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Articles

***671 ON PROSECUTING PRESIDENTS**

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In 1996, my student Brian Kalt and I co-authored an article explaining that a sitting President is constitutionally immune from ordinary criminal prosecution--state or federal--but is of course subject to ordinary prosecution the instant he leaves office, [\[FN1\]](#) a prospect that can obviously be hastened by impeachment. [\[FN2\]](#) In this Essay, I shall summarize my reasons for continuing to believe this.

The issue, as I understand it, concerns not Bill Clinton the man, but the institution of the Presidency. The rules laid down by the Framers apply equally to Democrats and Republicans, liberals and conservatives. I never asked Brian Kalt about his party affiliation, and we drafted our article before the 1996 elections, not knowing who would be President thereafter, and not knowing when this momentous question would next be on the national agenda. In analyzing this and other constitutional questions, I often try to reverse existing partisan polarities in my mind so as to arrive at a result and a reasoning process untinged by current political preference: I would invite the Senators and the Administration to do the same thing. Constitutional law should not be partisan.

The position Brian and I put forth--that a sitting President claiming the full privileges of his office may only be criminally tried by this "court," the Senate, sitting in impeachment, and can be criminally tried elsewhere only after he has left office [\[FN3\]](#)--has a very distinguished, and bipartisan, pedigree. It is the position put forth, in passing, in two Federalist Papers, Numbers 69 [\[FN4\]](#) and 77. [\[FN5\]](#) It is the position clearly taken by *672 both John Adams [\[FN6\]](#) and Thomas Jefferson [\[FN7\]](#)--men who disagreed about many other things, who both risked their lives to fight against monarchy, and who both believed deeply in the rule of law. It is the position clearly set forth in the First Congress by Senator Oliver Ellsworth--a Philadelphia Framer, the author of the Judiciary Act of 1789, and later the Chief Justice of the United States. [\[FN8\]](#) It is the position that makes the most sense of the analysis of the great Justice Joseph Story in his landmark 1833 treatise on the Constitution. [\[FN9\]](#) It is the position

articulated in the Supreme Court as early as 1867 by Attorney General Stanbery, [\[FN10\]](#) and *673 the traditional position of the Justice Department. [\[FN11\]](#) It is the position taken twenty-five years ago, when Richard Nixon was President, by two of my own teachers at Yale Law School, Robert Bork [\[FN12\]](#) and Charles Black. [\[FN13\]](#) In the symposium in which the Amar-Kalt article appeared, our views were largely in sync with those of most of the other participants, including my distinguished friend Terry Eastland. [\[FN14\]](#)

Apart from these points about history and tradition, my basic constitutional argument is more structural than textual, sounding in both separation of powers and federalism. Other impeachable officers--Vice Presidents, Cabinet officers, judges, and justices--may be indicted while in office. But the Presidency is constitutionally unique--in the President the entirety of the power of a branch of government is vested. [\[FN15\]](#) And so the language of impeachment in the Constitution sensibly means something slightly different as applied to Presidents on the one hand, and other officials on the other. An analogy: The Constitution gives the Senate the power of Advice and Consent, as to both Cabinet *674 officials and Supreme Court Justices. [\[FN16\]](#) But these words sensibly mean different things in these two contexts. Constitutionally, Cabinet officers are members of the President's team; Justices are not. [\[FN17\]](#) Thus, the Senate historically gives more deference to the President's nominees when Cabinet officers (who will leave when the President leaves) are at stake, than when Justices (who will be in place for life) are involved. The same words--"advise and consent"--must be understood in different ways when they interact with different clauses with different structural implications. So too with the Constitution's words concerning impeachment.

Let us begin structural analysis by pondering the following hypothetical, which implicates federalism as well as separation of powers: Could some clever state or county prosecutor in Charleston, South Carolina have indicted Abraham Lincoln in March 1861, and ordered him to stand trial in Charleston? If so, there might well be no United States today bringing us all together. I believe that the Constitution gave Lincoln immunity in this situation--so long as he was in office. [\[FN18\]](#) The President is elected by the whole nation, and no one part of the nation should have the power to undo a decision of the whole. [\[FN19\]](#) This is the kind of structural argument exemplified by Marshall's classic opinion in *McCulloch v. Maryland*. [\[FN20\]](#)

What is true of a state criminal prosecution is also true of a federal criminal prosecution. Here too, we cannot let a part undo the whole. Any one federal grand jury or federal petit jury will come from one city--be it Charleston or Little Rock or the District of Columbia. [\[FN21\]](#) The President is elected by the entire nation, and should be judged by the entire nation. His true grand jury is the House, his true petit jury is the *675 Senate, and the true indictment that he is subject to is called an impeachment. [\[FN22\]](#) What's more, any effort to indict him by an independent counsel would also violate the Constitution's Article II Appointments Clause. [\[FN23\]](#) (Let me make clear that Kenneth Starr the man is my friend, and I admire and respect him. Nothing that I say here should be understood as a personal criticism.) Counsel Starr is, constitutionally speaking, an "inferior" officer. [\[FN24\]](#) He was never, as counsel, confirmed by this body, the Senate of the United States. Were he to claim the power to indict a sitting President, it would be impossible to argue with a straight face that he is simply some "inferior" officer. He would be breaking with the historical and traditional approach of the Justice Department [\[FN25\]](#)--and even if you think he would be right, you cannot say he would truly be inferior. He would

be claiming for himself the power to imprison the Chief Executive Officer. This power is awesome--it is anything but an "inferior" power that can be vested in an "inferior" officer. This issue of course did not arise in the 1988 Supreme Court case, *Morrison v. Olson*, [\[FN26\]](#) since the President in that case was not a target. [\[FN27\]](#) (And remember, Richard Nixon was only named an unindicted co-conspirator.) Since *Morrison*, the Court has been even more strict in insisting that the word "inferior" be taken seriously in the Appointments Clause, as evidenced by the 1997 case *Edmond v. United States*. [\[FN28\]](#) Any indictment of the President by Counsel Starr would in my view plainly violate the teaching of *Edmond*. [\[FN29\]](#)

***676** Let me conclude by making clear that of course no man is above the law. Once out of office, an ex-President may be tried just like anyone else--and that day of reckoning can of course be speeded up if the House and the Senate decide to impeach and remove. [\[FN30\]](#) Moreover, since a sitting President's immunity sounds in personal jurisdiction, it may well be waivable, and if so, political pressure may be brought upon a President to consent to be tried. [\[FN31\]](#) The question is not whether a President is accountable to law and to the country--but how, when, and by whom.

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[\[FN1\]](#). See Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 *Nexus* 11, 11 (1997).

[\[FN2\]](#). See [U.S. Const. art. I, §3, cl. 7](#) (stating explicitly that impeachment and removal do not preclude ordinary criminal "Indictment, Trial, Judgment and Punishment").

[\[FN3\]](#). See Amar & Kalt, *supra* note 1, at 19.

[\[FN4\]](#). *The Federalist* No. 69, at 232 (Alexander Hamilton) (Neill H. Alford, Jr. et al. eds., 1983) (supporting the idea that a sitting President was not subject to criminal prosecution, and writing that a President shall be "liable to be impeached, tried, ... and removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law") (emphasis added).

[\[FN5\]](#). *The Federalist* No. 77, at 284, 289 (Alexander Hamilton) (Neill H. Alford, Jr. et al. eds., 1983) (noting that the President would be liable to impeachment, removal, and "subsequent" criminal punishment) (emphasis added).

[FN6]. See 9 *The Diary of William Maclay and Other Notes on Senate Debates 168* (Kenneth R. Bowling & Helen E. Veit eds., 1988) [hereinafter *Maclay Diary*] (reporting that then Vice President Adams, when asked the question whether a sitting President could commit "[m]urder in [the] [s]treets" and remain free, answered: "Why [w]hen he is no longer President, [y]ou can indict him.").

[FN7]. See Letter from Thomas Jefferson to a prosecutor at the Aaron Burr trial (June 20, 1807), in 10 *The Works of Thomas Jefferson* 404 (Paul Leicester Ford ed., 1905), quoted in [Nixon v. Fitzgerald, 457 U.S. 731, 751 n.31 \(1982\)](#). Jefferson stated:

The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But 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 bandy him from pillar to post, keep him constantly trudging from north to south [and] east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive.
Id.

[FN8]. Ellsworth here was agreeing with John Adams, in a conversation recorded by Senator William Maclay and quoted in the *Maclay Diary*, supra note 6, at 168.

[FN9]. See 3 Joseph Story, *Commentaries on the Constitution of the United States* §814, at 579 (1833). Justice Story believed:

[T]here 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.... The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of his duties of his office.
Id.

[FN10]. See [Akhil Reed Amar & Neal Kumar Katyal, Executive Privileges and Immunities: The Nixon and Clinton Cases, 108 Harv. L. Rev. 701, 717 n.63 \(1994\)](#). Attorney General Stanbery argued that a President "'is above the process of any court to bring him to account as President," ' for so long as they remain President. Id. Once a President leaves office (because of impeachment and removal, or otherwise) "'he no longer stands as the representative of the government," ' and then can be prosecuted "'for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President." ' Id.

[FN11]. The opinion of the Justice Department was set forth by then Solicitor General Robert Bork in response to Vice President Spiro Agnew's argument that both he and the President were immune from

criminal prosecution. The Justice Department argued that the President was immune, but the Vice President was not. See 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 (D. Md. 1973), reprinted in N.Y. Times, Oct. 6, 1973, at 9.

[FN12]. See John Hart Ely, On Constitutional Ground 140-41 (1996) (detailing Robert Bork's argument that the President "could not be indicted prior to being impeached").

[FN13]. See Charles L. Black, Jr., Impeachment: A Handbook 40 (1974). Professor Black argues:

[A]n incumbent president cannot be put on trial in the ordinary courts for ordinary crime, and if the crime he is charged with is not an impeachable offense, the simple and obvious solution would be either to indict him and delay trial until after his term has expired, or to delay indictment until after his term, [with the statute of limitations] "tolled" ... until the president's term is over.

Id.

[FN14]. See Terry Eastland, The Power to Control Prosecution, 2 Nexus 43, 49 (1997) (detailing his view "that the President may be prosecuted, but that the President may be prosecuted only to the extent he allows himself to be").

[FN15]. See U.S. Const. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.") (emphasis added); Eastland, *supra* note 14, at 46 ("No single constitutional officer has so much power as the President, none must be on the job so continuously--administration of the laws and the handling of foreign affairs requires that the presidency be open 24 hours a day--and for no other officer does the Constitution take such care to ensure a successor in the event of his removal, death, resignation, or inability to do the job."); see also Alexander M. Bickel, The Constitutional Tangle, New Republic, Oct. 6, 1973, at 14, 15 ("[The] presidency cannot be conducted from jail, nor can it be effectively carried on while an incumbent is defending himself in a criminal trial.").

[FN16]. See U.S. Const. art. II, §2 (stating that the President "shall nominate ... with the Advice and Consent of the Senate ... Judges of the supreme Court, and all other Officers of the United States").

[FN17]. See Charles L. Black, Jr., A Note on Senatorial Consideration of Supreme Court Nominees, 79 Yale L.J. 657, 660 (1970) (discussing how the Cabinet members are the President's "people" and that "the judges are not the President's people"); see generally [Akhil Reed Amar, Some Opinions on the Opinions Clause, 82 Va. L. Rev. 647 \(1996\)](#); Akhil Reed Amar, Trial and Tribulation, New Republic, Jan. 18, 1999, at 17.

[FN18]. See Amar & Kalt, *supra* note 1, at 14-15. The Lincoln hypothetical helps make clear that: (1) innocent Presidents can be targeted by political opponents; (2) local decision-makers cannot always be trusted to decide the fate of a sitting President; and (3) the cost to the nation of allowing open season on Presidents can be extraordinary. In particular, Vice Presidents are not always perfect substitutes. (Pop Quiz: Name Lincoln's Vice President in 1861.)

[FN19]. See *id.* at 15 (commenting that the only body that the President should answer to is "[a]ll of the People of America, through their chosen representatives").

[FN20]. [17 U.S. \(4 Wheat\) 316 \(1819\)](#).

[FN21]. See [28 U.S.C. §1861 \(1994\)](#).

[FN22]. See [U.S. Const. art. I, §2, cl. 5](#) (stating that the House of Representatives has the "sole Power of Impeachment"); *id.* [§3, cl. 6](#) (stating that the "Senate shall have the sole power to try all Impeachments").

[FN23]. See *id.* [art. II, §2, cl. 2](#).

[FN24]. See *id.* ("[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."). In [Morrison v. Olson, 487 U.S. 654 \(1988\)](#), the Supreme Court held the Office of Independent Counsel was an inferior officer under the appointments clause. See [id. at 671](#). But see [Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 802-12 \(1999\)](#).

[FN25]. See *supra* note 11 and accompanying text.

[FN26]. [487 U.S. 654 \(1988\)](#).

[FN27]. The targets of the investigation were Theodore B. Olson, Edward C. Schmults, and Carol E. Dinkins, officials in the Justice Department who were under suspicion of giving false testimony under oath, among other offenses. See [id. at 654-55](#).

[FN28]. [520 U.S. 651 \(1997\)](#).

[FN29]. The Court stated that "[g]enerally speaking, the term 'inferior officer' connotes a relationship [of supervision and direction] with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether or not he has a superior." [Id. at 662](#). For more discussion, see Amar, *supra* note 24, at 802-12; Nick Bravin, Note, Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence, [98 Colum. L. Rev. 1103, 1117-20 \(1998\)](#); Erez Kalir, Superior Logic, *New Republic*, Sept. 14 & 21, 1998, at 14, 14-15.

[FN30]. For discussion of the obvious distinctions between [Clinton v. Jones, 520 U.S. 681 \(1998\)](#)--which upheld a civil suit against an unconsenting President--and criminal prosecution of an unconsenting President, see Akhil Reed Amar, *Nixon's Shadow*, 83 *Minn. L. Rev.* (forthcoming 1999); Akhil Reed Amar, *In Praise of Impeachment*, *Am. Law.*, Sept. 1999, at 92, 92-94.

[FN31]. See Amar & Kalt, *supra* note 1, at 15, 17. Thus, there may be a difference between indicting a sitting President against his will, and forcing him to stand trial against his will. The former may be permissible even if the latter is not (bracketing for the moment the serious appointments clause objections to independent counsels).

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