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Feature

***11 THE PRESIDENTIAL PRIVILEGE AGAINST PROSECUTION**

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There are ... incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office ...

-- Justice Joseph Story, 1833 [\[FN1\]](#)

Can a sitting President ever be criminally prosecuted (outside an impeachment court)? The question has been debated--sometimes hotly, sometimes coolly--since the beginning of the Republic. Although the long pedigree of this debate suggests that reasonable people can disagree, we believe that the best view of constitutional text, history, structure, and precedent supports the conclusion that Justice Story reached: Sitting Presidents cannot be prosecuted.

This privilege does not place Presidents above the law; they can be held accountable for their actions after they leave office, and they can be impeached to hasten this. The privilege does not make Presidents imperial; their special status is ultimately traceable to the rights of the American People. Nor does the privilege clash with the structure of American constitutional government; the President is constitutionally distinct from other, prosecutable officials.

The President Is Unique

That last point is a good place to begin. An obvious counter-argument, a reason to think that a sitting President might be susceptible to prosecution, is that *12 members of Congress, federal judges, Vice Presidents, cabinet officers, and governors can all be prosecuted. But the Constitution does not view the President as it does these other officials. As Alex Bickel put it, "In the presidency is embodied the continuity and indestructibility of the state." [\[FN2\]](#) It is embodied in the presidency uniquely.

How exactly is the President so different, constitutionally speaking? First and most important, the President is a unitary executive. The Constitution vests the nation's legislative authority in 535 Senators and Representatives, its judicial authority in over 1300 Article III judges, but its entire executive power in a single President. Governors are elected separately from other state executive officials -- attorney generals, treasurers, and secretaries of state -- and thus do not embody the full executive power of their states.

Congress can (and does) function as if it were whole even when up to half of its members are absent; prosecuting an individual member of Congress thus does not interfere unduly with the legislature's usual function. The judiciary, too, maintains excess capacity and has largely fungible personnel. Even if, say, an entire circuit court were arrested, other judges could sit by designation if need be. When a governor is prosecuted, much of the executive power of the state can still be exercised in her absence. When, by contrast, the President is being prosecuted, the presidency itself is being prosecuted. When the President is substantially distracted from his job, he is half-absent and his job goes half-undone. If he is arrested, so too is the executive branch of the government.

Second, the President is national. Members of Congress and governors are elected to represent districts or states. Judges are unelected and represent, essentially, the pieces of paper that it is their job to interpret and apply. The President is elected by the entire polity and represents all 260 million citizens of the United States of America. If the President were prosecuted, the steward of all the People would be hijacked from his duties by an official offew (or none) of them.

Third, the President's job requires immediacy and constant vigilance. Our bicameral Congress was designed to be slow *13 and deliberative. The judiciary is supposed to be even more unhurried and circumspect. But the President must often act instantly and decisively, and unlike the other two branches, is on call to do so 24 hours a day, 365 days a year. As one of us has written elsewhere:

Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people: prosecute wars, command armed forces (and nuclear weapons), protect Americans abroad, negotiate with heads of state, and take care that the laws be faithfully executed. [\[FN3\]](#)

This obviously distinguishes the President from legislators and judges, but it also makes the President distinct from governors. While governors do have some continuous responsibilities, they have fewer problems of such extreme importance to cope with on a moment's notice. To take two obvious examples, they do not deal with foreign policy emergencies and they do not command nuclear weapons. And in practice, significantly, when an emergency does strike a state, a governor's response is usually to

call the President.

Other structural evidence shows the President's unique position in the government. Congress does not reconstitute itself when an emergency occurs during recess; it is up to the President to convene it. Additionally, the President is the only official with a constitutionally-defined instant understudy. Constitutionally, the Vice President's main job is to be ready to assume the mantle of state at a moment's notice.

For all of these reasons, any distraction of the President from his duties is much more significant than similar distractions of these other, prosecutable officials, and has a much bigger impact on the well-being of the nation and all its People.

State Prosecution

The question of prosecuting the President is really two questions: one state and one federal. We'll start with the former: Can a sitting President be prosecuted by state officials for violating state criminal laws?

The argument that sitting Presidents cannot be so prosecuted begins with the venerable case of *McCulloch v. Maryland*. Under *McCulloch*, state officials are not allowed to obstruct

***14** the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole. [\[FN4\]](#)

In other words, a single state cannot use its power to derail the functioning of the United States.

Does this prove too much? Surely the Constitution does not give federal officials license to become a lawless marauding horde. Surely indeed, but *McCulloch* provides a helpful dividing line:

If we apply the principle for which the state of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. [\[FN5\]](#)

Ordinarily, in other words, states can enforce their laws and prosecute federal officials without "arresting" and "prostrating" the normal functions of the federal government. But this is not so with the President, and so under *McCulloch* they cannot prosecute him until he has left office. *McCulloch* dealt, of course, with Maryland's legislative power to tax a National Bank, not with any state executive attempt to prosecute the President. But the principle is the same. To reiterate and paraphrase, no county prosecutor is allowed to "arrest[] all the [executive powers] of the government and prostrate[] it at the foot of the states."

Importantly, this privilege is not designed to protect the President's personal interests (although it does, temporarily), but rather the public interest of the People--all the People of America--to have their chosen leader able to execute his duties "for their benefit." This right of all the People to a functioning government trumps the right of only a few of them to have an instant prosecution.

A helpful example: Imagine that in April 1861, after the Civil War began but before his state had seceded, a local prosecutor in Virginia decided to prosecute President Lincoln. Would it make sense to say that Lincoln was subject to "arrest, imprisonment, or detention" at that crucial moment? Indeed, who is this local prosecutor that he could act in the name of the people of his county, at the expense of *15 the protection of all the People of the Union? If President Lincoln were held to answer for a crime, in whose name could he have been so held? The answer we will give below -- and more importantly, that the Constitution gives -- is, in the name of All the People of America, through their chosen representatives.

A skeptic might ask if a criminal prosecution would really be so disruptive. After all, in this day and age Presidents are often subject to crises that divert their attention. Since the executive branch is so big and has substantial inertia allowing it to function without the President around, would it really be such a crisis if the President had to face prosecution? With modern technology, couldn't a President even run the country from inside a jail cell? The skeptic misses a crucial point. We do not mind the President responding to a public crisis by diverting his attention from other matters, because that is precisely his job. If a war or a natural disaster requires his immediate attention, we expect him to be able to give it. The difference is that these so-called distractions are within the scope of his job. The presidency is designed to juggle a myriad of demands, but public ones. Mounting a personal, criminal defense would be a serious drain on the President's ability to do this.

"Is this necessarily so?" asks the skeptic. "Couldn't it be a minor violation that requires very little time at all?" Perhaps. But such lines are hard to draw, especially when they would be (necessarily) so politically charged. This political nature inherent in anything the President might do provides another answer. If the distraction of the President's crime is such that it is less disruptive for the President to just waive his immunity and plead guilty, he can always do just that. If he refuses to waive his privilege and the political pressures persist, rendering him unable to execute his duties, he can be impeached and then prosecuted. More on that mechanism later.

Our skeptic might still have nagging doubts. One is historical. In 1804, Vice President Aaron Burr killed Alexander Hamilton and was indicted in two states as a result. In 1973, Vice President Spiro Agnew faced prosecution too (though his was federal). No one successfully argued that these men should have been immune as a matter of their high constitutional rank -- in fact the federal government in Agnew's case argued just the opposite. [\[FN6\]](#) But Vice Presidents are not Presidents (to put it mildly). The government can certainly *16 function without them--at various points in our history, totaling almost forty years, we have not even had a Vice President. Although the Twenty-Fifth Amendment dramatically narrows this window of vulnerability, our Constitution also allows Congress to provide for Presidential succession without Vice Presidents, making them, ultimately, a constitutional luxury.

But at bottom, our skeptic asks, "isn't this supposed to be a government of laws, not men?" Certainly; we do not suggest otherwise. This temporary privilege from prosecution is less of a threat to the rule of the law than the immunity given to Presidents acting in their official capacities. President Nixon said that "if the President does it, it's not illegal" and the Supreme Court (in the case of Nixon v. Fitzgerald) essentially agreed with him. [\[FN7\]](#) That compromises the rule of law. By contrast, the privilege we assert says that, "if the President does it, [\[FN8\]](#) he can be held responsible for it after he leaves office."

This "leaving office" can be hastened by an election or an impeachment. The statute of limitations can be stayed. In short, the crime will out.

Our argument for temporary immunity is far from novel. Listen to Vice President John Adams and Senator (later Chief Justice) Oliver Ellsworth. A senator in conversation with them about presidential prosecutability asserted that the President was not above the laws, to which they replied that "[y]ou could only impeach him and no other process [w]hatever lay against him." [\[FN9\]](#) But then, the senator pointed out, a President committing murder on the streets could only be removed by impeachment. True, acknowledged Adams and Ellsworth, but "[w]hen he is no longer President, [y]ou can indict him." [\[FN10\]](#)

Federal Prosecution

Most of these same arguments apply to federal prosecutions as well. The main differences are structural. Instead of the division of power between state and federal, it is the separation of powers between the judicial, legislative, and executive branches at work here.

*17 Adams and Ellsworth agreed: "The President personally was not the subject to any process whatever ... For [that would] put it in the power of a common Justice to exercise any [a]uthority over him and [s]top the [w]hole [m]achine of Government." [\[FN11\]](#) Thomas Jefferson, not usually an intellectual ally of Adams and Ellsworth on constitutional matters, clarified this further: "would the executive be independent of the judiciary, if he were subject to the commands of the latter, and to imprisonment for disobedience; if the several courts could ... withdraw him entirely from his constitutional duties?" [\[FN12\]](#)

If the "common justice" is a state authority, this possibility raises the concerns already discussed. If the justice is federal, though, it raises separation of powers problems. First, it puts the entire executive branch at the mercy of the judiciary. Second, the Constitution designates Congress as the court that tries sitting Presidents. [\[FN13\]](#)

This principle does have limits. Obviously, the judiciary has some injunctive power over the presidency when the latter is acting in its official capacity. It is not as if ongoing wrongdoing cannot be enjoined. But punishing a sitting President for a past, wholly completed, bad act is a very different thing. On this the Court has spoken instructively:

It is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States. See, e.g., *United States v. Nixon*; *United States v. Burr*; cf. *Youngstown Sheet & Tube Co. v. Sawyer*. But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the executive branch. [\[FN14\]](#)

Prosecution of the President easily meets this standard of disruption. Indeed, if successful, it amounts to a de facto "removal" from office.

For its part, the Constitution foresees only two ways of removing a disfavored President from office: voting him out and impeaching him. [FN15] Of course, the President can always choose to resign or hand over power to the Vice President temporarily, just as he can choose to consent to prosecution. Without the background option of immunity from prosecution, however, this is no more a choice than is handing over your wallet to a mugger. As mentioned in the state context *18 too, the question is who can legitimately act against the President in this way. The answer once again is the chosen representatives of All the People, acting through the well-designed mechanism of impeachment, and not a lone judge and a lone prosecutor, wielding the sword of federal criminal law against the swordbearer, the President.

All of this might give our skeptic one reason to perk up. If the President is the Chief Federal Prosecutor, why is there a separation of powers problem if he, in effect, prosecutes himself? This is a good structural question. There are two answers. First of all, if the President is prosecuted, it is most likely to be by an independent counsel (who is, as a political matter, usually a member of the other party, and is, as a factual matter, often going to err on the side of prosecution), not the Justice Department. If the President freely allows his regularly appointed lieutenants to pursue him, then there is no separation of powers problem. As for an independent counsel pursuing the President, the President can refuse to allow her to be appointed in the first place, and he can fire her if he so chooses as well.

The case of Morrison v. Olson allowed independent counsels to be removable for cause only, but this was in the context of the prosecution of a lower executive official. If the President himself is the target of the independent counsel, it is harder to see how the Justices could credibly uphold the "for cause" limitation by claiming that they "simply do not see how the President's need to control the exercise of [prosecutorial] discretion is so central to the functioning of the executive branch." [FN16] Obviously, the question of prosecuting the President is central to the functioning of the executive branch, in a unique way. If Congress has passed a statute that does not give the President this discretion, it has violated the separation of powers. If judges uphold it, they have too.

Impeachment: First Things First

Contrast the check-and-balance of impeachment, in which the Constitution specifically gives Congress and the Chief Justice the job of charging and "trying" the President. Structurally, impeachment fits neatly with the temporary nature of the President's privilege. The Constitution explicitly states that impeached officials are subject to "indictment, trial, judgment and punishment" after their conviction by the Senate. Of course, for other federal officials this does not preclude pre-impeachment *19 prosecution (as we have seen, the President is unique). But since the punishment for impeachment is specifically limited to removal (and disqualification) from office, and since regular prosecution is then possible, impeachment provides a constitutional method --removal -- for prosecuting a President almost immediately without freezing the functions of the presidency. And while impeachment only comes into play for serious offenses (high crimes and misdemeanors) this is as it should be: it is only for such serious offenses that a prosecution cannot simply wait for the expiration of the President's term.

Doesn't impeachment freeze the functions of the presidency just as surely as a criminal prosecution

would? Possibly, though not necessarily. For one thing, impeachment allows for a much more flexible and stripped-down version of procedure than do our courts. For another, the President is already institutionally equipped to deal with Congress; while impeachment is a rare event, it is much closer to the regular business of Presidents than is a criminal prosecution. It certainly makes geographical sense to minimize disruption by trying the President down the street from his office instead of dragging him to a county courthouse thousands of miles away. [\[FN17\]](#) Also, it is harder to impeach than to indict, making it less likely that an impeachment will get to trial than in a regular criminal process, an important fact in this age of overcriminalization and rubber-stamp grand juries. Finally, after impeachment and conviction, the President is replaced and the function of government returns to full speed, while in a criminal prosecution conviction is just the beginning of the disruption: who would be in charge of the Oval Office pending an appeal?

Furthermore, even if the disruption of impeachment is no less than that of a trial, there is good reason for us to not mind. The disruption of impeachment is much more difficult to bring about; a prosecutor and a grand jury are much easier to convince than is half of the House of Representatives. Relatedly, and as we have been arguing all along, if we assume that the presidency is going to be disrupted, who is allowed, and *20 who do we want, to disrupt it? Few Presidents are saints, but who ultimately should decide whether they must stand trial for their alleged sins? A prosecutor and twenty- three grand jurors, or the representatives of half of "We the People" acting through explicit constitutional procedures? The Founders knew what they were doing when they designed the impeachment process. When a President is removed, it is not by an unaccountable state official or an even less accountable special prosecutor. It is done instead by the most august, most representative, most constitutionally elaborated, and most accountable deliberative body we have, the Congress. Aware that politics could enter into the equation, the Founders wisely and purposely put the final decision in the hands of the more deliberative Senate, and required a super-majority so that conviction of the President would not be possible without the assent of at least some of his political allies. [\[FN18\]](#) Impeachment, then, is the sole means of removing a sitting President, and is a good one at that.

There is one more point to be made. In the Founding debates, in a discussion of limiting the President's pardon power, the scenario of a malfeasing President pardoning his friends was raised. James Wilson responded to this scenario with a reassurance that, "[i]f [the President] himself be a party to the guilt he can be impeached and prosecuted." [\[FN19\]](#) Besides hinting at what we have said about impeachment necessarily preceding prosecution, [\[FN20\]](#) this introduces us to another structural consideration, the pardon. Then-Solicitor General Robert Bork argued that, logically, Presidents must be immune from federal prosecution, since they can always just pardon themselves. As one of us has argued at length elsewhere, though, Presidents cannot pardon themselves. [\[FN21\]](#) Among other reasons, the self-pardon would be permanent, not temporary, and would thus place the President above the rule of law. [\[FN22\]](#) And anyway, it cannot be so lightly assumed that a President facing prosecution would pardon himself, since doing so would almost certainly guarantee an impeachment (potentially as a [self-]bribe, one of the enumerated bases of impeachment), and might even be prosecutable as a crime (public misconduct, obstruction of justice, etc.) in itself.

Conclusion

The Constitution provides for a government of laws, not men. At the same *21 time, the People have the right to a vigorous Executive who protects and defends them, their country, and their Constitution. Temporary immunity is the only way to ensure both of these things. It prevents relatively unrepresentative actors from holding the country hostage, leaving discretion instead in the proper, more representative hands of Congress. By leaving the constitutional mechanism of impeachment available, it ultimately holds the President responsible for his actions. Put simply, it makes good constitutional sense.

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[\[FN1\]](#). 3 Joseph Story, Commentaries on the Constitution of the United States § 1563 (Boston, Hilliard, Gary & Co. 1833). Notwithstanding his language of "arrest, imprisonment, and detention," Story's conclusion was that Presidents have some immunity "in civil cases at least." See Akhil Reed Amar & Neal Kumar Katyal, Executive Privileges and Immunities: The Nixon and Clinton [Cases](#), [108 Harv. L. Rev.](#) 701, 716 (1995). For the reasons discussed above, though, we read the immunity more broadly.

[\[FN2\]](#). Alexander Bickel, The Constitutional Tangle, THE NEW REPUBLIC, Oct. 6, 1973, at 14, 15.

[\[FN3\]](#). Amar & Katyal, *supra* note 1, at 713.

[\[FN4\]](#). [McCulloch v. Maryland](#), 17 U.S. (4 Wheat.) 316, 435-36 (1819).

[\[FN5\]](#). [Id.](#) at 432.

[\[FN6\]](#). In his brief filed for the United States in the Agnew case, Solicitor General Bork pointed out that "the President is the only officer whose temporary disability while in office incapacitates an entire branch of government," and that:

[a]lthough the office of the Vice-Presidency is of course a high one, it is not indispensable to the orderly operation of government. There have been many occasions in our history when the nation lacked a Vice President and yet suffered no ill consequences. And at least one Vice President successfully fulfilled the responsibilities of his office while under indictment in two states.

Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, In re Proceedings of the Grand Jury Impaneled Dec. 5, 1972, at 18 (D. Md. 1973).

[\[FN7\]. 457 U.S. 731 \(1982\).](#)

[\[FN8\].](#) Or if he "did" it; the privilege extends to prosecutions for acts committed before becoming President. If an offense could have prosecuted before the assumption of office, though, we would probably have less sympathy for the state in that case.

[\[FN9\].](#) THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 168 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

[\[FN10\].](#) Id. at 163.

[\[FN11\].](#) Id.

[\[FN12\].](#) Letter from Thomas Jefferson to George Hay (June 20, 1807), in 10 THE WORKS OF THOMAS JEFFERSON 404 (Paul L. Ford ed., 1905) (emphasis added). Jefferson was referring to his being required to produce evidence in the federal treason trial of Aaron Burr. "Aha!" says our skeptic, "but what about when the President has himself done something wrong?" Well, notice that Jefferson is not complaining that he is innocent; he is complaining that he is being diverted from his duties. It is not a matter of how much or little the President deserves to be punished for a crime; he will get his due, whatever it is, when he has left office. It is a matter of keeping the government running.

In the event, the trial court was able to force Jefferson to assist in the Burr case in part because responding to a request for evidence was a relatively minor encroachment and in part because it was under the President's authority that Burr was being prosecuted in the first place. That is, it was unfair for the President to simultaneously prosecute someone and refuse to produce relevant evidence in that case. If Jefferson didn't want to comply with any subpoena he deemed onerous, he was at all times free to simply drop the prosecution.

[\[FN13\].](#) We do not mean by this that impeachment is intended as an exclusive means of acting against other federal officials. It is so for the President, though, since as we have argued (and will argue below) the President is unique.

[\[FN14\].](#) [Nixon v. Fitzgerald, 457 U.S. 731, 753-54 \(1982\)](#) (citations and footnotes omitted).

[\[FN15\].](#) A third mechanism, the Twenty-Fifth Amendment, allows a disabled President to be removed against his will with the acquiescence of the Vice President, half the Cabinet, and two-thirds of each House of Congress. This method is intended mainly for physical, not political disabilities, and anyway

requires broader agreement than mere impeachment.

[FN16]. [Morrison v. Olson, 487 U.S. 654, 691 \(1988\)](#).

[FN17]. The Founders designed impeachment with this sort of geographical convenience in mind. See THE FEDERALIST NO. 65, at 400 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[FN18]. See *id.* at 396-401.

[FN19]. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 185 (Max Farrand ed., 1911).

[FN20]. See FEDERALIST NO. 69, AT 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The President ... would be liable to be impeached, tried, and, upon conviction ... would afterwards be liable to prosecution and punishment in the ordinary course of law.") (emphasis added); *Id.* No. 77 at 464 (Alexander Hamilton) (discussing Presidential impeachment and "subsequent prosecution in the common course of law"). (emphasis added).

[FN21]. See Brian C. Kalt, Pardon Me?: The Constitutional Case Against Presidential Self-Pardons, [106 YALE L.J. 779 \(1996\)](#).

[FN22]. Even if the President could pardon himself, however, immunity does not necessarily follow. Bork's argument proves too much, since the President can pardon all sorts of people who are still subject to prosecution. Indeed, if immunity followed from ability to receive pardons, then no one could be prosecuted (paradoxically leaving no one to pardon).

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