.¹³¹ This achievement also complemented domestic accomplishments. For instance, President Clinton, a member of the Democratic Party, was able to negotiate with the Republican Party and agreed on paying dues to the United Nations, doubling afterschool programs, and implementing the 100,000 Teacher Initiative.¹³²

¹²⁴ Scott Bomboy, *How JFK's Assassination Led to a Constitutional Amendment*, NAT'L CONST. CTR. (Nov. 22, 2018), <https://constitutioncenter.org/blog/how-jfks-assassination-led-to-a-constitutional-amendment/>.

¹²⁵ *Johnson*, *supra* note 123.

¹²⁶ *Id.*

¹²⁷ Daniel H. Erskine, *The Trial of Queen Caroline and the Impeachment of President Clinton: Law As a Weapon for Political Reform*, 7 WASH. U. GLOBAL STUD. L. REV. 1, 2 (2008).

¹²⁸ Baker & Dewar, *supra* note 37.

¹²⁹ *Presidential Approval Ratings – Bill Clinton*, GALLUP, <https://news.gallup.com/poll/116584/Presidential-approval-ratings-bill-clinton.aspx> (last visited Apr. 9, 2019).

¹³⁰ Samuel J. Sarver, *Effects of the Impeachment on Bill Clinton's Staff, Cabinet, Agenda, and Legacy*, ILL. ST. U., <https://pol.illinoisstate.edu/downloads/conferences/2006/Sarver13.pdf> (last visited Apr. 9, 2019).

¹³¹ *Id.*

¹³² *Id.*

Overall, in President Clinton's case, attending to legal proceedings did not debilitate him and prevent him from executing his duties. One might reasonably point to many factors outside of President Clinton's control that influenced his favorable poll numbers.¹³³ Most prominent, perhaps, is the proliferation of the internet, websites, and cyber-commerce.¹³⁴ However, the consequences of legal proceedings did not appear to impair the credibility or function of the government.

Furthermore, insulating a president from indictment allows for a likely criminal actor to continue exercising great powers in our nation's highest office. The 25th Amendment provides the procedure for an administration to initiate a process which could be used to hold a criminal president liable for his actions.

Nixon's presidency reflects the consequences that occur when a criminally inclined sitting president maintains executive power.¹³⁵ For example, Nixon secured funds to bankroll cover-ups of the Watergate scandal because of his presidential position.¹³⁶ In fact, he further engaged in cover-ups of those cover-ups.¹³⁷ These schemes spanned two terms.¹³⁸ However, an indictment could have stopped that conduct sooner than an impeachment.

C. OLC Memoranda

As previously mentioned, the OLC drafted a memorandum in 1973 arguing that a sitting president could not be indicted.¹³⁹ The memo explained that the attention necessary to defend a criminal indictment would "interfere with the President's unique duties."¹⁴⁰ Accordingly, the memo concluded that an indictment would frustrate

¹³³ *Id.*

¹³⁴ See CHRISTIAN WOLESCHIED, RISE AND BURST OF THE DOTCOM BUBBLE: CAUSES, CHARACTERISTICS, EXAMPLES (2012).

¹³⁵ See generally JOHN W. DEAN, BLIND AMBITION (1976); CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN (1974); BOB WOODWARD & CARL BERNSTEIN, THE FINAL DAYS (1976).

¹³⁶ See generally DEAN, *supra* note 135; BERNSTEIN & WOODWARD, ALL THE PRESIDENT'S MEN, *supra* note 135; BOB WOODWARD & CARL BERNSTEIN, THE FINAL DAYS, *supra* note 135.

¹³⁷ See generally DEAN, *supra* note 135; BERNSTEIN & WOODWARD, ALL THE PRESIDENT'S MEN, *supra* note 135; BOB WOODWARD & CARL BERNSTEIN, THE FINAL DAYS, *supra* note 135.

¹³⁸ See generally DEAN, *supra* note 135; BERNSTEIN & WOODWARD, ALL THE PRESIDENT'S MEN, *supra* note 135; BOB WOODWARD & CARL BERNSTEIN, THE FINAL DAYS, *supra* note 135.

¹³⁹ 1973 OLC Memo, *supra* note 15.

¹⁴⁰ 1973 OLC Memo, *supra* note 15.

a president's ability to carry out his duties to such an extent that any proceeding should be deferred until after his term.¹⁴¹ In 2000, the OLC reaffirmed these conclusions with another memorandum.¹⁴²

Federal prosecutors are expected to follow official DOJ policies, regulations, and practices; such rules are published in memos like those mentioned above.¹⁴³ While it has been an official practice of the DOJ to refrain from indicting a president, it is unclear whether doing so is an official policy. Mueller followed the memo's guidelines and decided not to indict President Trump despite evidence that President Trump obstructed justice.¹⁴⁴

It stands to reason, though, that an indictment could serve as a disability. President Bush and President Reagan relinquished their duties because of their inability to perform presidential duties.¹⁴⁵ An indictment either prohibits a president from discharging his duties, impairs him, or serves no debilitating purpose. If the latter, then there is no policy reason that justifies presidential immunity in the OLC memos. If it is the former, administrations can turn to history, as presidents have utilized constitutional tools to relinquish their duties when they cannot discharge them. The argument that an indictment might impair the president requires nuanced policy consideration, as will later be addressed in this Note.¹⁴⁶

However, in his report, Mueller concluded that obstruction of justice laws can apply to the president.¹⁴⁷ Mueller relied on a footnote from a 1995 OLC opinion to reach this conclusion.¹⁴⁸ In 1995, President Clinton nominated William Fletcher to the U.S. Court of Appeals for the Ninth Circuit. Fletcher's mother also served as a judge on that court.¹⁴⁹ The OLC then issued an opinion as to whether federal nepotism statutes applied to presidential appointments.¹⁵⁰ The OLC argued that such statutes should not apply due to the clear statement

¹⁴¹ 1973 OLC Memo, *supra* note 15.

¹⁴² 2000 OLC Memo, *supra* note 16.

¹⁴³ 9-27.000 - *Principles of Federal Prosecution*, *supra* note 20.

¹⁴⁴ Michael S. Schmidt et al., *Mueller Won't Indict Trump if He Finds Wrongdoing, Giuliani Says*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/us/politics/mueller-trump-indictment.html>.

¹⁴⁵ Reagan, *supra* note 111; Bush, *supra* note 114.

¹⁴⁶ *See infra* Part V.

¹⁴⁷ MUELLER REPORT, *supra* note 8, at vol. II, p.169.

¹⁴⁸ Josh Blackman, *The Special Counsel's Constitutional Analysis*, LAWFARE (APRIL 19, 2019, 12:31PM), <https://www.lawfareblog.com/special-counsels-constitutional-analysis>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

rule.¹⁵¹ In other words, statutes should not apply to presidents unless the statute explicitly mention its applicability to the president. Since the statute did not explicitly apply to the president, the OLC concluded a court should not apply it.¹⁵²

The OLC qualified its analysis in footnote 11. In pertinent part, the footnote reads that “the clear statement principle [the OLC has] identified does not apply with respect to a statute that raises no separation of powers questions were it to be applied to the President.”¹⁵³ The footnote offers a bribery statute as an example of a law which would not implicate separation of powers questions. The footnote reads that

Application of [the bribery statute] raises no separation of powers question, let alone a serious one. The Constitution confers no power in the President to receive bribes; in fact, it specifically forbids any increase in the President’s compensation for his service while he is in office, which is what a bribe would function to do. *See* U.S. Const. art. II, § 1, cl. 7. Moreover, the Constitution expressly authorizes Congress to impeach the President for, inter alia, bribery. *Id.* § 4. The Constitution further provides that any party impeached and convicted may ‘nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.’ *Id.* art. I, § 3.¹⁵⁴

Mueller argues that “[u]nder OLC’s analysis, Congress can permissibly criminalize certain obstructive conduct by the President, such as suborning perjury, intimidating witnesses, or fabricating evidence, because those prohibitions raise no separation-of-powers questions.”¹⁵⁵ The Special Counsel’s report goes on to note that “[t]he Constitution does not authorize the President to engage in such conduct, and those actions would transgress the President’s duty to ‘take Care that the Laws be faithfully executed.’”¹⁵⁶ Mueller concludes

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ WALTER DELLINGER, U.S. DEP’T JUST.: OFFICE OF LEGAL COUNSEL, Application of 28 U.S.C. §458 to Presidential Appointments of Federal Judges at n.11 (1995) <https://www.justice.gov/file/20126/download>.

¹⁵⁴ *Id.*

¹⁵⁵ MUELLER REPORT, *supra* note 8, at vol. II, p.170.

¹⁵⁶ *Id.*

that in “view of those clearly permissible applications of the obstruction statutes to the President,” a clear statement rule would not preclude the obstruction of justice statutes from applying to the President.¹⁵⁷

D. Current Supreme Court of the United States’ View on Presidential Indictment

On July 9, 2018, President Trump nominated Brett Kavanaugh to the Supreme Court after Justice Anthony Kennedy announced his retirement.¹⁵⁸ On October 6, 2018, the Senate voted to confirm Justice Kavanaugh to the Supreme Court by a vote of 50 to 48.¹⁵⁹ Justice Kavanaugh provides a conservative majority on the nation’s highest court for potentially decades to come.¹⁶⁰

The question of whether a sitting president can be criminally indicted is an open question in the Supreme Court. There is no case law on the topic and the issue directly calls for an interpretation of the Constitution. The results would impact the highest office in our nation. Predicting how Justice Kavanaugh might rule on such a case is of particular relevance today. Justice Kavanaugh’s published opinions on whether a sitting president can be indicted command interest in light of President Trump’s legal troubles.

In 2009, Justice Kavanaugh penned a law review article in the *Minnesota Law Review* titled, “Separation of Powers During the

¹⁵⁷ *Id.*

¹⁵⁸ Mark Landler & Maggie Haberman, *Brett Kavanaugh Is Trump’s Pick for Supreme Court*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/politics/brett-kavanaugh-supreme-court.html>.

¹⁵⁹ Emily Knapp et al., *Kavanaugh Confirmed: Here’s How Senators Voted*, POLITICO (Oct. 6, 2018) <https://www.politico.com/interactives/2018/brett-kavanaugh-senate-confirmation-vote-count/>.

¹⁶⁰ *Priests for Life v. U.S. Department of Health and Human Services*, 808 F.3d 1 (D.C. Cir. May 20, 2015), [https://www.cadc.uscourts.gov/internet/opinions.nsf/425C0AE29F10AFD785257E4B00767BF5/\\$file/13-5368.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/425C0AE29F10AFD785257E4B00767BF5/$file/13-5368.pdf) (Justice Kavanaugh dissented that mandated contraception coverage in the Affordable Care Act infringed on the rights of religious organizations.); Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, AM. ENTERPRISE INST. (Dec. 12, 2017), <http://www.aei.org/publication/from-the-bench-the-constitutional-statesmanship-of-chief-justice-william-rehnquist/> (Justice Kavanaugh welcomes the idea of widening the flow of public funding to religious schools.); *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. Aug. 21, 2012), *rev’d*, *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014) (Justice Kavanaugh rejected the EPA’s attempt to stifle air pollution that crossed state lines).

Forty-Fourth Presidency and Beyond.”¹⁶¹ In his article, Justice Kavanaugh cites his experience working on the President Clinton investigation, as well as his background working in the White House.¹⁶² Justice Kavanaugh outlined a series of policy positions to improve the federal government’s performance.¹⁶³ One such recommendation is that a president be able to defer criminal proceedings and indictments until out of office.¹⁶⁴ He argues that criminal proceedings would “cripple the federal government” and render it “unable to function with credibility.”¹⁶⁵ Further, Justice Kavanaugh contends that criminal proceedings would distract a president from his responsibilities to the people.¹⁶⁶

Justice Kavanaugh anticipates two criticisms of his argument. He first concedes that no one is above the law.¹⁶⁷ However, he claims that the point is not to put people above the law, but to defer litigation until after a president’s term.¹⁶⁸ Second, Justice Kavanaugh recognizes that the law requires checks-and-balances.¹⁶⁹ That is why, Justice Kavanaugh writes, the Constitution charges Congress with the ability to impeach a president if he does something “dastardly.”¹⁷⁰ While Justice Kavanaugh’s law review article is not dispositive of how he might rule now that he is a Supreme Court Justice, it serves to inform the considerations he might make in such a case.

A future decision on a case considering presidential immunity from criminal indictment while in office might not fall along predictable party lines. In *Jones*, the court held unanimously for the president’s amenability to civil litigation.¹⁷¹ The majority discussed how it is not uncommon for a president to comply with subpoenas,

¹⁶¹ Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454 (2009).

¹⁶² *Id.* at 1459.

¹⁶³ Kevin Russell, *Kavanaugh on Presidential Power: Law-review Article on Investigations of Sitting Presidents (UPDATED)*, SCOTUS BLOG (July 13, 2018), <http://www.scotusblog.com/2018/07/kavanaugh-on-Presidential-power-law-review-article-on-investigations-of-sitting-Presidents/#more-272711>.

¹⁶⁴ Kavanaugh, *supra* note 161, at 1462.

¹⁶⁵ *Id.* at 1461.

¹⁶⁶ *Id.* at 1462.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Clinton v. Jones*, 520 U.S. 681 (1997).

depositions, and provide testimony.¹⁷² Justice Ginsburg, Justice Thomas, and Justice Breyer, who all voted with the majority, are currently sitting on the court.¹⁷³ Added to those three justices is a possible vote from Justice Roberts, who was willing to break with his conservative brethren in the Affordable Care Act case.¹⁷⁴ Additionally, they all occupy different positions on the ideological spectrum. Thus, a plurality opinion in favor of indicting a sitting president would not be surprising.

On the other hand, Congress could directly enact legislation that explicitly allows prosecutors to criminally indict a sitting president.¹⁷⁵ Under the presumption it is properly drafted, such a law may reflect much of the sentiment in the *Jones* decision. That is to say, Congress could clarify the judicial branch's role in the checks-and-balances aspect of our government. The Supreme Court has already opined that prohibiting the judiciary from exercising its power in the civil realm, barring *Fitzgerald*, would be an unconstitutional inhibition.¹⁷⁶ It stands to reason that the Court could find the same in the criminal arena. Lastly, enacting such a law would reinforce the prevailing sentiment that no one is above the law.¹⁷⁷

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Nat'l Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).

¹⁷⁵ Burton v. United States, 202 U.S. 344, 367 (1906).

While the framers of the Constitution intended that each department should keep within its appointed sphere of public action, it was never contemplated that the authority of the Senate to admit to a seat in its body one who had been duly elected as a Senator, or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of Congress to enact such statutes, not forbidden by the Constitution, as the public interests required for carrying into effect the powers granted to it.

Id. at 367. Here, the Court explicitly acknowledges that one's position in our government does not preclude Congress from criminalizing behavior and making an elected official amenable to prosecution for that behavior while in office.

¹⁷⁶ *Jones*, 520 U.S. at 699.

¹⁷⁷ Ronald J. Ostrow, 'No One Is Above the Law,' *Starr Reminds Bar Group*, L.A. TIMES (May 2, 1998), <http://articles.latimes.com/1998/may/02/news/mn-45632> ("Independent counsel Kenneth W. Starr, locked in an executive-privilege battle with President Clinton, on Friday invoked the words of a Watergate special prosecutor who won a similar struggle with then-President Nixon: 'No one—absolutely no one—is above the law.'"); Kenneth L. Khachigian, *It Still Rings True: No Man Is Above Law*, L.A. TIMES (Aug. 16, 1998), <http://articles.latimes.com/1998/aug/16/local/me-13684> ("These are the very last words in Special Prosecutor Leon Jaworski's best-selling memoir: '. . . during the Watergate years [our Constitution] was interpreted again so as to reaffirm that no one—absolutely no one—is above the law.'" (alteration in original)).

Justice Kavanaugh's distaste for special counsel investigations and indictments of a sitting president are well documented in his writings and public comments.¹⁷⁸ As discussed earlier, he argued against indicting a sitting president in his Minnesota law review article.¹⁷⁹ In it, he reflected on his tenure with the Kenneth Starr investigation into President Bill Clinton.¹⁸⁰ Drawing on his time in the White House, Justice Kavanaugh wrote that a president should be afforded deferment of litigation.¹⁸¹ What is more, Justice Kavanaugh outlined into the hypothetical, undesirable policy consequences that could follow a presidential indictment.¹⁸² In sum, it seems almost inevitable that Justice Kavanaugh would rule in favor of expansive presidential immunity from criminal proceedings if given the opportunity.

V. A PHILOSOPHICAL AND POLICY INQUIRY INTO PRESIDENTIAL DEFERMENT

One rebuttal to the argument that a president is subject to criminal prosecution, as Justice Kavanaugh notes, is that Congress is charged with removing a president when he does something “dastardly.”¹⁸³ Because impeachment is a political process, its

¹⁷⁸ Kavanaugh, *supra* note 161, at 1460 (“But I believe that the President should be excused from some of the burdens of ordinary citizenship while serving in office.”); Josh Gerstein, *Kavanaugh Signaled Sitting President Couldn't be Indicted*, POLITICO (July 11, 2018), <https://www.politico.com/blogs/under-the-radar/2018/07/11/brett-kavanaugh-president-indicted-709641> (Video showing Kavanaugh raising his hand in affirmation when asked whether a president is immune from criminal indictment while sitting in office.).

¹⁷⁹ Kavanaugh, *supra* note 161.

¹⁸⁰ *Id.* at 1460 (“This is not something I necessarily thought in the 1980s or 1990s. Like many Americans at that time, I believed that the President should be required to shoulder the same obligations that we all carry. But in retrospect, that seems a mistake.”).

¹⁸¹ *Id.* at 1459.

¹⁸² *Id.* (“In particular, Congress might consider a law exempting a President—while in office—from criminal prosecution and investigation, including from questioning by criminal prosecutors or defense counsel. Criminal investigations targeted at or revolving around a President are inevitably politicized by both their supporters and critics. As I have written before, ‘no Attorney General or special counsel will have the necessary credibility to avoid the inevitable charges that he is politically motivated—whether in favor of the President or against him, depending on the individual leading the investigation and its results.’”).

¹⁸³ *Id.* at 1462. Dastardly means underhanded or treacherous. Justice Kavanaugh writes in the preceding sentence that “A second possible concern is that the country needs a check against a bad-behaving or law-breaking President.” *Id.* He then writes “If the President does something dastardly, the impeachment process is available.” *Id.* One might reason that “dastardly” means “bad-behaving” or “law-breaking” in this context, too. *Dastardly*,

instigation is subject to the whims of Congress. Additionally, conviction also requires a two-thirds majority vote by Congress. Accordingly, it is possible that a president can commit a federal offense without removal from office. Consider that President Clinton perjured himself to a federal prosecutor. The House initiated impeachment proceedings for two articles of impeachment. However, the Senate failed to reach the required two-thirds threshold to convict him.¹⁸⁴ It does not necessarily follow that, because a president does something dastardly, he will be removed from office.

A further policy consideration is whether an executive officer should be permitted to serve subsequent terms after participating in criminal activity. In theory, a president could commit a crime his first day in office, deferring any consequences to the end of his term. But the president does not lose his status before, during, or after a reelection. It stands to reason that a president could defer consequences of a crime for eight years. Note, Nixon won his reelection campaign after Watergate. An individual with the gambit of presidential power at his disposal, coupled with a proclivity for crime, is a threat to any society.

As the OLC memorandums argue, a president should not be subject to indictment because it would impermissibly chill the executive's ability to carry out his constitutionally charged duties. However, the Court has recognized that chilling effects are too abstract to bind the administration of justice.¹⁸⁵ Moreover, the president is not charged to carry out criminal behavior. The president is not charged to suborn perjury, tamper with witnesses, shoot someone on Fifth Avenue, or act for other corrupt personal motives. These types of actions are not official conduct of the office. Application of obstruction statutes (or murder statutes) would not burden official conduct to the extent that they chill conduct which further corrupts or obstructs justice. Further, "the obstruction-of-justice statutes do not aggrandize power in Congress or usurp executive authority. Instead, they impose a discrete limitation on conduct" with the intent to obstruct justice.¹⁸⁶ Thus, "the President's conduct of office should not

MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/dastardly> (last visited Apr. 9, 2019).

¹⁸⁴ Baker & Dewar, *supra* note 37.

¹⁸⁵ Freedman, *supra* note 27 at n. 213.

¹⁸⁶ MUELLER REPORT, *supra* note 8, at vol. II, p.180.

be chilled based on hypothetical concerns about the possible application of a corrupt-motive standard.”¹⁸⁷

A final consideration is that enabling a prosecutor to indict a sitting president empowers politically motivated attorneys to indict a president on purely ideological grounds. However, Mueller’s report deals with this point explicitly. There is “no reason to believe that investigations, let alone prosecution, would occur except in highly unusual circumstances when a credible factual basis exists to believe that obstruction occurred.”¹⁸⁸ Mueller offers several checks against “initiating a baseless investigation or prosecution of a former President.”¹⁸⁹ It stands to reason that these checks exist for the investigation into a sitting president, too. For instance, the “Attorney General hold[s] ‘the power to conduct the criminal litigation of the United States Government.’”¹⁹⁰ This “provides a strong institutional safeguard against politicized investigations of prosecutions.”¹⁹¹ There are similar safeguards for DOJ officers and line prosecutors.¹⁹²

Once policy arguments are dispensed with, one can then turn to the question of whether deferring criminal prosecution serves the ends of justice. Classical philosophers, such as Aristotle, and modern ones, such as John Rawls, have provided durable theories of responsibility and justice. Aristotle’s work comports with much of our criminal law theory today.¹⁹³ John Rawls’ work offers a contractual theory of rights and justice that one can use to frame this discussion.¹⁹⁴

Deferment of criminal conduct flies in the face of both the moral responsibility and contract theories of justice. At its core, deferment of criminal action delays accountability for criminal

¹⁸⁷ *Id.* at vol. II, p. 180.

¹⁸⁸ *Id.* at vol. II, p. 179.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at vol. II, p.179 n.1092 (“Similar institutional safeguards protect Department of Justice officers and line prosecutors against unfounded investigations into prosecutorial acts. Prosecutors are generally barred from participating in matters implicating their personal interests, *see* 28 C.F.R. § 45.2, and are instructed not to be influenced by their ‘own professional or personal circumstances,’ Justice Manual § 9-27.260, so prosecutors would not frequently be in a position to take action that could be perceived as corrupt and personally motivated. And if such cases arise, criminal investigation would be conducted by responsible officials at the Department of Justice, who can be presumed to refrain from pursuing an investigation absent a credible factual basis.”).

¹⁹³ *See generally* ARISTOTLE, *NICOMACHEAN ETHICS* (J.E.C. Welldon trans., 1987).

¹⁹⁴ *See generally* JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

conduct. For a temporary period, one is outside the reaches of the nation's collectively agreed-to laws after participating in collectively agreed-to criminally deviant behavior. The nation operates under a mutual understanding that people consent to follow such laws and the government will enforce them. The question then becomes whether deferring prosecution of criminal behavior is inherently at odds with our nation's idea of accountability.

The mass of presidential powers naturally attends the position of president. Yet, winning a presidential election does not preclude one from engaging in criminal conduct. Thus, there could be an individual with the tendency to violate our laws at the helm of government, with substantial power, insulated from criminal laws for the duration of his term.

Aristotle, in his *Nicomachean Ethics*, developed one of the first accounts of moral responsibility.¹⁹⁵ In book III, sections 1 through 5, Aristotle reasons society should hold someone accountable for his voluntary acts.¹⁹⁶ The voluntary act must: (1) originate in the agent and (2) the agent must know what he or she is doing or going to bring about.¹⁹⁷ It should come as no surprise that this notion reflects *actus rea* and *mens rea* elements of criminal culpability.¹⁹⁸

One can imagine a situation where a candidate for President of the United States considers all the different tools to deploy in winning an election. Some tools are well within the scope of legality in our society. These include fundraising, buying campaign ads, and making media appearances. However, it would not be unreasonable to imagine a candidate with a history of violating our laws using tools outside the scope of legality. These tools might include encouraging a foreign superpower, on national television, to dedicate its resources towards hacking a political opponent's network. That candidate might also organize a meeting with this foreign superpower to exchange potentially compromising material on the opponent for favorable treatment in the international community. The candidate does so expecting an exchange of benefits from the transaction.¹⁹⁹

¹⁹⁵ See generally ARISTOTLE, *supra* note 193.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ For a discussion on the elements of *actus rea*, see https://www.law.cornell.edu/wex/actus_rea; for a discussion on the elements of *mens rea*, see https://www.law.cornell.edu/wex/mens_rea.

¹⁹⁹ MUELLER REPORT, *supra* note 8, vol. I, p.181.

What is more, a president may be the subject of a criminal investigation. That president then uses his executive power to frustrate, interfere, and obstruct the proceedings and operations of that investigation. He does so with the corrupt intent to end the investigation.

Such examples would fit within Aristotle's definition of a voluntary act. The President would (1) know what he is doing (*i.e.*, interfering with an investigation) and (2) bring about that action (*i.e.*, for the purpose of ending the investigation). Thus, refusing to hold that agent accountable insults basic notions of criminal accountability and morality that attend our legal system.

In his book, *A Theory of Justice*, John Rawls defines justice, the role of justice in our society, the necessary and sufficient conditions for justice to exist, and its implications.²⁰⁰ First, Rawls reasons that justice is "a proper balance of competing claims from a conception of justice as a set of related principles for identifying the relevant considerations which determine this balance."²⁰¹ He further states that: (1) people must negotiate and agree on the principles or a conception of justice and (2) there are institutions that generally satisfy these principles.²⁰²

The subject of justice, Rawls argues, is to assign rights and duties and determine what the proper benefits and burdens of social cooperation.²⁰³ It is from this assignment of rights and calculation of burdens that laws, institutional regulations, and norms arise. One need not wonder either long or far to find the burdens of participation in our society. For instance, one burden of participating in our society is to abide by the laws and regulations, whether or not you agree with all of them. Deviation from this norm leads to accountability under our laws. The justification here stems from a set of propositions.

Laws are an agreed upon set of rules that prohibit and permit behaviors. The purposes of laws are numerous. At their core, laws govern actors in a geopolitically defined area. The business of such governing in a democracy like the United States is negotiated. One might reasonably posit it is as in the interest of prosperity and cohesion. Thus, a deviation from such agreed rules would be to subvert the means of our collective goals.

²⁰⁰ RAWLS, *supra* note 194.

²⁰¹ *Id.* at 9.

²⁰² *Id.* at 4.

²⁰³ *Id.* at 6.

Further, if the agreement is born from a negotiation concerning the rights and duties of individuals, the negotiation would be the agreed means to establish appropriate behavior. Deviant actions offend both the process and the results of the negotiation. As such, it would be in the interest of society to prevent that actor from further frustrating its goals.

Even more concerning is the idea of deferment as a disarmament of what would otherwise be an effort to secure a just society. Where laws are the swords and shields of just people against tyranny and corruption, deferment is its seizure. What are the tools of securing a just state when they are stripped from the hands of good people? A righteous society would be secured by righteous means. Consequently, no one, not even the President of the United States, can be above the law. It is such immunity that births unrighteousness.

It is not clear that actors in our society have negotiated an agreement that provides the president with immunity from his criminal behavior. For instance, there are no laws clearly providing such a privilege. Even the Supreme Court held that a president must comply with court orders in criminal actions, and that a sitting president is liable for unofficial conduct.²⁰⁴ Moreover, the institutions that satisfy principles of justice would be unable to do their job.²⁰⁵ At its core, deferring the prosecution of a sitting president offends basic notions of justice and responsibility which have underpinned the western world for thousands of years. There is seemingly no shred of even a slightly redeeming moral principle on which to justify deferment. Deferment of prosecution subverts the negotiated principles of justice and the institutions society established to define those principles.

²⁰⁴ *United States v. Nixon*, 418 U.S. 683 (1974).

²⁰⁵ MUELLER REPORT, *supra* note 8, at vol. II., p.177 (“[I]mmunizing the President from the generally applicable criminal prohibition against corrupt obstruction of official proceedings would seriously impair Congress’s power to enact laws ‘to promote objectives within [its] constitutional authority.’” (alteration in original)); *id.* at 176-77 (“In *Nixon*, the Court rejected the President’s claim of absolute executive privilege because ‘the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.’”); *id.* at 177 (“[T]he grand jury cannot achieve its constitutional purpose absent protection from corrupt acts.”).

VI. CONCLUSION

Article 2, section 1, clause 6 of the Constitution, along with the 25th Amendment, provide adequate provisions to replace a president when he cannot discharge his duties. However, two OLC memoranda argue that an indictment against a president would severely impair that executive's ability to carry out his constitutional duties.²⁰⁶ Those memoranda are seemingly consistent with Justice Kavanaugh's views, as expressed in his law review article, that an indictment would hamstring a government's ability to function.²⁰⁷ Thus, both the OLC memos and Justice Kavanaugh's article conclude that an indictment against a sitting president should be deferred until after the executive leaves office.

Nevertheless, the author of this Note presents historical reasons that support indicting a president while in office. To the extent that an indictment could undercut the president's ability to discharge his duties, the 25th Amendment provides the appropriate framework, which has been invoked successfully in the past. The United States government has utilized replacement procedures on several occasions. Additionally, presidential cooperation with judicial orders, such as subpoenas and depositions, has repeatedly occurred without major disruption. This nation witnessed the many great domestic and foreign achievements of an administration plagued by either death or legal disability of a president. Neither death of a president nor disability has impaired the government from continuing to function. Finally, an independent study highlights how one should not look to impeachment provisions as a preclusion to a president's accountability in criminal law. Thus, an indictment should serve as no exception

Textual commitments in the Constitution support the conclusion that a president is, in fact, indictable. Article 1, section 3 clause 7 of the Constitution explicitly makes the president an indictable officer.²⁰⁸ This Note argues that a prosecutor need not wait until an impeachment conviction to indict a sitting president. Likewise, article 2, section 1, clause 6 empowers Congress to remove a president under certain conditions.²⁰⁹ One such condition is when the president suffers

²⁰⁶ *Supra* notes 24, 26.

²⁰⁷ Kavanaugh, *supra* note 161, at 1460.

²⁰⁸ *Supra* note 35.

²⁰⁹ *Supra* note 24.

a disability.²¹⁰ The author sets forth the idea of indictment as a disability sufficient for removal and replacement under the 25th Amendment.

Moreover, a philosophical analysis of the issue lends itself to the view that deferment of criminal accountability because of one's title offends basic notions of morality and fairness that underpin our society. The lack of clear laws and regulations on the matter suggests there is no consensus in our society concerning what is a just answer to the issue. Refusing to hold someone accountable for an intentional criminal act that originated in his mind and that he reasonably knew the effects of, contravenes both the *actus rea* and *mens rea* elements of our criminal system. Deferment is fundamentally at odds with western beliefs of accountability.

Most important, there are major policy concerns regarding a lack of action taken against criminally inclined presidents, serving at the helm of our government. It is only to society's detriment that Congress could effectively insulate a president's removal from office following an impeachment. Impeachment is not a sufficient remedy because, politically, it may not be possible to secure the requisite two-thirds vote necessary for conviction. This serves to keep a person, who has engaged in criminal behavior, with the gambit of executive power at his disposal, in office. Our experiences with President Nixon, and his proclivity for cover-ups, indicate why inaction against a criminally inclined president is problematic.

The Mueller investigation unearthed evidence that close colleagues of the president engaged in criminal activity. According to the Special Counsel's report, there is evidence that the President obstructed justice. The United States currently has a president who allegedly coordinated with a foreign adversary in securing dirt on a political opponent. Further, allegations detail that Russia laundered money into the Trump campaign. Lastly, some accuse President Trump of firing former FBI Chief, James Comey, and former United States Attorney for the Southern District in New York, Preet Bharara, in an attempt to obstruct justice. Mueller found that President Trump directed Don McGhan and Jeff Sessions to exercise their power in either limiting the Special Counsel's scope or to fire Mueller. It should be patently obvious how accepting aid from a foreign adversary, and

²¹⁰ *Id.*

then undermining an effort to expose that collusion, is an existential threat to the United States.

In sum, not only does the Constitution provide for replacing a disabled sitting president, but our laws and history support the view that presidents can be held criminally accountable. A thorough analysis of the policy and moral implications of the issue command it. It is not only permissible, but imperative, that we hold our chief executive accountable for his criminal behavior. No one, no matter their title, their position in government, their power, is above the law.²¹¹ Thus, prosecutors can, and should, bring indictments and let the Supreme Court resolve the constitutionality of such action.

²¹¹ MUELLER REPORT, *supra* note 8, at vol. II, p.181.