Law and the Presidency
Peter M. Shane
Spring, 2018
Supplementary Materials

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8318: Law and the Presidency
Spring, 2018

Monday, Tuesday, and Wednesday – 11:10 a.m.-Noon
Room 245

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Learning Goals

As you know from the official catalogue description, this course examines the law as it shapes the interactions of the President (and the executive branch more generally) with both Congress and the judiciary. My hope is that our work together will accomplish at least these five goals:

- Acquaint you with the foundational doctrines that constitute separation of powers law, including a set of "canonical" cases that are widely taken to be the key building blocks of that doctrine;
- Enable you to apply key doctrines to both current and ongoing controversies over presidential power;
- Familiarize you with the key government institutions that "practice" separation of powers law and how they interact;
- Acquaint you with the professional and ethical challenges facing executive branch lawyers – and the ways in which the challenges facing legal advisors to government do and do not resemble the challenges facing legal challenges to large non-governmental institutions with complex, often high-stakes outcomes; and
- Enable you to critique knowledgeably the legal positions put forward on separation of powers disputes whether by the courts, Congress, or the executive branch.

We will pursue these goals through a combination of lecture and in-class discussion, critical analysis of text, and sample problem solving.

Required and Optional Materials

- Our primary text for this class will be PETER M. SHANE HAROLD H. BRUFF, AND NEIL J. KINKOPF, SEPARATION OF POWERS LAW: CASES AND MATERIALS (4TH ED. 2018). Because the book may not be available in hard cover for the first couple of weeks of the course, please pick up the photocopied supplement from the copy center, which includes the

first few weeks' readings. (The publisher will also provide you electronic access to the book.) There will also be occasional photocopied supplementary readings.

- I have tried to pace the volume of reading evenly so as not to discourage in-depth analysis of the materials assigned. Please do not assume, unless I make an announcement to this effect, that our failure to cover an assignment completely in the session designated should delay your preparation of any subsequent assignment. Also, if, in covering those points that I think are important or especially difficult, I should neglect some point of interest to you, please feel free to raise your question in class or after.

Grading criteria

80 per cent of your course grade will depend on your performance on a final eight-hour take-home exam.

20 per cent of your grade will be based on class participation, to be calculated as follows: Each student begins with a base grade of 84 (2 points for each of 42 classes). Two points will be deducted for each unexcused absence, pursuant to the attendance policy below. One point will be deducted for any class in which you are not prepared to discuss the assigned material, except that, on a limited number of occasions, you may excused from this penalty if you notify me ahead of class that you are not prepared. Three points will also be added to your score for each time you successfully complete one the "case study" assignments explained below. I also reserve the discretion to add up to three points to a total score for any student whose participation shows consistent and insightful engagement with the material. (In sum, a student who attends and is prepared for every class, fulfills their two case study assignments, and shows consistent and insightful engagement with the material, would have a participation score of 93.)

I hasten to add that "insightful" does not mean "in agreement with the instructor." And you can not lose participation points for asking even those questions you think might be "too dumb/trivial" to ask in class. I guarantee that any question that occurs to you is on someone else's mind, too; you do everyone a favor by asking.

Course Policies

Electronics: Our class will operate with a "no laptop" – or, more accurately, "no computing device" – policy. That is, unless students are required to use an electronic note taking device as a disability accommodation, laptops, tablets, and all other electronic communication devices should be turned off while class in session. For those interested in the rationale, I'm happy to recommend some short readings on the impact of computer use on classroom pedagogy.

I do use PowerPoint slides in class as a substitute for the blackboard. All slides, however, will be posted to the class's TWEN website, so there will be no need to copy down the content of the slides into your notes.

Attendance: Because we are a fairly compact group, it will be especially crucial to the "chemistry" of the class if everyone is present for every class. In cases of religious observance,

personal or family medical emergency, or other unforeseen obligations that cannot be rescheduled, your absence will, of course, be excused. Should any of these circumstances arise, please notify me by email in advance of your absence if practicable.

I ask, however, that you try to avoid scheduling placement interviews or clinic-related appearances that would conflict with our meeting times. If you anticipate problems on this score, we should talk. I reserve the right to sanction a failure to meet the expectation of regular attendance by exclusion from the course or the assignment of mandatory make-up written work. (I should add that, over many years of teaching, I've never yet had a student who had to be excluded from class as a result of excessive absence.)

Law and Politics: If our group resembles the prior offerings of this class, we will probably find that opinions on the issues we discuss will stretch across a pretty wide spectrum. It is my experience in this area that political opinions range widely from "champions of a very strong executive," or "presidentialists," to "champions of strong checks and balances, or "constitutional pluralists." One interesting aspect of separation of powers law is that this division of opinion does not always map very neatly onto "Republican v. Democrat" or "liberal v. conservative" divides. In any event, the following may be a good form of self-discipline: When assessing a legal question, ask yourself whether your analysis would be changed if the sitting President were your most or least favorite President so far in your lifetime. If your candid self-diagnosis is, "Maybe," then you may want to look harder at the law! In any event, I hope everyone will share their views freely. Having a variety of legal and political views in the class will help all of us (a) to form deeper insights into the relationship between our own political and legal views and (b) to learn to anticipate more thoughtfully how people who disagree with us politically may or may not wind up disagreeing with us legally.

"Case Studies"

You will also note that, throughout the schedule of readings, I have designated a set of "case studies," although that's perhaps a misnomer. These are problems or areas of current controversy that can really help us focus on the role of the President's legal advisors. Part of everyone's participation will be serving as "point person" for the discussion of two of these case studies. All that role entails is being able to lead off the class's discussion by responding to some general questions I will give you in advance to guide your reading of the materials. Successful completion of this role will add 3 points to your class participation score for each of the two discussions.

SCHEDULE OF READINGS

(I have listed readings for only 40 classes in anticipation of using two class sessions for guest speakers)

1	I. Introduction A. Overview of the executive branch and introduction to the complexities of constitutional interpretation	Peruse pp. 1-32; read closely pp. 35-40 and Articles I-III of the U.S. Constitution
2	B. Judicial review of the executive	43-56
3	C. The interplay of statutes and Article II as sources of executive power	60-73
4	(Continued)	73-95
5	II. The Political Branches' Core Powers A. The executive's "big gun": The veto power (and signing statements) **CASE STUDY 1: Early Trump signing statements**	140-153 Supp. Vol 2, 1-8
6	B. Congress's "big gun": The power of the purse	178-188, 197-202
7	**CASE STUDY 2: The Antideficiency Act and Government Shutdowns**	Supp. Vol. 2, 9-25
8	III. Mechanisms of Executive Accountability A. Impeachment **CASE STUDY 3: Impeachment Issues and "the Russia Thing"**	225-249 249-254
9	**CASE STUDY 4: Presidential Indictment While in Office?**	Supp., Vol. 2, 26-120
10	B. The President's immunity from civil liability	279-300
11	C. Executive privilege in judicial proceedings 1. The presidential privacy privilege	314-329
12	2. The state secrets privilege	329-354
13	D. Executive privilege before Congress	354-385
14	**CASE STUDY 5: "Fast and Furious" Documents** **CASE STUDY 6: Testimony of White House Aides**	Supp., Vol. 2, 121-155
15	IV. Control of Administration by the Elected Branches A. Appointments 1. Executive branch appointments	443-469
16	2. Judicial appointments **CASE STUDY 7: The Nominations Process After Garland**	469-488 Supp., Vol. 2, 156-220
17	B. Removals	488-505
18	(Cont'd): *Morrison v. Olson*: An Unstable Synthesis?	518-541
19	(Cont'd): The "Layers of Protection" Problem	541-564
20	**CASE STUDY 8: Litigating the Constitutionality of ALJ'S**	Supplement

21	C. White House Management of the Bureaucracy	564-571, 582-599
22	D. Presidents and Law Enforcement 1. The problem of "non-execution" generally	611-634
23	2. Discretion in statutory enforcement **CASE STUDY 9: Deferred Action Programs**	635-664
24	V. National Security Powers A. Overview	709-735
25	**CASE STUDY 10: Congressional Regulation Of Diplomacy**	735-758
26	B. Treaty powers	758-784
27	C. Executive agreements	785-803
28	(Cont'd) **CASE STUDY 11: The Iranian Nuclear Deal**	803-823
29	D. Immigration and Foreign Policy **CASE STUDY 12: The Travel Ban and Sanctuary Orders**	906-925
30	VI. War Powers A. Overview	953-966, 1119-1123
31	B. War Powers Resolution	992-1006, 1069-1076
32	C. Presidential War-Making After Vietnam: Kosovo and Libya	1025-1047
33	D. Persian Gulf and Iraq Wars	1077-1110
34	E. Presidential Wartime Powers Off the Battlefield	1123-1157
35	VII. War Powers and "The Long War" A. The Treatment of Enemy Combatants	1159-1187
36	(Continued)	1204-1237
37	B. Targeted killing and the drone war	1274-1303
38	**C. CASE STUDY 13: Updating the AUMF for Action Against ISIS/ISIL**	1303-1318
39	D. Foreign Intelligence Surveillance Before 9/11	845-864
40	E. Foreign Intelligence Surveillance After 9/11	1318-1344

Administration of Donald J. Trump, 2017

Statement on Signing the Consolidated Appropriations Act, 2017

May 5, 2017

Today I have signed into law H.R. 244, the Consolidated Appropriations Act, 2017, which authorizes appropriations that fund the operation of the Federal Government through September 30, 2017.

Certain provisions of this bill (e.g., Division C, sections 8049, 8058, 8077, 8081, and 8116; Division J, under the heading "Contribution for International Peacekeeping Activities") would, in certain circumstances, unconstitutionally limit my ability to modify the command and control of military personnel and materiel or unconstitutionally vest final decision-making authority in my military advisers. Further, Division B, section 527; Division C, section 8101; and Division F, section 517 each restrict the transfer of Guantanamo detainees to the United States; Division C, section 8103 restricts the transfer of Guantanamo detainees to foreign countries and does not include an exception for when a court might order the release of a detainee to certain countries. I will treat these, and similar provisions, consistently with my constitutional authority as Commander in Chief.

Certain provisions (e.g., Division C, sections 8040, 8075, 8114, 9005, 9011, 9014, and under the headings "Operation and Maintenance, Defense-Wide," "Afghanistan Security Forces Fund," "Counter-ISIL Train and Equip Fund," and "Joint Improvised Threat Defeat Fund") require advance notice to the Congress before the President may direct certain military actions or provide certain forms of military assistance. In approving this bill, I wish to reiterate the longstanding understanding of the executive branch that these types of provisions encompass only military actions for which providing advance notice is feasible and consistent with my constitutional authority and duty as Commander in Chief to protect national security.

Numerous provisions could, in certain circumstances, interfere with the exercise of my constitutional authorities to negotiate international agreements (e.g., Division B, sections 509, 519, 530; Division J, sections 7010(c), 7013(a), 7025(c), 7029, 7031(e)(2), 7037, 7042, 7043, 7044, 7045, 7048, 7060, 7070, and 7071), to receive ambassadors (e.g., Division J, section 7031(c)), and to recognize foreign governments (e.g., Division J, section 7070(b)(2)(A)). My Administration will treat each of these provisions consistently with my constitutional authorities in the area of foreign relations.

Division E, section 622 prohibits the use of funds to pay the salaries and expenses for several advisory positions in the White House. The President has well-established authority to supervise and oversee the executive branch and to obtain advice in furtherance of this supervisory authority. The President also has the prerogative to obtain advice that will assist him in carrying out his constitutional responsibilities, not only from executive branch officials and employees outside the White House, but also from advisers within it. Legislation that significantly impedes my ability to supervise or obtain the views of appropriate senior advisers violates the separation of powers by undermining my ability to exercise my constitutional responsibilities, including to take care that the laws be faithfully executed. My Administration will, therefore, construe section 622 consistently with these Presidential prerogatives.

Division B, section 537 provides that the Department of Justice may not use any funds to prevent implementation of medical marijuana laws by various States and territories. I will treat

this provision consistently with my constitutional responsibility to take care that the laws be faithfully executed.

Several provisions (e.g., Division C, section 10006(b); Division D, section 401; Division J, section 7041(b)(3); Division N, sections 310, 311, 402, 502(d), and 503) mandate or regulate the submission of certain executive branch information to the Congress. I will treat these provisions in a manner consistent with my constitutional authority to withhold information that could impair foreign relations, national security, the deliberative processes of the executive branch, or the performance of my constitutional duties. In particular, Division E, section 713(1) and (2) prohibits the use of appropriations to pay the salary of any Federal officer or employee who interferes with or prohibits certain official communications between Federal employees and Members of Congress or who takes adverse action against an officer or employee because of such communications. I will construe these provisions not to apply to any circumstances that would detract from my authority to supervise, control, and correct employees' communications with the Congress related to their official duties, including in cases where such communications would be unlawful or could reveal confidential information protected by executive privilege.

Division C, section 8009 prohibits the use of funds to initiate a special access program unless the congressional defense committees receive 30 days' advance notice. The President's authority to classify and control access to information bearing on the national security flows from the Constitution and does not depend upon a legislative grant of authority. Although I expect to be able to provide the advance notice contemplated by section 8009 in most situations as a matter of comity, situations may arise in which I must act promptly while protecting certain extraordinarily sensitive national security information. In these situations, I will treat these sections in a manner consistent with my constitutional authorities, including as Commander in Chief.

Several provisions (e.g., Division C, section 8134; Division J, section 7063; and Division K, section 418) prohibit the use of funds to deny an Inspector General access to agency records or documents. I will construe these, and similar provisions, consistently with my authority to control the dissemination of information protected by executive privilege.

Several provisions prohibit the use of funds to recommend legislation to the Congress (e.g., Division A, section 716; Division C, sections 8005, 8014, 8070(a)(2), 8076; and Division H, section 210), or require recommendations of legislation to the Congress (e.g., Division C, section 8012(b), 8035(b); Division F, section 532; Division G, sections 101, 102, and a proviso under the heading "Administrative Provisions—Forest Service"; Division N, sections 605(c) and 610). Because the Constitution gives the President the authority to recommend "such Measures as he shall judge necessary and expedient" (Article II, section 3), my Administration will continue to treat these, and similar provisions, as advisory and non-binding.

Numerous provisions authorize congressional committees to veto a particular use of appropriated funds (e.g., Division C, section 8058), or condition the authority of officers to spend or reallocate funds on the approval of congressional committees (e.g., Division A, sections 702, 706, and 717; Division D, sections 101(a) and 201(a); Division G, sections 403 and 409; Division K, sections 188, 222, 405 and 406). These are impermissible forms of congressional aggrandizement in the execution of the laws other than by enactment of statutes. My Administration will notify the relevant committees before taking the specified actions and will accord the recommendations of such committees all appropriate and serious consideration,

but it will not treat spending decisions as dependent on the approval of congressional committees.

My Administration shall treat provisions that allocate benefits on the basis of race, ethnicity, and gender (e.g., Division B, under the heading "Minority Business Development"; Division C, sections 8016, 8021, 8038, and 8042; Division H, under the headings "Departmental Management Salaries and Expenses," "School Improvement Programs," and "Historically Black College and University Capital Financing Program Account"; Division K, under the heading "Native American Housing Block Grants"; and Division K, section 213) in a manner consistent with the requirement to afford equal protection of the laws under the Due Process Clause of the Constitution's Fifth Amendment.

DONALD J. TRUMP

The White House,
May 5, 2017.

NOTE: H.R. 244, approved May 5, was assigned Public Law No. 115–31. An original was not available for verification of the content of this statement.

Categories: Bill Signings and Vetoes : Consolidated Appropriations Act, 2017, signing statement.

Subjects: Budget, Federal : Appropriations :: Consolidated; Cuba : Guantanamo Bay, U.S. Naval Base :: Detention of alleged terrorists; Defense and national security : Classified national security information; Health and medical care : Marijuana, medical uses; Legislation, enacted : Consolidated Appropriations Act, 2017; Presidency, U.S. : Constitutional role and powers; Presidency, U.S. : Separation of powers; Terrorism : Counterterrorism efforts; Terrorism : Transfer of detainees at Guantanamo Bay.

DCPD Number: DCPD201700312.

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Statement on Signing the DHS Stop Asset and Vehicle Excess Act

June 6, 2017

H.R. 366, the "DHS Stop Asset and Vehicle Excess Act," would assign responsibility for achieving optimal vehicle fleet size in the Department of Homeland Security (DHS) to the Under Secretary for Management (the Under Secretary). I am pleased to sign this bill and applaud this legislative effort to eliminate waste. One provision of the bill, however, purports to require the Under Secretary to recommend budget rescissions to the Congress if the Under Secretary determines that DHS component heads have not taken adequate steps to achieve optimal vehicle fleet size in the previous fiscal year. My Administration, including the Under Secretary, will respectfully treat the provision in a manner consistent with Article II, section 3 of the Constitution, which provides the President the exclusive authority to "recommend" to the Congress spending "Measures" in such amounts and for such purposes "as he shall judge necessary and expedient." My Administration, including the Under Secretary, looks forward to working with the Congress to identify and implement proposals to eliminate wasteful spending.

DONALD J. TRUMP

The White House,
June 6, 2017.

NOTE: H.R. 366, approved June 6, was assigned Public Law No. 115–38. An original was not available for verification of the content of this statement.

Categories: Bill Signings and Vetoes : DHS Stop Asset and Vehicle Excess Act, signing statement.

Subjects: Legislation, enacted : DHS Stop Asset and Vehicle Excess Act.

DCPD Number: DCPD201700380.

Statement on Signing the Countering America's Adversaries Through Sanctions Act

August 2, 2017

Today I signed into law the "Countering America's Adversaries Through Sanctions Act," which enacts new sanctions on Iran, North Korea, and Russia. I favor tough measures to punish and deter bad behavior by the rogue regimes in Tehran and Pyongyang. I also support making clear that America will not tolerate interference in our democratic process and that we will side with our allies and friends against Russian subversion and destabilization. That is why, since taking office, I have enacted tough new sanctions on Iran and North Korea and shored up existing sanctions on Russia.

Since this bill was first introduced, I have expressed my concerns to Congress about the many ways it improperly encroaches on Executive power, disadvantages American companies, and hurts the interests of our European allies.

My administration has attempted to work with Congress to make this bill better. We have made progress and improved the language to give the Treasury Department greater flexibility in granting routine licenses to American businesses, people, and companies. The improved language also reflects feedback from our European allies, who have been steadfast partners on Russia sanctions, regarding the energy sanctions provided for in the legislation. The new language also ensures our agencies can delay sanctions on the intelligence and defense sectors, because those sanctions could negatively affect American companies and those of our allies.

Still, the bill remains seriously flawed, particularly because it encroaches on the executive branch's authority to negotiate. Congress could not even negotiate a health care bill after 7 years of talking. By limiting the executive's flexibility, this bill makes it harder for the United States to strike good deals for the American people and will drive China, Russia, and North Korea much closer together. The Framers of our Constitution put foreign affairs in the hands of the President. This bill will prove the wisdom of that choice.

Yet, despite its problems, I am signing this bill for the sake of national unity. It represents the will of the American people to see Russia take steps to improve relations with the United States. We hope there will be cooperation between our two countries on major global issues so that these sanctions will no longer be necessary. Further, the bill sends a clear message to Iran and North Korea that the American people will not tolerate their dangerous and destabilizing behavior. America will continue to work closely with our friends and allies to check those countries' malignant activities.

I built a truly great company worth many billions of dollars. That is a big part of the reason I was elected. As President, I can make far better deals with foreign countries than Congress.

NOTE: H.R. 3364, approved August 2, was assigned Public Law No. 115–44.

Categories: Bill Signings and Vetoes : Countering America's Adversaries Through Sanctions Act, signing statements.

Subjects: Health and medical care : Health insurance reforms; Iran : U.S. sanctions; Legislation, enacted : Countering America's Adversaries Through Sanctions Act; North Korea :

Statement on Signing the Countering America's Adversaries Through Sanctions Act

August 2, 2017

Today, I have signed into law H.R. 3364, the "Countering America's Adversaries Through Sanctions Act." While I favor tough measures to punish and deter aggressive and destabilizing behavior by Iran, North Korea, and Russia, this legislation is significantly flawed.

In its haste to pass this legislation, the Congress included a number of clearly unconstitutional provisions. For instance, although I share the policy views of sections 253 and 257, those provisions purport to displace the President's exclusive constitutional authority to recognize foreign governments, including their territorial bounds, in conflict with the Supreme Court's recent decision in *Zivotofsky* v. *Kerry*.

Additionally, section 216 seeks to grant the Congress the ability to change the law outside the constitutionally required process. The bill prescribes a review period that precludes the President from taking certain actions. Certain provisions in section 216, however, conflict with the Supreme Court's decision in *INS* v. *Chadha*, because they purport to allow the Congress to extend the review period through procedures that do not satisfy the requirements for changing the law under Article I, section 7 of the Constitution. I nevertheless expect to honor the bill's extended waiting periods to ensure that the Congress will have a full opportunity to avail itself of the bill's review procedures.

Further, certain provisions, such as sections 254 and 257, purport to direct my subordinates in the executive branch to undertake certain diplomatic initiatives, in contravention of the President's exclusive constitutional authority to determine the time, scope, and objectives of international negotiations. And other provisions, such as sections 104, 107, 222, 224, 227, 228, and 234, would require me to deny certain individuals entry into the United States, without an exception for the President's responsibility to receive ambassadors under Article II, section 3 of the Constitution. My Administration will give careful and respectful consideration to the preferences expressed by the Congress in these various provisions and will implement them in a manner consistent with the President's constitutional authority to conduct foreign relations.

Finally, my Administration particularly expects the Congress to refrain from using this flawed bill to hinder our important work with European allies to resolve the conflict in Ukraine, and from using it to hinder our efforts to address any unintended consequences it may have for American businesses, our friends, or our allies.

DONALD J. TRUMP

The White House,
August 2, 2017.

NOTE: An original was not available for verification of the content of this statement.

Categories: Statements by the President : Countering America's Adversaries Through Sanctions Act, signing statements.

All News

Today, I have signed into law H.R. 2810, the "National Defense Authorization Act for Fiscal Year 2018." This Act authorizes fiscal year 2018 appropriations for critical Department of Defense (DOD) national security programs, provides vital benefits for military personnel and their families, and includes authorities to facilitate ongoing military operations around the globe. I am very appreciative that the Congress has passed this bill to provide the DOD with the resources it needs to support our Armed Forces and keep America safe. I note, however, that the bill includes several provisions that raise constitutional concerns.

Several provisions of the bill, including sections 1046, 1664, 1680, and 1682, purport to restrict the President's authority to control the personnel and materiel the President believes is necessary or advisable for the successful conduct of military missions. Additionally, section 1601 provides that the Commander of Air Force Space Command, a military officer subordinate to the civilian leadership of the President as the Commander in Chief, the Secretary of Defense, and the Secretary of the Air Force, has "sole authority" over certain matters. While I share the objectives of the Congress with respect to maintaining the strength and security of the United States, my Administration will treat these provisions consistent with the President's authority as Commander in Chief.

Certain other provisions of the bill, including sections 350, 1011, 1041, 1202, and 1227, purport to require that the Congress receive advance notice before the President directs certain military actions. I reiterate the longstanding understanding of the executive branch that these types of provisions encompass only military actions for which such advance notice is feasible and consistent with the President's constitutional authority and duty as Commander in Chief to protect the national security of the United States.

Sections 1033 and 1035 restrict transfers of detainees held at the United States Naval Station, Guantanamo Bay. I fully intend to keep open that detention facility and to use it for detention operations. Consistent with the statement I issued in signing H.R. 244, I reiterate the longstanding position of the executive branch that, under certain circumstances, restrictions on the President's authority to transfer detainees would violate constitutional separation-of-powers principles, including the President's constitutional authority as Commander in Chief. Additionally, section 1035 could, in some circumstances, interfere with the ability of the United States to transfer a detainee who has been granted a writ of habeas corpus.

I also strongly object to section 1633, which threatens to undermine the effective operation of the Executive Office of the President by making full funding for the White House Communications Agency (WHCA) contingent upon the submission of a report on a national policy for cyberspace, cybersecurity, and cyberwarfare. I take cyber-related issues very seriously, as demonstrated by Executive Order 13800, which has initiated strategic actions across executive departments and agencies that will improve the Nation's cyber-related capabilities. Among other things, WHCA plays a critical role in providing secure communications to the President and his staff. The Congress should not hold hostage the President's ability to communicate in furtherance of the Nation's security and foreign policy. I look forward to working with the Congress to address, as quickly as possible, this unprecedented and dangerous funding restriction.

Several provisions of the bill, including sections 1069, 1231, 1232, 1239, 1239A, 1258, 1259, 1263, 1271, 1279A, and 1607, could potentially dictate the position of the United States in external military and foreign affairs and, in certain instances, direct the conduct of international diplomacy. My Administration will treat these provisions consistent with the President's exclusive constitutional authorities as Commander in Chief and as the sole representative of the Nation in foreign affairs to determine the terms on which recognition is given to foreign sovereigns and conduct the Nation's diplomacy.

Section 1244(b) purports to limit certain expenditures unless, under section 1244(c), the President submits to the Congress a plan to impose sanctions — including asset blocking, exclusion from the United States, and procurement bans — on certain persons for failing to comply with the Intermediate-Range Nuclear Forces (INF) Treaty. My Administration will apply these provisions consistent with the President's constitutional authority to conduct foreign relations, including the President's authority under Article II, section 3 of the Constitution to "receive Ambassadors and other public Ministers." Section 1245 purports to direct the United States

Government to consider the RS-26 ballistic missile to be a breach of the INF Treaty "for purposes of all policies and decisions," if the President, with the concurrence of certain other executive branch officials, were to make certain legal and factual determinations. My Administration will apply this provision consistent with the President's constitutional authority to identify breaches of international agreements by counterparties.

Section 910 purports to elevate the current Deputy Chief Management Officer of the DOD to the position of Chief Management Officer, which would result in an expansion of duties, along with an increase in both responsibility and pay. While my Administration supports the policy of section 910, the provision raises constitutional concerns related to the President's appointment authority. My Administration will devise a plan to treat this provision in a manner that mitigates the constitutional concerns, while adhering closely to the intent of the Congress.

Section 1097 purports to reauthorize the Office of Special Counsel, including by continuing the existing tenure protections for the Special Counsel. The Special Counsel is a principal officer of the United States who performs executive functions, and has both broad authority and long tenure insulated from the President's removal authority. I reiterate the longstanding position of the executive branch that such insulation of a principal officer like the Special Counsel raises serious constitutional concerns.

Section 1653 purports to require the Nuclear Weapons Council to make an assessment and provide a report to the congressional defense committees in response to legislative activity by a single house of Congress. To direct the Council's operations in this manner, the Congress must act in accord with the requirements of bicameralism and presentment prescribed in Article I, section 7 of the Constitution. Accordingly, my Administration will treat section 1653 as non-binding, and I will instruct the Council to take action in response to this provision only as an exercise of inter-branch comity — i.e., only insofar as such action would be practicable and consistent with the Council's existing legal responsibilities.

Several provisions of the bill, including sections 737, 1097, 1244, 1631, 1632, and 1669, as well as language in the classified annex to the joint explanatory statement of the committee of conference, purport to mandate or regulate the submission to the Congress of information — such as deliberative process and national security information — protected by executive privilege. My Administration will treat these provisions consistent with the President's constitutional authority to withhold information, the disclosure of which could impair foreign relations, national security, the deliberative processes of the executive branch, or the performance of the President's constitutional duties. Additionally, I note that conditions in the classified annex to the joint explanatory statement of the committee of conference are not part of the text of the bill and do not carry the force of law.

Several provisions of the bill, including sections 513, 572, 807, 1648, 1676, 1696, 2878, and 3117, purport to require executive branch officials under the President's supervision to recommend certain legislative measures to the Congress. My Administration will treat those provisions consistent with Article II, section 3 of the Constitution, which provides the President the discretion to recommend to the Congress only "such Measures as he shall judge necessary and expedient."

DONALD J. TRUMP

THE WHITE HOUSE,
December 12, 2017.

The White House

Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriation

If, after the expiration of an agency's appropriation, Congress has not enacted an appropriation for the immediately subsequent period, the agency may obligate no further funds except as necessary to bring about the orderly termination of its functions, and the obligation or expenditure of funds for any purpose not otherwise authorized by law would be a violation of the Antideficiency Act.

The manifest purpose of the Antideficiency Act is to insure that Congress will determine for what purpose the government's money is to be spent and how much for each purpose.

Because no statute generally permits federal agencies to incur obligations without appropriations for the pay of employees, agencies are not, in general, authorized to employ the services of their employees upon a lapse in appropriations.

April 25, 1980

THE PRESIDENT

MY DEAR MR. PRESIDENT: You have requested my opinion whether an agency can lawfully permit its employees to continue work after the expiration of the agency's appropriation for the prior fiscal year and prior to any appropriation for the current fiscal year. The Comptroller General, in a March 3, 1980, opinion, concluded that, under the so-called Antideficiency Act, 31 U.S.C. § 665(a), any supervisory officer or employee, including the head of an agency, who directs or permits agency employees to work during any period for which Congress has not enacted an appropriation for the pay of those employees, violates the Antideficiency Act. Notwithstanding that conclusion, the Comptroller General also took the position that Congress, in enacting the Antideficiency Act, did not intend federal agencies to be closed during periods of lapsed appropriations. In my view, these conclusions are inconsistent. It is my opinion that, during periods of "lapsed appropriations," no funds may be expended except as necessary to bring about the orderly termination of an agency's functions, and that the obligation or expenditure of funds for any purpose not otherwise authorized by law would be a violation of the Antideficiency Act.

Section 665(a) of Title 31 forbids any officer or employee of the United States to:

> Involve the Government in any contract or other obligation, for the payment of money for any purpose, in

advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

Because no statute permits federal agencies to incur obligations to pay employees without an appropriation for that purpose, the "authorized by law" exception to the otherwise blanket prohibition of § 665(a) would not apply to such obligations.[1] On its face, the plain and unambiguous language of the Antideficiency Act prohibits an agency from incurring pay obligations once its authority to expend appropriations lapses.

The legislative history of the Antideficiency Act is fully consistent with its language. Since Congress, in 1870, first enacted a statutory prohibition against agencies incurring obligations in excess of appropriations, it has amended the Antideficiency Act seven times.[2] On each occasion, it has left the original prohibition untouched or reenacted the prohibition in substantially the same language. With each amendment, Congress has tried more effectively to prohibit deficiency spending by requiring, and then requiring more stringently, that agencies apportion their spending throughout the fiscal year. Significantly, although Congress, from 1905 to 1950, permitted agency heads to waive their agencies' apportionments administratively, Congress never permitted an administrative waiver of the prohibition against incurring obligations in excess or advance of appropriations. Nothing in the debates concerning any of the amendments to or reenactments of the original prohibition has ever suggested an implicit exception to its terms.[3]

The apparent mandate of the Antideficiency Act notwithstanding, at least some federal agencies, on seven occasions during the last 30 years, have faced a period of lapsed appropriations. Three such lapses occurred in 1952, 1954, and 1956.[4] On two of these occasions, Congress subsequently enacted provisions ratifying interim obligations incurred during the lapse.[5] However, the legislative history of these provisions

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[1] An example of a statute that would permit the incurring of obligations in excess of appropriations is 41 U.S.C. § 11, permitting such contracts for "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies" for the Armed Forces. *See* 15 Op. Att'y Gen. 209. *See also* 25 U.S.C § 99 and 31 U.S.C. § 668.

[2] Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1257; Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48; Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 765; Pub. L. 85-170, § 1401, 71 Stat. 440 (1957); Pub. L. 93-198, § 421, 87 Stat. 789 (1973); Pub. L. 93-344, § 1002, 88 Stat. 332 (1974); Pub. L. 93-618, § 175(a)(2), 88 Stat. 2011 (1975).

[3] The prohibition against incurring obligations in excess of appropriations was enacted in 1870, amended slightly in 1905 and 1906, and reenacted in its modern version in 1950. The relevant legislative debates occur at Cong. Globe, 41st Cong., 2d Sess. 1553, 3331 (1870); 39 Cong. Rec. 3687-692, 3780-783 (1905); 40 Cong. Rec. 1272-298, 1623-624 (1906); 96 Cong. Rec. 6725-731, 6835-837, 11369-370 (1950).

[4] In 1954 and 1956, Congress enacted temporary appropriations measures later than July 1, the start of fiscal years 1955 and 1957. Act of July 6, 1954, ch. 460, 68 Stat. 448; Act of July 3, 1956, ch. 516, 70 Stat. 496. In 1952, Congress enacted, two weeks late, supplemental appropriations for fiscal year 1953 without having previously enacted a temporary appropriations measure. Act of July 15, 1952, ch. 758, 66 Stat. 637.

[5] Act of July 15, 1952, ch. 758, § 1414, 66 Stat. 661; Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831.

does not explain Congress' understanding of the effect of the Antideficiency Act on the agencies that lacked timely appropriations.[6] Neither are we aware that the Executive Branch formally addressed the Antideficiency Act problem on any of these occasions.

The four more recent lapses include each of the last four fiscal years, from fiscal year 1977 to fiscal year 1980. Since Congress adopted a fiscal year calendar running from October 1 to September 30 of the following year, it has never enacted continuing appropriations for all agencies on or before October 1 of the new fiscal year.[7] Various agencies of the Executive Branch and the General Accounting Office have internally considered the resulting problems within the context of their budgeting and accounting functions. Your request for my opinion, however, apparently represents the first instance in which this Department has been asked formally to address the problem as a matter of law.

I understand that, for the last several years, the Office of Management and Budget (OMB) and the General Accounting Office (GAO) have adopted essentially similar approaches to the administrative problems posed by the Antideficiency Act. During lapses in appropriations during this Administration, OMB has advised affected agencies that they may not incur any "controllable obligations" or make expenditures against appropriations for the following fiscal year until such appropriations are enacted by Congress. Agencies have thus been advised to avoid hiring, grantmaking, nonemergency travel, and other nonessential obligations.

When the General Accounting Office suffered a lapse in its own appropriations last October, the Director of General Services and Controller issued a memorandum, referred to in the Comptroller General's opinion,[8] indicating that GAO would need "to restrain our FY 1980 obligations to only those essential to maintain day-to-day operations." Employees could continue to work, however, because of the Director's determination that it was not "the intent of Congress that GAO close down."

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[6] In 1952, no temporary appropriations were enacted for fiscal year 1953. The supplemental appropriations measure enacted on July 15, 1952 did, however, include a provision ratifying obligations incurred on or since July 1, 1952. Act of July 15, 1952, ch. 758, § 1414, 66 Stat. 661. The ratification was included, without elaboration, in the House Committee-reported bill, H. Rep. No. 2316, 82d Cong., 2d Sess. 69 (1952), and was not debated on the floor.

In 1954, a temporary appropriations measure for fiscal year 1955 was presented to the President on July 2 and signed on July 6. Act of July 6, 1954, ch. 460, 68 Stat. 448. The Senate Committee on Appropriations subsequently introduced a floor amendment to the eventual supplemental appropriations measure that ratified obligations incurred on or after July 1, 1954, and was accepted without debate. Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831. 100 Cong. Rec. 13065 (1954).

In 1956, Congress' temporary appropriations measure was passed on July 2 and approved on July 3. Act of July 3, 1956, ch. 516, 70 Stat. 496. No ratification measure for post-July 1 obligations was enacted.

[7] Pub. L. 94-473, 90 Stat. 2065 (Oct. 11, 1976); Pub. L. 95-130, 91 Stat. 1153 (Oct. 13, 1977); Pub. L. 95-482, 92 Stat. 1603 (Oct. 18, 1978); Pub. L. 96-86, 93 Stat. 656 (Oct. 12, 1979).

[8] The entire memorandum appears at 125 Cong. Rec. S13784 (daily ed. Oct. 1, 1979) [remarks of Sen. Magnuson].

In my view, these approaches are legally insupportable. My judgment is based chiefly on three considerations.

First, as a matter of logic, any "rule of thumb" excepting employee pay obligations from the Antideficiency Act would have to rest on a conclusion, like that of the Comptroller General, that such obligations are unlawful, but also authorized. I believe, however, that legal authority for continued operations either exists or it does not. If an agency may infer, as a matter of law, that Congress has authorized it to operate in the absence of appropriations, then in permitting the agency to operate, the agency's supervisory personnel cannot be deemed to violate the Antideficiency Act. Conversely, if the Antideficiency Act makes it unlawful for federal agencies to permit their employees to work during periods of lapsed appropriations, then no legislative authority to keep agencies open in such cases can be inferred, at least from the Antideficiency Act.

Second, as I have already stated, there is nothing in the language of the Antideficiency Act or in its long history from which any exception to its terms during a period of lapsed appropriations may be inferred. Faithful execution of the laws cannot rest on mere speculation that Congress does not want the Executive Branch to carry out Congress' unambiguous mandates.

It has been suggested, in this regard, that legislative intent may be inferred from Congress' practice in each of the last four years of eventually ratifying obligations incurred during periods of lapsed appropriations if otherwise consistent with the eventual appropriations.[9] Putting aside the obvious difficulty of inferring legal authority from expectations as to Congress' future acts, it appears to me that Congress' practice suggests an understanding of the Antideficiency Act consistent with the interpretation I have outlined. If legal authority exists for an agency to incur obligations during periods of lapsed appropriations, Congress would not need to confirm or ratify such obligations. Ratification is not necessary to protect private parties who deal with the government. So long as Congress has waived sovereign immunity with respect to damage claims in contract, 28 U.S.C. §§ 1346, 1491, the *apparent* authority alone of government officers to incur agency obligations would likely be sufficient to create obligations that private parties could enforce in court. The effect of the ratifying provisions seems thus to be limited to providing *legal* authority where there was none before, implying Congress' understanding that agencies are not otherwise empowered to incur obligations in advance of appropriations.

Third, and of equal importance, any implied exception to the plain mandate of the Antideficiency Act would have to rest on a rationale that would undermine the statute. The manifest purpose of the

[9] Pub. L. 94-473, § 108, 90 Stat. 2066 (1976); Pub. L. 95-130, § 108, 91 Stat. 1154 (1977); Pub. L. 95-482, § 108, 92 Stat. 1605 (1978); Pub. L. 96-86, § 117, 93 Stat. 662 (1979).

Antideficiency Act is to insure that Congress will determine for what purposes the government's money is to be spent and how much for each purpose. This goal is so elementary to a proper distribution of governmental powers that when the original statutory prohibition against obligations in excess of appropriations was introduced in 1870, the only responsive comment on the floor of the House was, "I believe that is the law of the land now." Cong. Globe, 41st Cong., 2d Sess. 1553 (1870) (remarks of Rep. Dawes).

Having interpreted the Antideficiency Act, I would like to outline briefly the legal ramifications of my interpretation. It follows first of all that, on a lapse in appropriations, federal agencies may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. There are no exceptions to this rule under current law, even where obligations incurred earlier would avoid greater costs to the agencies should appropriations later be enacted.[10]

Second, the Department of Justice will take actions to enforce the criminal provisions of the Act in appropriate cases in the future when violations of the Antideficiency Act are alleged. This does not mean that departments and agencies, upon a lapse in appropriations, will be unable logistically to terminate functions in an orderly way. Because it would be impossible in fact for agency heads to terminate all agency functions without incurring any obligations whatsoever in advance of appropriations, and because statutes that impose duties on government officers implicitly authorize those steps necessary and proper for the performance of those duties, authority may be inferred from the Antideficiency Act itself for federal officers to incur those minimal obligations necessary to closing their agencies. Such limited obligations would fall within the "authorized by law" exception to the terms of § 665(a).

This Department will not undertake investigations and prosecutions of officials who, in the past, may have kept their agencies open in advance of appropriations. Because of the uncertainty among budget and accounting officers as to the proper interpretation of the Act and Congress' subsequent ratifications of past obligations incurred during periods of lapsed appropriations, criminal sanctions would be inappropriate for those actions.

Respectfully,
BENJAMIN R. CIVILETTI

[10] *See* 21 Op. Att'y Gen. 288.

Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations

Statutory authority for an agency to incur obligations in advance of appropriations need not be express, but may be implied from the specific duties that have been imposed upon, or of authorities that have been invested in, the agency.

The "authorized by law" exception in the Antideficiency Act exempts from that Act's general prohibition not only those obligations for which there is statutory authority, but also those obligations necessarily incident to initiatives undertaken within the President's constitutional powers.

A government agency may employ personal services in advance of appropriations only when there is a reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property, and when there is some reasonable likelihood that either or both would be compromised in some degree by delay in the performance of the function in question.

January 16, 1981

THE PRESIDENT
THE WHITE HOUSE

MY DEAR MR. PRESIDENT: You have asked my opinion concerning the scope of currently existing legal and constitutional authorities for the continuance of government functions during a temporary lapse in appropriations, such as the government sustained on October 1, 1980. As you know, some initial determination concerning the extent of these authorities had to be made in the waning hours of the last fiscal year in order to avoid extreme administrative confusion that might have arisen from Congress' failure timely to enact 11 of the 13 anticipated regular appropriations bills,[1] or a continuing resolution to cover the hiatus between regular appropriations. The resulting guidance, which I approved, appeared in a memorandum that the Director of the Office of Management and Budget circulated to the heads of all departments and agencies on September 30, 1980. Your request, in effect, is for a close and more precise analysis of the issues raised by the September 30 memorandum.

Before proceeding with my analysis, I think it useful to place this opinion in the context of my April 25, 1980, opinion to you concerning the applicability of the Antideficiency Act, 31 U.S.C. § 665, upon lapses

[1] Prior to October 1, 1980, Congress had passed regular appropriations for fiscal year 1981 only for energy and water development, Pub. L. No. 96-367, 94 Stat 1331 (Oct. 1, 1980).

in appropriations, 43 Op. Att'y Gen. No. 24, 4 Op. O.L.C. 16 (1980). That opinion set forth two essential conclusions. First, if, after the expiration of an agency's appropriations, Congress has enacted no appropriation for the immediately subsequent period, the agency may make no contracts and obligate no further funds except as authorized by law. Second, because no statute generally permits federal agencies to incur obligations without appropriations for the pay of employees, agenices are not, in general, authorized by law to employ the services of their employees upon a lapse in appropriations. My interpretation of the Antideficiency Act in this regard is based on its plain language, its history, and its manifest purposes.

The events prompting your request for my earlier opinion included the prospect that the then-existing temporary appropriations measure for the Federal Trade Commission (FTC) would expire in April, 1980, without extension, and that the FTC might consequently be left without appropriations for a significant period.[2] The FTC did not then suggest that it possesses obligational authorities that are free from a one-year time limitation. Neither did it suggest, based on its interpretation of the law at that time, that the FTC performs emergency functions involving the safety of human life or the protection of property other than protecting government property within the administrative control of the FTC itself. Consequently, the legal questions that the April 25, 1980, opinion addressed were limited. Upon determining that the blanket prohibition expressed in § 665(a) against unauthorized obligations in advance of appropriations is to be applied as written, the opinion added only that the Antideficiency Act does permit agencies that are ceasing their functions to fulfill certain legal obligations connected with the orderly termination of agency operations.[3] The opinion did not consider the more complex legal questions posed by a general congressional failure to enact timely appropriations, or the proper course of action to be followed when no prolonged lapse in appropriations in such a situation is anticipated.

The following analysis is directed to those issues. Under the terms of the Antideficiency Act, the authorities upon which the government may rely for the continuance of functions despite a lapse in appropriations implicates two fundamental questions. Because the proscription of § 665(a) excepts obligations in advance of appropriations that are "authorized by law," it is first necessary to consider which functions this exception comprises. Further, given that § 665(b) expressly permits the

[2] FTC actually sustained less than a one-day lapse in appropriations between the expiration, on April 30, 1980, of a transfer of funds for its use, Pub. L. No. 96-219, 94 Stat. 128 (Mar. 28, 1980), and the enactment, on May 1, 1980, of an additional transfer, Pub. L. No. 96-240, 94 Stat. 342. Prior to April 30, however, it appeared likely that a protracted congressional dispute concerning the terms of the FTC's eventual authorization, Pub. L. No. 96-252, 94 Stat. 374 (May 28, 1980), would precipitate a lapse in appropriations for a significantly longer period.

[3] *See* note 11, *infra*.

government to employ the personal service of its employees in "cases of emergency involving the safety of human life or the protection of property," it is necessary to determine how this category is to be construed. I shall address these questions in turn, bearing in mind that the most useful advice concerning them must be cast chiefly in the form of general principles. The precise application of these principles must, in each case, be determined in light of all the circumstances surrounding a particular lapse in appropriations.

I.

Section 665(a) of Title 31, United States Code provides:

> No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropiation or fund in excess of the amount available therein; *nor shall any officer or employee involve the Government in any contract or obligation, for the payment of money for any purpose, unless such contract or obligation is authorized by law.* (Emphasis added.)

Under the language of § 665(a) emphasized above, it follows that, when an agency's regular appropriation lapses, that agency may not enter contracts or create other obligations unless the agency has legal authority to incur obligations in advance of appropriations. Such authority, in some form, is not uncommon in the government. For example, notwithstanding the lapse of regular appropriations, an agency may continue to have available to it particular funds that are subject to a multi-year or no-year appropriation. A lapse in authority to spend funds under a one-year appropriation would not affect such other authorities. 13 Op. Att'y Gen. 288, 291 (1870).

A more complex problem of interpretation, however, may be presented with respect to obligational authorities that are not manifested in appropriations acts. In a few cases, Congress has expressly authorized agencies to incur obligations without regard to available appropriations.[4] More often, it is necessary to inquire under what circumstances statutes that vest particular functions in government agencies imply authority to create obligations for the accomplishment of those functions despite the lack of current appropriations. This, of course, would be the relevant legal inquiry even if Congress had not enacted the Antideficiency Act; the second phrase of § 665(a) clearly does no more than codify what, in any event and not merely during lapses in appropriations, is a requirement of legal authority for the obligation of public funds.[5]

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[4] *See, e.g.*, 25 U.S.C. § 99; 31 U.S.C. § 668; 41 U.S.C. § 11.

[5] This rule has, in fact, been expressly enacted in some form for 160 of the 191 years since Congress first convened. The Act of May 1, 1820, provided:

> [N]o contract shall hereafter be made by the Secretary of State, or of the Treasury, or

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Previous Attorneys General and the Comptrollers General have had frequent occasion to address, directly or indirectly, the question of implied authority. Whether the broader language of all of their opinions is reconcilable may be doubted, but the conclusions of the relevant opinions fully establish the premise upon which my April 25, 1980, memorandum to you was based: statutory authority to incur obligations in advance of appropriations may be implied as well as express, but may not ordinarily be inferred, in the absence of appropriations, from the kind of broad, categorical authority, standing alone, that often appears, for example, in the organic statutes of government agencies. The authority must be necessarily inferrable from the specific terms of those duties that have been imposed upon, or of those authorities that have been invested in, the officers or employees purporting to obligate funds on behalf of the United States. 15 Op. Att'y Gen. 235, 240 (1877).

Thus, for example, when Congress specifically authorizes contracts to be entered into for the accomplishment of a particular purpose, the delegated officer may negotiate such contracts even before Congress appropriates all the funds necessary for their fulfillment. *E.g.,* 30 Op. Att'y Gen. 332, 333 (1915); 30 Op. Att'y Gen. 186, 193 (1913); 28 Op. Att'y Gen. 466, 469-70 (1910); 25 Op. Att'y Gen. 557, 563 (1906). On the other hand, when authority for the performance of a specific function rests on a particular appropriation that proves inadequate to the fulfillment of its purpose, the responsible officer is not authorized to obligate further funds for that purpose in the absence of additional appropriations. 21 Op. Att'y Gen. 244, 248-50 (1895); 15 Op. Att'y Gen. 235, 240 (1877); 9 Op. Att'y Gen. 18, 19 (1857); 4 Op. Att'y Gen. 600, 601-02 (1847); *accord,* 28 Comp. Gen. 163, 165-66 (1948).

This rule prevails even though the obligation of funds that the official contemplates may be a reasonable means for fulfilling general responsi-

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> of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment.

3 Stat. 567, 568. The Act of March 2, 1861, extended the rule as follows:

> No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year.

12 Stat. 214, 220. Congress reiterated the ban on obligations in excess of appropriations by enacting the Antideficiency Act in 1870:

> [I]t shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of appropriations

Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251. Congress substantially reenacted this provision in 1905, adding the proviso "unless such contract or obligation is authorized by law," Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257, and reenacted it again in 1906, Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 27, 48. Section 665(a) of Title 31, United States Code, enacted in its current form in 1950, Act of Sept. 6, 1950, Pub. L. No 81-759, § 1211, 64 Stat. 595, 765, is substantially the same as these earlier versions, except that, by adding an express prohibition against unauthorized obligations "in advance of" appropriations to the prohibition against obligations "in excess of" appropriations, the modern version indicates even more forcefully Congress' intent to control the availability of funds to government officers and employees.

bilities that Congress has delegated to the official in broad terms, but without conferring specific authority to enter into contracts or otherwise obligate funds in advance of appropriations. For example, Attorney General McReynolds concluded, in 1913, that the Postmaster General could not obligate funds in excess of appropriations for the employment of temporary and auxiliary mail carriers to maintain regular service, notwithstanding his broad authorities for the carrying of the mails. 30 Op. Att'y Gen. 157, 161 (1913). Similarly, in 1877, Attorney General Devens concluded that the Secretary of War could not, in the absence of appropriations, accept "contributions" of materiel for the army, *e.g.*, ammunition and medical supplies, beyond the Secretary's specific authorities to contract in advance of appropriations. 15 Op. Att'y Gen. 209, 211 (1877).[6]

Ordinarily, then, should an agency's regular one-year appropriation lapse, the "authorized by law" exception to the Antideficiency Act would permit the agency to continue the obligation of funds to the extent that such obligations are: (1) funded by moneys, the obligational authority for which is not limited to one year, *e.g.*, multi-year appropriations; (2) authorized by statutes that expressly permit obligations in advance of appropriations; or (3) authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency.[7] A nearly government-wide lapse, however, such as occurred on October 1, 1980, implicates one further question of executive authority.

Unlike his subordinates, the President performs not only functions that are authorized by statute, but functions authorized by the Constitution as well. To take one obvious example, the President alone, under Article II, § 2, clause 1 of the Constitution, "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Manifestly, Congress could not deprive the President of this power by purporting to deny him the minimum

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[6] *Accord*, 37 Comp. Gen. 155, 156 (1957) (Atomic Energy Commission's broad responsibilities under the Atomic Energy Act do not authorize it to enter into a contract for supplies or services to be furnished in a fiscal year subsequent to the year the contract is made); 28 Comp. Gen. 300, 302 (1948) (Treasury Department's discretion to establish reasonable compensation for Bureau of the Mint employees does not confer authority to grant wage increases that would lead to a deficiency).

[7] It was on this basis that I determined, in approving the September 30, 1980, memorandum, that the responsible departments are "authorized by law" to incur obligations in advance of appropriations for the administration of benefit payments under entitlement programs when the funds for the benefit payments themselves are not subject to a one-year appropriation. Certain so-called "entitlement programs," *e.g.*, Old-Age and Survivors Insurance, 42 U.S.C. § 401(a), are funded through trust funds into which a certain portion of the public revenues are automatically appropriated. Notwithstanding this method of funding the entitlement payments themselves, the costs connected with the administration of the trust funds are subject to annual appropriations. 42 U.S.C. § 401(g). It might be argued that a lapse in administrative authority alone should be regarded as expressing Congress' intent that benefit payments also not continue. The continuing appropriation of funds for the benefit payments themselves, however, substantially belies this argument, especially when the benefit payments are to be rendered, at Congress' direction, pursuant to an entitlement formula. In the absence of a contrary legislative history to the benefit program or affirmative congressional measures to terminate the program, I think it proper to infer authority to continue the administration of the program to the extent of the remaining benefit funding.

obligational authority sufficient to carry this power into effect. Not all of the President's powers are so specifically enumerated, however, and the question must consequently arise, upon a government-wide lapse in appropriations, whether the Antideficiency Act should be construed as depriving the President of authority to obligate funds in connection with those initiatives that would otherwise fall within the President's powers.

In my judgment, the Antideficiency Act should not be read as necessarily precluding exercises of executive power through which the President, acting alone or through his subordinates, could have obligated funds in advance of appropriations had the Antideficiency Act not been enacted. With respect to certain of the President's functions, as illustrated above, such an interpretation could raise grave constitutional questions. It is an elementary rule that statutes should be interpreted, if possible, to preclude constitutional doubts, *Crowell* v. *Benson,* 285 U.S. 22, 62 (1932), and this rule should surely be followed in connection with a broad and general statute, such as 31 U.S.C. § 665(a), the history of which indicates no congressional consideration at all of the desirability of limiting otherwise constitutional presidential initiatives. The President, of course, cannot legislate his own obligational authorities; the legislative power rests with Congress. As set forth, however, in Mr. Justice Jackson's seminal concurring opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 635 (1952):

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress.

Following[8] this reasoning, the Antideficiency Act is not the only source of law or the only exercise of congressional power that must be weighed in determining whether the President has authority for an initiative that obligates funds in advance of appropriations. The President's obligational authority may be strengthened in connection with initiatives that are grounded in the peculiar institutional powers and

[8] A majority of the Supreme Court has repeatedly given express endorsement to Mr. Justice Jackson's view of the separation of powers. *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 443 (1977); *Buckley* v. *Valeo,* 424 U.S. 1, 122 (1976); *United States* v. *Nixon,* 418 U.S. 683, 707 (1974); *Old Dominion Branch No. 496, National Association of Letter Carriers* v. *Austin,* 418 U.S. 264, 273 n.5 (1974).

competency of the President. His authority will be further buttressed in connection with any initiative that is consistent with statutes—and thus with the exercise of legislative power in an area of concurrent authority—that are more narrowly drawn than the Antideficiency Act and that would otherwise authorize the President to carry out his constitutionally assigned tasks in the manner he contemplates. In sum, with respect to any presidential initiative that is grounded in his constitutional role and consistent with statutes other than the Antideficiency Act that are relevant to the initiative, the policy objective of the Antideficiency Act must be considered in undertaking the initiative, but should not alone be regarded as dispositive of the question of authority.

Unfortunately, no catalogue is possible of those exercises of presidential power that may properly obligate funds in advance of appropriations.[9] Clearly, such an exercise of power could most readily be justified if the functions to be performed would assist the President in fulfilling his peculiar constitutional role, and Congress has otherwise authorized those or similar functions to be performed within the control of the President.[10] Other factors to be considered would be the urgency of the initiative and the likely extent to which funds would be obligated in advance of appropriations.

In sum, I construe the "authorized by law" exception contained within 31 U.S.C. § 665(a) as exempting from the prohibition enacted by the second clause of that section not only those obligations in advance of appropriations for which express or implied authority may be found in the enactments of Congress, but also those obligations necessarily incident to presidential intiatives undertaken within his constitutional powers.

II.

In addition to regulating generally obligations in advance of appropriations, the Antideficiency Act further provides, in 31 U.S.C. § 665(b):

> No officer or employee of the United States shall accept voluntary service for the United States or employ per-

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[9] As stated by Attorney General (later Justice) Murphy:

> [T]he Executive has powers not enumerated in the statutes—powers derived not from statutory grants but from the Constitution. It is universally recognized that the constitutional duties of the Executive carry with them constitutional powers necessary for their proper performance. These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. In a measure this is true with respect to most of the powers of the Executive, both constitutional and statutory. The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.

39 Op. Att'y Gen. 343, 347–48 (1939).

[10] One likely category into which certain of these functions would fall would be "the conduct of foreign relations essential to the national security," referred to in the September 30, 1980, memorandum.

> sonal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

Despite the use of the term "voluntary service," the evident concern underlying this provision is not government agencies' acceptance of the benefit of services rendered without compensation. Rather, the original version of § 665(b) was enacted as part of an urgent deficiency appropriation act in 1884, Act of May 1, 1884, ch. 37, 23 Stat. 15, 17, in order to avoid claims for compensation arising from the unauthorized provision of services to the government by non-employees, and claims for additional compensation asserted by government employees performing extra services after hours. That is, under § 665(b), government officers and employees may not involve the government in contracts for *employment, i.e.,* for compensated labor, except in emergency situtations. 30 Op. Att'y Gen. 129, 131 (1913).

Under § 665(b), it is thus crucial, in construing the government's authority to continue functions in advance of appropriations, to interpret the phrase "emergencies involving the safety of human life or the protection of property." Although the legislative history of the phrase sheds only dim light on its precise meaning, this history, coupled with an administrative history—of which Congress is fully aware—of the interpretation of an identical phrase in a related budgeting context, suggests two rules for identifying those functions for which government officers may employ personal services for compensation in excess of legal authority other than § 665(b) itself. First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.

As originally enacted in 1884, the provision forbade unauthorized employment "except in cases of *sudden* emergency involving the loss of human life or the *destruction* of property." 23 Stat. 17. (Emphasis added.) The clause was added to the House-passed version of the urgent deficiency bill on the floor of the Senate in order to preserve the function of the government's "life-saving stations." One Senator cautioned:

> In other words, at the life-saving stations of the United States, for instance, the officers in charge, no matter what the urgency and what the emergency might be, would be prevented [under the House-passed bill] from using the absolutely necessary aid which is extended to them in such cases because it had not been provided for by law in a statute.

15 Cong. Rec. 2,143 (1884) (remarks of Sen. Beck); *see also id.* at 3,410–11 (remarks of Rep. Randall). This brief discussion confirms what the originally enacted language itself suggests, namely, that Congress initially contemplated only a very narrow exception to what is now § 665(b), to be employed only in cases of dire necessity.

In 1950, however, Congress enacted the modern version of the Antideficiency Act and accepted revised language for 31 U.S.C. § 665(b) that had originally been suggested in a 1947 report to Congress by the Director of the Bureau of the Budget and the Comptroller General. Without elaboration, these officials proposed that "cases of sudden emergency" be amended to "cases of emergency," "loss of human life" to "safety of human life," and "destruction of property" to "protection of property." These changes were not qualified or explained by the report accompanying the 1947 recommendation or by any aspect of the legislative history of the general appropriations act for fiscal year 1951, which included the modern § 665(b). Act of September 6, 1950, Pub. L. No. 81-759, § 1211, 64 Stat. 765. Consequently, we infer from the plain import of the language of their amendments that the drafters intended to broaden the authority for emergency employment. In essence, they replaced the apparent suggestion of a need to show absolute necessity with a phrase more readily suggesting the sufficiency of a showing of reasonable necessity in connection with the safety of human life or the protection of property in general.

This interpretation is buttressed by the history of interpretation by the Bureau of the Budget and its successor, the Office of Management and Budget, of 31 U.S.C. § 665(e), which prohibits the apportionment or reapportionment of appropriated funds in a manner that would indicate the need for a deficiency or supplemental appropriation, except in, among other circumstances, "emergencies involving the safety of human life, [or] the protection of property." § 665(e)(1)(B).[11] Directors

[11] As provisions containing the same language, enacted at the same time, and aimed at related purposes, the emergency provisions of §§ 665(b) and 665(e)(1)(B) should not be deemed *in pari materia* and given a like construction, *Northcross* v. *Memphis Board of Education*, 412 U.S. 427, 428 (1973), although at first blush, it may appear that the consequences of identifying a function as an "emergency" function may differ under the two provisions. Under § 665(b), if a function is an emergency function, then a federal officer or employee may employ what otherwise would constitute unauthorized personal service for its performance; in this sense, the emergency nature of the function triggers additional obligational authority for the government. In contrast, under § 665(e)(1)(B), if a function is an emergency function, OMB may allow a deficiency apportionment or reapportionment—this permitting the expenditure of funds at a rate that could not be sustained for the entire fiscal year without a deficiency—but the effect of such administrative action would not be to trigger new obligational authority automatically. That is, Congress could always decline to enact a subsequent deficiency appropriation, thus keeping the level of spending at the previously appropriated level.)

This distinction, however, is outweighed by the common practical effect of the two provisions, namely, that when authority is exercised under either emergency exception, Congress, in order to accomplish all those functions it has authorized, must appropriate more money. If, after a deficiency apportionment or reapportionment, Congress did not appropriate additional funds, its purposes would be thwarted to the extent that previously authorized functions could not be continued until the end of the fiscal year. This fact means that, although deficiency apportionments and reapportionments do not create new obligational authority, they frequently impose a necessity for further appropriations as

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of the Bureau of the Budget and of the Office of Management and Budget have granted dozens of deficiency reapportionments under this subsection in the last 30 years, and have apparently imposed no test more stringent than the articulation of a reasonable relationship between the funded activity and the safety of human life or the protection of property. Activities for which deficiency apportionments have been granted on this basis include Federal Bureau of Investigation criminal investigations, legal services rendered by the Department of Agriculture in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967, 21 U.S.C. §§ 601–695, the protection and management of commodity inventories by the Commodity Credit Corporation, and the investigation of aircraft accidents by the National Transportation Safety Board. These few illustrations demonstrate the common sense approach that has guided the interpretation of § 665(e).[12] Most important, under § 665(e)(2), each apportionment or reapportionment indicating the need for a deficiency or supplemental appropriation has been reported contemporaneously to both Houses of Congress, and, in the face of these reports, Congress has not acted in any way to alter the relevant 1950 wording of § 665(e)(1)(B), which is, in this respect, identical to § 665(b).[13]

It was along these lines that I approved, for purposes of the immediate crisis, the categories of functions that the Director of the Office of Management and Budget included in his September 30, 1980, memorandum, as illustrative of the areas of government activity in which emergencies involving the safety of human life and the protec-

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compelling as the government's employment of personal services in an emergency in advance of appropriations. There is thus no genuine reason for ascribing, as a matter of legal interpretation, greater or lesser scope to one emergency provision than to the other.

[12] In my April 25, 1980, memorandum to you, I opined that the Antideficiency Act permits departments and agencies to terminate operations, upon a lapse in appropriations, in an orderly way. 43 Op. Att'y Gen No. 24, at 1 [4 Op. O.L.C.—(1980)]. The functions that, in my judgment, the orderly shutdown of an agency for an indefinite period or permanently would entail include the emergency protection, under § 665(b), of the agency's property by its own employees until such protection can be arranged by another agency with appropriations; compliance, within the "authorized by law" exception to § 665(a), with statutes providing for the rights of employees and the protection of government information; and the transfer, also under the "authorized by law" exception to § 665(a), of any matters within the agency's jurisdiction that are also under the jurisdiction of another agency that Congress has funded and thus indicated its intent to pursue. Compliance with the spirit, as well as the letter, of the Antideficiency Act requires that agencies incur obligations for these functions in advance of appropriations only to the minimum extent necessary to the fulfillment of their legal duties and with the end in mind of terminating operations for some substantial period. It would hardly be prudent, much less consistent with the spirit of the Antideficiency Act, for agencies to incur obligations, in advance of appropriations in connection with "shutdown functions" that would only be justified by a more substantial lapse in appropriations than the agency, in its best judgment, expects.

[13] The Supreme Court has referred repeatedly to the

> venerable rule that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 381 (1969) (footnotes omitted). Since enacting the modern Antideficiency Act, including § 665(e)(1)(B), in 1950, Congress has amended the act three times, including one amendment to another aspect of § 665(e). At no time has Congress altered this interpretation of § 665(e)(1)(B) by the Office of Management and Budget, which has been consistent and is consistent with the statute. *Compare* 43 Op. Att'y Gen. No. 24, 4 Op. O.L.C. 16 (1980).

tion of property might arise. To erect the most solid foundation for the Executive Branch's practice in this regard, I would recommend that, in preparing contingency plans for periods of lapsed appropriations, each government department or agency provide for the Director of the Office of Management and Budget some written description, that could be transmitted to Congress, of what the head of the agency, assisted by its general counsel, considers to be the agency's emergency functions.

In suggesting the foregoing principles to guide the interpretation of § 665(b), I must add my view that, in emergency circumstances in which a government agency may employ personal service in excess of legal authority other than § 665(b), it may also, under the authority of § 665(b), it may also, under the authority of § 665(b), incur obligations in advance of appropriations for material to enable the employees involved to meet the emergency successfully. In order to effectuate the legislative intent that underlies a statute, it is ordinarily inferred that a statute "carries with it all means necessary and proper to carry out effectively the purposes of the law." *United States* v. *Louisiana,* 265 F. Supp. 703, 708 (E.D. La. 1966) (three-judge court), *aff'd,* 386 U.S. 270 (1967). Accordingly, when a statute confers authorities generally, those powers and duties necessary to effectuate the statute are implied. *See* 2A J. Sutherland, Statutes and Statutory Construction § 55.04 (Sands ed. 1973). Congress has contemplated expressly, in enacting § 655(b), that emergencies will exist that will justify incurring obligations for employee compensation in advance of appropriations; it must be assumed that, when such an emergency arises, Congress would intend those persons so employed to be able to accomplish their emergency functions with success. Congress, for example, having allowed the government to hire firefighters must surely have intended that water and firetrucks would be available to them.[14]

III.

The foregoing discussion articulates the principles according to which, in my judgment, the Executive can properly identify those functions that the government may continue upon lapses in appropriations. Should a situation again present itself as extreme as the emergency that arose on October 1, 1980, this analysis should assist in guiding planning by all departments and agencies of the government.

As the law is now written, the Nation must rely initially for the efficient operation of government on the timely and responsible functioning of the legislative process. The Constitution and the

[14] *Accord,* 53 Comp. Gen. 71 (1973), holding that, in light of a determination by the Administrator of General Services that such expenses were "necessarily incidental to the protection of property of the United States during an extreme emergency," *id.* at 74, the Comptroller General would not question General Services Administration (GSA) payments for food for GSA special police who were providing round-the-clock protection for a Bureau of Indian Affairs building that had been occupied without authority.

Antideficiency Act itself leave the Executive leeway to perform essential functions and make the government "workable." Any inconvenience that this system, in extreme circumstances, may bode is outweighed, in my estimation, by the salutary distribution of power that it embodies.

Respectfully,
BENJAMIN R. CIVILETTI

A Sitting President's Amenability to Indictment and Criminal Prosecution

The indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions

October 16, 2000

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

In 1973, the Department concluded that the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions. We have been asked to summarize and review the analysis provided in support of that conclusion, and to consider whether any subsequent developments in the law lead us today to reconsider and modify or disavow that determination.[1] We believe that the conclusion reached by the Department in 1973 still represents the best interpretation of the Constitution.

The Department's consideration of this issue in 1973 arose in two distinct legal contexts. First, the Office of Legal Counsel ("OLC") prepared a comprehensive memorandum in the fall of 1973 that analyzed whether all federal civil officers are immune from indictment or criminal prosecution while in office, and, if not, whether the President and Vice President in particular are immune from indictment or criminal prosecution while in office. *See* Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office* (Sept. 24, 1973) ("OLC Memo"). The OLC memorandum concluded that all federal civil officers except the President are subject to indictment and criminal prosecution while still in office; the President is uniquely immune from such process. Second, the Department addressed the question later that same year in connection with the grand jury investigation of then-Vice President Spiro Agnew. In response to a motion by the Vice President to enjoin grand jury proceedings against him, then-Solicitor General Robert Bork filed a brief arguing that, consistent with the Constitution, the Vice President could be subject to indictment and criminal prosecution. *See* Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity (filed Oct. 5, 1973), *In re Proceedings of the Grand Jury Impaneled December 5, 1972:*

[1] Since that time, the Department has touched on this and related questions in the course of resolving other questions, *see, e.g., The President—Interpretation of 18 U.S.C. §603 as Applicable to Activities in the White House*, 3 Op. O.L.C. 31, 32 (1979); Brief for the United States as Amicus Curiae in Support of Petitioner at 15 n.8, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95-1853), but it has not undertaken a comprehensive reexamination of the matter. We note that various lawyers and legal scholars have recently espoused a range of views of the matter. *See, e.g., Impeachment or Indictment: Is a Sitting President Subject to the Compulsory Criminal Process: Hearings Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 105th Cong. (1998).

Application of Spiro T. Agnew, Vice President of the United States (D. Md. 1973) (No. 73–965) ("SG Brief"). In so arguing, however, Solicitor General Bork was careful to explain that the President, unlike the Vice President, could not constitutionally be subject to such criminal process while in office.

In this memorandum, we conclude that the determinations made by the Department in 1973, both in the OLC memorandum and in the Solicitor General's brief, remain sound and that subsequent developments in the law validate both the analytical framework applied and the conclusions reached at that time. In Part I, we describe in some detail the Department's 1973 analysis and conclusions. In Part II, we examine more recent Supreme Court case law and conclude that it comports with the Department's 1973 conclusions.[2]

I.

A.

The 1973 OLC memorandum comprehensively reviewed various arguments both for and against the recognition of a sitting President's immunity from indictment and criminal prosecution. What follows is a synopsis of the memorandum's analysis leading to its conclusion that the indictment or criminal prosecution of a sitting President would be unconstitutional because it would impermissibly interfere with the President's ability to carry out his constitutionally assigned functions and thus would be inconsistent with the constitutional structure.

1.

The OLC memorandum began by considering whether the plain terms of the Impeachment Judgment Clause prohibit the institution of criminal proceedings against any officer subject to that Clause prior to that officer's conviction upon impeachment. OLC Memo at 2. The memorandum concluded that the plain terms of the Clause do not impose such a general bar to indictment or criminal trial prior to impeachment and therefore do not, by themselves, preclude the criminal prosecution of a sitting President. *Id.* at 7.[3]

[2] Implicit in the Department's constitutional analysis of this question in 1973 was the assumption that the President would oppose an attempt to subject him to indictment or prosecution. We proceed on the same assumption today and therefore do not inquire whether it would be constitutional to indict or try the President with his consent.

The Department's previous analysis also focused exclusively on federal rather than state prosecution of a sitting President. We proceed on this assumption as well, and thus we do not consider any additional constitutional concerns that may be implicated by state criminal prosecution of a sitting President. *See Clinton v Jones*, 520 U S 681, 691 (1997) (noting that a state criminal prosecution of a sitting President would raise "federalism and comity" concerns rather than separation of powers concerns)

[3] In a memorandum prepared earlier this year, we concluded that neither the Impeachment Judgment Clause nor any other provision of the Constitution precludes the prosecution of a former President who, while still in office, was impeached by the House of Representatives but acquitted by the Senate *See Whether a Former President May*

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The Impeachment Judgment Clause provides:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

U.S. Const. art. I, § 3, cl. 7. The textual argument that the criminal prosecution of a person subject to removal by impeachment may not precede conviction by the Senate arises from the reference to the "Party convicted" being liable for "Indictment, Trial, Judgment and Punishment." This textual argument draws support from Alexander Hamilton's discussion of this Clause in *The Federalist Nos.* 65, 69, and 77, in which he explained that an offender would still be liable to criminal prosecution in the ordinary course of the law after removal by way of impeachment. OLC Memo at 2.[4]

The OLC memorandum explained, however, that the use of the term "nevertheless" cast doubt on the argument that the Impeachment Judgment Clause constitutes a bar to the prosecution of a person subject to impeachment prior to the termination of impeachment proceedings. *Id.* at 3. "Nevertheless" indicates that the Framers intended the Clause to signify only that prior conviction in the Senate would not constitute a bar to subsequent prosecution, not that prosecution of a person subject to impeachment could occur only after conviction in the Senate. *Id.* "The purpose of this clause thus is to permit criminal prosecution in spite of the prior adjudication by the Senate, *i.e.*, to forestall a double jeopardy argument." *Id.*[5]

Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. 111 (2000).

[4] In *The Federalist No. 69*, Hamilton explained:

> The President of the United States would be liable to be impeached, tried, and upon conviction . . . removed from office, and would *afterwards* be liable to prosecution and punishment in the ordinary course of law. The person of the King of Great Britain is sacred and inviolable: there is no constitutional tribunal to which he is amenable, no punishment to which he can be subjected without involving the crisis of a national revolution.

The Federalist No. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). Similarly, in *The Federalist No. 65*, he stated:

> the punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender. *After* having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law.

Id. at 398–99 (emphasis added). Moreover, in *The Federalist No. 77*, he maintained that the President is "at all times liable to impeachment, trial, dismission from office . . . and to the forfeiture of life and estate by *subsequent* prosecution in the common course of law." *Id.* at 464 (emphasis added). In addition, Gouverneur Morris stated at the Convention that "[a] conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President after the trial of the impeachment." 2 *Records of the Federal Convention of 1787*, at 500 (Max Farrand ed., 1974).

[5] In our recent memorandum exploring in detail the meaning of the Impeachment Judgment Clause, we concluded that the relationship between this clause and double jeopardy principles is somewhat more complicated than the 1973 OLC Memo suggests. *See Whether a Former President May Be Indicted and Tried for the Same Offenses*

The OLC memorandum further explained that if the text of the Impeachment Judgment Clause barred the criminal prosecution of a sitting President, then the same text would necessarily bar the prosecution of all other "civil officers" during their tenure in office. The constitutional practice since the Founding, however, has been to prosecute and even imprison civil officers other than the President while they were still in office and prior to their impeachment. *See, e.g., id.* at 4–7 (cataloguing cases). In addition, the conclusion that the Impeachment Judgment Clause constituted a textual bar to the prosecution of a civil officer prior to the termination of impeachment proceedings "would create serious practical difficulties in the administration of the criminal law." *Id.* at 7. Under such an interpretation, a prosecution of a government official could not proceed until a court had resolved a variety of complicated threshold constitutional questions:

> These include, *first*, whether the suspect is or was an officer of the United States within the meaning of Article II, section 4 of the Constitution, and *second*, whether the offense is one for which he could be impeached. *Third*, there would arise troublesome corollary issues and questions in the field of conspiracies and with respect to the limitations of criminal proceedings.

Id. The memorandum concluded that "[a]n interpretation of the Constitution which injects such complications into criminal proceedings is not likely to be a correct one." *Id.* As a result, the Impeachment Judgment Clause could not itself be said to be the basis for a presidential immunity from indictment or criminal trial.

2.

The OLC memorandum next considered "whether an immunity of the President from criminal proceedings can be justified on other grounds, in particular the consideration that the President's subjection to the jurisdiction of the courts would be inconsistent with his position as head of the Executive branch." OLC Memo at 18. In examining this question, the memorandum first considered the contention that the express, limited immunity conferred upon members of Congress by the Arrest and Speech or Debate Clauses of Article I, Section 6 of the Constitution necessarily precludes the conclusion that the President enjoys a broader, implicit immunity from criminal process.[6] One might contend that the Constitution's grant

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for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 128–30. Nothing in our more recent analysis, however, calls into question the 1973 OLC Memo's conclusions.

[6] Article I, Section 6, Clause 1 provides

> The Senators and Representatives shall . . . in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going

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of a limited immunity to members of Congress reflects a determination that federal officials enjoy no immunity absent a specific textual grant.

The OLC memorandum determined that this contention was not "necessarily conclusive." OLC Memo at 18. "[I]t could be said with equal validity that Article I, sec. 6, clause 1 does not confer any immunity upon the members of Congress, but rather limits the complete immunity from judicial proceedings which they otherwise would enjoy as members of a branch co-equal with the judiciary." *Id.* Thus, in the absence of a specific textual provision withdrawing it, the President would enjoy absolute immunity. In addition, the textual silence regarding the existence of a presidential immunity from criminal proceedings may merely reflect the fact that it "may have been too well accepted to need constitutional mention (by analogy to the English Crown), and that the innovative provision was the specified process of impeachment extending even to the President." *Id.* at 19. Finally, the historical evidence bearing on whether or not an implicit presidential immunity from judicial process was thought to exist at the time of the Founding was ultimately "not conclusive." *Id.* at 20.

3.

The OLC memorandum next proceeded to consider whether an immunity from indictment or criminal prosecution was implicit in the doctrine of separation of powers as it then stood. OLC Memo at 20. After reviewing judicial precedents and an earlier OLC opinion,[7] *id.* at 21–24, the OLC memorandum concluded that "under our constitutional plan it cannot be said either that the courts have the same jurisdiction over the President as if he were an ordinary citizen or that the President is absolutely immune from the jurisdiction of the courts in regard to any kind of claim." *Id.* at 24. As a consequence, "[t]he proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and functions of the Presidency." *Id.*

The OLC memorandum separated into two parts the determination of the proper constitutional balance with regard to the indictment or criminal prosecution of a sitting President. First, the memorandum discussed whether any of the considerations that had lead to the rejection of the contention that impeachment must precede criminal proceedings for ordinary civil officers applied differently with respect to the President in light of his position as the sole head of an entire branch of government. *Id.*[8] Second, the memorandum considered "whether criminal pro-

to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place

[7] *See* Memorandum from Robert G Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re Presidential Amenability to Judicial Subpoenas* (June 25, 1973).

[8] We note that the statements quoted in footnote 4 above from *The Federalist Papers* and Gouverneur Morris, which provide that the President may be prosecuted *after* having been tried by the Senate, are consistent with the conclusion that the President may enjoy an immunity from criminal prosecution while in office that other civil officers do not The quoted statements are not dispositive of this question, however, as the OLC memorandum

ceedings and execution of potential sentences would improperly interfere with the President's constitutional duties and be inconsistent with his status." *Id.*

a.

The OLC memorandum's analysis of the first of these questions began with a consideration of whether the nature of the defendant's high office would render such a trial "too political for the judicial process." OLC Memo at 24. The memorandum concluded that the argument was, as a general matter, unpersuasive. Nothing about the criminal offenses for which a sitting President would be tried would appear to render the criminal proceedings "too political." The only kind of offenses that could lead to criminal proceedings against the President would be statutory offenses, and "their very inclusion in the Penal Code is an indication of a congressional determination that they can be adjudicated by a judge and jury." *Id.* In addition, there would not appear to be any "weighty reason to differentiate between the President and other officeholders" in regard to the "political" nature of such a proceeding "unless special separation of powers based interests can be articulated with clarity." *Id.* at 25.

The memorandum also considered but downplayed the potential concern that criminal proceedings against the President would be "too political" either because "the ordinary courts may not be able to cope with powerful men" or because no fair trial could be provided to the President. *Id.* Although the fear that courts would be unable to subject powerful officials to criminal process "arose in England where it presumably was valid in feudal time," "[i]n the conditions now prevailing in the United States, little weight is to be given to it as far as most officeholders are concerned." *Id.* Nor did the memorandum find great weight in the contention that the President, by virtue of his position, could not be assured a fair criminal proceeding. To be sure, the memorandum continued, it would be "extremely difficult" to assure a sitting President a fair trial, *id.*, noting that it "might be impossible to impanel a neutral jury." *Id.* However, "there is a serious 'fairness' problem whether the criminal trial precedes or follows impeachment." *Id.* at 26. And "the latter unfairness is contemplated and accepted in the impeachment clause itself, thus suggesting that the difficulty in impaneling a neutral jury should not be viewed, in itself, an absolute bar to indictment of a public figure." *Id.*

The OLC memorandum next considered whether, in light of the President's unique powers to supervise executive branch prosecutions and assert executive

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recognized. Some statements by subsequent commentators may be read to contemplate criminal prosecution of incumbent civil officers, including the President. *See, e.g.*, William Rawle, *A View of the Constitution of the United States of America* 215 (2d ed. 1829) ("But the ordinary tribunals, as we shall see, are not precluded, either before or after an impeachment, from taking cognizance of the public and official delinquency."). There is also James Wilson's statement in the Pennsylvania ratification debates that "far from being above the laws, he [the President] is amenable to them in his private character as a citizen, and in his public character by *impeachment*." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (Jonathan Elliot ed., 2d ed. 1836).

privilege, the constitutional balance generally should favor the conclusion that a sitting President may not be subjected to indictment or criminal prosecution. *Id.* at 26. According to this argument, the possession of these powers by the President renders the criminal prosecution of a sitting President inconsistent with the constitutional structure. It was suggested that such powers, which relate so directly to the President's status as a law enforcement officer, are simply incompatible with the notion that the President could be made a defendant in a criminal case. The memorandum did not reach a definitive conclusion on the weight to be accorded the President's capacity to exercise such powers in calculating the constitutional balance, although it did suggest that the President's possession of such powers pointed somewhat against the conclusion that the chief executive could be subject to indictment or criminal prosecution during his tenure in office.

In setting forth the competing considerations, the memorandum explained that, on the one hand, "it could be argued that a President's status as defendant in a criminal case would be repugnant to his office of Chief Executive, which includes the power to oversee prosecutions. In other words, just as a person cannot be judge in his own case, he cannot be prosecutor and defendant at the same time." *Id.* This contention "would lose some of its persuasiveness where, as in the *Watergate* case, the President delegates his prosecutorial functions to the Attorney General, who in turn delegates them [by regulation] to a Special Prosecutor." *Id.* At the same time, the status of the Watergate Special Prosecutor was somewhat uncertain, as "none of these delegations is, or legally can be, absolute or irrevocable." *Id.* The memorandum suggested, therefore, that even in the Watergate matter there remained the structural anomaly of the President serving as the chief executive and the defendant in a federal prosecution brought by the executive branch.[9]

The OLC memorandum also considered the degree to which a criminal prosecution of a sitting President is incompatible with the notion that the President possesses the power to assert executive privilege in criminal cases. The memorandum suggested that "the problem of Executive privilege may create the appearance of so serious a conflict of interest as to make it appear improper that the President should be a defendant in a criminal case." *Id.* "If the President claims the privilege he would be accused of suppressing evidence unfavorable to him. If he fails to do so the charge would be that by making available evidence favorable to him he is prejudicing the ability of future Presidents to claim privilege." *Id.* Ulti-

[9] This particular concern might also "lose some of its persuasiveness" with respect to a prosecution by an independent counsel appointed pursuant to the later-enacted Ethics in Government Act of 1978, 28 U.S.C §§49, 591 *et seq*., whose status is defined by statute rather than by regulation. In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court rejected the argument that the independent counsel's statutory protection from removal absent "good cause" or some condition substantially impairing the performance of his duties, *id.* at 663, violates the Appointments Clause, U.S. Const. art. II, §2, cl. 2, or separation of powers principles more generally, 487 U.S. at 685–96. But since the 1973 OLC memorandum did not place appreciable weight on this argument in determining a sitting President's amenability to criminal prosecution, and since we place no reliance on this argument at all in our reconsideration and reaffirmation of the 1973 memorandum's conclusion, *see infra* part IIB, we need not further explore *Morrison*'s relevance to this argument.

mately, however, the memorandum did not conclude that the identification of the possible incompatibility between the exercise of certain executive powers and the criminal prosecution of a sitting President sufficed to resolve the constitutional question whether a sitting President may be indicted or tried.

b.

The OLC memorandum then proceeded to the second part of its constitutional analysis, examining whether criminal proceedings against a sitting President should be barred by the doctrine of separation of powers because such proceedings would "unduly interfere in a direct or formal sense with the conduct of the Presidency." OLC Memo at 27. It was on this ground that the memorandum ultimately concluded that the indictment or criminal prosecution of a sitting President would be unconstitutional.

As an initial matter, the memorandum noted that in the *Burr* case, *see United States v. Burr*, 25 F. Cas. 187 (C.C. D. Va. 1807) (No. 14,694), President Jefferson claimed a privilege to be free from attending court in person. OLC Memo at 27. Moreover, "it is generally recognized that high government officials are excepted from the duty to attend court in person in order to testify," and "[t]his privilege would appear to be inconsistent with a criminal prosecution which necessarily requires the appearance of the defendant for pleas and trial, as a practical matter." *Id.* The memorandum noted, however, that the privilege against personal appearance was "only the general rule." *Id.* The memorandum then suggested that the existence of such a general privilege was not, by itself, determinative of the question whether a sitting President could be made a defendant in a criminal proceeding. "Because a defendant is already personally involved in a criminal case (if total immunity be laid aside), it may be questioned whether the normal privilege of high officials not to attend court in person applies to criminal proceedings in which the official is a defendant." *Id.*

Even though the OLC memorandum suggested that the existence of a general privilege against personal appearance was not determinative, the memorandum did conclude that the necessity of the defendant's appearance in a criminal trial was of great relevance in determining how the proper constitutional balance should be struck. By virtue of the necessity of the defendant's appearance, the institution of criminal proceedings against a sitting President "would interfere with the President's unique official duties, most of which cannot be performed by anyone else." *Id.* at 28. Moreover, "[d]uring the past century the duties of the Presidency . . . have become so onerous that a President may not be able fully to discharge the powers and duties of his office if he had to defend a criminal prosecution." *Id.* Finally, "under our constitutional plan as outlined in Article I, sec. 3, only the Congress by the formal process of impeachment, and not a court by any process should be accorded the power to interrupt the Presidency or oust an incumbent."

Id. The memorandum rejected the argument that such burdens should not be thought conclusive because even an impeachment proceeding that did not result in conviction might preclude a President from performing his constitutionally assigned duties in the course of defending against impeachment. In contrast to the risks that would attend a criminal proceeding against a sitting President, "this is a risk expressly contemplated by the Constitution, and is a necessary incident of the impeachment process." *Id.*

As a consequence of the personal attention that a defendant must, as a practical matter, give in defending against a criminal proceeding, the memorandum concluded that there were particular reasons rooted in separation of powers concerns that supported the recognition of an immunity for the President while in office. With respect to the physical disabilities alone imposed by criminal prosecution, "in view of the unique aspects of the Office of the President, criminal proceedings against a President in office should not go beyond a point where they could result in so serious a physical interference with the President's performance of his official duties that it would amount to an incapacitation." *Id.* at 29. To be sure, the concern that criminal proceedings would render a President physically incapable of performing constitutionally assigned functions would not be "quite as serious regarding minor offenses leading to a short trial and a fine." *Id.* But "in more serious matters, *i.e.*, those which could require the protracted personal involvement of the President in trial proceedings, the Presidency would be derailed if the President were tried prior to removal." *Id.*

The OLC memorandum also explained that the "non-physical yet practical interferences, in terms of capacity to govern" that would attend criminal proceedings against a sitting President must also be considered in the constitutional balance of competing institutional interests. *Id.* In this regard, the memorandum explained that "the President is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs." *Id.* at 30. In light of the conclusion that an adjudication of the President's criminal culpability would be uniquely destabilizing to an entire branch of government, the memorandum suggested that "special separation of powers based interests can be articulated with clarity" against permitting the ordinary criminal process to proceed. *Id.* at 25. By virtue of the impact that an adjudication of criminal culpability might have, a criminal proceeding against the President is, in some respects, necessarily political in a way that criminal proceedings against other civil officers would not be. In this respect, it would be "incongruous" for a "jury of twelve" to undertake the "unavoidably political" task of rendering judgment in a criminal proceeding against the President. *Id.* at 30. "Surely, the House and Senate, via impeachment, are more appropriate agencies for such a crucial task, made unavoidably political by the nature of the 'defendant.'" *Id.* The memorandum noted further that "[t]he genius of the jury trial" was to provide a forum for ordinary people to pass on

"matters generally within the experience or contemplation of ordinary, everyday life." *Id.* at 31. The memorandum therefore asked whether it would "be fair to such an agency to give it responsibility for an unavoidably political judgment in the esoteric realm of the Nation's top Executive." *Id.*

In accord with this conclusion about the propriety of leaving such matters to the impeachment process, the memorandum noted that "[u]nder our developed constitutional order, the presidential election is the only national election, and there is no effective substitute for it." *Id.* at 32. A criminal trial of a sitting President, however, would confer upon a jury of twelve the power, in effect, to overturn this national election. "The decision to terminate this mandate . . . is more fittingly handled by the Congress than by a jury, and such congressional power is founded in the Constitution." *Id.* In addition, the impeachment process is better suited to the task than is a criminal proceeding because appeals from a criminal trial could "drag out for months." *Id.* at 31. By contrast, "[t]he whole country is represented at the [impeachment] trial, there is no appeal from the verdict, and removal opens the way for placing the political system on a new and more healthy foundation." *Id.*

4.

The OLC memorandum concluded its analysis by addressing "[a] possibility not yet mentioned," which would be "to indict a sitting President but defer further proceedings until he is no longer in office." OLC Memo at 29. The memorandum stated that "[f]rom the standpoint of minimizing direct interruption of official duties — and setting aside the question of the power to govern — this procedure might be a course to be considered." *Id.* The memorandum suggested, however, that "an indictment hanging over the President while he remains in office would damage the institution of the Presidency virtually to the same extent as an actual conviction." *Id.* In addition, there would be damage to the executive branch "flowing from unrefuted charges." *Id.* Noting that "the modern Presidency, under whatever party, has had to assume a leadership role undreamed of in the eighteenth and early nineteenth centuries," the memorandum stated that "[t]he spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination." *Id.* at 30.

The memorandum acknowledged that, "it is arguable that . . . it would be possible to indict a President, but defer trial until he was out of office, without in the meantime unduly impeding the power to govern, and the symbolism on which so much of his real authority rest." *Id.* at 31. But the memorandum nevertheless concluded that

> [g]iven the realities of modern politics and mass media, and the delicacy of the political relationships which surround the Presidency

> both foreign and domestic, there would be a Russian roulette aspect to the course of indicting the President but postponing trial, hoping in the meantime that the power to govern could survive.

Id. In light of the effect that an indictment would have on the operations of the executive branch, "an impeachment proceeding is the only appropriate way to deal with a President while in office." *Id.* at 32.

In reaching this conclusion regarding indictment, the memorandum noted that there are "certain drawbacks," such as the possibility that the statute of limitations might run, thereby resulting in "a complete hiatus in criminal liability." *Id.* As the statute of limitations is ultimately within the control of Congress, however, the memorandum's analysis concluded as follows: "We doubt . . . that this gap in the law is sufficient to overcome the arguments against subjecting a President to indictment and criminal trial while in office." *Id.*

B.

On October 5, 1973, less than two weeks after OLC issued its memorandum, Solicitor General Robert Bork filed a brief in the United States District Court for the District of Maryland that addressed the question whether it would be constitutional to indict or criminally try a sitting President. Then-Vice President Agnew had moved to enjoin, principally on constitutional grounds, grand jury proceeding against him. *See* SG Brief at 3. In response to this motion, Solicitor General Bork provided the court with a brief that set forth "considerations based upon the Constitution's text, history, and rationale which indicate that all civil officers of the United States other than the President are amenable to the federal criminal process either before or after the conclusion of impeachment proceedings." *Id.*[10]

1.

As had the OLC memorandum, the Solicitor General's brief began by noting that "[t]he Constitution provides no explicit immunity from criminal sanctions for any civil officer." SG Brief at 4. Indeed, the brief noted that the only textual grant of immunity for federal officials appears in the Arrest and Speech or Debate Clauses of Article I, Section 6. In referring to these clauses, the brief rejected the suggestion that the immunities set forth there could be understood to be a partial withdrawal from members of Congress of a broader implicit immunity that all civil officers, including the President, generally enjoyed; indeed, "[t]he intent

[10] Unlike the OLC memorandum, the Solicitor General's brief did not specifically distinguish between indictment and other phases of the "criminal process." While explaining that "the President is immune from indictment and trial prior to removal from office," SG Brief at 20, the brief did not specifically opine as to whether the President could be indicted as long as further process was postponed until he left office.

of the Framers was to the contrary." SG Brief at 5.[11] In light of the textual omission of any express grant of immunity from criminal process for civil officers generally, "it would require a compelling constitutional argument to erect such an immunity for a Vice President." *Id.*

In considering whether such a compelling argument could be advanced, the brief distinguished the case of the President from that of the Vice President. Although the Vice President had suggested that the Impeachment Judgment Clause itself demonstrated that "impeachment must precede indictment" for all civil officers, the records of the debates of the constitutional convention did not support that conclusion. *Id.* The Solicitor General argued, in accord with the OLC memorandum, that the "principal operative effect" of the Impeachment Judgment Clause "is solely the preclusion of pleas of double jeopardy in criminal prosecutions following convictions upon impeachments." *Id.* at 7. In any event, the discussion of the Impeachment Judgment Clause in the convention focused almost exclusively on the Office of the President, and "the Framers did not debate the question whether impeachment generally must precede indictment." *Id.* at 6.

To the extent that the convention did debate the timing of impeachment relative to indictment, the brief explained, the convention records "show that the Framers contemplated that this sequence should be mandatory only as to the President." *Id.* Moreover, the remarks contained in those records "strongly suggest an understanding that the President, as Chief Executive, would not be subject to the ordinary criminal process." *Id.* The Framers' "assumption that the President would not be subject to criminal process" did not, however, rest on a general principle applicable to all civil officers. *Id.* Instead, the assumption was "based upon the crucial nature of his executive powers." *Id.* As the brief stated:

> The President's immunity rests not only upon the matters just discussed but also upon his unique constitutional position and powers . . . . There are substantial reasons, embedded not only in the constitutional framework but in the exigencies of government, for distinguishing in this regard between the President and all lesser officers including the Vice President.

Id. at 7.

2.

In explaining why, as an initial matter, the Vice President could be indicted and tried while still in office, the brief argued that indictment would not effect the de facto removal of that officer. SG Brief at 11. "[I]t is clear from history

[11] In this respect, the Solicitor General's brief more forcefully rejected this suggestion than did the OLC memorandum, which reasoned that the clauses gave rise "with equal validity" to competing inferences on this point *See* OLC Memo at 18

that a criminal indictment, or even trial and conviction, does not, standing alone, effect the removal of an impeachable federal officer." *Id.* at 11–12. The brief noted the past constitutional practice of indicting and even convicting federal judges during their tenure, as well as the fact that Vice President Aaron Burr "was subject to simultaneous indictment in two states while in office, yet he continued to exercise his constitutional responsibilities until the expiration of his term." *Id.* at 12. "Apparently, neither Burr nor his contemporaries considered him constitutionally immune from indictment. Although counsel for the Vice President asserted that Burr's indictments were 'allowed to die,' that was merely because 'Burr thought it best not to visit either New York or New Jersey.'" *Id.* at 12 n* (citations omitted). The brief therefore determined that "[c]ertainly it is clear that criminal indictment, trial, and even conviction of a Vice President would not, *ipso facto*, cause his removal; subjection of a Vice President to the criminal process therefore does not violate the exclusivity of the impeachment power as the means of his removal from office." *Id.* at 13.

The brief did conclude, however, that the "structure of the Constitution" precluded the indictment of the President. *Id.* at 15. In framing the inquiry into whether considerations of constitutional structure supported the recognition of an immunity from criminal process for certain civil officers, the brief explained that the "Constitution is an intensely practical document and judicial derivation of powers and immunities is necessarily based upon consideration of the document's structure and of the practical results of alternative interpretations." *Id.* As a consequence,

> [t]he real question underlying the issue of whether indictment of any particular civil officer can precede conviction upon impeachment—and it is constitutional in every sense because it goes to the heart of the operation of government—is whether a governmental function would be seriously impaired if a particular civil officer were liable to indictment before being tried on impeachment.

Id. at 15–16. Given that the constitutional basis for the recognition of a civil officer's immunity from criminal process turned on the resolution of this question, the answer "must necessarily vary with the nature and functions of the office involved." *Id.* at 16.

The brief then proceeded to consider the consequences that criminal prosecutions would have on the performance of the constitutional functions that are the responsibility of various civil officers. As a matter of constitutional structure, Article III judges should enjoy no constitutional immunity from the criminal process because while a "judge may be hampered in the performance of his duty when he is on trial for a felony . . . his personal incapacity in no way threatens the ability of the judicial branch to continue to function effectively." *Id.* at 16.

Similarly, no such immunity should be recognized for members of Congress. The limited immunity in the Arrest and Speech or Debate Clauses reflected

> a recognition that, although the functions of the legislature are not lightly to be interfered with, the public interest in the expeditious and even-handed administration of the criminal law outweighs the cost imposed by the incapacity of a single legislator. Such incapacity does not seriously impair the functioning of Congress.

Id. at 16–17.

The brief argued that the same structural considerations that counseled against the recognition of an immunity from criminal process for individual judges or legislators also counseled against the recognition of such an immunity for the Vice President:

> Although 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, as has been discussed above, at least one Vice President successfully fulfilled the responsibilities of his office while under indictment in two states.

Id. at 18 (citation omitted). The brief noted that the Vice President had only three constitutional functions: to replace the President in certain extraordinary circumstances; to make, in certain extraordinary circumstances, a written declaration of the President's inability to discharge the powers and duties of his office; and to preside over the Senate and cast the deciding vote in the case of a tie in that body. *Id.* at 19. None of these "constitutional functions is substantially impaired by [the Vice President's] liability to the criminal process." *Id.*

3.

The Solicitor General's brief explained that recognition of presidential immunity from criminal process, in contrast to the vice presidential immunity, was compelled by a consideration of the constitutional structure. After noting that "[a]lmost all legal commentators agree . . . that an incumbent President must be removed from office through conviction upon an impeachment before being subject to the criminal process," SG Brief at 17, the brief repeated its determination that the Framers assumed "that the nation's Chief Executive, responsible as no other single officer is for the affairs of the United States, would not be taken from duties that only he can perform unless and until it is determined that he

is to be shorn of those duties by the Senate." *Id.* A proper understanding of the constitutional structure reflects this shared assumption; in this regard it is "noteworthy that the President is the only officer of government for whose temporary disability the Constitution provides procedure to qualify a replacement." *Id.* at 18. This provision constituted a textual recognition "that the President is the only officer of government for whose temporary disability while in office incapacitates an entire branch of government." *Id.*

Finally, the brief noted that the conclusion that the Framers assumed that the President would enjoy an immunity from criminal process was supported by other considerations of constitutional structure beyond the serious interference with the capacity of the executive branch to perform its constitutional functions. The "Framers could not have contemplated prosecution of an incumbent President because they vested in him complete power over the execution of the laws, which includes, of course, the power to control prosecutions." *Id.* at 20.

C.

The foregoing review demonstrates that, in 1973, the Department applied a consistent approach in analyzing the constitutional question whether a sitting President may be subject to indictment and criminal prosecution. Both the OLC memorandum and the Solicitor General's brief recognized that the President is not above the law, and that he is ultimately accountable for his misconduct that occurs before, during, and after his service to the country. Each also recognized, however, that the President occupies a unique position within our constitutional order.

The Department concluded that neither the text nor the history of the Constitution ultimately provided dispositive guidance in determining whether a President is amenable to indictment or criminal prosecution while in office. It therefore based its analysis on more general considerations of constitutional structure. Because of the unique duties and demands of the Presidency, the Department concluded, a President cannot be called upon to answer the demands of another branch of the government in the same manner as can all other individuals. The OLC memorandum in particular concluded that the ordinary workings of the criminal process would impose burdens upon a sitting President that would directly and substantially impede the executive branch from performing its constitutionally assigned functions, and the accusation or adjudication of the criminal culpability of the nation's chief executive by either a grand jury returning an indictment or a petit jury returning a verdict would have a dramatically destabilizing effect upon the ability of a coordinate branch of government to function. The Department therefore concluded in both the OLC memorandum and the Solicitor General's brief that, while civil officers generally may be indicted and criminally prosecuted during their tenure in office, the constitutional structure permits a sitting President

to be subject to criminal process only after he leaves office or is removed therefrom through the impeachment process.

II.

Since the Department set forth its constitutional analysis in 1973, the Supreme Court has decided three cases that are relevant to whether a sitting President may be subject to indictment or criminal prosecution.[12] *United States v. Nixon*, 418 U.S. 683 (1974), addressed whether the President may assert a claim of executive privilege in response to a subpoena in a criminal case that seeks records of communications between the President and his advisors. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), and *Clinton v. Jones*, 520 U.S. 681 (1997), both addressed the extent to which the President enjoys a constitutional immunity from defending against certain types of civil litigation, with *Fitzgerald* focusing on official misconduct and *Jones* focusing primarily on misconduct "unrelated to any of his official duties as President of the United States and, indeed, occurr[ing] before he was elected to that office." *Id.* at 686.[13]

None of these cases directly addresses the questions whether a sitting President may be indicted, prosecuted, or imprisoned.[14] We would therefore hesitate before

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[12] We do not consider either *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), or *Morrison v. Olson*, 487 U.S. 654 (1988), to be directly relevant to this question, and thus we do not discuss either of them extensively. *Nixon v. Administrator of General Services* involved a suit brought by former President Nixon to enjoin enforcement of a federal statute taking custody of and regulating access to his Presidential papers and various tape recordings, in part on the ground that the statute violated the separation of powers. While the case did analyze the separation of powers claim under a balancing test of the sort we embrace here, *see infra* text accompanying note 17, the holding and reasoning do not shed appreciable light on the question before us.

Morrison v. Olson considered and rejected various separation of powers challenges to the independent counsel provisions of the Ethics in Government Act of 1978, which authorized a court-appointed independent counsel to investigate and prosecute the President and certain other high-ranking executive branch officials for violations of federal criminal laws. *Morrison* focused on whether a particular *type* of prosecutor could pursue criminal investigations and prosecutions of executive branch officials, in a case involving the criminal investigation of an inferior federal officer. The Court accordingly had no occasion to and did not consider whether the Act could constitutionally be invoked to support an independent counsel's indictment of a sitting President.

[13] The Court noted that Jones's state law claim for defamation based on statements by "various persons authorized to speak for the President," 520 U.S. at 685, "arguably may involve conduct within the outer perimeter of the President's official responsibilities." *Id.* at 686. For purposes of this memorandum, we use the phrase "unofficial conduct," as did the Court, *see id.* at 693, to refer to conduct unrelated to the President's official duties. *Compare Nixon v. Fitzgerald*, 457 U.S. at 756 (recognizing "absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility").

[14] *See United States v. Nixon*, 418 U.S. at 687 n.2 (expressly reserving the question whether the President can constitutionally be named an unindicted co-conspirator). *See also Jones v. Clinton*, 36 F. Supp. 2d 1118, 1134 n.22 (E.D. Ark. 1999) ("[T]he question of whether a President can be held in criminal contempt of court and subjected to criminal penalties raises constitutional issues not addressed by the Supreme Court in the *Jones* case.") As a matter of constitutional practice, it remains the case today that no President has ever so much as testified, or been ordered to testify, in open court, let alone been subject to criminal proceedings as a defendant. *Clinton v. Jones*, 520 U.S. at 692 n.14.

In the reply brief for the United States in *United States v. Nixon*, in response to President Nixon's argument that a sitting President was constitutionally immune from indictment and therefore immune from being named an unindicted co-conspirator by a grand jury, Watergate Special Prosecutor Leon Jaworski argued that it was not settled as a matter of constitutional law whether a sitting President could be subject to indictment. *See* Reply Brief for the United States, *United States v. Nixon*, 418 U.S. 683 (1974) (No. 73-1766). He therefore argued that the Court

Continued

concluding that judicial statements made in the context of these distinct constitutional disputes would suffice to undermine the Department's previous resolution of the precise constitutional question addressed here. In any event, however, we conclude that these precedents are largely consistent with the Department's 1973 determinations that (1) the proper doctrinal analysis requires a balancing between the responsibilities of the President as the sole head of the executive branch against the important governmental purposes supporting the indictment and criminal prosecution of a sitting President; and (2) the proper balance supports recognition of a temporary immunity from such criminal process while the President remains in office. Indeed, *United States v. Nixon* and *Nixon v. Fitzgerald* recognized and embraced the same type of constitutional balancing test anticipated in this Office's 1973 memorandum. *Clinton v. Jones*, which held that the President is not immune from at least certain judicial proceedings while in office, even if those proceedings may prove somewhat burdensome, does not change our conclusion in 1973 and again today that a sitting President cannot constitutionally be indicted or tried.

A.

1.

In *United States v. Nixon*, the Court considered a motion by President Nixon to quash a third-party subpoena duces tecum directing the President to produce certain tape recordings and documents concerning his conversations with aides and advisers. 418 U.S. at 686. The Court concluded that the subpoena, which had been issued upon motion by the Watergate Special Prosecutor in connection

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should not rely on the assumption that a sitting President is immune from indictment in resolving the distinct question whether the President could be named an unindicted co-conspirator. In so arguing, the Special Prosecutor rejected the President's contention that either the historical evidence of the intent of the Framers or the plain terms of the Impeachment Judgment Clause foreclosed the indictment of a sitting President as a constitutional matter. *See id.* at 24 ("nothing in the text of the Constitution or in its history . . . imposes any bar to indictment of an incumbent President"), *id.* at 29 ("[T]he simple fact is that the Framers never confronted the issue at all.") The Special Prosecutor then argued, as the Department itself had concluded, that "[p]rimary support for such a prohibition must be found, if at all, in considerations of constitutional and public policy including competing factors such as the nature and role of the Presidency in our constitutional system, the importance of the administration of criminal justice, and the principle that under our system no person, no matter what his station, is above the law." *Id.* at 24–25. The Special Prosecutor explained that the contention that the President should be immune from indictment because the functioning of the executive branch depends upon a President unburdened by defending against criminal charges "is a weighty argument and it is entitled to great respect." *Id.* at 31. He noted, however, that "our constitutional system has shown itself to be remarkably resilient" and that "there are very serious implications to the President's position that he has absolute immunity from criminal indictment." *Id.* at 32. In particular, the Special Prosecutor argued that to the extent some criminal offenses are not impeachable, the recognition of an absolute immunity from indictment would mean that "the Constitution has left a *lacuna* of potentially serious dimensions." *Id.* at 34. The Special Prosecutor ultimately concluded that "[w]hether these factors compel a conclusion that as a matter of constitutional interpretation a sitting President cannot be indicted for violations of federal criminal laws is an issue about which, at best, there is presently considerable doubt." *Id.* at 25. He explained further that the resolution of this question was not necessary to the decision in *Nixon*, because the Court confronted only the question whether the President could be named an unindicted co-conspirator—an event that "cannot be regarded as equally burdensome." *Id.* at 20.

with the criminal prosecution of persons other than the President, satisfied the standards of Rule 17(c) of Federal Rules of Criminal Procedure.[15] The Court therefore proceeded to consider the claim "that the subpoena should be quashed because it demands 'confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce.'" *Id.* at 703 (citation omitted).

In assessing the President's constitutional claim of privilege, the Court first considered the relevant evidence of the Framers' intent and found that it supported the President's assertion of a constitutional interest in confidentiality. *Id.* at 705 n.15. The Court also rejected the suggestion that the textual omission of a presidential privilege akin to the congressional privilege set forth in the Arrest and Speech or Debate Clauses was "dispositive" of the President's claim. *Id.* at 705 n.16. Considering the privilege claim in light of the constitutional structure as a whole, the Court concluded that,

> [w]hatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

Id. at 705–06 (footnote omitted). Such a privilege must be recognized, the Court said, in light of "the importance of . . . confidentiality of Presidential communications in performance of the President's responsibilities." *Id.* at 711. The interest in the confidentiality of Presidential communications was "weighty indeed and entitled to great respect." *Id.* at 712.

The Court next considered the extent to which that interest would be impaired by presidential compliance with a subpoena. The Court concluded that it was quite unlikely that the failure to recognize an absolute privilege for confidential presidential communications against criminal trial subpoenas would, in practical consequence, undermine the constitutional interest in the confidentiality of such communications. "[W]e cannot conclude that advisers will be moved to temper

[15] In response to an earlier subpoena, President Nixon had asserted that, as a constitutional matter, he was absolutely immune from judicial process while in office. The United States Court of Appeals for the District of Columbia Circuit rejected that contention. *See Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973). The D.C. Circuit explained that the President's constitutional position could not be maintained in light of *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694), and it rejected the contention that the Supreme Court's decision in *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), was to the contrary. 487 F.2d at 708–12. We note that the Department's 1973 analysis did not depend upon a broad contention that the President is immune from all judicial process while in office. Indeed, the OLC memorandum specifically cast doubt upon such a contention and explained that even Attorney General Stanbery had not made such a broad argument in *Mississippi v. Johnson*. *See* OLC Memo at 23 ("Attorney General Stanbery's reasoning is presumably limited to the power of the courts to review official action of the President.")

the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." *Id.* Finally, the Court balanced against the President's interest in maintaining the confidentiality of his communications "[t]he impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *Id.* at 707. The Court predicated its conclusion on the determination that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *Id.* at 709.

The assessment of these competing interests led the Court to conclude that "the legitimate needs of the judicial process may outweigh Presidential privilege," *id.* at 707, and it therefore determined that it was "necessary to resolve those competing interests in a manner that preserves the essential functions of each branch." *Id.* Here, the Court weighed the President's constitutional interest in confidentiality, *see id.* at 707–08, against the nation's "historic commitment to the rule of law," *id.* at 708, and the requirement of "the fair administration of criminal justice." *Id.* at 713. The Court ultimately concluded that the President's generalized interest in confidentiality did not suffice to justify a privilege from all criminal subpoenas, although it noted that a different analysis might apply to a privilege based on national security interests. *Id.* at 706.

2.

In *Nixon v. Fitzgerald*, the Supreme Court considered a claim by former President Nixon that he enjoyed an absolute immunity from a former government employee's suit for damages for President Nixon's allegedly unlawful official conduct while in office. The Court endorsed a rule of absolute immunity, concluding that such immunity is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." 457 U.S. at 749.

The Court reviewed various statements by the Framers and early commentators, finding them consistent with the conclusion that the Constitution was adopted on the assumption that the President would enjoy an immunity from damages liability for his official actions. *Id.* at 749, 751 n.31. The Court once again rejected the contention that the textual grant of a privilege to members of Congress in Article I. Section 6 precluded the recognition of an implicit privilege on behalf of the President. *See id.* at 750 n.31.

But as in *United States v. Nixon*, the Court found that "the most compelling arguments arise from the Constitution's separation of powers and the Judiciary's historic understanding of that doctrine," *Id.* at 752 n.31. It emphasized that "[t]he

President occupies a unique position in the constitutional scheme . . . as the chief constitutional officer of the Executive Branch." *Id.* at 749–50. Although other government officials enjoy only qualified immunity from civil liability for their official actions, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. Such lawsuits would be likely to occur in considerable numbers since the "President must concern himself with matters likely to 'arouse the most intense feelings.'" *Id.* at 752. Yet, the Court noted, "it is in precisely such cases that there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially' with the duties of his office." *Id.* (citations omitted). The Court emphasized that the "visibility" of the President's office would make him "an easily identifiable target for suits for civil damages," and that "[c]ognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.* at 753.

The Court next examined whether the constitutional interest in presidential immunity from civil damages arising from the performance of official duties was outweighed by the governmental interest in providing a forum for the resolution of damages actions generally, and actions challenging the legality of official presidential conduct in particular. The Court concluded that it was appropriate to consider the "President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Id.* at 753. As the Court explained,

> [i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States. 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.

Id. at 753–54 (citations omitted). In performing this balancing, the Court noted that recognition of a presidential immunity from such suits "will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive," in light of other mechanisms creating "incentives to avoid misconduct" (including impeachment). *Id.* at 757. The Court concluded that the constitutional interest in ensuring the President's ability to perform his constitutional functions outweighed the competing interest in permitting civil actions for unlawful official conduct to proceed.

3.

In *Clinton v. Jones*, the Court declined to extend the immunity recognized in *Fitzgerald* to civil suits challenging the legality of a President's unofficial conduct. In that case, the plaintiff sought to recover compensatory and punitive damages for alleged misconduct by President Clinton occurring before he took federal office. The district court denied the President's motion to dismiss based on a constitutional claim of temporary immunity and held that discovery should go forward, but granted a stay of the trial until after the President left office. The court of appeals vacated the order staying the trial, while affirming the denial of the immunity-based motion to dismiss. The Supreme Court affirmed, permitting the civil proceedings to go forward against the President while he still held office.

In considering the President's claim of a temporary immunity from suit, the Court first distinguished *Nixon v. Fitzgerald*, maintaining that "[t]he principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct." *Clinton v. Jones*, 520 U.S. at 692–93. The point of immunity for official conduct, the Court explained, is to "enabl[e] such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability." *Id.* at 693. But "[t]his reasoning provides no support for an immunity for *unofficial* conduct." *Id.* at 694. Acknowledging *Fitzgerald*'s additional concern that " '[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government,' " the Court treated this prior statement as dictum because "[i]n context . . . it is clear that our dominant concern" had been the chilling effect that liability for official conduct would impose on the President's performance of his official duties. *Id.* at 694 n.19 (quoting *Nixon v. Fitzgerald*, 457 U.S. at 751).

After determining that the historical evidence of the Framers' understanding of presidential immunity was either ambiguous or conflicting and thus could not by itself support the extension of presidential immunity to unofficial conduct, *see id.* at 695–97, the Court considered the President's argument that the "text and structure" of the Constitution supported his claim to a temporary immunity. The Court accepted his contention that "the doctrine of separation of powers places limits on the authority of the Federal Judiciary to interfere with the Executive Branch," *id.* at 697–98, and conceded that the powers and obligations conferred upon a single President suggest that he occupies a " 'unique position in the constitutional scheme.' " *Id.* at 698 (quoting *Nixon v. Fitzgerald*, 457 U.S. at 749). But "[i]t does not follow . . . that separation-of-powers principles would be violated by allowing this action to proceed." *Id.* at 699.

Rather than claiming that allowing the civil suit would either aggrandize judicial power or narrow any constitutionally defined executive powers, the President

argued that, as an inevitable result of the litigation, "burdens will be placed on the President that will hamper the performance of his official duties," *id.* at 701, both in the *Jones* case and others that might follow. The Court first rejected the factual premise of the President's claim, asserting that the President's "predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case." *Id.* at 702. "As for the case at hand," the Court continued, "if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's time." *Id.* The Court emphasized at the outset that it was not "confront[ing] the question whether a court may compel the attendance of the President at any specific time or place," *id.* at 691, and it "assume[d] that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person." *Id.* at 691–92.

Moreover, the Court explained, "even quite burdensome interactions" between the judicial and executive branches do not "necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Id.*; *see also id.* at 703 ("that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution"). Noting that courts frequently adjudicate civil suits challenging the legality of official presidential actions, the Court also observed that courts occasionally have ordered Presidents to provide testimony and documents or other materials. *Id.* at 703–05 (citing *United States v. Nixon* as an example). By comparison, the Court asserted, "[t]he burden on the President's time and energy that is a mere byproduct of [the power to determine the legality of his unofficial conduct through civil litigation] surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions." *Id.* at 705.

Finally, the Court agreed with the court of appeals that the district court abused its discretion by invoking its equitable powers to defer any trial until after the President left office, even while allowing discovery to continue apace. The Court observed that such a "lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial," *id.* at 707, in particular the concern that delay "would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party." *Id.* at 707–08. On the other hand, continued the Court, assuming careful trial management, "there is no reason to assume that the district courts will be either unable to accommodate the President's [scheduling] needs or unfaithful to the tradition—especially in matters involving national security—of giving 'the utmost deference to Presidential responsibilities.'" *Id.* at 709 (quoting *United States v. Nixon*, 418 U.S. at 710–11). On this

basis, the Court determined that a stay of any trial pending the President's leaving office was not supported by equitable principles.[16]

B.

We believe that these precedents, *United States v. Nixon*, *Nixon v. Fitzgerald*, and *Clinton v. Jones*, are consistent with the Department's analysis and conclusion in 1973. The cases embrace the methodology, applied in the OLC memorandum, of constitutional balancing. That is, they balance the constitutional interests underlying a claim of presidential immunity against the governmental interests in rejecting that immunity. And, notwithstanding *Clinton*'s conclusion that *civil* litigation regarding the President's unofficial conduct would not unduly interfere with his ability to perform his constitutionally assigned functions, we believe that *Clinton* and the other cases do not undermine our earlier conclusion that the burdens of *criminal* litigation would be so intrusive as to violate the separation of powers.

1.

The balancing analysis relied on in the 1973 OLC memorandum has since been adopted as the appropriate mode of analysis by the Court. In 1996, this Office summarized the principles of analysis for resolving separation of powers issues found in the Court's recent cases. *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 133–35 (1996). As noted there, " 'the proper inquiry focuses on the extent to which [a challenged act] pre-

[16] One final recent precedent merits brief mention, the federal district court's decision to hold President Clinton in civil contempt for statements made in the course of a deposition taken in the *Jones* case and to order him to pay expenses (including attorneys' fees) to the plaintiff and costs to the court. *See Jones v. Clinton*, 36 F Supp 2d 1118 (E.D. Ark 1999) This decision was not appealed, and for purposes of our analysis here we assume arguendo that it is correct But a court order citing a sitting President for civil contempt does not support the proposition that a sitting President can be subject even to criminal contempt sanctions, let alone indictment and criminal prosecution. Civil contempt differs from criminal contempt because the former is designed to ensure compliance with court orders or to remedy harms inflicted upon another litigant, while criminal contempt is intended to punish the commission of a public wrong *See United Mine Workers v Bagwell*, 512 U.S 821, 826–30 (1994) A civil contempt proceeding is thus not likely to be either as consuming of the defendant's time or as detrimental to the defendant's public standing as a criminal contempt proceeding; that is particularly true when the civil contempt sanction takes the form of an award of costs to the court or other litigant. Significantly, the district court that imposed the contempt citation emphasized the narrow scope of its decision. *See Jones*, 36 F Supp. 2d at 1125 (explaining that "the Court recognizes that significant constitutional issues would arise were this Court to impose sanctions against the President that impaired his decision-making or otherwise impaired him in the performance of his official duties," and emphasizing that "[n]o such sanction will be imposed") The court further noted that, while "the power [upheld by the Supreme Court in *Clinton v. Jones*] to determine the legality of the President's unofficial conduct includes with it the power to issue civil contempt citations and impose sanctions for his unofficial conduct which abuses the judicial process," *id*, the Supreme Court's decision did not imply the existence of any authority to impose criminal sanctions on the President, *id.* at 1134 n.22 ("the question of whether a President can be held in criminal contempt of court and subjected to criminal penalties raises constitutional issues not addressed by the Supreme Court in the *Jones* case") For these reasons, this district court decision does not affect our analysis of the soundness of the Department's 1973 conclusion that it would be unconstitutional to indict or prosecute a President while he remains in office

vents the Executive Branch from accomplishing its constitutionally assigned functions.' " *Id.* at 133 (quoting *Administrator of General Services*, 433 U.S. at 443). The inquiry is complex, because even where the acts of another branch would interfere with the executive's "accomplishing its functions," this "would not lead inexorably to" invalidation; rather, the Court "would proceed to 'determine whether that impact is justified by an overriding need to promote' " legitimate governmental objectives. *Id.* (quoting *Administrator of General Services*, 433 U.S. at 443).

These inquiries formed the basis for the Court's analysis in *United States v. Nixon*, where the Court employed a balancing test to preserve the opposing interests of the executive and judicial branches with respect to the President's claim of privilege over confidential communications. The Court's resort to a balancing test was quite explicit. *See e.g.*, 418 U.S. at 711–12 ("In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in the performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice."). In *Nixon v. Fitzgerald*, the Court's recognition of an absolute presidential immunity from civil suits for damages concerning official conduct also reflected a balance of competing interests. As the Court explained, "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States. 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." 457 U.S. at 753–54. And in *Clinton v. Jones*, the Court again acknowledged that " '[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.' " 520 U.S. at 701 (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996)).[17]

We now explain why, in light of the post-1973 cases, we agree with the 1973 conclusions that indicting and prosecuting a sitting President would "prevent the executive from accomplishing its constitutional functions" and that this impact cannot "be justified by an overriding need" to promote countervailing and legitimate government objectives.

[17] Although the Court in *Clinton v Jones* did not explicitly use the language of "balancing" to weigh the President's interests against those of the civil litigant, the Court did assess both what it saw as the rather minor disruption to the President's office from defending against such civil actions as well as the interests in the private litigant in avoiding delay in adjudication *See id.* at 707–08 In any event, the Court may not have explicitly invoked the second part of the analysis (weighing the intrusions on the executive branch against the legitimate governmental interests opposed to immunity), because it found the burdens of civil litigation insufficiently weighty to warrant an extended inquiry. *See Administrator of General Services*, 433 U.S at 443 (emphasis added) (explaining that when there is a potential for disruption of presidential authority, "the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions *Only where the potential for disruption is present* must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."), *cited with approval in Clinton v Jones*, 520 U.S. at 701

2.

Three types of burdens merit consideration: (a) the actual imposition of a criminal sentence of incarceration, which would make it physically impossible for the President to carry out his duties; (b) the public stigma and opprobrium occasioned by the initiation of criminal proceedings, which could compromise the President's ability to fulfill his constitutionally contemplated leadership role with respect to foreign and domestic affairs; and (c) the mental and physical burdens of assisting in the preparation of a defense for the various stages of the criminal proceedings, which might severely hamper the President's performance of his official duties. In assessing the significance of these burdens, two features of our constitutional system must be kept in mind.

First, the Constitution specifies a mechanism for accusing a sitting President of wrongdoing and removing him from office. *See* U.S. Const. art. II, § 4 (providing for impeachment by the House, and removal from office upon conviction in the Senate, of sitting Presidents found guilty of "Treason, Bribery or other high Crimes and Misdemeanors"). While the impeachment process might also, of course, hinder the President's performance of his duties, the process may be initiated and maintained only by politically accountable legislative officials. Supplementing this constitutionally prescribed process by permitting the indictment and criminal prosecution of a sitting president would place into the hands of a single prosecutor and grand jury the practical power to interfere with the ability of a popularly elected President to carry out his constitutional functions.

Second, "[t]he President occupies a unique position in the constitutional scheme." *Fitzgerald*, 457 U.S. at 749. As the court explained, "Article II, § 1 of the Constitution provides that '[t]he executive Power shall be vested in a President of the United States . . . .' This grant of authority establishes the President as the chief constitutional officer of the Executive branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Id.* at 749–50. In addition to the grant of executive power, other provisions of Article II make clear the broad scope and important nature of the powers entrusted to the President. The President is charged to "take Care that the Laws be faithfully executed." *See* U.S. Const. art. II, § 3. He and the Vice President are the only officials elected by the entire nation. *See id.* art. II, § 1. He is the sole official for whose temporary disability the Constitution expressly provides procedures to remedy. *See id.* art. II, § 1, cl. 6; *id.* amend. XXV. He is the Commander in Chief of the Army and the Navy. *See id.* art. II, § 2, cl. 2. He has the power to grant reprieves and pardons for offenses against the United States. *See id.* He has the power to negotiate treaties and to receive Ambassadors and other public ministers. *See id.* art. II, § 2, cl. 2. He is the sole representative to foreign nations. He appoints all of the "Judges of the supreme Court" and the principal officers of the government. *See id.* art. II, § 2, cl. 2. He is the only constitutional officer

empowered to require opinions from the heads of departments, *see id.* art. II, § 2, cl. 1, and to recommend legislation to the Congress. *See id.* art. II, § 3. And he exercises a constitutional role in the enactment of legislation through the presentation requirement and veto power. *See id.* art. I, § 7, cls. 2, 3.

Moreover, the practical demands on the individual who occupies the Office of the President, particularly in the modern era, are enormous. President Washington wrote that "[t]he duties of my Office * * * at all times * * * require an unremitting attention," Brief for the United States as Amicus Curiae in Support of the Petitioner at 11, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95–1853) (quoting Arthur B. Tourtellot, *The Presidents on the Presidency* 348 (1964)). In the two centuries since the Washington Administration, the demands of government, and thus of the President's duties, have grown exponentially. In the words of Justice Jackson, "[i]n drama, magnitude and finality [the President's] decisions so far overshadow any others that almost alone he fills the public eye and ear." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring). In times of peace or war, prosperity or economic crisis, and tranquility or unrest, the President plays an unparalleled role in the execution of the laws, the conduct of foreign relations, and the defense of the Nation. As Justice Breyer explained in his opinion concurring in the judgment in *Clinton v. Jones*:

> The Constitution states that the "executive Power shall be vested in a President." Art. II, § 1. This constitutional delegation means that a sitting President is unusually busy, that his activities have an unusually important impact upon the lives of others, and that his conduct embodies an authority bestowed by the entire American electorate. . . . [The Founders] sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many.

520 U.S. at 711–12. The burdens imposed on a sitting President by the initiation of criminal proceedings (whether for official or unofficial wrongdoing) therefore must be assessed in light of the Court's "long recogni[tion of] the 'unique position in the constitutional scheme' that this office occupies." *Id.* at 698 (quoting *Nixon v. Fitzgerald*, 457 U.S. at 749).

a.

Given the unique powers granted to and obligations imposed upon the President, we think it is clear that a sitting President may not constitutionally be imprisoned. The physical confinement of the chief executive following a valid conviction

would indisputably preclude the executive branch from performing its constitutionally assigned functions. As Joseph Story wrote:

> 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 . . . .

3 Joseph Story, *Commentaries on the Constitution of the United States* 418–19 (1st ed. 1833) (*quoted in Nixon v. Fitzgerald*, 457 U.S. at 749).[18]

To be sure, the Twenty-fifth Amendment provides that either the President himself, or the Vice-President along with a majority of the executive branch's principal officers or some other congressionally determined body, may declare that the President is "unable to discharge the powers and duties of his office," with the result that the Vice President assumes the status and powers of Acting President. *See* U.S. Const. amend. XXV, §§ 3, 4. But it is doubtful in the extreme that this Amendment was intended to eliminate or otherwise affect any constitutional immunities the President enjoyed prior to its enactment. None of the contingencies discussed by the Framers of the Twenty-fifth Amendment even alluded to the possibility of a criminal prosecution of a sitting President.[19] Of course, it might be argued that the Twenty-fifth Amendment provides a mechanism to ensuring that, if a sitting President were convicted and imprisoned, there could

[18] *See also* Alexander M. Bickel, *The Constitutional Tangle*, The New Republic, Oct 6, 1973, at 14, 15 ("In the presidency is embodied the continuity and indestructibility of the state It is not possible for the government to function without a President, and the Constitution contemplates and provides for uninterrupted continuity in that office. Obviously the presidency cannot be conducted from jail, nor can it be effectively carried on while an incumbent is defending himself in a criminal trial ").

[19] The Framers of the Twenty-fifth Amendment were primarily concerned with the possibility that a sitting President might be unable to discharge his duties due to incapacitation by physical or mental illness *See generally Hearings on Presidential Inability Before the Subcomm. on Constitutional Amendments of the Senate Comm on the Judiciary*, 88th Cong. (1963), *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 88th Cong. (1964); *Hearings on Presidential Inability Before the House Comm on the Judiciary*, 89th Cong. (1965), *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcomm on Constitutional Amendments of the Senate Comm. on the Judiciary*, 89th Cong. (1965) ("1965 Senate Hearings"); *Selected Materials on the Twenty-Fifth Amendment*, S. Doc. No 93–42 (1973) which includes Senate Reports Nos 89–1382 and 89–66 But the amendment's terms "unable" and "inability" were not so narrowly defined, apparently out of a recognition that situations of inability might take various forms not neatly falling into categories of physical or mental illness *See, e.g.*, 1965 Senate Hearings at 20 ("[T]he intention of this legislation is to deal with any type of inability, whether it is from traveling from one nation to another, a breakdown of communications, capture by the enemy or anything that is imaginable. The inability to perform the powers and duties of the office, for any reason is inability under the terms that we are discussing ") (statement of Sen Bayh); John D Feerick, *The Twenty-fifth Amendment* 197 (1976) ("Although the terms 'unable' and 'inability' are nowhere defined in either Section 3 or 4 of the Amendment (or in Article II), this was not the result of an oversight. Rather, it reflected a judgment that a rigid constitutional definition was undesirable, since cases of inability could take various forms not neatly fitting into such a definition."). Thus, while imprisonment appears not to have been expressly considered by the Framers as a form of inability, the language of the Twenty-fifth Amendment might be read broadly enough to encompass such a possibility

be a transfer of powers to an Acting President rather than a permanent disabling of the executive branch. But the possibility of Vice-Presidential succession "hardly constitutes an argument in favor of allowing other branches to take actions that would disable the sitting President." [20] To rationalize the President's imprisonment on the ground that he can be succeeded by an "Acting" replacement, moreover, is to give insufficient weight to the people's considered choice as to whom they wish to serve as their chief executive, and to the availability of a politically accountable process of impeachment and removal from office for a President who has engaged in serious criminal misconduct.[21] While the executive branch would continue to function (albeit after a period of serious dislocation), it would still not do so as the people intended, with their elected President at the helm.[22] Thus, we conclude that the Twenty-fifth Amendment should not be understood *sub silentio* to withdraw a previously established immunity and authorize the imprisonment of a sitting President.

b.

Putting aside the possibility of criminal confinement during his term in office, the severity of the burden imposed upon the President by the stigma arising both from the initiation of a criminal prosecution and also from the need to respond to such charges through the judicial process would seriously interfere with his ability to carry out his constitutionally assigned functions. To be sure, in *Clinton v. Jones* the Supreme Court rejected the argument that a sitting President is constitutionally immune from civil suits seeking damages for unofficial misconduct. But the distinctive and serious stigma of indictment and criminal prosecution imposes burdens fundamentally different in kind from those imposed by the initiation of a civil action, and these burdens threaten the President's ability to act as the Nation's leader in both the domestic and foreign spheres. *Clinton*'s reasoning does not extend to the question whether a sitting President is constitutionally immune from criminal prosecution; nor does it undermine our conclusion that a proper balancing of constitutional interests in the criminal context dictates a presidential immunity from such prosecution.

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[20] 1 Laurence H. Tribe, *American Constitutional Law* § 4–14, at 755 n.5 (3rd ed. 2000)

[21] If the President resists the conclusion that he is "unable" to discharge his public duties, a transition of power to the Vice President as Acting President depends on the concurrence of both Houses of Congress by a two-thirds vote. But this ultimate congressional decision does not transform the process into a politically accountable one akin to impeachment proceedings, for the situation forcing Congress's hand would have been triggered by the decision of a single prosecutor and unaccountable grand jury to initiate and pursue the criminal proceedings in the first place.

[22] Although we do not consider here whether an elected President loses his immunity from criminal prosecution if and while he is temporarily dispossessed of his presidential authority under either § 3 or § 4 of the Twenty-fifth Amendment, structural considerations suggest that an elected President remains immune from criminal prosecution until he permanently leaves the Office by the expiration of his term, resignation, or removal through conviction upon impeachment.

The greater seriousness of criminal as compared to civil charges has deep roots not only in the Constitution but also in its common law antecedents. Blackstone distinguished between criminal and civil liability by describing the former as a remedy for "public wrongs" and the latter as a response to "private wrongs." 4 William Blackstone, *Commentaries* *5. As he explained, "[t]he distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity." *Id.* This fundamental distinction explains why a criminal prosecution may proceed without the consent of the victim and why it is brought in the name of the sovereign rather than the person immediately injured by the wrong. The peculiar public opprobrium and stigma that attach to criminal proceedings also explain, in part, why the Constitution provides in Article III for a right to a trial by jury for all federal crimes, *see Lewis v. United States*, 518 U.S. 322, 334 (1996) (Kennedy, J. concurring), and provides in the Sixth Amendment for a "speedy and public trial," U.S. Const. amend. VI, *see Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967) (pendency of an indictment "may subject [the defendant] to public scorn" and "indefinitely prolong[] this oppression, as well as the 'anxiety and concern accompanying public accusation' ") (citation omitted).[23]

The magnitude of this stigma and suspicion, and its likely effect on presidential respect and stature both here and abroad, cannot fairly be analogized to that caused by initiation of a private civil action. A civil complaint filed by a private person is understood as reflecting one person's allegations, filed in court upon payment of a filing fee. A criminal indictment, by contrast, is a public rather than private allegation of wrongdoing reflecting the official judgment of a grand jury acting under the general supervision of the District Court. Thus, both the ease and public meaning of a civil filing differ substantially from those of a criminal indictment. *Cf. FDIC v. Mallen*, 486 U.S. 230, 243 (1988) ("Through the return of the indictment, the Government has already accused the appellee of serious wrongdoing.").[24] Indictment alone risks visiting upon the President the disabilities that

[23] In *Klopfer*, the Supreme Court held that the Sixth Amendment right to a speedy trial is violated by the practice of having a prosecutor indefinitely suspend a prosecution after a grand jury returns an indictment. One of the purposes of the speedy trial right is to enable the defendant to be freed, as promptly as reasonably possible, from the "disabling cloud of doubt and anxiety that an overhanging indictment invariably carries with it." 1 Laurence H. Tribe, *American Constitutional Law* § 4–14, at 756. *Cf. In re Winship*, 397 U.S. 358, 363 (1970) ("The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction").

[24] In *Mallen*, for example, the Court rejected a due process challenge to a statute authorizing the immediate suspension for up to 90 days, without a pre-suspension hearing, of a bank officer or director who is indicted for a felony involving dishonesty or breach of trust. In describing the significance of indictment for purposes of the due process calculus, the Court observed as follows:

> The returning of the indictment establishes that an independent body has determined that there is probable cause to believe that the officer has committed a crime . . . This finding is relevant in at least two

stem from the stigma and opprobrium associated with a criminal charge, undermining the President's leadership and efficacy both here and abroad. Initiation of a criminal proceeding against a sitting President is likely to pose a far greater threat than does civil litigation of severely damaging the President's standing and credibility in the national and international communities. While this burden may be intangible, nothing in the Supreme Court's recent case law draws into question the Department's previous judgment that "to wound [the President] by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs." OLC Memo at 30.

c.

Once criminal charges are filed, the burdens of responding to those charges are different in kind and far greater in degree than those of responding to civil litigation. The Court in *Clinton v. Jones* clearly believed that the process of defending himself in civil litigation would not impose unwieldy burdens on the President's time and energy. The Court noted that "[m]ost frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement of the defendant." 520 U.S. at 708. Moreover, even if the litigation proceeds all the way to trial, the Court explicitly assumed that "there would be no necessity for the President to attend in person, though he could elect to do so." *Id.* at 692.

These statements are palpably inapposite to criminal cases. The constitutional provisions governing criminal prosecutions make clear the Framers' belief that an individual's mental and physical involvement and assistance in the preparation of his defense both before and during any criminal trial would be intense, no less so for the President than for any other defendant. The Constitution contemplates the defendant's attendance at trial and, indeed, secures his right to be present by ensuring his right to confront witnesses who appear at the trial. *See* U.S. Const. amend. VI; *Illinois v. Allen*, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."); *see also* Fed. R. Crim. P. 43(a); *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (Due Process Clause also protects right to be present). The Constitution also guarantees the defendant a right to counsel, which is itself premised on the defendant's ability to communicate with such counsel and assist in the preparation of

important ways. First, the finding of probable cause by an independent body demonstrates that the suspension is not arbitrary. Second, the return of the indictment itself is an objective fact that will in most cases raise serious public concern that the bank is not being managed in a responsible manner.

486 U.S. at 244–45.

his own defense. *See* U.S. Const. amend. VI.[25] These protections stand in stark contrast to the Constitution's relative silence as to the rights of parties in civil proceedings, and they underscore the unique mental and physical burdens that would be placed on a President facing criminal charges and attempting to fend off conviction and punishment. These burdens inhere not merely in the actual trial itself, but also in the substantial preparation a criminal trial demands.

It cannot be said of a felony criminal trial, as the Court said of the civil action before it in *Clinton v. Jones*, that such a proceeding, "if properly managed by the District Court, . . . [is] highly unlikely to occupy any substantial amount of petitioner's time." *Clinton*, 520 U.S. at 702.[26] The Court there emphasized the many ways in which a district court adjudicating a civil action against the President could and should use flexibility in scheduling so as to accommodate the demands of the President's constitutionally assigned functions on his time and energy. *See id.* at 706 (noting that a district court "has broad discretion to stay proceedings as an incident to its power to control its own docket").[27] The Court explicitly "assume[d] that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule." *Id.* at 691–92. The Court thus concluded that "[a]lthough scheduling problems may arise, there is no reason to assume that the district courts will be . . . unable to accommodate the President's needs." *Id.* at 709.[28]

Although the Court determined in *Clinton v. Jones* that "[t]he fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the chief Executive is not sufficient to establish a violation of the Constitution," 520 U.S. at 703, this determination must be understood in light of the Court's own characterizations of the manageable burdens imposed

[25] In theory, of course, the President could decline to appear at his own criminal trial, notwithstanding the strong Anglo-American tradition against trials *in absentia*. But availability of this option says little about the constitutional issue; there is no evidence that the Framers intended that the President waive an entire panoply of constitutional guarantees and risk conviction in order to fulfill his public obligations.

[26] With respect specifically to concerns about mental preoccupation, the Court in *Clinton v. Jones* "recognize[d] that a President, like any other official or private citizen, may become distracted or preoccupied by pending litigation," 520 U.S. at 705 n.40, but likened this distraction to other "vexing" distractions caused by "a variety of demands on their time, . . . some private, some political, and some as a result of official duty." *Id.* As a "predictive judgment," *id.* at 702, however, the level of mental preoccupation entailed by a threat of criminal conviction and imprisonment would likely far exceed that entailed by a private civil action.

[27] In his opinion concurring in the judgment, Justice Breyer further emphasized the Court's assumptions with respect to the scheduling flexibility properly due the President by the district court. He explained that he agreed "with the majority that the Constitution does not automatically grant the President an immunity from civil lawsuits based upon his private conduct." 520 U.S. at 710. Nevertheless, he emphasized that

> once the President sets forth and explains a conflict between judicial proceeding and public duties, the matter changes. At that point, the Constitution permits a judge to schedule a trial in an ordinary civil damages action (where postponement normally is possible without overwhelming damage to a plaintiff) only within the constraints of a constitutional principle—a principle that forbids a federal judge in such a case to interfere with the President's discharge of his public duties.

Id.

[28] The Court added that, "[a]lthough Presidents have responded to written interrogatories, given depositions, and provided videotaped trial testimony, no sitting President has ever testified, or been ordered to testify, in open court." *Id.* at 692 n.14. In criminal litigation, as compared to civil litigation, however, the presence of the accused is a *sine qua non* of a valid trial, absent extraordinary circumstance.

by civil litigation. By contrast, criminal proceedings do not allow for the flexibility in scheduling and procedures upon which *Clinton v. Jones* relied. Although the Court emphasized that "our decision rejecting the immunity claim and allowing the case to proceed does not require us to confront the question whether a court may compel the attendance of the President at any specific time or place," *id.* at 691, a criminal prosecution would require the President's personal attention and attendance at specific times and places, because the burdens of criminal defense are much less amenable to mitigation by skillful trial management. Indeed, constitutional rights and values are at stake in the defendant's ability to be present for all phases of his criminal trial. For the President to maintain the kind of effective defense the Constitution contemplates, his personal appearance throughout the duration of a criminal trial could be essential. Yet the Department has consistently viewed the requirement that a sitting President personally appear at a trial at a particular time and place in response to judicial process to raise substantial separation of powers concerns. *See* Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutional Concerns Implicated by Demand for Presidential Evidence in a Criminal Prosecution* (Oct. 17, 1988).[29]

In contrast to ordinary civil litigation, moreover, which the Court in *Clinton v. Jones* described as allowing the trial court to minimize disruptions to the President's schedule, the Sixth Amendment's guarantee to criminal defendants of a "speedy and public trial," U.S. Const. amend. VI, circumscribes the trial court's flexibility. Once a defendant is indicted, his right to a speedy trial comes into play. *See United States v. Marion*, 404 U.S. 307 (1971) (defendant's speedy trial right is triggered when he is "accused" by being indicted). In addition, under the federal Speedy Trial Act, the trial judge's discretion is constrained in order to meet the statutory speedy trial deadlines. *See* 18 U.S.C. §§ 3161–3174 (1994). While a defendant may waive his speedy trial rights, it would be a peculiar constitutional argument to say that the President's ability to perform his constitutional

[29] The Kmiec memorandum explained that "it has been the rule since the Presidency of Thomas Jefferson that a judicial subpoena in a criminal case may be issued to the President, and any challenge to the subpoena must be based on the nature of the information sought rather than any immunity from process belonging to the President." *See* Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutional Concerns Implicated by Demand for Presidential Evidence in a Criminal Prosecution* at 2 (Oct. 17, 1988). However, the memorandum proceeded to explain, "[a]lthough there are *no judicial opinions* squarely on point, historical precedent has clearly established that sitting Presidents are not required to testify in person at criminal trials." *Id.* at 3 (reviewing precedents). The memorandum noted in particular that Attorney General Wirt had advised President Monroe in 1818 that "[a] subpoena ad testificandum may I think be properly awarded to the President of the U.S. . . . But if the presence of the chief magistrate be required at the seat of government by his official duties, I think those duties paramount to any claim which an individual can have upon him, and that his personal attendance on the court from which the summons proceeds ought to be, and must, of necessity, be dispensed with . . . ." *Id.* at 4 (quoting Opinion of Attorney General Wirt, January 13, 1818, *quoted in* Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*," 1975 U. Ill. L. F. 1, 6). The memorandum concluded that "the controlling principle that emerges from the historical precedents is that a sitting President may not be required to testify in court at a criminal trial because his presence is required elsewhere for his 'official duties'—or, in the vernacular of the time, required at 'the seat of government.'" *Id.* at 6 (citations and footnote omitted).

duties should not be considered unduly disrupted by a criminal trial merely because the President could, in theory, waive his personal constitutional right to a speedy trial. The Constitution should not lightly be read to put its Chief Executive officer to such a choice.

In sum, unlike private civil actions for damages — or the two other judicial processes with which such actions were compared in *Clinton v. Jones* (subpoenas for documents or testimony and judicial review and occasional invalidation of the President's official acts, *see* 520 U.S. at 703–05) — criminal litigation uniquely requires the President's *personal* time and energy, and will inevitably entail a considerable if not overwhelming degree of mental preoccupation.[30] Indictment also exposes the President to an official pronouncement that there is probable cause to believe he committed a criminal act, *see, e.g., United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297–98 (1991), impairing his credibility in carrying out his constitutional responsibilities to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and to speak as the "sole organ" of the United States in dealing with foreign nations. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936); *see also Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (describing the President "as the Nation's organ for foreign affairs"); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) ("The President . . . is the constitutional representative of the United States in its dealings with foreign nations."). These physical and mental burdens imposed by an indictment and criminal prosecution of a sitting President are of an entirely different magnitude than those imposed by the types of judicial process previously upheld by the Court.

It is conceivable that, in a particular set of circumstances, a particular criminal charge will not in fact require so much time and energy of a sitting President so as materially to impede the capacity of the executive branch to perform its constitutionally assigned functions. It would be perilous, however, to make a judgment in advance as to whether a particular criminal prosecution would be a case of this sort. Thus a categorical rule against indictment or criminal prosecution is most consistent with the constitutional structure, rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President.[31]

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[30] While illustrating the potentially burdensome nature of judicial review of Presidential acts with the "most dramatic example" of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (invalidating President Truman's order directing the seizure and operation of steel mills), the Court mentioned "the substantial time that the President must necessarily have devoted to the matter as a result of judicial involvement." *Clinton v. Jones*, 520 U.S. at 703. Of course, it is most frequently the case that the President spends little or no time *personally* engaged in such confrontations, with the task of defending his policies in court falling to subordinate executive branch officials. *See, e.g.*, Maeva Marcus, *Truman and the Steel Seizure Case* 102–77 (1977) (describing in detail Department of Justice attorneys' involvement in the steel seizure litigation without discussing any role played personally in the litigation by President Truman). Such a routine delegation of responsibilities is unavailable when the President personally faces criminal charges.

[31] *Cf. Clinton v. Jones*, 520 U.S. at 706 ("Indeed, if the Framers of the Constitution had thought it necessary to protect the President from the burdens of private litigation, we think it far more likely that they would have

3.

Having identified the burdens imposed by indictment and criminal prosecution on the President's ability to perform his constitutionally assigned functions, we must still consider whether these burdens are "justified by an overriding need to promote" legitimate governmental objectives, *Administrator of General Services*, 433 U.S. at 443, in this case the expeditious initiation of criminal proceedings. *United States v. Nixon* underscored the legitimacy and importance of facilitating criminal proceedings in general. Although Nixon did not address the interest in facilitating criminal proceedings against the President, it is fair to say that there exists an important national interest in ensuring that no person—including the President—is above the law. *Clinton v. Jones* underscored the legitimacy and importance of allowing civil proceedings against the President for unofficial misconduct to go forward without undue delay. Nevertheless, after weighing the interests in facilitating immediate criminal prosecution of a sitting President against the interests underlying temporary immunity from such prosecution, considered in light of alternative means of securing the rule of law, we adhere to our 1973 determination that the balance of competing interests requires recognition of a presidential immunity from criminal process.

Recognizing an immunity from prosecution for a sitting President would not preclude such prosecution once the President's term is over or he is otherwise removed from office by resignation or impeachment.[32] The relevant question, therefore, is the nature and strength of any governmental interests in *immediate* prosecution and punishment.

With respect to immediate punishment, the legitimate objectives of retribution and specific deterrence underlying the criminal justice system compete against a recognition of presidential immunity from penal incarceration. The obvious and overwhelming burdens that such incarceration would impose on the President's ability to perform his constitutionally assigned functions, however, clearly support the conclusion that a sitting President may not constitutionally be imprisoned upon a criminal conviction. *See supra* note 18 and accompanying text. The public's general interest in retribution and deterrence does not provide an "overriding need" for immediate as opposed to deferred incarceration.

With respect to immediate prosecution, we can identify three other governmental interests that might be impaired by deferring indictment and prosecution

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adopted a categorical rule than a rule that required the President to litigate the question whether a specific case belonged in the 'exceptional case' subcategory.")

[32] The temporary nature of the immunity claimed here distinguishes it from that pressed in *Nixon v. Fitzgerald*, which established a permanent immunity from civil suits challenging official conduct. The temporary immunity considered here is also distinguishable from that pressed by the President but rejected in *United States v. Nixon*, since the claim of executive privilege justifying the withholding of evidence relevant to the criminal prosecution of other persons would apparently have suppressed the evidence without any identifiable time limitation. The asserted privilege might therefore have forever thwarted the public's interest in enforcing its criminal laws. *See United States v. Nixon*, 418 U.S. at 713 ("Without access to specific facts a criminal prosecution may be totally frustrated.").

until after the accused no longer holds the office of President: (1) avoiding the bar of a statute of limitations; (2) avoiding the weakening of the prosecution's case due to the passage of time; and (3) upholding the rule of law. We consider each of these in turn.

The interest in avoiding the statute of limitations bar by securing an indictment while the President remains sitting is a legitimate one. However, we do not believe it is of significant constitutional weight when compared with the burdens such an indictment would impose on the Office of the President, especially in light of alternative mechanisms to avoid a time-bar. First, a President suspected of the most serious criminal wrongdoing might well face impeachment and removal from office before his term expired, permitting criminal prosecution at that point. Second, whether or not it would be appropriate for a court to hold that the statute of limitations was tolled while the President remained in office (either as a constitutional implication of temporary immunity or under equitable principles[33]), Congress could overcome any such obstacle by imposing its own tolling rule.[34] At most, therefore, prosecution would be delayed rather than denied.

Apart from concern over statutes of limitations, we recognize that a presidential immunity from criminal prosecution could substantially delay the prosecution of a sitting President, and thereby make it more difficult for the ultimate prosecution to succeed.[35] In *Clinton v. Jones*, the Court observed that—notwithstanding the continuation of civil discovery—"delaying trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party." 520 U.S. at 707–08.

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[33] Federal courts have suggested that, in proper circumstances, criminal as well as civil statutes of limitation are subject to equitable tolling. *See, e.g., United States v. Midgley*, 142 F.3d 174, 178–79 (3d Cir. 1998) ("Although the doctrine of equitable tolling is most typically applied to limitation periods on civil actions, there is no reason to distinguish between the rights protected by criminal and civil statutes of limitations.") (internal quotation omitted); *cf. United States v. Levine*, 658 F.2d 113, 119–21 (3d Cir. 1981) (noting that criminal statutes of limitations have a primary purpose of providing fairness to the accused, but are "perhaps not inviolable" and are subject to tolling, suspension, and waiver). Equitable tolling, however, is invoked only sparingly, in the "rare situation where [it] is demanded by sound legal principles as well as the interests of justice." *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996) (tolling two-year limitation period for FTCA actions where plaintiff had been incarcerated for two years).

[34] *See, e.g.*, 18 U.S.C. § 3287 (1994) (suspension of criminal statutes of limitation for certain fraud offenses against the United States until three years after the termination of hostilities); *United States v. Grainger*, 346 U.S. 235 (1953) (applying this statutory suspension). We believe Congress derives such authority from its general power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. *Cf. Clinton v. Jones*, 520 U.S. at 709 ("If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation."). Indeed, without deciding the question, we note that Congress may have power to enact a tolling provision governing the statute of limitations for conduct that has already occurred, at least so long as the original statutory period has not already expired. *Cf. United States v. Powers*, 307 U.S. 214 (1939) (rejecting *Ex Post Facto* challenge to a prosecution based on a statute extending the life of a temporary criminal statute before its original expiration date); *cf., e.g., United States v. Grimes*, 142 F.3d 1342, 1350–51 (11th Cir. 1998) (collecting decisions rejecting *Ex Post Facto* challenges to statutes extending the limitations period as applied to conduct for which the original period had not already run), *cert. denied*, 525 U.S. 1088 (1999).

[35] In theory, the delay could be as long as 10 years, for a President who originally assumes the office through ascension rather than election and then fully serves two elected terms. *See* U.S. Const. amend. XXII, § 1. Given quadrennial elections and the possibility of impeachment, however, it seems unlikely that a President who is seriously suspected of grave criminal wrongdoing would remain in office for that length of time.

The Court considered this potential for prejudice to weigh against recognition of temporary immunity from civil process. We believe that the costs of delay in the criminal context may differ in both degree and kind from delay in the civil context.[36] But in any event it is our considered view that, when balanced against the overwhelming cost and substantial interference with the functioning of an entire branch of government, these potential costs of delay, while significant, are not controlling. In the constitutional balance, the potential for prejudice caused by delay fails to provide an "overriding need" sufficient to overcome the justification for temporary immunity from criminal prosecution.

Finally, recognizing a temporary immunity would not subvert the important interest in maintaining the "rule of law." To be sure, as the Court has emphasized, "[n]o man in this country is so high that he is above the law." *United States v. Lee*, 106 U.S. 196, 220 (1882). Moreover, the complainant here is the Government seeking to redress an alleged crime against the public rather than a private person seeking compensation for a personal wrong, and the Court suggested in *Nixon v. Fitzgerald* that "there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions," 457 U.S. at 754 n.37; *see id.* (describing *United States v. Nixon* as "basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision"). However, unlike the immunities claimed in both *Nixon* cases, *see supra* note 32, the immunity from indictment and criminal prosecution for a sitting President would generally result in the delay, but not the forbearance, of any criminal trial. Moreover, the constitutionally specified impeachment process ensures that the immunity would not place the President "above the law." A sitting President who engages in criminal behavior falling into the category of "high Crimes and Misdemeanors," U.S. Const. art. II, § 4, is always subject to removal from office upon impeachment by the House and conviction by the Senate, and is thereafter subject to criminal prosecution.

4.

We recognize that invoking the impeachment process itself threatens to encumber a sitting President's time and energy and to divert his attention from

[36] On the one hand, there may be less reason to fear a prejudicial loss of evidence in the criminal context. A grand jury could continue to gather evidence throughout the period of immunity, even passing this task down to subsequently empaneled grand juries if necessary. *See* Fed. R. Crim. P. 6(e)(3)(C)(iii). Moreover, in the event of suspicion of serious wrongdoing by a sitting President, the media and even Congress (through its own investigatory powers) would likely pursue, collect and preserve evidence as well. These multiple mechanisms for securing and preserving evidence could mitigate somewhat the effect of a particular witness's failed recollection or demise. By contrast, many civil litigants would lack the resources and incentives to pursue and preserve evidence in the same comprehensive manner.

On the other hand, the consequences of any prejudicial loss of evidence that does occur in the criminal context are more grave, given the presumptively greater stakes for both the United States and the defendant in criminal litigation. *See United States v. Nixon*, 418 U.S. at 711–13, 713 (in emphasizing the importance of access to evidence in a pending criminal trial, giving significant weight in the constitutional balance to "the fundamental demands of due process of law in the fair administration of criminal justice").

his public duties. But the impeachment process is explicitly established by the Constitution. While in some circumstances an impeachment and subsequent Senate trial might interfere with the President's exercise of his constitutional responsibilities in ways somewhat akin to a criminal prosecution, "this is a risk expressly contemplated by the Constitution, and it is a necessary incident of the impeachment process." OLC Memo at 28. In other words, the Framers themselves specifically determined that the public interest in immediately removing a sitting President whose continuation in office poses a threat to the Nation's welfare outweighs the public interest in avoiding the Executive burdens incident thereto.

The constitutionally prescribed process of impeachment and removal, moreover, lies in the hands of duly elected and politically accountable officials. The House and Senate are appropriate institutional actors to consider the competing interests favoring and opposing a decision to subject the President and the Nation to a Senate trial and perhaps removal. Congress is structurally designed to consider and reflect the interests of the entire nation, and individual Members of Congress must ultimately account for their decisions to their constituencies. By contrast, the most important decisions in the process of criminal prosecution would lie in the hands of unaccountable grand and petit jurors, deliberating in secret, perhaps influenced by regional or other concerns not shared by the general polity, guided by a prosecutor who is only indirectly accountable to the public. The Framers considered who should possess the extraordinary power of deciding whether to initiate a proceeding that could remove the President — one of only two constitutional officers elected by the people as a whole — and placed that responsibility in the elected officials of Congress. It would be inconsistent with that carefully considered judgment to permit an unelected grand jury and prosecutor effectively to "remove" a President by bringing criminal charges against him while he remains in office.

Thus, the constitutional concern is not merely that any *particular* indictment and criminal prosecution of a sitting President would unduly impinge upon his ability to perform his public duties. A more general concern is that permitting such criminal process against a sitting President would affect the underlying dynamics of our governmental system in profound and necessarily unpredictable ways, by shifting an awesome power to unelected persons lacking an explicit constitutional role vis-a-vis the President. Given the potentially momentous political consequences for the Nation at stake, there is a fundamental, structural incompatibility between the ordinary application of the criminal process and the Office of the President.

For these reasons we believe that the Constitution requires recognition of a presidential immunity from indictment and criminal prosecution while the President is in office.

5.

In 1973, this Department concluded that a grand jury should not be permitted to indict a sitting President even if all subsequent proceedings were postponed until after the President left office. The Court's emphasis in *Clinton v. Jones* on the interests of Article III courts in allowing ordinary judicial processes to go forward against a sitting President, and its reliance on scheduling discretion to prevent those processes from interfering with performance of the President's constitutional duties, might be thought to call this aspect of the Department's 1973 determination into question. We have thus separately reconsidered whether, if the constitutional immunity extended only to criminal prosecution and confinement but not indictment, the President's ability to perform his constitutional functions would be unduly burdened by the mere pendency of an indictment against which he would need to defend himself after leaving office.

We continue to believe that the better view of the Constitution accords a sitting President immunity from indictment by itself. To some degree, indictment alone will spur the President to devote some energy and attention to mounting his eventual legal defense.[37] The stigma and opprobrium attached to indictment, as we explained above, far exceed that faced by the civil litigant defending a claim. Given "the realities of modern politics and mass media, and the delicacy of the political relationships which surround the Presidency both foreign and domestic," there would, as we explained in 1973, "be a Russian roulette aspect to the course of indicting the President but postponing trial, hoping in the meantime that the power to govern could survive." OLC Memo at 31.[38] Moreover, while the burdens imposed on a sitting President by indictment alone may be less onerous than those imposed on the President by a full scale criminal prosecution, the public interest in indictment alone would be concomitantly weaker assuming that both trial and punishment must be deferred, and weaker still given Congress' power to extend the statute of limitations or a court's possible authority to recognize an equitable tolling.

Balancing these competing concerns, we believe the better view is the one advanced by the Department in 1973: a sitting President is immune from indictment as well as from further criminal process. Where the President is concerned,

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[37] *Cf. Moore v. Arizona*, 414 U.S. 25, 27 (1973) (indictment with delayed trial "may disrupt [a defendant's] employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends") (citations omitted). Indeed, indictment coupled with temporary immunity from further prosecution may even magnify the problem, since the President would be legally stigmatized as an alleged criminal without any meaningful opportunity to respond to his accusers in a court of law.

[38] Our conclusion would hold true even if such an indictment could lawfully be filed, and were filed, under seal. Given the indictment's target it would be very difficult to preserve its secrecy. *Cf. United States v. Nixon*, 418 U.S. at 687 n.4 (noting parties' acknowledgment that "disclosures to the news media made the reasons for continuance of the protective order no longer meaningful," with respect to the "grand jury's immediate finding relating to the status of the President as an unindicted co-conspirator"). Permitting a prosecutor and grand jury to issue even a sealed indictment would allow them to take an unacceptable gamble with fundamental constitutional values

only the House of Representatives has the authority to bring charges of criminal misconduct through the constitutionally sanctioned process of impeachment.

III.

In 1973, the Department of Justice concluded that the indictment and criminal prosecution of a sitting President would unduly interfere with the ability of the executive branch to perform its constitutionally assigned duties, and would thus violate the constitutional separation of powers. No court has addressed this question directly, but the judicial precedents that bear on the continuing validity of our constitutional analysis are consistent with both the analytic approach taken and the conclusions reached. Our view remains that a sitting President is constitutionally immune from indictment and criminal prosecution.

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May 13, 1998

draft

The Honorable Kenneth W. Starr
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Re: INDICTABILITY OF THE PRESIDENT

Dear Judge Starr:

SUMMARY AND INTRODUCTION.

You have asked my legal opinion as to whether a sitting President is subject to indictment.[1] Does the Constitution immunize a President from being indicted for criminal activities while serving in the office of President? For example, if the President committed a crime before assuming office, does his election to the Presidency immunize his criminal activities? If the President in his private capacity commits one or more crimes while in office, does his election serve to immunize him? In short, is a sitting President above the criminal law?

As this opinion letter makes clear, I conclude that, in the circumstances of this case, President Clinton is subject to indictment and criminal prosecution, although it may be the case that he could not be imprisoned (assuming that he is convicted and that imprisonment is the appropriate punishment) until after he leaves that office. A criminal prosecution and conviction (with imprisonment delayed) does not, in the

[1] For your information, I am attaching a resume listing my publications.

words of *Nixon v. Sirica*,[2] "compete with the impeachment device by working a constructive removal of the President from office."

In addition, I express no opinion as to whether a prosecution by state authorities may be proper (a state prosecution may violate the Supremacy Clause). Nor do I consider whether the President could be indicted if there were no Independent Counsel statute. In the circumstances of this case, there is such a statute, and it was enacted as the specific request of President Clinton, who knew — at the time he lobbied for and signed the legislation — that a specific purpose of the statute was to investigate criminal allegations involving him. He welcomed the independent investigation so that it could clear the air.

In addition, as discussed below, I express no opinion as to whether the Federal Government could indict a President for allegations that involve his *official* duties as President. The Office of Independent Counsel is investigating allegations that do not involve any official duties of President Clinton. The counts of an indictment against President Clinton would include serious allegations involving witness tampering, document destruction, perjury, subornation of perjury, obstruction of justice, conspiracy, and illegal pay-offs; these counts in no way relate to the President Clinton's official duties, even though some of the alleged violations occurred after he became President. The allegations involved here do not involve any sort of policy dispute between the President and Congress. The allegations, in short, do not relate to the President's official duties; they are not "within the outer perimeter of his official responsibility."[3] Indeed, the alleged acts involved here are not only outside the outer perimeter of the President's official responsibility, they are contrary to the President's official responsibility to take care that the law be faithfully executed.

Also, as discussed below, a grand jury indictment is not inconsistent in present circumstances with the conclusion reached by the Watergate Special Prosecutor.[4] For example, in the present case (and unlike the Watergate situation) a criminal prosecution would not duplicate any impeachment proceeding already begun in the

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[2] 487 F.2d 700, 711(D.C. Cir. 1973) (per curiam) (en banc). President Nixon chose not to seek U.S. Supreme Court review of this decision. Instead he fired Watergate Special Prosecutor Archibald Cox.

[3] *Nixon v. Fitzgerald*, 457 U.S. 731, 756, 102 S.Ct. 2690, 2704, 73 L.Ed.2d 349 (1982).

[4] I should disclose that I was Assistant Majority Counsel to the Senate Watergate Committee.

House of Representatives.[5] In the Watergate era, the House of Representatives had — *prior* to the time that Special Prosecutor Leon Jaworski turned over any information to the House Impeachment Inquiry — already made the *independent* decision to begin, and, in fact, had begun impeachment proceedings. In the present case, no House Impeachment Inquiry has begun, and, if one were to begin, it would only be because the House of Representatives would be responding to information that the Office of Independent Counsel would transfer to the House of Representatives. Watergate Prosecutor Jaworski, in short, did not want to preempt the House inquiry that had independently begun. Now, there is no House inquiry, and the OIC would not be preempting any House inquiry. While the Independent Counsel statute authorizes the OIC to transmit relevant information to the House, the statute does even suggest that the OIC must postpone any indictment until the House and Senate shave have concluded any impeachment inquiry.

In this country, the U.S. Supreme Court has repeatedly reaffirmed the state that no one is "above the law."[6] The Constitution grants no one immunity from the

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[5] *See* LEON JAWORSKI, THE RIGHT AND THE POWER 100 (1976). Watergate Prosecutor Jaworski's views are discussed below. One should also note that, in the present case, the House might not see fit to begin an impeachment, or it might decide that the alleged violations of law do not merit removal from office, either because some acts occurred prior to the time of President Clinton's assumption of office or because they do not rise to the level of impeachable offences.

As Justice Joseph Story has noted: "There is also much force in the remark that an impeachment is a proceeding purely of a political nature. It touches neither his person, nor his property; but simply divests him of his political capacity." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, §§ 406, at p. 289 (RONALD D. ROTUNDA & JOHN E. NOWAK, eds., Carolina Academic Press, 1987, originally published, 1833).

[6] *E.g., United States v. Lee*, 106 U.S. 196, 220, 1 S.Ct. 240, 260, 27 L.Ed. 171 (1882); *United States v. United Mine Workers of America*, 330 U.S. 258, 343, 67 S.Ct. 677, 720, 91 L.Ed. 884 (1947); *Malone v. Bowdoin*, 369 U.S. 643, 651, 82 S.Ct. 980, 986, 8 L.Ed.2d 168 (1962) (Douglas, J., dissenting); *Malone v. Bowdoin*, 369 U.S. 643, 651, 82 S.Ct. 980, 986, 8 L.Ed.2d 168 (1962) (Douglas, J., dissenting);*Johnson v. Powell*, 393 U.S. 920, 89 S.Ct. 250, 251, 21 L.Ed.2d 255 (1968)(Memorandum Opinion of Douglas, J., regarding application for a stay); *Branzburg v. Hayes*, 408 U.S. 665, 699, 92 S.Ct. 2646, 2665, 33 L.Ed.2d 626 (1972); *Gravel v. United States.*, 408 U.S. 606, 615, 92 S.Ct. 2614, 2622, 33 L.Ed.2d 583 (1972); *United States v. Nixon*, 418 U.S. 683, 715, 94 S.Ct. 3090, 3111, 41 L.Ed.2d 1039 (1974); *Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894,2910, 57 L.Ed.2d 895 (1978); *Davis v. Passman*, 442 U.S. 228, 246, 99 S.Ct. 2264, 2277, 60 L.Ed.2d 846 (1979); *Nixon v. Fitzgerald*, 457 U.S. 731, 758 & n. 41, 102 S.Ct. 2690, 2705 & n.41, 73 L.Ed.2d 349 (1982); *Briscoe v. LaHue*, 460 U.S. 325, 358, 103 S.Ct. 1108, 1127, 75 L.Ed.2d 96 (1983); *United States v.*
(continued...)

criminal laws. Congress enacted the present law governing the appointment of Independent Counsel, at the specific request of President Clinton and Attorney General Janet Reno. All of the parties — the President, the Attorney General, Congress — knew that the specific and immediate purpose of this statute would result in the appointment of an Independent Counsel to investigate certain allegations of criminal activities that appeared to implicate the President of the United States and the First Lady. Since that time, the Attorney General has, on several occasions, successfully urged the Court to expand the jurisdiction of this particular Office of Independent Counsel (hereinafter, "OIC") to include other allegations involving the President and Mrs. Clinton.

As the judiciary has noted in the past, the President "does not embody the nation's sovereignty. He is not above the law's commands . . .."[7] The people "do not forfeit through elections the right to have the law construed against and applied to every citizen. *Nor does the Impeachment Clause imply immunity from routine court process.*"[8]

In the remainder of this opinion letter I examine the case law, the legal commentators, the history and language of the relevant Constitutional provisions, the legislative history of the Independent Counsel law, the logic and structure of our Constitution, and the laws governing the Grand Jury's power to investigate and indict. As discussed in detail below, if the Constitution really provides that the President must be impeached before he can be prosecuted for breaking the criminal law — even if the President commits a crime prior to the time he became President, or if he commits a crime in his personal capacity, not in his official capacity as President —, the our Constitution has created serious anomalies.

First, it is quite clear that a President may be impeached for actions that do

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[6] (...continued)
Stanley, 483 U.S. 669, 706, 107 S.Ct. 3054, 3076, 97 L.Ed.2d 550 (1987)Brennan, J., joined by Marshall, J., concurring in part & dissenting in part); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 103 n. 2, 116 S.Ct. 1114, 1146 n. 2, 134 L.Ed.2d 252 (1996)(Souter, J., joined by Ginsburg & Breyer, JJ.); *Clinton v. Jones*, — U.S. —, —, 117 S.Ct. 1636, 1645, 137 L.Ed.2d 945 (1997).

[7] *Nixon v. Sirica*, 487 F.2d 700 at 711 (footnote omitted).

[8] *Nixon v. Sirica*, 487 F.2d at 711 (per curiam) (en banc) (footnote omitted)(emphasis added).

not violate any criminal statute.[9] Acts that (a) constitute impeachable offenses and (b) are violations of a crime created by statute (our Constitution recognizes no common law crimes) are two different categories of acts. Moreover, if the President does commit a crime, that does not necessarily mean that he must be impeached, because some crimes do not merit impeachment and removal from office.

For example, if the President in a moment of passion slugs an irritating heckler, he has committed a criminal battery. But no one would suggest that the President should be removed from office simply because of that assault. Yet, the President has no right to assault hecklers.[10] If there is no recourse against the President, if he cannot be prosecuted for violating the criminal laws, he will be above the law. *Clinton v. Jones* rejected such an immunity; instead, it emphatically agreed with the Eight Circuit that: "the President, like other officials, is subject to the same laws that apply to all citizens."[11] The "rationale for official immunity 'is inapposite where only *personal, private conduct* by a President is at issue.'"[12] The President has no immunity in such a case. If the Constitution prevents the President from being indicted for violations of one or more federal criminal statutes, even if those statutory violations are not impeachable offences, then the Constitution authorizes the President to be above the law. But the Constitution creates an Executive Branch with the President under a sworn obligation to faithfully executive the law. The Constitution does not create an absolute Monarch above the law.

In addition, as also discussed below, if the President must be impeached prior to being prosecuted for serious violations of the criminal law, then Congress would have the final determination of when a criminal prosecution must begin. But it violates the Doctrine of the Separation of Powers for the legislative branch of government to control when (or if) a criminal prosecution may occur. It would even violate the Separation of Powers if Congress were to make the decision of the

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[9] *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, §§ 405, at p. 288 (RONALD D. ROTUNDA & JOHN E. NOWAK, eds., Carolina Academic Press, 1987, originally published, 1833): "Congress have unhesitatingly adopted the conclusion that no previous statute is necessary to authorize any impeachment of any official misconduct . . .."

[10] *Cf.* Gary Borg, *Chretien is Charged Briefly with Assault*, CHI. TRIB., May 7, 1996, at A10, *available in* 1996 WESTLAW 2669290 (reporting that the Canadian Prime Minister — the first time this century that a sitting Canadian Prime Minister was faced with criminal charges — was charged with assault for grabbing a protester by the throat; the charge was later quashed).

[11] — U.S. —, 117 S.Ct. 1636, 1638. (1997).

[12] 117 S.Ct. 1636, 1641 (quoting Eight Circuit)(emphasis added).

Attorney General to refuse to seek (or to seek) the appointment of an independent counsel subject to judicial review.[13]

Moreover, as the case law discussed below indicates, if the Grand Jury cannot indict the President, it cannot constitutionally investigate him. But, in *Morrison v. Olson*[14] the Supreme Court upheld the constitutionality of the Independent Counsel Act and the constitutionality of grand jury investigations under the direction of an Independent Counsel appointed by the court. *Morrison* implicitly decided the issue analyzed in this opinion letter.

The Constitution does grant limited immunity to federal legislators in certain limited contexts, as discussed below, but those immunities do not exempt Senators or Representatives from the application of the criminal laws. One looks in vain to find any textual support in the Constitution for any Presidential immunity (either

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[13] *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988). The Court made it quite clear that it was necessary, in order to save the constitutionality of the Independent Counsel statute, for the Court to conclude that it gave neither Congress nor the Special Division any power to force the Attorney General to appoint an Independent Counsel nor any power to direct or supervise the Independent Counsel once the appointment took place. For example, the Court in *Morrison* also said: "[T]he Special Division has *no power to appoint* an independent counsel *sua sponte*; it may do so upon the specific request of the Attorney General, and the courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment." 487 U.S. at 695, 108 S.Ct. at 2621. As to Congress, the Court said: "The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General *has no duty* to comply with the request, although he must respond within a certain time limit." 487 U.S. at 694, 108 S.Ct. at 2621. The Attorney General's decision not to appoint an Independent Counsel is "committed to his unreviewable discretion," even though the Act purports to require the Attorney General to appoint unless "he finds 'no reasonable grounds to believe that further investigation is warranted.'" 487 U.S. at 696, 108 S.Ct. at 2622.

Morrison also made clear that Congress could not remove or prevent the removal of the Independent Counsel, and the Special Division could not remove the Independent Counsel. In order to save the statute's constitutionality, the Court interpreted the statutory provision relating to termination to mean virtually nothing: "It is basically a device for removing from the public payroll an independent counsel who has served her purpose, but is unwilling to acknowledge the fact. So construed, the Special Division's power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive's authority to require that the Act be invalidated as inconsistent with Article III." *Morrison*, 487 U.S. at 683, 108 S.Ct. at 2615. *See*, Ronald D. Rotunda, *The Case Against Special Prosecutors*, WALL STREET JOURNAL, Jan. 15, 1990, at p. A8.

[14] 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

absolute or temporary) from the commands of the criminal laws. If the framers of our Constitution wanted to create a special immunity for the President, they could have written the relevant clause. They certainly knew how to write immunity clauses, for they wrote two immunity clauses that apply to Congress.[15] But they wrote nothing to immunize the President. Instead, they wrote an Impeachment Clause treating the President and all other civil officers the same way. Other civil officers, like judges, have been criminally prosecuted without being impeached. Sitting Vice Presidents have been indicted even though they were not impeached.

As *Nixon v. Sirica*[16] carefully noted: "Because impeachment is available against all 'civil officers of the Untied Sates,' not merely against the President, it is difficult to understand how any immunities peculiar to the President can emanate by implication from the fact of impeachability." Moreover, it would be anomalous and aberrant to interpret the Impeachment Clause to immunize the President for alleged criminal acts, some of which occurred prior to the time he assumed the Presidency and all far removed from any of the President's enumerated duties: witness tampering, destruction of documents, subornation of perjury, perjury, illegal pay-offs.

BACKGROUND.

The Office of Independent Counsel has investigated and continues to investigate various matters that are loosely grouped under the name of "Whitewater," which is a particular real estate deal that involves land developed in Arkansas. The "Whitewater" label is often used in the popular press. However, the investigative mandate to this Office of Independent Counsel is broader than this title implies. There are land deals other than Whitewater that are part of this investigation as well as other matters, such as the scandal involving the White House Travel Office and the misuse of FBI files by political operatives working in the White House. More recently, the Attorney General petitioned the Court to expand OIC's mandate and jurisdiction to include various allegations surrounding Ms. Monica Lewinsky and involving obstruction of justice, witness tampering, perjury, and suborning of perjury.[17]

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[15] U.S. Const., art. I, § 6, cl. 1 [limited privilege from arrest; speech or debate privilege]. Both of these immunities are *very limited* in scope, as discussed below.

[16] 487 F.2d at 700, 711 n.50 (D.C. Cir. 1973) (en banc)(per curiam) (internal citation omitted, citing the Impeachment Clause, Art. II, § 4)..

[17] In that case, when the OIC came upon the initial information, the OIC referred the matter to the Attorney General and suggested various alternatives: the Department of

(continued...)

Attorney General Janet Reno and the Department of Justice have rejected the claims of those who seek to narrow the jurisdiction of this OIC.[18] In addition, the Attorney General has, at various times, *expanded* the original jurisdiction of the OIC to include matters beyond those originally within the OIC mandate.[19] Indeed, the Attorney General has even gone to court in order to submit these matters to you and to expand the OIC's jurisdiction over your objection.[20] While she has expanded the

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[17] (...continued)
Justice could take over the investigation, or the DOJ could investigate together with the OIC, or the DOJ could turn over the entire matter to the OIC, or the DOJ could seek the appointment of a new Independent Counsel. The Attorney General chose the third alternative and promptly asked the Special Division to expand the jurisdiction of the OIC.

The Special Division granted this special request of the Attorney General. The OIC did investigate after it had received oral authorization to do so. This oral authorization was followed by written authorization.

[18] When others have claimed that the OIC is acting outside of its jurisdiction (a claim, for example, that Governor Jim Guy Tucker advanced in court), the Attorney General has also *supported* the OIC's jurisdiction and the Eight Circuit agreed with this position.

[19] The scandal and charges that have been collectively referred to as "Travel-gate" (involving the White House Travel Office) or the "FBI Files" (referring to FBI files sent to the White House and then used for partisan purposes) fit in this category.

The Attorney General's efforts to expand your jurisdiction are also significant because recent events show that she is often reluctant to seek the appointment of a Independent Counsel. She has *refused* to appoint an Independent Counsel in various matters relating to campaign finance, even when the Director of the FBI has supported the appointment of an Independent Counsel. And, in matters involving other Independent Counsel, she has *objected to* any expansion of jurisdiction, even when the courts have eventually ruled that her position was legally in error. *E.g.*, Terry Eastland, *How Justice Tried to Stop Smaltz*, Wall Street Journal, Dec. 22, 1997, at A19, col. 3-6 (Midwest ed.).

[20] It is unusual for the subject of an investigation by an Independent Counsel to attack the *bona fides* of the Independent Counsel. For example, neither Attorney General Meese nor his personal attorney ever personally attacked the people investigating him, even though the Independent Counsel was a member of the other political party. In fact, it has been typical for the Independent Counsel to be a member of the opposing political party.

I am aware that some supporters of President Clinton (including his wife and occasionally the President himself) have engaged in public attacks on the OIC and personal attacks on the *bona fides* of its attorneys. They accuse the OIC of partisanship and abuse of the prosecutorial powers. However, the fact that Attorney General Reno — who serves at the
(continued...)

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jurisdiction of the OIC, President Clinton has refused on several occasions to testify before the Grand Jury, had pled executive privilege to block his aides from testifying, and has urged the creation of a new type of privilege to prevent Secret Service Agents from testifying.

Notwithstanding these roadblocks, the investigation is proceeding to the point that there is significant, credible, persuasive evidence that the President has been involved in various illegal activities in a conspiracy with others (in particular his wife), to tamper with witnesses, suborn perjury, commit perjury, hide or destroy incriminating documents, and obstruct justice.

If the President were any other official of the United States, for example, a Cabinet Officer or a Congressperson, I understand that the two Deputy Independent Counsel (one, a former U.S. Attorney and the other, a former member of the Public Integrity Section of the Department of Justice) have concluded that an indictment would be proper and would issue given the evidence before the Grand Jury. The Office of Independent Counsel is, in general, required to follow the Department of Justice regulations governing other federal prosecutors. To refuse to indict the President when the crimes are serious enough and the evidence strong enough that

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[20] (...continued)
pleasure of President Clinton and is the highest law enforcement official in the Department of Justice — has gone to court to *expand* your jurisdiction (even over your objection) is inconsistent with these attacks. If she thought that the OIC or any of its attorneys were acting improperly in investigating President Clinton, she would make no sense for her to be fighting to *expand* the OIC's jurisdiction. *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), discussed below, made it quite clear that the Attorney General's decision not to seek the appointment of an Independent Counsel is *not* reviewable in any court.

Recently, a bipartisan group of former Attorneys General of the United States have joined together to rebut the attacks on the integrity of the Independent Counsel. Their statement of March, 1998, was extraordinary. It said, in part:

> "As former attorneys general, we are concerned that the severity of the attacks on Independent Counsel Kenneth Starr and his office by high-level government officials and attorneys representing their particular interests, among others, appear to have the improper purpose of influencing and impeding an ongoing criminal investigation and intimidating possible jurors, witnesses and even investigators."

a Senator or Cabinet Secretary would be indicted would be inconsistent with the OIC's obligations to exercise its prosecutorial discretion the same way that the Department of Justice attorneys exercise their discretion to refuse to indict.

Moreover, there is the apparent injustice that would result if the Grand Jury would seek to indict the various members of this conspiracy (*e.g.*, Hillary Rodham Clinton) while refusing to indict the center of the conspiracy.[21]

If the Grand Jury simply issues a report of the facts that it has found, but does not indict even though it concludes that there is substantial evidence that the President has committed serious crimes, then the President has no judicial forum to present his side of the story and seek vindication in the judicial system. As then Solicitor General Robert Bork said, in arguing that a sitting Vice President can be indicted:

"An officer may have co-conspirators and even if the officer

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[21]

> were immune [from indictment], his co-conspirators would not be. The result would be that the grand and petit juries would receive evidence about the illegal transactions and that evidence would inevitably name the officer. The trial might end up in the conviction of the co-conspirators for their dealings with the officer, yet the officer would not be on trial, would not have the opportunity to cross-examine and present testimony on his own behalf. The man and his office would be slandered and demeaned without a trial in which he was heard. The individual might prefer that to the risk of punishment, but *the courts should not adopt a rule that opens the office to such a damaging procedure.*"[22]

Consequently, you have asked my legal opinion as to whether it is constitutional to indict a sitting President for actions that occurred both before he became President and while he was under investigation.

In order to answer the question, it is important to understand the constitutional issue in context. The question is not, as an abstract matter, whether any sitting President is immune from the criminal laws of the state or federal governments as long as he is in office. Rather, the question is whether — given the enactment of the Independent Counsel law under which the OIC operates, given the historical background that led to that law, and given the constitutionality of that law as determined by *Morrison v. Olson*[23] — it is constitutional for a grand jury to indict this President if the evidence demonstrates beyond a reasonable doubt that the President is part of an extensive and continuing conspiracy, stretching over many years, involving witness tampering, document destruction, perjury, subornation of perjury, obstruction of justice, and illegal pay-offs — all serious allegations that in no way relate to the President Clinton's official duties, even though some of the

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[22] *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 21 (emphasis added). Judge Bork concluded that a sitting Vice President could be indicted prior to impeachment but he also said (in dictum) that the President would be immune from indictment prior to impeachment. While Judge Bork argued that the President should be immune from indictment, his reasoning at this point supports the opposite conclusion. His point is well-taken: the Office of Independent Counsel should not cast a charge against the President without giving him a judicial forum within which to vindicate himself.

[23] 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

alleged violations occurred after he became President.

Before turning to this particular question, it is useful to consider some background matters.

CRIMINAL PROSECUTIONS OF CHIEF EXECUTIVES OF OTHER COUNTRIES.

First, it is interesting that democracies in other countries do not recognize a principle that an individual would be above the law and privileged to engage in criminal activities simply because he or she is the President, Premier, Prime Minister, Chief Executive, or Head of State. In fact, heads of state are not immune from criminal prosecution even if we only look at countries with a tradition of living under the rule of law that is much weaker than the tradition that exists in the United States. I have been unable to find any instances where a democracy — even a democracy that also recognizes a King or Queen — has immunized its Chief Executive Officer from criminal conduct simply because he or she is the Chief Executive Officer.

On the other hand, it is quite easy to find examples of foreign heads of state subject to prosecution for allegedly criminal activities. Even if one confines a search to the relatively short time period since 1980, it is not difficult to find various examples of heads of state who have been subject to the possibility of criminal prosecution (what we call "indictment" in this country) in a wide variety of countries.[24]

Other countries are governed by their own Constitutions, and the fact that their chief executives (like their other citizens) are subject to the criminal law does not, of course, mean that the chief executive officer of the United States is subject to its federal criminal laws. Each of these instances is, in a sense, unique and one can therefore distinguish them from the present circumstance.

Consequently, I do not rely on the examples discussed below in reaching the conclusions of the opinion letter. I simply present these examples as suggesting that the claim that the chief executive officer of the United States is immune from criminal prosecution and above the law as long as he holds the chief executive office is a claim that other countries (at least those who are not governed by a dictatorship) would find curious if not peculiar.

- In VENEZUELA, in 1993, President Carlos Andres Perez was ordered to stand trial on

[24] In this case, I used a computerized search of WESTLAW for the period since 1980.

embezzlement charges. Perez has the dubious distinction of being the first incumbent Venezuelan president charged with a crime since the country shed a military dictatorship and became a democracy in 1958. The provisional government of Octavio Lepage was sworn in to replace Mr. Perez.[25]

- In PAKISTAN, in 1997, Prime Minister Nawaz Sharif was charged with contempt of court after criticizing the judiciary, which is a crime in Pakistan. Sharif pleaded innocent. A conviction could lead to his removal from office.[26] The fact that he held the office of Prime Minister did not immunize him from the rule of law.
- In ITALY, prosecutors requested the indictment of Prime Minister Romano Prodi on charges of corrupt management of the country's state industries. The charges arose from the transfer of a food production company from state to private hands in 1993. Prodi was accused of fixing the sale of a large package of shares in the company by offering it to a politically well-connected private concern at a cut-price rate. The fact that he was Prime Minister did not immunize him from the rule of law. A preliminary magistrate was in charge of deciding whether to order Prodi to stand trial.[27]
- In CANADA, Prime Minister Jean Chretien was charged with assault for manhandling a protester. His office of Prime Minister did not immunize him from the rule of law. Of course, the fact that he could be charged does not mean that he would be convicted, and, in fact, the charges were quashed. This was the first time this century that a sitting Canadian prime minister faced criminal assault charges. Kenneth Russell, brought the charge against the prime minister for grabbing a demonstrator by the throat during a Flag Day ceremony.[28]
- In FRANCE, traders said that "one of the major reasons for the enactment of emergency money market measures has been removed with Wednesday's decision not to pursue criminal charges against the Prime Minister for illegally acquiring cheap apartments for himself and his son." However, if the evidence warranted, Prime Minister Alain Juppe would not be immunized from the rule of law and could have been prosecuted.[29]
- In ISRAEL, in 1995, Shekem workers asked Attorney General Michael Ben-Yair to open a

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[25] *Venezuela Ponders Next Move as President Ordered to Stand Trial,* ATLANTA JOURNAL & CONSTITUTION, May 23, 1993, A 10, available in 1993 WESTLAW 3364034.

[26] *Sharif Warns Crisis Taking Pakistan Near Destruction,* DOW JONES INT'L NEWS SERV., Nov. 19, 1997. Raymond Bonner, *Pakistan's Army May Settle Political Feud,* N.Y. TIMES, Dec. 1, 1997, at A4.

[27] *Italian PM Faces Accusations,* VANCOUVER SUN, Nov. 26, 1996, A7, *available in* 1996 WestLaw 5031681; Andrew Gumbel, *Prosecutors Turn Sights on Italian PM,* THE INDEP. (London), Nov. 26, 1996, at 15, International Section.

[28] Gary Borg, *Chretien is Charged Briefly with Assault,* CHI. TRIB., May 7, 1996, at A10, *available in* 1996 WESTLAW 2669290.

[29] Capital Markets Report, Oct. 12, 1995; Reuters World Service, Oct. 11, 1995.

criminal investigation against Prime Minister Yitzhak Rabin for allegedly violating sub judice laws. Rabin charged that "Shekem's fired workers are parasites." Israel's laws forbid publishing information on an issue negotiated in court if it could influence the court's ruling.[30] Rabin's office of Prime Minister did not serve to immunize him from the rule of law.

- In JAPAN, prosecutors ultimately refused to press charges against Prime Minister Noboru Takeshita or any other major political leader being investigated for criminal activity in connection with an influence-peddling scandal. Former prime minister Yasuhiro Nakasone and at least three cabinet members in Takeshita's government also escaped indictment. The scandal, however, forced Takeshita to announce on April 25, 1989, that he would resign.[31] Once again, the Prime Minister was subject to the rule of law, and if the evidence had warranted could have been criminally prosecuted.
- In PAPUA NEW GUINEA, a judge recommended that Prime Minister Bill Skate face criminal charges if evidence that he failed to stop a mutiny was confirmed.[32] The fact that he was Prime Minister did not immunize him from the rule of law.
- In SLOVAKIA, in 1996, President Michael Kovac filed criminal slander charges against Prime Minister Vladimir Meciar.[33] The fact that Meciar held the office of Prime Minister

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[30] Galit Lipkis Beck, *Shekem Workers: Investigate Rabin*, JERUSALEM POST, Feb. 21, 1995, A8, *available in* 1995 WESTLAW 7552690; Galit Lipkis Beck, *Shekem Workers Protest Rabin's Insults*, JERUSALEM POST, Feb. 24, 1995, at p. 15, in Economics Section.

In another instance, ISRAEL, the Prime Minister, Benjamin Netanyahu, faced a parliamentary no confidence vote after an inquiry found "insufficient evidence to link him to an alleged plot to subvert the investigation of a right-wing coalition ally on corruption charges by appointing a loyal but unqualified attorney general, Mr. Roni Bar On." Julian Borger, *Confidence Vote Can Only Be Bad News for Netanyahu*, IRISH TIMES, Jun. 24, 1997, A10, *available in* 1997 WESTLAW 12011461; Anton La Guardia, *Netanyahu Vows to Battle on After Escaping Charges*, DAILY TELEGRAPH, Apr. 21, 1997, at 13, International Section. If the inquiry had found sufficient evidence, he would have been subject to indictment. His office of Prime Minister did not immunize him from the rule of law.

[31] *Probe Ends, Japan's PM Not Charged in Scandal*, MONTREAL GAZETTE, May 30, 1989, B6, *available in* 1989 WESTLAW 5664899; Steven R. Weisman, *Japanese Prosecutors End Scandal Inquiry Without Indicting Major Figures*, N.Y. TIMES, May 30, 1989, at A3.

[32] *Papua New Guinea's PM Could Face Criminal Charges in Mutiny*, DOW JONES INT'L NEWS SERV., Dec. 15, 1997. *Around the World*, SEATTLE TIMES, Dec. 15, 1997.

[33] *Slovakia President Files Charges Against Prime Minister*, DOW JONES INT'L NEWS SERV., May 30, 1996.

did not serve to immunize him from the rule of law.[34]

These examples should not be surprising. As Chief Justice Marshall stated nearly two centuries ago, in *Marbury v. Madison*,[35] the case that has become the fountainhead of American constitutional law: "The government of the United States has emphatically termed a government of laws, and not of men."[36] And, he added, "In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."[37]

Let us now turn specifically to American law. The first item to consider is the language and structure of our Constitution.

THE STRUCTURE AND LANGUAGE OF THE UNITED STATES CONSTITUTION.

Chief Justice Marshall explained that the Constitution "assigns to different

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[34] *Cf.* THAILAND, in 1992, where Prime Minister Suchinda Kraprayoon resigned after "accepting responsibility for the deaths of at least 40 people and the wounding of more than 600 when army troops opened fire on unarmed pro-democracy demonstrators." Demonstrators demanded that trials be held for Suchinda and top military officers who were responsible for ordering troops to fire on unarmed demonstrators. A decree granted the Prime Minister amnesty from criminal charges arising from the repression of the protests. If there were no decree, the Prime Minister would be subject to the rule of law, and the fact that he was Prime Minister would not serve to immunize him. Even after the pardon, an effort was under way to have the amnesty decree declared illegal by a constitutional tribunal. Charles P. Wallace, *Long-Awaited Constitutional Reforms Made in Thailand*, COURIER-JOURNAL (Louisville, Ky.), May 26, 1992, A3, *available in* 1992 WESTLAW 7837659; William Branigin, *Amnesty Opposition Building in Thailand*, HOUSTON CHRONICLE, May 25, 1992, A24.

Also in THAILAND, in 1996, criminal fraud charges were leveled against Prime Minister Banharn Silpa-archa. His office of Prime Minister did not immunize him from the rule of law. The *Bangkok Post* said that "the charges involved allegations about the sale of land by Mr. Banharn's daughter, Ms. Kanchana, to the state and the diversion of a seven-billion-baht ($393-million) fund from the environment to the Interior Ministry, which Mr. Banharn heads as minister." *Banharn Faces Criminal Charges: Opposition*, STRAITS TIMES (Sing.), Sept. 4, 1996, *available in* 1996 WESTLAW 11723429; *PM Faces Criminal Charges: Move to Show Banharn's Zero Credibility*, THE BANGKOK POST, June 3, 1997, at p. 1.

[35] 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

[36] 5 U.S. (1 Cranch) at 163.

[37] 5 U.S. (1 Cranch) at 163. *Cf.* Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 1975 U. OF ILL. L. FORUM 1 (1975), cited, *e.g.* in *Clinton v. Jones*, — U.S. —, —, 117 S.Ct. 1636, —, 137 L.Ed.2d 945 (1997).

departments their respective powers."[38] So that —

> "those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation."[39]

Because we live under a *written* constitution, and the Constitution was written so that we would be governed by the written words, it is useful to look at what that writing says about immunities from prosecution. Let us look at the language of the Constitution.

Our written Constitution has two specific sections that refer to what may be categorized as some type of "immunity" from the ordinary reach of the laws.

THE PRIVILEGE FROM ARREST.

First, Senators and Representatives are "privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same . . .," except in cases of "Treason, Felony and Breach of the Peace . . .."[40]

This section illustrates several important factors. First, the Framers of our Constitution thought about immunity, and when they did, they gave a limited immunity to the Senators and Representatives. No similar clause applies to any member of the Executive Branch nor any member of the Judicial Branch. Second, the immunity granted is really quite narrow. It only applies during a legislative session. Moreover, it is limited to arrest in *civil* cases, an obsolete form of arrest that no longer exists.[41]

The Privilege from Arrest Clause does *not* apply at all to criminal cases. It does not protect the Senator or Representative from service of process in a criminal

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[38] 5 U.S. (1 Cranch) at 176.

[39] 5 U.S. (1 Cranch) at 176-77.

[40] U.S. CONST., ART. I, § 6, cl. 1.

[41] See discussion in, 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 8.9, "Privilege from Arrest" (West Pub. Co., 2d ed. 1992). *See also, Williamson v. United States*, 207 U.S. 425, 435-46, 28 S.Ct. 163, 166, 52 L.Ed. 278 (1908).

case.[42] It does not even protect the Senator or Representative from service of process in a civil case.[43] In other words, this clause immunizes a Senator or Representative against a procedure that no longer exists — arrest in a *civil* case.

As Justice Brandeis, speaking for the Supreme Court, has warned us, this narrow privilege should be narrowly construed:

> "Clause 1 [the privilege from arrest clause] defines the extent of the immunity. Its language is exact and leaves no room for a construction which would extend the privilege beyond the terms of the grant."[44]

THE SPEECH OR DEBATE CLAUSE.

The same clause of the Constitution contains the only other reference to a privilege or immunity from the criminal law. It provides that, "for any Speech or Debate in either House, they shall not be questioned in any other Place."[45]

The Supreme Court has interpreted this "Speech or Debate" Clause, like the Privilege from Arrest Clause, quite narrowly. For example, if the Executive Branch seeks to prosecute a Member of Congress for taking a bribe to vote a certain way, the prosecution cannot introduce into the trial the vote of the Representative, but the prosecution can introduce into evidence the "[p]romises by a Member to perform an act in the future," because "a *promise* to introduce a bill is not a legislative act."[46] In other words, Members of Congress can be criminally prosecuted for taking a bribe to introduce legislation into Congress, notwithstanding the supposed protections of the Speech or Debate Clause.

In addition, the Speech or Debate Privilege, like the Arrest Privilege, only applies to the legislative branch, not the executive branch. The Constitutional language makes that quite clear. The existence of these two privileges and the absence of any similarly clear language creating any sort of Presidential privilege is

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[42] *United States v. Cooper*, 25 Fed. Cases 626, (4 Dall.) 341, 1 L.Ed. 859 (C.C.Pa. 1800).

[43] *Long v. Ansell*, 293 U.S. 76, 82, 55 S.Ct. 21, 22, 79 L.Ed. 208 (1934).

[44] *Long v. Ansell*, 293 U.S. 76, 82, 55 S.Ct. 21, 22, 79 L.Ed. 208 (1934).

[45] U.S. CONST. ART. I, § 6, cl. 1.

[46] *United States v. Helstoski*, 442 U.S. 477, 489-90, 99 S.Ct. 2432, 2439-40, 61 L.Ed.2d 12 (1979)(emphasis in original).

significant. If the Framers of our Constitution had wanted to create some constitutional privilege to shield the President or any other member of the Executive Branch from criminal indictment (or to prevent certain officials from being indicted before they were impeached), they could have drafted such a privilege. They certainly know how to draft immunity language, for they drafted a very limited immunity for the federal legislature.

Yet, even in the case of federal legislators, the Constitution gives no immunity from indictment. As then Solicitor General Robert Bork concluded, in rejecting the argument that the United States could not indict a sitting Vice President:

> "The Constitution provides no explicit immunity from criminal sanctions for any civil officer. The only express immunity in the entire document is found in Article I, Section 6, which provides [here he quotes the "arrest clause"].
>
> "Since the Framers knew how to, and did, spell out an immunity, the natural inference is that no immunity exists where none is mentioned. Indeed, any other reading would turn the constitutional text on its head: the construction advanced by counsel for the Vice President requires that the explicit grant of immunity to legislators be read as in fact a partial withdrawal of a complete immunity legislators would otherwise have possessed in common with other government officers. The intent of the Framers was to the contrary."[47]

THE IMPEACHMENT CLAUSE.

The Language. There is only one impeachment clause in the Constitution. It does not purport to distinguish the impeachment of a federal judge from the Vice President, nor does it distinguish the impeachment of the Vice President from the President. The clause provides:

> "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and

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[47] *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States,* Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 5.

> subject to Indictment, Trial, Judgment, and Punishment, according to Law."[48]

This clause indicates that Congress should not be entrusted with the power to impose any penalty on an impeached official other than (or no greater than) removal from office and disqualification from further office. Criminal penalties would be left to the judiciary. In addition, the clause makes clear that double jeopardy would not bar a criminal prosecution. The clause does not state that criminal prosecution must come after an impeachment, nor does it state that the refusal of the House to impeach (or the Senate to remove from office) would bar a subsequent criminal prosecution.

The Commentators and the Case Law. The available historical evidence as to the meaning of this clause is sparse. One can find various historical references that *assume* that impeachment would precede indictment, but these references, as Professor John Hart Ely concluded, "did not argue that the Constitution *required* that order."[49] Professor Ely, at the time, was a consultant to Archibald Cox, then the Watergate Special Prosecutor, when he made these comments and concluded that the Constitution does not require that impeachment and removal precede a criminal indictment, even of the President. In 1996, in the midst of the Whitewater investigation, he reaffirmed his analysis.[50]

Judge Robert Bork agrees with Professor Ely, his former colleague at the Yale Law School. While Solicitor General, Judge Bork concluded, when "the Constitution provides that the 'Party convicted' is nonetheless subject to criminal punishment," that language does "not establish the sequence of the two processes, but [exists] *solely* to establish that conviction upon impeachment does not raise a double jeopardy defense in a criminal trial."[51]

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[48] U.S. Const., art. I, § 3, cl. 7. Clause 6 provides that if the President is subject to impeachment, the Chief Justice of the United States shall preside. The framers evidently thought that the person who normally presides over the Senate [*i.e.* the Vice President of the United States] should not preside in the case of a Presidential impeachment because he would be in a conflict of interest.

[49] JOHN HART ELY, ON CONSTITUTIONAL GROUND 138 (Princeton University Press 1996) (emphasis added).

[50] JOHN HART ELY, ON CONSTITUTIONAL GROUND 138-39 (Princeton University Press 1996).

[51] *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, (continued...)

Of course, impeachment by the House and conviction by the Senate is the only constitutional way to *remove* the President or Vice President or federal judges from office. A criminal conviction in an Article III federal court of a federal official does not remove this official from office, even if the criminal act would also constitute "high crimes or misdemeanors."

The debates surrounding the drafting of the Constitution are "rife with assertions that the president is not a monarch above the law. and so the argument must proceed along the line that the president must be impeached before he can be criminally prosecuted."[52] Let us consider some of these historical sources.

For example, in one of the FEDERALIST PAPERS, Alexander Hamilton says, "The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender."[53] Another FEDERALIST PAPER (also penned by Hamilton) states the President can be impeached for "treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law."[54] Perhaps this language only means that if the President is being charged with actions that are peculiarly and uniquely contrary to Presidential responsibility (like treason committed while President, or acceptance of bribes while President), then impeachment must precede indictment. But that interpretation would mean that other crimes (assault and battery, witness tampering, obstruction of justice, perjury, suborning perjury in a civil case, etc.) can be prosecuted prior to impeachment and removal from office.

Against this sparse language (which nowhere asserts that impeachment and

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[51] (...continued)
Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 10 (emphasis added). Solicitor General Bork, in this Memorandum ,by way of dictum, also concluded, based on the case law that existed at the time, that the President was immune from criminal prosecution prior to indictment.

[52] JOHN HART ELY, ON CONSTITUTIONAL GROUND 138 (Princeton University Press 1996).

[53] THE FEDERALIST PAPERS, No. 65, 8th paragraph (Alexander Hamilton). In No. 69.

[54] THE FEDERALIST PAPERS, No. 69, 4th paragraph (Alexander Hamilton).

removal *must* precede criminal indictment in *all* cases)[55] is other specific historical language that goes the other way and indicates that the Framers of our Constitution concluded that, unlike federal legislators, no special constitutional immunity should attach to the President.[56]

Consider, for example, the remarks of James Wilson, in the course of the Pennsylvania debates on the Constitution. He said: "far from being above the laws, he [the President] is amenable to them in his private character as a citizen, and in his public character by impeachment."[57] That quotation implies that the President can be criminally prosecuted like any other citizen, without regard to impeachment. Similarly, Iredell, in the course of the North Carolina debates on the Constitution, said: "If he [the President] commits any misdemeanor in office, he is impeachable . . .. If he commits any crime, he is punishable by the laws of his country, and in capital cases may be deprived of his life."[58]

Wilson was hardly a solitary voice. Charles Pinckney, a contemporary observer, also stated:

> "Let us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their [*i.e.*, Congressional] privileges [Pinckney had just referred to the Congressional privilege from arrest, discussed above], and have shewn so little to the President of the United States in this respect. . . . *No privilege of this kind was intended for your*

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[55] Professor John Hart Ely, who examined the historical references for Watergate Special Prosecutor Archibald Cox, also concluded that the historical references do not require that impeachment and removal precede a criminal indictment, even of the President. JOHN HART ELY, ON CONSTITUTIONAL GROUND 139 (Princeton University Press 1996).

[56] *See, e.g.*, MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at p. 1066 (1911)(comments of Charles Pinckney); 10 ANNALS OF CONGRESS 71 (1800)(Senator Pinckney, stating that "our Constitution supposes no man . . . to be infallible, but considers them all as mere men, and subject to all the passions, and frailties, and crimes, that men generally are, and accordingly provides for the trial of such as ought to be tried . . .."); Eric M. Freedman, *Achieving Political Adulthood*, 2 NEXUS 67, 68 (Spring, 1997), also discussing account of Charles Pinckney, a delegate to the Constitutional Convention.

[57] 2 ELLIOTT'S DEBATES 480, quoted in WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 7-8.

[58] 4 ELLIOTT'S DEBATES 109, quoted in WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 8 n.7.

> *Executive*, nor any except that which I have mentioned for your Legislature. The Convention which formed the Constitution well knew that this was an important point, and *no subject had been more abused than privilege.* They therefore determined so set the example, in merely limiting privilege to what was necessary, *and no more.*"[59]

Tench Coxe, in his *Essays on the Constitution*, published in the *Independent Gazetteer* in September, 1787, agreed. He concluded, in discussing the President:

> *"His person is not so much protected as that of a member of the House of Representatives; for he may be proceeded against like any other man in the ordinary course of law."* (emphasis in original).[60]

When those who argue that the President is immune from the criminal law until after he has been impeached look to the historical sources, the very most that they could draw from the historical debates in support of their view is that there certainly was no agreement to create any Presidential immunity from criminal indictment (either absolute or temporary), for the easiest way to create it (temporary or otherwise) would have been to add a clause to the Constitution defining its existence and extent. In fact, the contemporary sources suggest that the Constitution provides no criminal immunity for any President who commits crimes in his personal capacity.

This analysis should not be surprising; it is the same conclusion reached in *Nixon v. Sirica*,[61] where the Court — after examining the Constitutional debates and the views of the Framers of our Constitution — said:

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[59] 10 ANNUALS OF CONGRESS 74 (1800). Also quoted in, 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 385, also cited in JOHN HART ELY, ON CONSTITUTIONAL GROUND 415 (Princeton University Press 1996).

[60] Quoted in, 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 141 (1976), quoted with approval in *Nixon v. Sirica*, 487 F.2d 700, — (D.C. Cir. 1973)(per curiam)(en banc).

[61] *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973)(per curiam)(en banc). President Nixon chose not to appeal this ruling.

Samuel Dash (also a special consultant to the Office of Independent Counsel) and I were two of the attorneys who filed a brief in this case on behalf of the Senate Watergate Committee.

> "The Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. This silence cannot be ascribed to oversight."[62]

Later, this same Court said:

> "Lacking textual support, counsel for the President nonetheless *would have us infer immunity from the President's* political mandate, or from his *vulnerability to impeachment*, or from his broad discretionary powers. *These are invitations to refashion the Constitution and we reject them.*"[63]

Professor John Hart Ely — a distinguished Constitutional scholar, a former chaired Professor of Constitutional Law as Harvard Law School, a former chaired Professor and the Dean of Stanford Law School, a special consultant to Watergate Prosecutor Archibald Cox, and now a chaired Professor at the University of Miami School of Law — concluded, after analyzing the debates at the Constitutional Convention, that it would be "misleading" to argue that there was a special Presidential immunity from criminal indictment or prosecution until the President was first impeached. He concluded that "there was no immunity contemplated by the framers — or if they contemplated it they didn't say so . . .." As Professor Ely went on to explain:

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[62] *Nixon v. Sirica*, 487 F.2d 700, 710-11 (D.C. Cir. 1973)(per curiam)(en banc):

> "Thus, to find the President immune from judicial process, we must read out of [*United States v.] Burr*, [25 Fed. Cases p. 30 (Case No. 14,6962d) (1807)] and *Youngstown* [*Sheet & Tube v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863 (1952)], the underlying principles that the eminent jurists in each case thought they were establishing. *The Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. This silence cannot be ascribed to oversight.* James Madison raised the question of Executive privilege during the Constitutional Convention, and Senators and Representatives enjoy an express, if limited, immunity from arrest, and an express privilege from inquiry concerning 'Speech and Debate' on the floors of Congress."

[footnotes omitted; emphasis added.]

[63] 487 F.2d at 711 [emphasis added].

> "To the extent that they [the Constitutional debates] suggest anything on the subject, the debates suggest that the immunities the Constitution explicitly granted members of Congress (which do not, incidentally, include this sort of immunity [from criminal prosecution]) were not intended for anyone else. The argument for presidential immunity from indictment is one that must be based on necessity — and perhaps, but only perhaps, the presidency *and vice presidency* are distinguished on that score — *but not* on anything the framers said either in the Constitution itself or during the debates."[64]

Consider also some remarks that Joseph Story made in his COMMENTARIES ON THE CONSTITUTION:

> "There are other 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; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion .. .. But he has no authority to control other officers of the government, in relation to the duties imposed on them by law, in cases not touching his political powers."[65]

Some people focus on the phrase: "The president cannot, therefore, be liable to arrest, imprisonment, or detention . . .." However, they forget to read the rest of the sentence, which gives him this immunity only when pursuing his official duties: "*while* he is in the discharge of the *duties of his office* . . .." Obstruction of justice, witness tampering, destruction of documents, accepting pay-offs — none of this is part of the President's official duties. In fact, as Justice Story states, the President: "has no authority to control *other officers of the* government, in relation to the duties

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[64] JOHN HART ELY, ON CONSTITUTIONAL GROUND 141 (Princeton University Press 1996) (emphasis added).

[65] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, § 814, at p. 579 (RONALD D. ROTUNDA & JOHN E. NOWAK, eds., Carolina Academic Press, 1987, originally published, 1833); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, § 1563, at 418-19 (1833 ed.).

imposed on them by law, in cases not touching his political powers."

Justice Story explained that these "other officers of the government" — judges, federal prosecutors, the Independent Counsel — are supposed to do their jobs, to perform the duties imposed on them by law. The duties imposed on the Independent Counsel are duties imposed by the Independent Counsel statute and by the decision of Attorney General Janet Reno to petition the court to appoint an Independent Counsel. The statute provides that Independent Counsel must, in general, comply with the regulations of the Department of Justice.[66] If President Clinton's alleged criminal acts would be criminally prosecuted by the Department of Justice if a Cabinet Officer or Senator or Representative committed those crimes, and if the alleged crimes are serious enough and the evidence of criminality is substantial so that a federal prosecutor believes that he or she would secure a conviction beyond a reasonable doubt by a fair-minded jury, then the Independent Counsel, following his statutory duty, should allow the Grand Jury to indict.

The prosecution in this case does to relate to any political dispute between Congress and the President. It does not relate to claims that the President should, or should not have, exercised political discretion in a particular way. There is no issue as to whether the President should have deployed a new Air Force bomber, or whether the President should not have sent troops to Bosnia. The issues in this case do not relate to the President's official duties. In fact, some of the issues occurred before he became President, and all of the issues (obstruction, conspiracy, witness tampering, etc.) have nothing to do with the President's official duties to take care that the law be faithfully executed.[67]

The language that I have quoted from Justice Story is often quoted in the relevant case law. The courts have placed the same interpretation on that language that I have. In *Nixon v. Fitzgerald*,[68] for example, the Court quoted this language from Justice Story[69] and held that the President had no immunity from civil damages for matters that were outside the outer perimeter of his official duties. In fact, in that

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[66] CITE

[67] The facts here are not like the situation in *Morrison v. Olson*, where a criminal prosecution of a high-level political appointee of the President arouse out of "a bitter power dispute between the President and the Legislative Branch . . .." 487 U.S. 654, 703, 1087 S.Ct. 2597, 2625, 101 L.Ed.2d 569 (1988)(Scalia, J., dissenting).

[68] 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

[69] 457 U.S. at 749, 102 S.Ct. at 2701.

case, Justices White, Brennan, Marshall, and Blackmun said explicitly that "there is no contention that the President is immune from criminal prosecution in the courts under the criminal laws . . . [n]or would such a claim be credible. . . . Similarly, our cases indicate that immunity from civil damage actions carries no protection from criminal prosecution."[70] By the way, Vice President Gore, while a U.S. Representative, agreed with the dissent in this case and argued that the President should not even be immune from civil damage suits for acts does in his official capacity.[71]

The majority opinion in *Fitzgerald* did not dispute this conclusion that the President is subject to criminal indictment. On the contrary, the majority appeared to agree with the dissent on this point. Justice Powell, joined by Justices Rehnquist, Stevens, O'Connor & Chief Justice Burger, responded that absolute immunity from civil damages "'does not leave the public powerless to deter misconduct or to punish that which occurs.'"[72] This is so because the judge or prosecutor — who, like the President is absolutely immune from a civil damage lawsuit brought by a private litigant in certain cases — can still be criminally prosecuted.[73]

Clinton v. Jones[74] also quotes this same passage from Justice Story. Justice Stevens, for the Court, italicizes part of this quotation. The President —

> "cannot, therefore be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and *for this purpose* his person must be deemed, in civil cases at least, to possess an official inviolability." (emphasis in original).[75]

The Court went on to say: "Story said only that '*an* official inviolability,'

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[70] 457 U.S. at 780, 102 S.Ct. at 2717 (dissenting opinion).

[71] See discussion in, Ronald D. Rotunda, *Paula Jones Day in Court*, 17 LEGAL TIMES (OF WASHINGTON, D.C.) 24, 27 (May 30, 1994), *reprinted, e.g.*, 10 TEXAS LAWYER 24, 27 (June 13, 1994), referring to Amicus Brief that Representative Gore joined.

[72] 457 U.S. at 757 n.38, 102 S.Ct. at 2705 n. 38, quoting *Imbler v. Pachtman*, 424 U.S. at 428-29, 96 S.Ct. at 994.

[73] 457 U.S. at 757 n.38, 102 S.Ct. at 2705 n. 38, quoting *Imbler v. Pachtman*, 424 U.S. at 428-29, 96 S.Ct. at 994.

[74] — U.S. —, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997).

[75] — U.S. at — n. 23; 117 S.Ct. at 1645 n. 23 (emphasis in original).

[emphasis by the Court] was necessary to preserve the President's ability to perform the functions of his office; he did not specify the dimensions of the necessary immunity."[76] Once again the Court made clear that there is no need to give the President absolute immunity from criminal prosecution when he is charged with offenses that do not relate to the discharge of the duties of his office because criminal activities are not in the discharge of the President's *official* duties.

As the Court explicitly stated: "With respect to acts taken in his 'public character' — that is official acts — the President may be disciplined principally by impeachment, not by private lawsuits for damages. But *he is otherwise subject to the laws for his purely private acts.*"[77] For private acts, acts taken in his private capacity, the President is "otherwise subject to the laws." That has to mean "all" of the laws, including the criminal laws. If a President suborns perjury, tampers with witnesses, destroys documents, he is not acting in his official capacity as President. The fact that some of these acts occurred prior to the time he became President does not bolster his claim of immunity from the criminal laws.

If the President is indicted for acts that occurred prior to the time he became President and for acts that were not taken as part of his official constitutional duties, then, as *Clinton v. Jones* states: "the fact that a federal court's exercise of its tradition Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution."[78] The Court added:

> "it must follow that the federal courts have power to determine the legality of his [the President's] unofficial conduct."[79]

If a President were indicted for acts not taken in his official capacity as President, a federal court would only be exercising its traditional Article III jurisdiction. Article III courts have the power to determine the legality of the President's unofficial conduct, even though the exercise of that traditional jurisdiction may significantly burden the time and attention of the Chief Executive.

If public policy and the Constitution allow a private litigant to sue a sitting

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[76] *Id.*

[77] — U.S. at —, 117 S.Ct. 1645 (emphasis added).

[78] — U.S. at —, 117 S.Ct. at 1648-49.

[79] — U.S. at —, 117 S.Ct. at 1650.

President for alleged acts that are not part of the President's official duties (and are outside the outer perimeter of those duties) — and that is what *Clinton v. Jones* squarely held — then one would think that an indictment is constitutional because the public interest in criminal cases is *greater than* the public interest in civil cases.[80]

IMPLIED PRIVILEGE?

Although the Constitution, by its own terms, does not create a privilege, that does not end the discussion, because the Supreme Court may create a common law privilege or derive such a privilege from its earlier precedent. Let us now consider this issue.

EXECUTIVE PRIVILEGE. First, one should look at the role that Executive Privilege has played in the case law. The President, over the course of two centuries, has sometimes raised a claim of Executive Privilege *when Congress* demands certain information. But that was not the fact pattern involved in *United States v. Nixon.*[81]

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[80] *Nixon v. Fitzgerald,* the Supreme Court held that the President was *absolutely* immune for civil damages involving actions taken within his official duties, but also emphasized that this was "merely a private suit for damages" and that there is "a lesser public interest in actions for civil damages *than, for example, in criminal prosecutions.*" 457 U.S. 731, 754 & n.37, 102 S.Ct. 2690, 2703 & n.37.

[81] 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

For a discussion of prior incidences where Presidents provided personal testimony, under oath, pursuant to subpoena, *see,* Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote,* 1975 U. OF ILLINOIS LAW FORUM 1 (1975).

The earlier cases — where the President complied with a subpoena in a criminal case — did not reach the U.S. Supreme Court. *See also,* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 7-1(a)-(d) (West Pub. Co., 2d ed. 1992)(and corresponding pages in 1998 pocket part).

However, the Supreme Court, *prior* to *United States v. Nixon,* did explicitly approve of *United States v. Burr,* 25 Federal Cases 30, 34 (No. 14,6962d)(C.C.Va. 1807), the decision that required President Jefferson to comply with a subpoena issued by an Article III court. After stating that "the public has a right to every man's evidence" the Court, in *Branzberg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646 (1972), added this footnote:

> "In *United States v. Burr* Chief Justice Marshall, sitting on Circuit, opined that in proper circumstances a subpoena could be issued to the President of the United States."

(continued...)

Instead, the question was quite different: whether the President could refuse to disclose information relevant to a federal criminal prosecution brought in an Article III court. President Nixon was the first President in history to litigate the use of Executive Privilege in the court system and the U.S. Supreme Court and to refuse to turn over evidence based on this theory. President Clinton is only the second President in history to raise and litigate Executive Privilege in an effort to block evidence relevant to a criminal investigation.[82]

The main case on this question, *United States v. Nixon*, recognized a very limited form of an evidentiary privilege in the case where the President pleads Executive Privilege to a subpoena issued under the authority of an Article III court in connection with a criminal case.[83]

While the Supreme Court recognized Executive Privilege in *United States v. Nixon* it did not apply it to shield the President; it did not allow President Nixon to assert it in order to prevent disclosure of Presidential tapes regarding confidential conversations. As Judge Robert Bork recently explained: "Nixon's claim, being based only on a generalized interest in confidentiality was overcome by the need of the

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[81] (...continued)
Branzberg v. Hayes, 408 U.S. at 688 n.26, 92 S.Ct. at 2660 n.26.

[82] Thus far, President Clinton has lost on this issue. He raised, and then abandoned, the Executive Privilege claim in his unsuccessful effort to prevent the Independent Counsel from subpoenaing notes taken by Government lawyers (various White House counsel) of conversations with Hillary Clinton. See discussion in, Ronald D. Rotunda, *Lips Unlocked: Attorney Client Privilege and Government Lawyers*, LEGAL TIMES (OF WASHINGTON, D.C.) 21-22, 28 (June 30, 1997).

President Clinton also unsuccessfully raised Executive Privilege in an effort to prevent Bruce Lindsey and Sidney Blumenthal from testifying before the Grand Jury. *In re Grand Jury Proceedings*, Misc. Action 98-095, 98-096 & 98-097 (NHJ), *filed under seal*, May 4, 1998 (D.D.C.Cir.) (Judge Norma Holloway Johnson).

[83] 418 U.S. at 712, n.19, 94 S.Ct. at 3109 n.19:

> "We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and the congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials."

courts and parties in a criminal case for relevant evidence."[84] The Court, in short, recognized Executive Privilege and then ordered the President to turn over the evidence. The Court rejected any claim of a general Executive Privilege in criminal proceedings. If the matter involved military secrets — where the missile silos are buried in Montana — or diplomatic secrets — the contents of a secret cable from the Ambassador to China — the courts are likely to recognize a privilege in the appropriate case. But the issues that surrounded President Nixon, and the issues now surrounding President Clinton, do not fall in these categories.

In addition, the Supreme Court, in its reasoning in *United States v. Nixon*, relied on the "necessary and proper" clause of Article I.[85] That clause gives Congress the power to expand on other powers — to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[86] This power is granted *to Congress*, not to the President. *United States v. Nixon* suggests that Congress may well have the power, under the necessary and proper clause, to create, explicitly, some sort of immunity from criminal prosecution for the President — assuming that this immunity (whether temporary or absolute) is not so broad that it violates other provisions of the Constitution.[87] But Congress has not done so. It has enacted no statute giving any sort of immunity from the criminal laws to the President.

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[84] Robert H. Bork, *Indict Clinton? — How I Wish It Were Possible*, WALL STREET JOURNAL, March 18, 1998, at A22, col. 3 (Midwest ed.).

[85] 418 U.S. at 706 n.16, 94 S.Ct. at 3106 n.16, citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819).

[86] U.S. CONST. ART. I, § 8, cl. 18.

[87] Congress could, if it wished, provide for what is known as "protective jurisdiction" so that criminal actions that states bring against federal officials must be tried in federal court rather than state court.

However, it is an open question whether it would be constitutional for Congress to enact a statute that, either explicitly or in effect, immunizes the President from the application of federal criminal laws. All of the acts of Congress must comply with the limitations of the Bill of Rights. For example, could Congress provide that the President is immune from criminal law if he kills someone, or takes that person's property by theft or deception, or imprisons that person? The due process clause of the Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law." If the President (like an absolute Monarch) has immunity from the criminal law, will we really be a nation of laws and not of men? Did our predecessors revolt from one king only to install another?

RELEVANT FEDERAL STATUTE REJECTS CRIMINAL IMMUNITY. No federal statutes recognize, or purport to recognize, any Presidential immunity from criminal indictment. Indeed, Congress has done quite the opposite: it has created an Independent Counsel statute for the express purpose of investigating alleged criminal activities of the President. In fact, it enacted this statute with a specific background of criminal allegations surrounding *this particular President*. And this particular President not only signed the law, he and his Attorney General lobbied for the law so that the Special Division of the District of Columbia Circuit could appoint an Independent Counsel to investigate alleged criminal activities of this President.[88] Attorney General Janet Reno testified that "President Clinton and the Department of Justice *strongly supported* reauthorization" of the Independent Counsel Act.[89]

The legislative history of the Independent Counsel law nowhere states that the President cannot be indicted, or is above the law or is immune from the criminal law as long as he is a sitting President. The official Legislative History of the Ethics in Government Act of 1978, creating the first independent law, does not suggest that the President is immune from indictment. In fact, it takes pains to reject any such suggestion. The relevant legislative history provides the following:

> "Subsection (c) simply gives the special prosecutor, who has information which he wants to turn over to the House of Representatives because it involves potentially impeachable offenses against the individuals names in this subsection, the authority to so turn over that information.
>
> *"This section should in no way be interpreted as identifying individuals who are not subject to criminal prosecution prior to being impeached and removed from office.* In fact, a number of persons holding the positions identified in this subsection have been subject to criminal prosecution while still holding such an office."[90]

THE BORK MEMORANDUM. The distinguished constitutional scholar and then

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[88] *See generally,* Independent Counsel Reauthorization Act of 1994, Pub. L. 103-270, 4 UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 809-1 (1994).

[89] 4 UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, at 753 (1994)(emphasis added).

[90] Legislative History of Ethics in Government Act of 1978, P.L. 95-521, 92 Stat. at Large 1824, U.S. CODE CONGRESSIONAL AND LEGISLATIVE NEWS 41216, 4287-88 (emphasis added)..

Solicitor General, Robert Bork, concluded in a Memorandum he filed in the criminal prosecution of Vice President Agnew, that the Vice President could be indicted and tried prior to impeachment but the President, in contrast, would be immune from criminal prosecution prior to impeachment. Judge Bork relied on several arguments. One of the most significant was that —

> "The Framers could not have contemplated prosecution of an incumbent President because they vested him complete power over the execution of the laws, which includes, of course, the power to control prosecutions."[91]

If President Clinton had the complete "power to control prosecutions" today, Judge Bork's analysis would be applicable. But President Clinton made sure that he does not have the "complete power" to "control prosecution." President Clinton and Attorney General Reno lobbied for the Independent Counsel Act, and President Clinton signed it.[92] This law places important limitations on the Attorney General's power to remove the Independent Counsel. The Independent Counsel can, in brief, only be removed for cause. President Clinton signed the law and decided to give up his "complete power" to "control prosecution." Under the statute, the Independent Counsel can only be removed "for cause." The Supreme Court upheld the constitutionality of limiting the removal power in *Morrison v. Olson.*[93]

Judge Bork's reasoning implies that the President is subject to indictment *if*

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[91] *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States,* Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 20.

[92] The fact that the President has signed this law is relevant in determining whether this law — and its implicit authorization of a grand jury to investigate alleged criminal acts by President Clinton "disrupts the proper balance between the coordinate branches" and "prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of General Services,* 433 U.S. 425, —, 97 S.Ct. 2777, —, 53 L.Ed.2d 867 (1977), quoting *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). In deciding that the law was constitutional, *Nixon v. Administrator* emphasized: "The Executive Branch became a party to the Act's regulation when President Ford signed the Act into law . . .." In that case, the Act was applied against a *former* President. In this case, the Executive Branch became a party to the Independent Counsel Act when the present President — President Clinton — signed a law that was written to create an Independent Counsel to investigate that *same* President — President Clinton.

[93] 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

he gives up the power to control prosecutions. And that is exactly what President Clinton did.

Judge Bork, in his Memorandum concluding that the Vice President — but not the President — can be indicted prior to impeachment, also relied on the TWENTY-FIFTH AMENDMENT in support of his conclusion.[94] Judge Bork argued that "the President is the only officer from whose temporary disability the Constitution provides procedures to qualify a replacement.." From that he concludes: "This is recognition that the President is the only officer whose temporary disability while in office incapacitates an entire branch of government."

However, the Twenty-Fifth Amendment suggests the opposite conclusion, especially after the decision in *Jones v. Clinton*. Because of this Amendment, the temporary disability of the President does *not* incapacitate an entire branch of government because the Constitution itself recognizes the problems and deals with it in a structural way, not by creating an immunity but by providing for a temporary replacement. In addition, the indictment of the President does not incapacitate either the President or entire Executive Branch. Aaron Burr was quite able to function as a Vice President although indicted. Indictment does not incapacitate the indicted individual.

In the unlikely event that the defense of a civil case (*e.g., Jones v. Clinton*) or the defense of a criminal case would prevent the President from performing his duties, the Executive Branch does not simply shut down. The Twenty Fifth Amendment, § 3, provides a procedure for the Executive Branch to continue to function "[w]henever the President transmits . . . his written declaration that is unable to discharge the powers and duties of his office . . .." This procedure is clearly not limited to cases of illness.

One should also note that it is easy to make a claim that the Executive Branch will simply "shut down," but that claim is difficult to accept. President Clinton, during the pendency of the *Jones* case, said repeatedly that the looming civil case was not affecting his duties as President. Nonetheless, while he was making those statements, the defense attorneys claimed that a delay was necessary because of the burdens on the President. The trial judge in *Jones v. Clinton* refused to change the date of the civil trial. When attorneys cry "wolf" too often, they lose their credibility. (Subsequently, the trial judge granted summary judgment to the defendant.)

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[94] *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 18.

TEMPORARY IMMUNITY CREATED BY STATUTE. Perhaps Congress could enact a statute creating some sort of temporary immunity, — that is, providing that there shall be no trial of a sitting President until after he has finished his term of office as President. However, enactment of such a law would raise important constitutional and policy issues.

First, in terms of the Constitution, the Sixth Amendment grants the accused a right to a "speedy and public trial." If Congress were to enact a statute that immunizes a sitting President from any criminal indictment as long as he holds office, then the delay in the indictment (and resulting delay in any trial) will run afoul of the speedy trial guarantee. Presumably the President could waive this right, in any particular case. However, if the President could waive this right, then he should be able to waive his other rights. If one of his rights is the right to temporary immunity, then he should be able to waive that right as well.

And, if the President has a right to temporary immunity, he appears that he may have waived this right by signing the Independent Counsel Act — which was enacted only *after this President* and his Attorney General advocated its passage. Janet Reno stated that President Clinton *"strongly supported* reauthorization" of this Independent Counsel Act.[95] President Clinton lobbied for, and signed,[96] the present Independent Counsel Act, with full knowledge that the Act's first court-appointed counsel would be specifically charged with investigating criminal allegations against President Clinton.

As President Clinton stated when he signed the law:

> "[This law] ensures that no matter what party controls the Congress or the executive branch, an independent, nonpartisan process will be in place to guarantee the integrity of public officials and ensure that *no one is above the law.*"[97]

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[95] 4 UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, at 753 (1994)(emphasis added).

[96] In *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) the Court found it significant — in deciding the case involving the Presidential Recordings and Materials Preservation Act against former President Nixon — that the "Executive Branch became a party to the Act's regulation when President Ford signed the Act into law . . .." 433 U.S. at 426, 97 S.Ct. at 2781. In this case, President Clinton himself, not a subsequent President, signed the Act into law.

[97] Statement by President William J. Clinton upon Signing S.24, June 30, 1994, (continued...)

President Clinton was correct. As Lloyd Cutler, the former Counsel to President Clinton, said in supporting the concept of an Independent Counsel, President Nixon was "certainly not a fluke. The qualities that betrayed him and us are far from unique, and we will see them in future administrations again."[98]

Second, in terms of policy, if Congress were to enact temporal immunity from criminal liability for the President, it would first have to consider the costs. The old proverb, "justice delayed is justice denied," applies with special vigor in the context of a criminal prosecution. The statute of limitations may prevent prosecution. As veteran prosecutors know, if a trial is delayed, then the memories of witnesses will fade, documents may be destroyed. It is an axiom that delaying a criminal trial — especially delaying for years — may result in, or be tantamount to creating, a *de facto* immunity.

In any event, even if Congress could enact a statute immunizing the President from the federal criminal laws, it has not done so. Instead, it has enacted a statute that authorized an Independent Counsel to use the federal grand jury system to investigate alleged criminal activities of this President.

LEGAL PRECEDENT

THE CASE LAW AND LEGAL OPINIONS. No legal precedent has ever concluded that the President is immune from the federal criminal laws. In fact, the cases have suggested the contrary.

For example, in 1972, *Gravel v. United States*[99] noted: "The so-called executive privilege has never been applied to shield executive officials from prosecution for crime . . .."

In 1982, in *Nixon v. Fitzgerald,*[100] the Supreme Court held that the President was *absolutely* immune for civil damages involving actions taken within his official duties, but also emphasized that this was "merely a private suit for damages" and

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[97] (...continued)
in, 30 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1383, July 4, 1994.

[98] Lloyd Cutler, *A Permanent "Special Prosecutor,"* WASHINGTON POST, Dec. 2, 1974, at A24, col. 4.

[99] 408 U.S. 606, 627, 92 S.Ct. 2614, 2628, 33 L.Ed.2d 583 (1972).

[100] 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

that there is "a lesser public interest in actions for civil damages *than, for example, in criminal prosecutions.*"[101] This Court also made clear that there would be no immunity from civil damage claims, for actions that were not "within the outer perimeter of his [the President's] authority."[102] There is only "absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility."[103]

In 1994, Lloyd Cutler, the White House Counsel to President Clinton, issued his official legal opinion that it was against the Clinton Administration policy to invoke Executive Privilege for cases involving "personal wrongdoing" by any government official.[104]

Later, in *Clinton v. Jones*,[105] the Court rejected any notion of Presidential immunity (even a temporary immunity) for the President who is sued by a private civil litigant for damages involving acts not within his Presidential duties. In that case, President Clinton's "strongest argument" supporting his claim for immunity on a temporary basis, the Court said, was the claim that the President occupies a "unique office" and burdening him with litigation would violate the constitutional separation of powers and unduly interfere with the President's performance of his official duties.[106]

In language of remarkable breadth, the *Jones* Court repeatedly stated that *no* amount of this kind of burden would violate the Constitution. The President, the Court held: "errs by presuming that interactions between the Judicial Branch and the Executive, *even quite burdensome interactions*, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions."[107] The opinion, which had no dissents, quoted with approval James Madison's view that separation of powers "does not mean that

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[101] 457 U.S. 731, 754 & n.37, 102 S.Ct. 2690, 2703 & n.37 (emphasis added).

[102] 457 U.S. at 757, 102 S.Ct. at 2705.

[103] 457 U.S. at 756, 102 S.Ct. at 2704.

[104] Lloyd Cutler Legal Opinion of Sept. 28, 1994, discussed in, T.R.Goldman, *Cutler Opined Against Broad Use of Privilege*, LEGAL TIMES (OF WASHINGTON, D.C.) 14 (Feb. 9, 1998).

[105] — U.S. —, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997).

[106] — U.S. at —, 117 S.Ct. at 1645-46.

[107] — U.S. at —, 117 S.Ct. at 1648.

the branches 'ought to have no *partial agency* in, or no *controul* over the acts of each other.'"[108]

And, if that were not clear enough, Justice Stevens' opinion added this clincher:

> *"The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution."*[109]

The Court explained that it "has the authority to determine whether he has acted within the law."[110] And, "it is also settled that the President is subject to judicial process in appropriate circumstances."[111]

In the Watergate Tapes case (*United States v. Nixon*[112]), President Nixon argued that a President could not be subject to the criminal process because, "if the President were indictable while in office, any prosecutor and grand jury would have within their power the ability to cripple an entire branch of the national government and hence the whole system."[113] The Court did not reach that question, but *Clinton*

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[108] — U.S. at —, 117 S.Ct. at 1648 (emphasis in original), quoting THE FEDERALIST PAPERS, Federalist No. 47, pp. 325-36 (J. Cooke ed. 1961), which also has emphasis in the original.

[109] — U.S. at —, 117 S.Ct. at 1648-49 (emphasis added). I tentatively explored the implications of the strong language of the *Jones* case is, Ronald D. Rotunda, *The True Significance of Clinton vs. Jones*, CHICAGO TRIBUNE, July 8, 1997, at 12, col. 1-6; Rotunda, *Can a President Be Imprisoned?*, 20 LEGAL TIMES (OF WASHINGTON, D.C.) 22-23 (July 21, 1997). However, my earlier writing mainly quoted from that case. Now I have investigated this issue fully. Based on my evaluation of the Constitutional history, the Constitutional language, legal precedent, the relevant statutes and case law, and the view of commentators, and I am reaching the conclusion of this legal opinion.

[110] — U.S. at —, 117 S.Ct. at 1649.

[111] — U.S. at —, 117 S.Ct. at 1649-50, citing and relying on, Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 1975 U. OF ILL. L. FORUM 1 (1975); 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 7.1 (West. Pub. Co., 2d ed. 1992) & 1997 Pocket Part.

[112] 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

[113] Brief for the Respondent, Richard M. Nixon, President of the United States, in (continued...)

v. Jones later rejected the argument that the uniqueness of the Presidential Office requires that the Court recognize some sort of immunity from the law. *Clinton v. Jones* held that, even if the burden of litigation is heavy, the Constitution gives the President no special redress from that burden.

If even a *private* party instituting *civil* litigation may impose special litigation burdens on a sitting President, then the President's argument for a relief from the burdens of litigation is much less when the Federal Government initiates a criminal case, where the public interest of justice is much greater[114] because the party is the United States,[115] and the action is criminal, not civil.

ARGUMENTS OF PRESIDENT NIXON AND OTHERS THAT THE PRESIDENT IS IMMUNE FROM THE CRIMINAL LAW. President Nixon's argument — that "any prosecutor and grand jury would have within their power the ability to cripple an entire branch of the national government" — is inapplicable here. Neither "any" prosecutor nor "any" grand jury cannot institute criminal charges against a sitting President. The Independent Counsel Act does not authorize anyone to institute charges; it only gives its authority to the Independent Counsel, who can only be appointed if the Attorney General (who serves at the discretion of the President) asks the Special Division for an appointment.

Nor can it be argued that an indictment would close down the entire Executive Branch of the Federal Government. The President can continue his duties, and *"a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution."*[116] If the President is indicted, the government will not shut down, any more than it shut down when the Court ruled that the President must answer a civil suit brought by Paula Jones.

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[113] (...continued)
United States v. Nixon, Nos. 73-1766 & 73-1834 (October term, 1973), at p. 97.

[114] Recall, in *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), the Court specifically noted that, when there is "merely a private suit for damages," then there is "a lesser public interest in actions for civil damages than, for example, in criminal prosecutions." 457 U.S. 731, 754 & n.37, 102 S.Ct. 2690, 2703 & n.37.

[115] The Independent Counsel institutes its criminal litigation in the name of the United States. *E.g., United States v. Webster Hubbell, et al.*, Crim. No. 98-0151 (JRJ).

[116] — U.S. at —, 117 S.Ct. at 1648-49 (emphasis added).

President Clinton may well argue that a criminal indictment of the President would inevitably place the nation in turmoil and bring the entire government to a halt. Oddly enough, those same people argue that the solution is to impeach the President. Would not an impeachment place the nation in even more turmoil?

Moreover, this argument was rejected in *Nixon v. Sirica,*[117] which stated, over a quarter of a century ago, that the President "does not embody the nation's sovereignty. He is not above the law's commands . . .."[118] A criminal proceeding would take no more time than a civil case against the President (and we know that is Constitutional). Moreover, any sanction if there is a conviction can be postponed until after the President is no longer a sitting President.

In short, to the extent that case law discusses this issue, the cases do not conclude that the President should have any immunity, either absolute or temporary, from the law. On the contrary, they point to the conclusion that, since the birth of the Republic, our constitutional system rejected the fiction that the King can do no wrong. In fact, in the *Clinton v. Jones* case, President Clinton himself specifically did not place any reliance on the claim that the President enjoyed the prerogatives of a monarch.[119] He has not stated that he would now embrace such a claim, and, if he did, there is no reason to believe that a court would accept that claim any more than the courts accepted President Nixon's claims of immunity.

IMPEACHMENT, INDICTMENT, AND THE COMMENTATORS

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[117] 487 F.2d 700, 711 (D.C. Cir. 1973)(per curiam)(en banc).

[118] 487 F.2d at 711:

> "Though the President is elected by nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. He is not above the law's commands: 'With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law . . ..' Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen." (footnotes omitted).

In light of this case, it should be clear that the President is subject to a grand jury subpoena to give evidence. The President can, of course, plead the Fifth Amendment and refuse to testify, as could any other witness.

[119] — U.S. at — n.24, 117 S.Ct. at 1646 n.24.

A few commentators have questioned whether the impeachment process must be completed before an indictment can issue. No case has ever ruled that any officer subject to the criminal law must be impeached before he or she is prosecuted criminally. In fact, whenever the issue has been litigated, the cases have held that impeachment need not precede criminal indictment.[120] As early as 1796, when the Constitution and the nation were less than a decade old, Attorney General Lee advised Congress that a territorial court judge could be indicted for criminal offenses while in office although he had not been impeached. Lee, by the way, gave no suggestion that the President should be treated differently.[121]

There certainly is no suggestion in the language of the Constitution that the President is otherwise to be treated any differently than other civil officers. If the Framers wanted to treat the President differently — for example, if they wanted to make sure that the President is immune from indictment until after he has been impeached — then they could have written such language. They certainly knew how to write such language. Our Constitution refers to "impeachment" several times, and creates no special rules for the President except it provides a different procedural rule in one specific instance: when the President is tried in the Senate, the Constitution provides that the Chief Justice of the United States (rather than the Vice President)

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[120] As the Seventh Circuit noted in upholding the criminal conviction of Federal Judge Otto Kerner:

> "The Constitution does not forbid the trial of a federal judge for criminal offenses committed either before or after the assumption of judicial office. The provision of Art. I, § 3, cl. 7, that an impeached judge is 'subject to Indictment, Trial, Judgment and Punishment, according to Law' does not mean that a judge may not be indicted and tried without impeachment first. The purpose of the phrase may be to assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy, or it may be to differentiate the provisions of the Constitution from the English practice of impeachment."

United States v. Issacs, 493 F.2d 1124, 1142 (7th Cir. 1974). *Cf.* Ronald D. Rotunda, *Impeaching Federal Judges: Where Are We and Where Are We Going?*, 72 JUDICATURE: THE JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 359 (1989); Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KENTUCKY LAW REVIEW 707 (1988).

[121] 3 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 982-83 (Washington, 1907).

presides over an impeachment trial.[122] The Framers made the decision to treat the President differently on one issue only: they explicitly provided that the Chief Justice shall preside only in the case of a Presidential impeachment.[123] The Framers did not want the Vice President from presiding over the impeachment of the President because he would be in a conflict of interest: if the President were to be impeached, the Vice President would become President.[124]

It is generally recognized, as Justice Joseph Story noted, that an impeachable offense is not limited to a criminal or statutory offense.[125] Moreover, not all crimes are impeachable. To determine what are "high crimes and misdemeanors" Justice Story advised that one must look to the common law, but it is not necessary to look to the list of statutory crimes. He added:

> "Congress have unhesitatingly adopted the conclusion, that no previous [violation of] statute is necessary to authorize an impeachment for any official misconduct; and the rules of proceeding, and the rules of evidence, as well as the principles of decision, have been uniformly regulated by the known doctrines of the common law and parliamentary usage. In the few cases of

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[122] U.S. CONST. ART. I, § 2, cl. 5 (House has "sole Power of Impeachment"); ART. I, § 3, c. 6 (Senate has "sole Power to try all Impeachments" and, in an impeachment trial of the President, the Chief Justice shall preside); ART. I, § 3, cl. 7 (impeachment sanctions cannot impose criminal penalties, but criminal sanctions may be imposed by separate criminal trials); ART. II, § 4 ("all civil Officers of the United States" are subject to impeachment).

[123] One can look at quotations by various of the Framers of the Constitution, but, in "dealing with these historical materials a serious danger exists of reading into statements made two hundred years ago a meaning not intended by the speaker." WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 4. *See also* various memoranda attached to this Memorandum and marked as "confidential."

This WATERGATE SPECIAL PROSECUTION FORCE, Memorandum — after examining the historical record — concludes that the historical sources of two centuries ago "are equivocal lending little firm support for or against the proposition that the Framers intended to immunize a sitting President from criminal liability." *Id.* at 9.

[124] See discussion in, Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KENTUCKY LAW REVIEW 707 (1988).

[125] *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, §§ 403-07, at pp. 287-90 (RONALD D. ROTUNDA & JOHN E. NOWAK, eds., Carolina Academic Press, 1987, originally published, 1833).

> impeachment, which have hitherto been tried, no one of the charges has rested upon any statutable misdemeanour. It seems, then, to be the *settled doctrine* of the high court of impeachment, that though the common law cannot be a foundation of a jurisdiction not given by the constitution, or laws, that jurisdiction, when given, attaches, and is to be exercised according to the rules of the common law; and that, *what are, and what are not high crimes and misdemeanours, is to be ascertained by a recurrence to that great basis of American jurisprudence.*"[126]

Story's judgement has stood the test of time. Impeachment charges have not been limited to violations of federal criminal statutes. Federal judges have been indicted *before* they are impeached.[127] Indeed, to emphasize the distinction and separation of impeachment and criminal indictment, one judge was impeached *after* he had been *acquitted* in a criminal trial.[128]

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[126] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, §§ 405, at p. 288 (RONALD D. ROTUNDA & JOHN E. NOWAK, eds., Carolina Academic Press, 1987, originally published, 1833)(emphasis added).

[127] This has long been the rule. In 1796, Attorney General Lee informed Congress that a judge of a territorial court, a civil officer of the United States subject to impeachment, was indictable for criminal offenses while in office. 3 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 982-83 (Washington, 1907). The "Framers did not intend civil officers generally to be immune from criminal process." *In re* Proceedings of the Grand Jury Impaneled Dec. 9, 1972, *Memorandum for the Unites States Concerning the Vice President's Claim of Constitutional Immunity*, at p. 99, quoting 3 HINDS' PRECEDENTS, *supra*.

For example, Judge Otto Kerner was indicted and convicted *before* there was any impeachment. His resignation ended the need for a subsequent impeachment. *See United States v. Isaccs*, 493 F.2d 1124, 1142 (7th Cir. 1974), citing the 1796 Attorney General Opinion upholding the conviction of Judge Kerner even though he had not been impeached and removed by Congress. Kerner then resigned from the bench and was not impeached.

Judge Walter Nixon (who did not resign from the bench) was impeached *after* he was convicted. *See, Nixon v. United States*, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993).

[128] Judge Alcee Hastings falls in this category. *See, Hastings v. Judicial Conference of the United States*, 829 F.2d 91 (D.C. Cir. 1987). *See generally*, WILLIAM H. REHNQUIST, GRAND INQUESTS (1992). The House impeached Judge Hastings by a lopsided vote of 413 to 3; the Senate removed him in 1989. Hastings was subsequently elected to the U.S. House of Representatives. Joe Davidson, *Ex-Judge Is Likely To Join the Congress That Impeached Him*, Wall Street Journal, Nov. 2, 1992, at A1, 1992 WESTLAW-WSJ 629646.

INDICTABILITY OF THE VICE PRESIDENT. Similarly, history demonstrates that the Vice President can be indicted and criminally prosecuted before being impeached (and whether or not he has been impeached). New Jersey, for example, indicted Vice President Aaron Burr for the death of Alexander Hamilton in a duel.[129] Burr did not act as if he were immunized from indictment. Instead, he fled the jurisdiction to avoid arrest.[130] Burr continued functioning as Vice President while under indictment; in fact, Burr (as President of the Senate) even presided over the impeachment trial of Justice Chase.[131] Vice President Spiro Agnew also argued, unsuccessfully, that he was immune from indictment prior to impeachment, but he ended up being indicted on corruption charges, pleading guilty, and resigning from office.[132]

President Clinton, like President Nixon, may wish to argue that the Presidency is "unique," and that the President alone represents "the Executive Branch." Consequently, it is argued, the President alone is immune from the criminal laws while he is sitting as President.

The Court, in *Nixon v. Sirica*,[133] explicitly rejected that argument. "Because impeachment is available against all 'civil Officers of the United States,' not merely against the President, U.S. Const. art. II, § 4, it is difficult to understand how any immunities peculiar to the President can emanate by implication from the fact of impeachability."[134] A criminal indictment and even a trial do not "compete with the impeachment device by working a constructive removal of the President from office."[135] If the President is acquitted, there is no "constructive removal" from office.

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129 1 MILTON LOMASK, AARON BURR 329, 349-55 (1979).

130 *Id.*

131 *See*, WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 29-30.

132 *E.g.*, RICHARD D. COHEN & JULES WITCOVER, A HEARTBEAT AWAY (1974).

133 487 F.2d at 700 (D.C. Cir. 1973)(per curiam)(en banc).

134 487 F.2d at 711 n.50.

135 487 F.2d at 711:

> "Nor does the Impeachment Clause imply immunity from routine court process. While the President argues that the Clause means that impeachability precludes criminal prosecution of an incumbent, we see no need to explore this question except to note its irrelevance to the case

(continued...)

If the President is convicted, the punishment may not include imprisonment, and — if it does — any imprisonment can be stayed until he no longer is a sitting President.

The test that *Nixon v. Sirica* adopted is directly applicable here. A criminal indictment and even a trial do not "compete with the impeachment device by working a constructive removal of the President from office." However, imprisonment may be a "constructive removal of the President from office," and, if it is, that sanction cannot be imposed on a sitting President. But indictment and trial are not the same as imprisonment. If there is a trial, the President may be acquitted. If he is convicted, the sanction may not include imprisonment, and if it does, that sanction can be stayed until after the Presidential term has ended.

CONGRESSIONAL POWER TO CONTROL THE DECISION TO INDICT. If an official subject to impeachment (such as the President, Vice President, or a federal judge) could not be indicted until after he or she had been impeached, then Congress would control the decision whether to prosecute. But such a power would be inconsistent with the doctrine of separation of powers, which does not give Congress a role in the execution of the laws.[136]

The decision to prosecute or not prosecute is a decision that cannot lie with the legislature. In the instant case, it lies with the Independent Counsel, who, under the statute, stands in the shoes of the Attorney General. The decision to appoint the Independent Counsel rests in the *unreviewable discretion* of the Attorney General. The U.S. Supreme Court has made clear that neither the courts nor Congress can require the appointment of an Independent Counsel.[137]

The decision to indict a sitting President lies with the Grand Jury, not with the House of Representatives or Senate. As *Nixon v. Sirica* eloquently stated: "The federal grand jury is a constitutional fixture in its own right, legally independent of

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[135] (...continued)
before us. The order entered below, and approved here in modified form, is not a form of criminal process. *Nor does it compete with the impeachment device by working a constructive removal of the President from office."*

487 F.2d 700 at 711(emphasis added).

[136] *See Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986).

[137] *Morrison v. Olson*, 487 U.S. 654, 694-95, 108 S.Ct. 2597, 2621, 101 L.Ed.2d 569 (1988). This point is discussed in detail in note 10, *supra*.

the Executive. . . . If a grand jury were a legal appendage of the Executive, it could hardly serve its historic functions as a shield for the innocent and *a sword against corruption in high places.*"[138] The Court went on to state that, as "a *practical*, as opposed to legal matter, the Executive may, of course cripple a grand jury investigation," but even though the President may have the practical power to handicap the grand jury in various ways, "it is he who must exercise them. the court will not assume that burden by eviscerating the grand jury's independent legal authority."[139]

THE WATERGATE EXPERIENCE. The Watergate Special Prosecution Force did not indict President Nixon but named him an unindicted coconspirator. President Nixon resigned from office, was pardoned by his successor, President Ford, and the issue was never tested in court. Some modern day commentators assume that the Watergate Special Prosecutor concluded that a sitting President is immune from indictment. That assumption is simply wrong.

The Watergate Special Prosecutor only argued that, in the narrow circumstances of that case — where the House of Representatives had already made the independent judgment to begin impeachment proceedings, when the House of Representatives, prior to any turnover of Grand Jury evidence, had independently decided to consider the very matters that were before the Grand Jury — the President should not be indicted until after the impeachment process had concluded.[140]

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[138] 487 F.2d at 712 n.54 (emphasis added)(internal citations omitted).

[139] 487 F.2d at 713 n.54 (emphasis in original).

[140] *See* LEON JAWORSKI, THE RIGHT AND THE POWER 100 (1976). Jaworski argued that his Watergate Special Prosecution Force could seek an indictment against the President for some crimes (like murder), but, Jaworski said, he questioned whether it was appropriate to indict the President for other crimes, like obstruction of justice, "especially when the House Judiciary Committee was then engaged in an inquiry into whether the President should be impeached on that very ground."

Of course, Jaworski's comments must be read in context. First, no case law reaches the conclusion that Jaworski and other lawyers working for him reached at the time. His ambivalent opinions are not legal precedent.

More importantly, Jaworski's decision was quite nuanced. The distinctions he drew argue that an indictment would be appropriate in the present case because no impeachment is under way. In addition, Jaworski conclusion that the President should not be indicted was tentative ("grave doubts," not firm conclusions), and those conclusions, he emphasized, were

(continued...)

[140] (...continued)
made in the specific factual and historical context within which the Watergate Special Prosecution Force operated. That factual and historical context is different today.

That factual and historical context is important. It is significant that the Watergate Special Prosecution Force was a very different animal than the present Office of Independent Counsel. Unlike the present Office of Independent Counsel, the Watergate Special Prosecution Force was not a creature of statute. It was merely a creation of executive regulation. Until the U.S. Supreme Court ruled on the issue, it was unclear if the courts could even rule on an evidentiary dispute between the Special Prosecutor and a "superior officer of the Executive Branch." *United States v. Nixon*, 94 U.S. 683, 692-93, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974). The decision of the Watergate Special Prosecutor not to seek to indict President Nixon was made in the context where even the powers of the Special Prosecutor to subpoena evidence from the President were unclear. I have examined the series of memoranda dealing with the issue of the amenability of President Nixon to indictment. The various memoranda are not of one opinion (some favored indictment), and they specifically raised concerned about the permissibility of an indictment brought by a Special Prosecutor who was appointed by, and could be fired by, the Attorney General, when the Special Prosecutor was protected only by a regulation signed by the Attorney General, and the validity of this entire arrangement had not been tested in court. *See*, WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 33-34.

Significantly, the regulations that created the Watergate Special Prosecutor provided that the "Prosecutor will not be removed from his duties . . . without the President's first consulting the Majority and Minority Leaders and the Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action." 38 FED. REG. 30739, quoted in, *United States v. Nixon*, 418 U.S. 683, 695 n.8, 94 S.Ct. 3090, 3101 n.8. The *Nixon* Court did not specifically rule on this provision. We know now that a law that gives Congress (or certain members of Congress) a role in limiting the removal of executive branch officials is *un*constitutional. As *Bowsher v. Synar*, 478 U.S. 714, 722-23, 106 S.Ct. 3181, 3186, 92 L.Ed.2d 583 (1986) held:

> "The Constitution does not contemplate an active role for Congress in the supervision of officers charged with execution of the laws its enacts. . . . Once the appointment has been made and confirmed, however, the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment . . .. A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one [of impeachment] is inconsistent with separation of powers."

One could see why the Watergate Prosecutor was hesitant to claim a power to indict, when the very existence of the Watergate Prosecutor was constitutionally in doubt (a doubt (continued...)

[140] (...continued)
that bore fruit in *Synar*). No such doubt applies to the present Office of Independent Counsel, for Congress has no role to play in the removal of the Independent Counsel, and the Supreme Court has upheld the constitutionality of this statute. *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

At the time that Jaworski wrote his tentative conclusions, the U.S. Supreme Court had not even decided that a President could be sued for damages in a civil case. The Court later answered yes to that question in, *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

Moreover, the Memoranda on this issue show that the attorneys in the Watergate Special Prosecution Force divided on this issue. *E.g.*, WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 43, 44:

> "*The issue is close.* Respectable arguments derived from history and contemporary policy exist on both sides of the issue. . . . [M]y conclusion is that the Constitution does not preclude indictment, and the issue is really whether the incumbent President should be indicted." [emphasis added.]

See also, JOHN HART ELY, ON CONSTITUTIONAL GROUND 133 *et seq.* (Princeton University Press 1996), reprinting his memorandum to Special Prosecutor Archibald Cox that argued that the President could be indicted.

Commentators prior to *Morrison v. Olson*. The view of legal commentators regarding the indictment of a sitting President was mixed, prior to *Morrison v. Olson*. Those commentators claiming that the President is immune from criminal prosecution have typically discussed the issue in a vacuum, not in the context of a specific investigation of a President pursuant to a statute, enacted at the President's request, authorizing a criminal investigation of the President. *See* George E. Danielson, *Presidential Immunity from Criminal Prosecution*, 63 GEORGETOWN L.J. 1065 (1975) (arguing that the President is immune from criminal prosecution); PHILIP KURLAND, WATERGATE AND THE CONSTITUTION 135 (1978) (arguing that the President is immune from criminal prosecution). Note that these commentators wrote without benefit of the Supreme Court decision in, *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

Other commentators have argued that the President and all other officials are subject to indictment prior to impeachment — in part because some acts may not be impeachable but are certainly indictable. *See*, RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 215 (2d ed. 1829):

> "the ordinary tribunals, as we shall see, *are not precluded, either before or after impeachment*, from taking cognizance of the public and official delinquency."

(continued...)

However, *prior to that situation* — in the case where the House of Representatives had not already begun impeachment process — historians forget that the Watergate Special Prosecution Force was advised that the President could be

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[140] (...continued)
(emphasis added).

Quoted in, WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 13. *See also* other authorities cited therein. *Accord,* JOHN HART ELY, ON CONSTITUTIONAL GROUND 133 *et seq.* (Princeton University Press 1996), reprinting his 1973 memorandum to Special Prosecutor Archibald Cox arguing that President could be indicted.

Commentators after *Morrison v. Olson*. Post-*Morrison v. Olson* commentators have tended to conclude that the President is not above the law. *See,* Gary L. McDowell, *Yes, You Can Indict the President,* WALL STREET JOURNAL, March 9, 1998, at A19, col. 3-6 (Midwest ed.); Edwin B. Firmage & R.C. Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment,* 1974 DUKE L.J. 1023 (arguing that President is not immune from the criminal process); Eric 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 (1992) (thorough article concluding that the President is not immune); Terry Eastland, *The Power to Control Prosecution,* 2 Nexus 43, 49 (Spring, 1997)(referring to *Morrison v. Olson* and concluding that the President is not immunized from prosecution); Eric M. Freedman, *Achieving Political Adulthood,* 2 NEXUS 67, 84 (Spring, 1997), concluding:

> "To the extent that the belief that the President should have a blanket immunity from criminal prosecutions manifests itself in legal form, legal decisionmakers should reject it. The argument is inconsistent with the history, structure, and underlying philosophy of our government, at odds with precedent, and unjustified by practical considerations."

See also, Scott W. Howe, *The Prospect of a President Incarcerated,* 2 NEXUS 86 (Spring, 1997), arguing that the President has no constitutional immunity from criminal prosecution, but Congress may wish to create some limited immunity by statute.

Jay S. Bybee, *Who Executes the Executioner?,* 2 NEXUS 53 (Spring, 1997) argues that before the President, or federal judges, can be tried, they first must be impeached, an argument that is more in the nature of a polemic, because it uproots two centuries of practice regarding the prosecution of federal judges. *See also* Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution,* 2 NEXUS 11 (Spring, 1997), which presents such a broad argument for Presidential immunity that it is inconsistent with *Clinton v. Jones,* — U.S. —, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997).

indicted.[141]

USE OF GRAND JURY TO COLLECT EVIDENCE FOR AN IMPEACHMENT.

INTRODUCTION. If it is unconstitutional for a federal grand jury, acting pursuant to the Independent Counsel statute to indict a President for engaging, in his private capacity, in serious violations of federal law, then it would be a gross abuse of the grand jury powers and a violation of federal statutory and constitutional law for that grand jury to investigate whether the President has committed any criminal law violations. But we know, after *Morrison v. Olson*,[142] that it is constitutional for the Independent Counsel to use the grand jury to investigate the President. That conclusion was implicit in the holding of *Morrison*. Hence it should be constitutional to indict a sitting President because it would not be constitutional to use the grand jury to investigate if it could not constitutionally indict.

Let us analyze this argument in more detail. First, as all the legal commentators acknowledge:

> "The grand jury is authorized only to conduct criminal investigations. Accordingly, it is *universally acknowledged* that the grand jury cannot be used to conduct an investigation — or *even explore a particular line of inquiry* — solely in order to collect evidence for civil purposes."[143]

Thus, as the U.S. Supreme Court has stated, the federal government may not "start or continue a grand jury inquiry where no criminal prosecution seem[s] likely."[144] If the grand jury investigation "is merely a pretext for a civil evidence-gathering

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[141] JOHN HART ELY, ON CONSTITUTIONAL GROUND 133 *et seq.* (Princeton University Press 1996), reprinting his: *Memorandum to Special Prosecutor Archibald Cox on the Legality of Calling President Nixon before a Grand Jury* (1973). Professor Ely explains that "prosecution of a sitting (non-impeached) president must be possible, or else there would be no way to reach" crimes that do not rise to the level of impeachment. *Id.* at 139. Ely expanded on those arguments in *id.* at 140-41.

[142] 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

[143] 2 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 8.01 at 2 (Callaghan & Co., 1986)(emphasis added).

[144] *United States v. Sells Engineering Inc.*, 463 U.S. 418, 432, 103 S.Ct. 3133, 3142, 77 L.Ed.2d 743 (1983). *See also*, 2 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 10.14 at 51 (Callaghan & Co., 1986)

mission, the grand jury process is clearly being abused under any standard."[145]

There are few cases where the courts have found that the Government has abused the grand jury system in order to gain evidence that would or could not be used in a criminal prosecution. But, where the courts find a bad motive, they do not allow an illegal use of the grand jury system.

In the present case, it is quite clear that one of the purposes of the grand jury investigation conducted by the Office of Independent Counsel is to investigate President Clinton. Of course, the OIC and the grand jury have other persons whom it is investigating and whom it may indict (or already have indicted). And, to that extent, the actions of the several Grand Juries in this investigation are proper. Morever, to the extent that it is conducting a valid criminal investigation, it may disclose the fruits of its investigation for civil purposes to the extent that statutes or rules governing such disclosure so authorize.[146]

However, in this case it is clear that *some* of the grand jury's subpoenas, some of the energy of the OIC, and a portion of the mandate of the OIC are intended *solely to investigate criminal allegations against the President* in connection with issues such as Whitewater, Castle Grande, the FBI White House files, the alleged illegal abuses involving the Travel Office of the White House, and — most recently — allegations involving possible Presidential perjury, subordination of perjury, tampering of witnesses, and obstruction of justice in the litigation captioned as *Jones v. Clinton.*

The purpose of the OIC investigation and the grand jury investigation is to determine whether the President has, or has not, engaged in serious crimes. If the grand jury cannot indict the President for such crimes, then it has no business investigating the President's role in such crimes. Impeachment, after all, is an

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[145] 2 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 8.03 at 9 (Callaghan & Co., 1986).

See also United States v. Proctor & Gamble Co., 187 F. Supp. 55, 57-58 (D. N.J. 1960). This case was on remand from, *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958), and it applied the test adopted in that case.

[146] *E.g., United States v. Baggot*, 463 U.S. 476, 103 S.Ct. 3164, 77 L.Ed.2d 785 (1983); RULE 6(E), FEDERAL RULES OF CRIMINAL PROCEDURE.

admittedly *non*criminal proceeding.[147] If the purpose of the grand jury investigation of President Clinton is not to indict even if the evidence commands indictment (or if its purpose is simply to investigate possible impeachable offenses on behalf of the House of Representatives and then turn over this information to the House), then, in either case, the grand jury is being misused.[148]

WHEN THE GRAND JURY IS USED TO TURN OVER INFORMATION TO ANOTHER UNIT OF GOVERNMENT. It would be wrong, for example, to use the grand jury solely to gather information to be used by another governmental unit. If the grand jury is investigating in good faith to determine if the President has engaged in any criminal conduct, it may turn over, to the House of Representatives, information that it has gathered in its investigation of alleged criminality that also is relevant to the House even if the grand jury ultimately concludes that it is not relevant to a criminal inquiry.

The important point is that the grand jury must act in good faith and not as the agent of another entity of the government. "It is sufficient if the agencies are engaged in good faith investigations within their respective jurisdictions, and that one agency is not simply serving as a cat's paw for another, under the pretext of conducting its own investigation."[149] Grand Juries cannot be used as a short cut for the House of Representatives to collect information that otherwise would be more difficult to secure.[150] The OIC cannot use the grand jury to investigate alleged criminal activity by the President if an indictment (assuming that the evidence warranted it) is "merely an unexpected bare possibility."[151] The OIC (which sits in the shoes of the Attorney General) must have an open mind whether to seek an indictment, but it cannot have an open mind about this issue if it would be illegal or

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[147] *E.g.*, the sanction cannot result in imprisonment or fine. The standard of proof is not beyond a reasonable doubt. There is no jury of twelve people drawn from the general public. An impeachment and removal do not prevent a criminal prosecution.

[148] On the other hand, it would be proper to turn over information secured in good faith for purposes of securing an indictment but that is also relevant to impeachment.

[149] 2 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 8.02 at 6 (Callaghan & Co., 1986), citing, *United States v. Proctor & Gamble Co.*, 187 F. Supp. 55, 58 (D. N.J. 1960).

[150] *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683-84, 78 S.Ct. 983, 987, 2 L.Ed.2d (1957).

[151] *United States v. Proctor & Gamble Co.*, 187 F. Supp. 55, 58 (D. N.J. 1960).

unconstitutional to indict the President.[152]

In other words, if the statute creating the OIC and authorizing it to investigate the President and turn over relevant information to the House of Representatives does not authorize or permit the OIC to seek an indictment of the President, the statute is authorizing an abuse of the grand jury powers, an unconstitutional perversion of the Fifth Amendment, which created the grand jury. It is clearly improper to use the grand jury, a creature of the criminal process, to collect evidence for noncriminal purposes. It is unconstitutional to use the grand jury solely as a tool of a House impeachment inquiry to investigate in an area where it could not indict even if the evidence warranted an indictment.

WHEN THE GRAND JURY IS USED TO INVESTIGATE A CRIMINAL DEFENDANT WHO CANNOT BE INDICTED FOR A CRIME BECAUSE HE ALREADY HAS BEEN INDICTED. It is improper for the Government to use the grand jury to investigate a target's role in a matter after the grand jury has indicted the target. If the grand jury has already indicted a target, it is an abuse of the grand jury system to use the grand jury to investigate further on that matter. Because the grand jury cannot indict the target on the matter in question — the target, after all, has already been indicted — it cannot use its investigatory powers to further investigate the target.[153]

That logic applies here too. If the grand jury cannot indict the target (because he is President) then it cannot use its investigatory powers to further investigate the target.

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[152] **Grand Jury Presentments.** In some instances, a Grand Jury can issue a report, a "presentment" without issuing any indictments. But such a Grand Jury is investigating alleged criminal activities and could indict. Even in these circumstances, civil libertarians have raised serious objections to such presentments.

No Grand Jury should be the alter ego of the House Judiciary Committee or any other House entity investigating possible impeachment. The House of Representatives has the "sole" power to impeach [U.S. CONST., ART. I, § 2, cl. 5 (House has "sole Power of Impeachment")] and should not treat the Office of Independent Counsel as its alter ego or tool.

[153] *E.g.,United States v. Dardi,* 330 F.2d 316, 336 (2d Cir. 1964), *cert. denied,* 379 U.S. 845, 85 S.Ct. 50, 13 L.Ed.2d 50 (1964); *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels),* 767 F.2d 26, 29-30 (2d Cir. 1985)(To protect the grand jury from being "abused," where defendant makes a "strong showing that the government's dominant purpose [in issuing a subpoena] was pretrial preparation," for an already pending indictment the court will quash the subpoena. In this case, the Court of Appeals reversed the trial court and quashed the subpoena.) *See also In re National Window Glass Workers,* 287 F. 219 (N.D. Ohio 1922).

WHEN THE GRAND JURY IS USED TO INVESTIGATE A MATTER WHERE IT WOULD BE UNCONSTITUTIONAL TO INDICT. As discussed above, the Speech or Debate Clause gives an absolute constitutional privilege that will protect a Member of Congress from being questioned about his or her vote on a legislative matter. Assume that a grand jury was investigating a matter where it could not constitutionally indict, given the narrow, but absolute protections of the Speech or Debate Clause. It would be unconstitutional for the grand jury to inquire into matters where it could not constitutionally indict.[154] If the grand jury cannot constitutionally indict for particular actions because of the Speech or Debate Clause, then it cannot constitutionally ask questions regarding this matter.[155] Courts should "not hesitate to limit the grand jury's investigative power in deference to this congressional privilege."[156]

If the grand jury cannot indict the President (because it would be unconstitutional to do so), then the Independent Counsel certainly cannot use the grand jury to investigate President Clinton. If the President is somehow immune from indictment and above the law, then the grand jury (whether in Arkansas or in Washington, D.C. or elsewhere) would be acting unconstitutionally, as would the federal trial judges who supervise these Grand Juries. If it is unconstitutional to indict the President, it is unconstitutional for the grand jury to investigate him.

But, we know that it is constitutional for the Independent Counsel to investigate the President to determine if he should be indicted for criminal acts. That was what *Morrison v. Olson*[157] was all about.

Morrison upheld the constitutionality of the Independent Counsel Act. That case decided, implicitly, that it must be constitutional to indict the President if the evidence warrants and demands such an indictment. That conclusion was implied in the holding of *Morrison v. Olson*, and it explains why the Court later issued its strong language in *Clinton v. Jones*, rejecting the notion that the federal judiciary's exercise of jurisdiction over the President creates a problem of separation of powers.

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[154] *Gravel v. United States*, 408 U.S. 606, 628-29, 92 S.Ct. 2614, 2628-29, 33 L.Ed.2d 583 (1972).

[155] *Gravel v. United States*, 408 U.S. 606, 629 n.18, 92 S.Ct. 2614, 2629 n.18, 33 L.Ed.2d 583 (1972).

[156] PAUL S. DIAMOND, FEDERAL GRAND JURY PRACTICE AND PROCEDURE § 6.04 at 6-31 (Aspen Publishers, Inc. 1995). *See also id.* at § 4.01[D].

[157] 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

> *"The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution."*[158]

As discussed above, distinguished Constitutional scholar, former Federal Judge, and former Yale Law Professor Robert Bork concluded, in a famous Memorandum he filed when he was Solicitor General of the United States, that Federal prosecutors could investigate and indict a sitting Vice President. It is noteworthy to recall the first sentence of that Memorandum:

> "The motion by the Vice President [Spiro T. Agnew] poses a grave and unresolved constitutional issue: whether the Vice President of the United States is subject to federal grand jury investigation and possible indictment and trial while still in office."[159]

Solicitor General Bork properly concluded that, if the Vice President could not be indicted, the grand jury could not subject him to an investigation. Because, he concluded, the grand jury could constitutionally indict the Vice President, therefore it could constitutionally investigate the Vice President.

CONCLUSION

We must keep in mind the following:

- the decision of the U.S. Supreme Court in *Morrison v. Olson* upholding the constitutionality of the Independent Counsel Act and the authority it bestows on a grand jury to investigate criminal charges involving the President of the United States;
- the decision of President Clinton to lobby for and sign this legislation with full knowledge that a prime focus of that Act would be allegations surrounding his own conduct;
- the decision of Congress not to enact any legislation conferring

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158 — U.S. at —, 117 S.Ct. at 1648-49 (emphasis added).

159 *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 1.

immunity from criminal prosecution but, on the contrary, to enact legislation to create the Office of Independent Counsel to investigate allegations of criminal conduct involving President Clinton;

- the legislative history of the law creating an Independent Counsel indicating specifically that Congress did not intend to bestow any criminal immunity to any person covered by that Act;
- President Clinton's full knowledge that the Act's first court-appointed counsel would be specifically charged with investigating President Clinton;
- the decision of President Clinton's Attorney General to petition the Special Division to appoint such an Independent Counsel;
- the subsequent decision of President Clinton's Attorney General on several occasions to petition the Special Division to expand the jurisdiction of the Independent Counsel to include other allegations of criminal conduct involving President Clinton.
- the counts of an indictment against President Clinton would include serious allegations involving witness tampering, document destruction, perjury, subornation of perjury, obstruction of justice, conspiracy, and illegal pay-offs — counts that in no way relate to the President Clinton's official duties, even though some of the alleged violations occurred after he became President.

These factors all buttress and lead to the same conclusion: it is proper, constitutional, and legal for a federal grand jury to indict a sitting President for serious criminal acts that are not part of, and are contrary to, the President's official duties. In this country, no one, even President Clinton, is above the law.

This conclusion does not imply that a President must be required to serve an actual prison term before he leaves office. The defendant President could remain free pending his trial,[160] and the trial court could defer any prison sentence until he leaves office.[161] The defendant-President may petition the courts to exercise its discretion in appropriate cases. It is one thing for the President to petition the court to exercise its discretion; it is quite another for the President to announce that he is above the law and immune from criminal prosecution.

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[160] There is, after all, no risk of flight to avoid prosecution.

[161] *See* Ronald D. Rotunda, *When Duty Calls, Courts Can Be Flexible*, WASHINGTON POST, January 29, 1997, at p. A21, col. 2-3.

Before or after indictment, Congress could exercise its independent judgment as to whether to begin impeachment proceedings or await the conclusion of the criminal proceedings.[162] Or, if Congress did not wish to postpone the impeachment proceedings, Congress if it wished (and if the President agreed), could ask the Independent Counsel to delay the criminal trial. The President could also petition the court to stay or postpone the criminal trial until the impeachment proceedings were concluded.

Neither the criminal proceeding nor the impeachment proceeding will control the other. As Solicitor General Bork pointed out a quarter of a century ago:

> "Because the two processes have different objects, the considerations relevant to one may not be relevant to the other."

For that reason, neither conviction nor acquittal in one trial, though it may be persuasive, need automatically determine the result in the other trial."[163]

And, the House or Senate may conclude that "a particular offense, though properly punishable in the courts, did not warrant" either impeachment or removal from office.[164]

Sincerely,

Ronald D. Rotunda
ALBERT E. JENNER, JR. PROFESSOR OF LAW

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[162] Of course, if Congress decides to institute impeachment proceedings, it will decide whether a penalty is to be imposed, and, if so, what penalty is appropriate (*e.g.*, removal from office, or a lesser penalty, such as a public censure).

[163] *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 9 (Robert Bork, Solicitor General).

[164] *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 9 (Robert Bork, Solicitor General).

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, UNITED STATES HOUSE OF REPRESENTATIVES, Plaintiff,

v.

Loretta E. LYNCH, Attorney General of the United States, Defendant.

Civil Action No. 12-1332 (ABJ)

United States District Court, District of Columbia.

Signed 01/19/2016

Background: Committee on Oversight and Government Reform of the United States House of Representatives brought action against Attorney General of the United States, seeking to enforce subpoena it had issued to Attorney General for information regarding failure of Bureau of Alcohol, Tobacco, and Firearms (AFT) to interdict transportation of illegally purchased firearms to Mexico. The United States District Court for the District of Columbia, Amy Berman Jackson, J., 979 F.Supp.2d 1, denied Attorney General's motion to dismiss, and denied Committee's motion for summary judgment. Subsequently, the District Court, 2013 WL 11241275, denied Attorney General's motion for certification. Committee moved to compel production of documents.

Holdings: The District Court, Amy Berman Jackson, J., held that:

(1) records reflecting internal deliberation of Attorney General over how to respond to Congressional and media inquiries were protected under deliberate process privilege;

(2) deliberate process privilege would not shield records sought by Committee; and

(3) district court would compel Attorney General to produce documents sought by Committee for which Attorney General did not identify any grounds for claim of privilege.

Ordered accordingly.

1. Privileged Communications and Confidentiality ⇐361

The deliberative process privilege is a qualified privilege that can be overcome by a sufficient showing of need for the material, as determined on a case-by-case, ad hoc basis.

2. Privileged Communications and Confidentiality ⇐355, 361

The executive privilege consists of two prongs: the Presidential communications privilege and the deliberative process privilege.

3. Privileged Communications and Confidentiality ⇐361

The deliberative process privilege reaches beyond conversations with the President of the United States to protect other communications among executive branch officials crucial to fulfillment of the unique role and responsibilities of the executive branch.

4. Privileged Communications and Confidentiality ⇐361

The deliberative process privilege allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations, and deliberations, comprising part of a process by which governmental decisions and policies are formulated.

5. Privileged Communications and Confidentiality ⇐361

For a document to be protected by the deliberative process privilege, it must be both predecisional and deliberative.

6. Privileged Communications and Confidentiality ⇐361

The purpose of the deliberative process privilege is to protect the decision-making process within government agencies and to encourage the frank discussion of legal and policy issues by ensuring that agencies are not forced to operate in a fishbowl.

7. Privileged Communications and Confidentiality ⇐361

Records reflecting internal deliberations of Attorney General of the United States over how to respond to Congressional and media inquiries, and detailed list of records being withheld, in action brought by Committee on Oversight and Governmental Reform of the United States House of Representatives against the Attorney General, seeking to enforce subpoena it had issued to Attorney General for information regarding failure of Bureau of Alcohol, Tobacco, and Firearms (AFT) to interdict transportation of illegally purchased firearms to Mexico, were protected from production under deliberative process privilege.

8. Privileged Communications and Confidentiality ⇐361

District courts must balance the public interests at stake in determining whether the deliberative process privilege should yield in a particular case, and must specifically consider the need of the party seeking privileged evidence.

9. Privileged Communications and Confidentiality ⇐361

In determining whether a plaintiff's need for withheld documents outweighs a defendant's need to protect them, as required to overcome the deliberative process privilege, a district court must balance the competing interests on a flexible, case by case, ad hoc basis, considering such factors as the relevance of the evidence, the availability of other evidence, the seriousness of the litigation or investigation, the harm that could flow from disclosure, the possibility of future timidity by government employees, and whether there is reason to believe that the documents would shed light on government misconduct, all through the lens of what would advance the public's, as well as the parties', interests.

10. Privileged Communications and Confidentiality ⇐361

Deliberative process privilege invoked by United States Attorney General, to shield from production records sought by Committee on Oversight and Government Reform of the United States House of Representatives, was outweighed by Committee's legitimate need for those documents, as required for documents to be produced in Committee's action seeking to enforce subpoena it had issued to Attorney General for information regarding failure of Bureau of Alcohol, Tobacco, and Firearms (ATF) to interdict transportation of illegally purchased firearms to Mexico, where Attorney General had repeatedly acknowledged legitimacy of Committee's investigation, and emails and memoranda that were responsive to the subpoena were described in detail in report by Department of Justice Inspector General that had already been released to public, such that there was no need to balance Committee's need for the material against impact revelation of record could have on candor in future executive decision making.

11. Records ⇐34

District court would compel United States Attorney General to produce documents sought by Committee on Oversight and Government Reform of the United States House of Representatives pertaining to failure of Bureau of Alcohol, Tobacco, and Firearms (AFT) to interdict trans-

portation of illegally purchased firearms to Mexico, which Attorney General sought to withhold or redact, where district court had ordered Attorney General to prepare detailed list that would identify and describe material in manner sufficient to enable resolution of any privilege claim, and Attorney General did not identify any grounds for claim of privilege pertaining to those documents.

Eleni Maria Roumel, Isaac Benjamin Rosenberg, Kerry William Kircher, Todd Barry Tatelman, William Bullock Pittard, IV, U.S. House of Representatives, Washington, DC, for Plaintiff.

Daniel Schwei, John Kenneth Theis, John Russell Tyler, U.S. Department of Justice, Washington, DC, for Defendant.

MEMORANDUM OPINION AND ORDER

AMY BERMAN JACKSON, United States District Judge

This case concerns a Congressional subpoena for documents from plaintiff, the Committee on Oversight and Government Reform of the United States House of Representatives ("Committee") to the defendant, the Attorney General of the United States.[1] Before the Court is plaintiff's motion to compel the production of documents [Dkt. # 103], which the Court will grant in part and deny in part.

INTRODUCTION

The pending motion is styled as a motion to compel, but it seeks the relief sought in the lawsuit itself: an order compelling the production of certain documents responsive to an October 11, 2011 subpoena issued by the Committee to the Attorney General for records related to Operation Fast and Furious. Compl. [Dkt. #1] ¶¶ 4, 7, 8. In particular, the action seeks those records generated after February 4, 2011 that have been withheld on the grounds that they are covered by the deliberative process prong of the executive privilege. *Id.* ¶ 14.

After the lawsuit was filed, the Department of Justice took the position that this Court did not have—or should decline to exercise—jurisdiction over what the Department characterized as a political dispute between the executive and legislative branches of the government. The defense warned that it would threaten the constitutional balance of powers if the Court endeavored to weigh the Committee's stated need for the material against the executive's interest in confidential decision making, or if the Court were to make its own judgment about whether the negotiation and accommodation process to date had been adequate. Mem. in Supp. of Def.'s Mot. to Dismiss [Dkt. # 13-1] at 19–45. Individual Members of Congress also urged the Court to stay its hand and entrust the matter to the time-honored negotiation process. Memorandum Amici Curiae of Reps. Cummings, Conyers, Waxman, Towns & Slaughter in Supp. of Dismissal [Dkt. # 30] ("Mem. Amici Curiae").

In response to the motion to dismiss, the Committee argued that it was both lawful and prudent for the Court to exercise jurisdiction since the case involved a discrete, narrow question of law:

> This type of case—at bottom, a *subpoena enforcement case*—has been brought in and addressed by the courts in this

1. Loretta E. Lynch replaced Eric H. Holder, Jr., as Attorney General on April 27, 2015. Accordingly, pursuant to Federal Rule of Civil Procedure 25(d), Loretta E. Lynch is substituted as defendant in this case.

> Circuit many times before .... Moreover, this case involves the purely legal question of the scope and application of Executive privilege ....

Pl.'s Opp. to Def.'s Mot. to Dismiss [Dkt. # 17] at 6 (emphasis in original).

The Court agreed. Citing *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), it ruled that it had not only the authority, but the responsibility, to resolve the conflict.

> [T]he Supreme Court held that it was "the province and duty" of the Court "'to say what the law is'" with respect to the claim of executive privilege that was presented in that case. *Id.* at 705, 94 S.Ct. 3090, quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). "Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." *Id.* at 704, 94 S.Ct. 3090. Those principles apply with equal force here. To give the Attorney General the final word would elevate and fortify the executive branch at the expense of the other institutions that are supposed to be its equal, and do more damage to the balance envisioned by the Framers than a judicial ruling on the narrow privilege question posed by the complaint.

Mem. Op. (Sept. 30, 2013) [Dkt. # 52] ("Mem. Op. on Mot. to Dismiss") at 17–18; *see also id.* at 15–16, citing *Comm. on the Judiciary v. Miers*, 558 F.Supp.2d 53, 84–85 (D.D.C.2008).

The Committee then moved for summary judgment on the grounds that as a matter of law, the executive branch could not invoke the deliberative process privilege in response to a Congressional subpoena. Pl.'s Mot. for Summ. J. [Dkt. # 61]. In the Committee's view, since the records did not involve actual communications with the President that would raise separation of powers concerns, they had to be produced. Mem. of P. & A. in Supp. of Pl.'s Mot. for Summ. J. [Dkt. # 61] ("Pl.'s Summ. J. Mem."). The Court ruled against the Committee on that issue. Order [Dkt. # 81] ("Order on Mot. for Summ. J."). It determined that there is an important constitutional dimension to the deliberative process aspect of the executive privilege, and that the privilege could be properly invoked in response to a legislative demand. *Id.* at 2, citing *In re Sealed Case*, 121 F.3d 729, 745 (D.C.Cir.1997) ("*Espy*").

However, the Court also found that defendant's blanket assertion of the privilege over all records generated after a particular date could not pass muster, because no showing had been made that any of the individual records satisfied the prerequisites for the application of the privilege. Order on Mot. for Summ. J. at 3–4. Defendant was ordered to review the responsive records to determine which, if any, records were both pre-decisional and deliberative and to produce any that were not. *Id.* at 4–5. Defendant was also ordered to create a detailed list identifying all records that were being withheld on privilege grounds. *Id.* at 4.

The current motion pending before the Court marks the next stage in these proceedings, as the Committee has moved to compel the production of every single record described in the list, as well as a body of material that defendant did not include in the index. Pl.'s Mot. to Compel ("Mot. to Compel") [Dkt. # 103] and Mem. of P. & A. in Supp. of Pl.'s Mot. to Compel ("Pl.'s Mem. for Mot. to Compel") [Dkt. # 103-1]. Fundamentally, the Committee takes the position that not one of the records is deliberative, and that even if some are, the privilege is outweighed in this instance by the Committee's need for the material. In particular, the Committee seeks a declara-

tion that intra-agency communications about responding to Congressional and media requests for information are not covered by the privilege. Pl.'s Mem. for Mot. to Compel at 26–29. It also argues that the right to invoke any privilege has been vitiated by the Department's own misconduct. *Id.* at 32 n.15.

As will be explained in more detail below, the Court rejects the Committee's articulation of the scope of the privilege. In accordance with other authority from this Circuit, the Court finds that records reflecting the agency's internal deliberations over how to respond to Congressional and media inquiries fall under the protection of the deliberative process privilege. It also finds that the defendant's detailed list describes the records being withheld with sufficient detail to support the assertion of the privilege.

[1] But, as both parties recognize, the deliberative process privilege is a qualified privilege that can be overcome by a sufficient showing of need for the material. *Espy*, 121 F.3d at 737–38.

> This need determination is to be made flexibly on a case-by-case, ad hoc basis. "[E]ach time [the deliberative process privilege] is asserted, the district court must undertake a fresh balancing of the competing interests . . . ."

Id. quoting *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C.Cir.1992). Thus, while the determination of whether the executive exceeded his authority in withholding materials began with the sort of pure legal inquiry that undeniably rests with the judiciary, following that process to its conclusion necessarily involves the kind of balancing that may raise separation of powers concerns when the legislature is the other party involved.

In other words, now that that legal ruling that was the stated justification for the invocation of this Court's jurisdiction has been issued, prudential considerations could weigh against going further and engaging in the balancing of the competing interests. But here, that exercise can be accomplished without the sort of interference in legislative or executive matters that courts should endeavor to avoid, and the Court can decide this case without assessing the relative weight of the interests asserted by the other two co-equal branches of government.

There is no need for the Court to invade the province of the legislature and undertake its own assessment of the legitimacy of the Committee's investigation, because the Department of Justice has conceded the point: it has repeatedly acknowledged the legitimacy of the investigation. *See e.g.*, Mem. in Supp. of Def.'s Mot. to Dismiss [Dkt. # 13-1] at 2–3 (referring to "Congress's legitimate oversight interests" and "legitimate investigative concerns"); Mem. in Supp. of Def.'s Mot. for. Summ. J. & in Opp. to Pl.'s Mot. for Summ. J. [Dkt. # 63] ("Def.'s Summ. J. Mem.") at 7–9; Letter from James M. Cole to Darrell E. Issa (June 20, 2012) [Dkt. # 17-3] ("June 20 Cole Letter") at 1 ("[T]he Department has provided a significant amount of information to the Committee in an extraordinary effort to accommodate the Committee's legitimate oversight interests."); and Tr. of May 15, 2014 Hearing at 72 [Dkt. # 79] (counsel for defendant: "because we had had an inaccurate letter [ ] we believed that it was appropriate to provide them with documents explaining that letter").

Furthermore, there is no need to balance the need against the impact that the revelation of any record could have on candor in future executive decision making, since any harm that might flow from the public revelation of the deliberations at issue here has already been self-inflicted:

the emails and memoranda that are responsive to the subpoena were described in detail in a report by the Department of Justice Inspector General that has already been released to the public. *See* A Review of ATF's Operation Fast and Furious and Related Matters (Redacted), Office of the Inspector General Oversight and Review Division, U.S. Dep't of Justice (Sept. 2012) ("IG Report"), https://oig.justice.gov/reports/2012/s1209.pdf.

Therefore, the Court finds, under the unique and limited circumstances of this case, that the qualified privilege must yield, given the executive's acknowledgment of the legitimacy of the investigation, and the fact that the Department itself has already publicly revealed the sum and substance of the very material it is now seeking to withhold. Since any harm that would flow from the disclosures sought here would be merely incremental, the records must be produced. The Court emphasizes that this ruling is not predicated upon a finding of wrongdoing.

The Committee's motion also raises issues about the withholding of records on other grounds and whether the subpoena was narrowed by agreement of the parties. Since the Committee was quite clear when it invoked the jurisdiction of this Court that it was simply asking for a ruling on the discrete question of law that has now been decided, the Court will decline to interpose itself in the negotiations between the parties on those other issues or to rule on questions that were not posed by the complaint. *See* Pl.'s Opp. to Mot. to Dismiss [Dkt. # 17] at 43–44 ("Once the limits and application of the deliberative process privilege in the context of the Holder Subpoena have been declared, the parties will know how to proceed."). The Committee has assured the Court that in the past, it has been willing and able to accommodate legitimate concerns about revealing law enforcement, attorney-client privileged, or purely private information and that it will be prepared to do so in the future. *See* Pl.'s Mem. for Mot. to Compel at 22; Tr. of July 30, 2015 Hearing [Dkt. # 109] at 27–28. So now that the issues have been substantially narrowed, all that is left to accomplish is the execution of a familiar set of steps applying a familiar set of principles. Given that backdrop, notwithstanding the Committee's insistence that the time for negotiation about these particular records has passed, the Court encourages the parties to start with a fresh slate and resolve the few remaining issues with flexibility and respect.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On October 11, 2011, the Committee issued a subpoena to the Attorney General calling for documents related to its investigation of a law enforcement initiative known as Operation Fast and Furious. The operation, launched by the Bureau of Alcohol, Tobacco, and Firearms ("ATF") and the U.S. Attorney's office in Phoenix, Arizona in 2009, sought to address the suspected illegal flow of firearms from the United States to drug cartels in Mexico. As part of the investigation, law enforcement officers allowed straw purchasers to buy firearms illegally in the United States and take them into Mexico without being apprehended—deliberately permitting the guns to "walk" in order to track them to their destination. But after a U.S. law enforcement agent was killed in December 2010 by a bullet fired from one of these guns, the ATF's tactic came under intense scrutiny.

Congress began inquiring into Operation Fast and Furious in early 2011, and on February 4, 2011, Assistant Attorney General Ronald Weich sent a letter to Senator Charles E. Grassley, Ranking Minority

Member of the Committee on the Judiciary, denying that the tactic had been utilized or that straw purchasers were permitted to transport firearms into Mexico without being interdicted. Letter from Ronald Weich to Charles E. Grassley (Feb. 4, 2011) [Dkt. # 17-1]. Ten months later, though, on December 2, 2011, the Deputy Attorney General officially retracted the earlier denial and confirmed that in fact, federal investigators had permitted the weapons to leave the country and enter Mexico. Letter from James M. Cole to Darrell E. Issa (Dec. 2, 2011) [Dkt. # 17-2]. The Committee then expanded its investigation to look into the circumstances behind the Justice Department's initial inaccurate assurances, as well as when and how the Department determined that the February 4 letter was incorrect and why it took as long as it did for Congress to be informed. As part of that effort, the Committee issued the October 11, 2011 subpoena. The Department produced a considerable volume of material that was responsive to the subpoena, but it withheld all records created on or after February 4, 2011.

This response was not satisfactory to the Committee, and the parties engaged in several months of negotiations concerning the post-February 4 documents. Ultimately, the Committee threatened to hold the Attorney General in contempt of Congress for withholding the records. The Committee scheduled a hearing on the contempt issue for June 20, 2012, and as the date approached, additional letters were exchanged in an attempt to avert the vote. Letter from James M. Cole to Darrell E. Issa (June 11, 2012) [Dkt. # 13-5]; Letter from Darrell E. Issa to Eric H. Holder, Jr. (June 13, 2012) [Dkt. # 63-8] ("June 13 Issa Letter"); Letter from Eric H. Holder, Jr. to Darrell E. Issa (June 14, 2012) [Dkt. # 13-4] ("June 14 Holder Letter"); Letter from James M. Cole to Darrell E. Issa [Dkt. # 13-6] (June 19, 2012) ("June 19 Cole Letter"). This effort did not bear fruit. On June 20, 2012, the Deputy Attorney General informed the Committee that the President had asserted executive privilege over the documents in dispute – internal documents related to the Department's response to Congress—on the grounds that their disclosure would reveal the agency's deliberative processes. June 20 Cole Letter [Dkt. # 17-3]. His letter lies at the heart of this action.

On August 13, 2012, the Committee filed this lawsuit to enforce the October 11, 2011 subpoena, Compl. [Dkt. # 1], and the complaint was amended in January of 2013 when the incoming 113th Congress reissued the subpoena. Am. Compl. [Dkt. # 35]. On September 30, 2013, the Court denied defendant's motion to dismiss for lack of subject matter jurisdiction, Order [Dkt. # 51], and the parties subsequently filed cross-motions for summary judgment. The Committee sought judgment on the grounds that the Attorney General could not invoke executive privilege to shield records that did not involve direct communications with the President, Pl.'s Summ. J. Mem. [Dkt. # 61], and the Department took the position that the entire set of records was covered by the deliberative process prong of the executive privilege. Def.'s Summ. J. Mem. [Dkt. # 63].

On August 20, 2014, the Court denied both motions without prejudice, holding that the executive branch could properly invoke the deliberative process privilege in response to a legislative demand, but that it could not do so unless the prerequisites for the application of the privilege had been established. Order on Mot. for Summ. J. at 3.

The Court ordered the defense to review each of the withheld documents and to produce all that were not both predecisional and deliberative. *Id.* at 4. With respect

to those documents for which a claim of privilege was still being asserted, the Court ordered the Department to generate a detailed list identifying "the author and recipient(s) and the general subject matter of the record being withheld, [and] the basis for the assertion of the privilege; in particular, ... the decision that the deliberations contained in the document precede." *Id.*

On November 4, 2014, the Department produced 10,104 records that had been previously withheld—totaling 64,404 pages. It also provided the detailed list of the records it deemed to be privileged in whole or in part after the individualized review. Pl.'s Notice of Disputed Claims & Other Issues [Dkt. # 98] at 2–3. On December 10, 2014, it produced a revised list, which it also provided to the Court. Not. of Filing of Privilege List [Dkt. # 100].[2] Defendant provided a third revised list to plaintiff on February 19, 2015, which was not filed with the Court. Pl.'s Reply to Def.'s Opp. to Pl.'s Mot. to Compel [Dkt. # 106] ("Pl.'s Reply") at 1. Finally, on May 29, 2015, the Department notified the Court that it had re-reviewed certain material withheld from the Committee, and it transmitted a final revised detailed list to the Committee and the Court. Def.'s Not. of Subsequent Developments. [Dkt. # 107].

Based on the Court's review of defendant's final revised list, which had a total of 17,835 entries, it appears that 4082 of the documents listed are duplicates wholly contained within other documents on the list, leaving 13,753 unique documents. Of those, approximately 3307 were released in full to plaintiff. The remaining 10,446 documents were withheld in whole or part:

Basis for Withholding	Number of Documents
Deliberative process privilege	5342
Law enforcement sensitive	3041
Privacy	1351
Other	310
Unrelated	394
No reason provided	8

On January 16, 2015, plaintiff filed the instant motion to compel production of all the documents on the revised detailed list,[3] and that motion has been fully briefed. Pl.'s Mot. to Compel [Dkt. # 103] and Pl.'s Mem. for Mot. to Compel [Dkt. # 103-1];

2. The Court ordered the parties to file notice of any objections to the Court making the revised list publically available on its website, Min. Order of Dec. 9, 2014, and upon receiving none, the Court posted the list to its website. *See* http://www.dcd.uscourts.gov/dcd/sites/dcd/files/DefsDetailedListofPrivDocsCtteHolder12-1332.pdf.

3. The Court recognizes that the motion to compel was filed and briefed before defendant produced its final revised list in May 2015, so the numbers of documents identified based on the Court's review of that list do not match those in the motion, which was based on earlier versions of the list.

Def.'s Mem. in Opp. to Pl.'s Mot. to Compel [Dkt. # 104] ("Def.'s Opp. to Mot. to Compel"); Pl.'s Reply [Dkt. # 106].

ANALYSIS

The Committee asks the Court to order the Attorney General to produce all of the post-February 4, 2011 documents that have been withheld. The Committee's motion divides the withheld materials into several categories:

1) materials withheld under the deliberative process privilege;
2) materials for which defendant has provided no basis for the claim of privilege;
3) materials that defendant neither produced to the Committee nor included on the detailed list; and
4) materials withheld on grounds other than the deliberative process privilege.

With respect to the records the defense seeks to withhold as deliberative, the Committee argues that the descriptions in the log are insufficient to support the invocation of the privilege, the types of records described are not covered by the privilege, and the qualified privilege has been outweighed in any event. The Court will address this category of material—which is the subject of the lawsuit—first.

I. Documents withheld on the basis of deliberative process privilege

[2–4] As this Court has already held, the executive privilege consists of two prongs: the Presidential communications privilege and the deliberative process privilege. While the Presidential communications prong of the privilege may derive more protection from the Constitution, the deliberative process privilege reaches beyond conversations with the President to protect other communications among executive branch officials "crucial to fulfillment of the unique role and responsibilities of the executive branch." *Espy,* 121 F.3d at 736–37. This privilege "allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Id.* at 737.

[5] For a document to be protected by the deliberative process privilege, it must be both predecisional and deliberative. *Id.* citing *Army Times Publ'g Co. v. Dep't of the Air Force,* 998 F.2d 1067, 1070 (D.C.Cir.1993); *Wolfe v. Dep't of Health and Human Servcs.,* 839 F.2d 768, 774 (D.C.Cir.1988). So in this case, the Court directed the Attorney General to prepare a detailed list "that identifies and describes the material in a manner 'sufficient to enable resolution of any privilege claims,' " including "the author and recipient(s) and the general subject matter of the record being withheld, ... the basis for the assertion of the privilege; ... in particular, ... the decision that the deliberations contained in the document precede." Order on Mot. for Summ. J. at 4, quoting *Miers,* 558 F.Supp.2d at 107 and Fed. R. Civ. Proc. 45(e)(2)(A)(ii).

The Committee challenges the sufficiency of the entries on the list, *see* Pl.'s Mem. for Mot. to Compel at 29–31, but the Court has reviewed the list and finds that with respect to the bulk of the material being withheld as deliberative, the Attorney General has specified the grounds for the assertion of the privilege with enough detail to permit the Court to rule on the availability of the privilege as a legal matter. For example,

- Doc. No. 3, DOJ-FF-00003–00005, is a bulleted summary of ATF reports, described as containing "draft reforms at ATF in wake of Fast and Furious." Revised Detailed List (Dec. 4, 2014).

- Doc. No. 251, DOJ-FF-00998–01001, is a draft email to the Mexican government regarding Fast and Furious, described as "discussing proposed email to Mexican government re FF briefings." Revised Detailed List (Dec. 4, 2014).
- Doc. No. 484, DOJ-FF-01939–01944, is an email discussing a scheduled meeting, described as containing a "discussion of proposed personnel action and recommendations concerning internal Department management." Revised Detailed List (Dec. 4, 2014).

The Committee's real problem with the list appears to be its contention that the sorts of deliberations that are often described should not fall within the ambit of the privilege at all. *Compare* Pl.'s Mem. for Mot. to Compel at 26–29 (arguing that deliberations about how to respond to Congress and the press are not covered by the privilege) *with* Pl.'s Mem. for Mot. to Compel at 30–32 (providing sample descriptions that it contends are insufficient involving many of the same issues, including "proposed changes to a draft letter to Congress," "discussing how to respond to quote," "how to communicate info to Congress and public").[4]

A. Documents reflecting the Department's internal deliberations about how to respond to Congressional and media inquiries about Operation Fast and Furious are protected by the deliberative process privilege.

The deliberative documents at the center of this litigation concern communications within the Department about how to respond to press and Congressional inquiries into Operation Fast and Furious. In its complaint and motion for summary judgment, the Committee took the position that these materials could not lawfully be withheld from the legislature because they did not involve communications with the President, and the deliberative process privilege did not have the same constitutional dimension as the executive communications privilege. In its order of August 20, 2014, the Court held that the Attorney General could properly invoke the deliberative process prong of the executive privilege in response to a Congressional subpoena, but that it was necessary to do so on a document-by-document basis. Order on Mot. for Summ. J. at 2–4.

Now the Committee contends that the documents that survived that review are not covered by the deliberative process privilege because the privilege only applies to deliberations concerning the development of policy. *See* Pl.'s Mem. for Mot. to Compel at 26–27 (asserting that the privilege allows "agency decisionmakers to engage in that frank exchange of opinions and recommendations necessary to the formulation of *policy* without being inhibited by fear of later public disclosure" and must reflect "the 'give-and-take' of the deliberative process and contain[ ] opinions, recommendations, or advice about agency *policies*") (emphasis added by plaintiff) (citations omitted); *see also* Pl.'s Mem. for Mot. to Compel at 27, quoting *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598

4. Plaintiff also asserted that there are fifty-five documents that were withheld as deliberative process privileged in defendant's revised detailed list of December 4, 2014 for which no "Withholding Description" was provided. Pl.'s Mem. for Mot. to Compel at 25; Ex. I to *id.* Based upon the Court's review of the final list of May 29, 2015, it appears that only document, Doc. No. 9087, remains listed as deliberative process privileged with the Withholding Description column left blank. Because defendant did not provide an adequate description of why this document is covered by the privilege, defendant must produce it to plaintiff.

F.3d 865, 875 (D.C.Cir.2009) ("To the extent the documents ... [do not] make recommendations for *policy change* ... they are not predecisional and deliberative despite having been produced by an agency that generally has an advisory role.") (emphasis added by plaintiff).[5]

Notwithstanding the Committee's added emphasis on the word "policy" found in selected excerpts from opinions, the precedent that governs this Circuit does not hold that the privilege is limited to deliberations concerning the formulation of policy.

[6] The purpose of the privilege is to protect the decision-making process within government agencies and to encourage "the frank discussion of legal and policy issues" by ensuring that agencies are not "forced to operate in a fishbowl." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C.Cir.1993), quoting *Wolfe*, 839 F.2d at 773. The Court of Appeals has applied that privilege to such mundane operational matters as the selection of a vendor to provide data retrieval services. *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 575 F.2d 932, 935 (D.C.Cir.1978) ("While [plaintiff] correctly notes that the end product of these Air Force deliberations on the [Mead Data Central] proposal is not a 'broad policy' decision, that deliberation is nonetheless a type of decisional process that Exemption 5 seeks to protect from undue public exposure.").[6] *See also In re Apollo Grp., Inc. Sec. Litig.*, 251 F.R.D. 12, 29 (D.D.C.2008) (holding that documents reflecting the Department of Education's review of a university's compliance with Title IV were covered by the privilege and rejecting the argument that a specific policy judgment is necessary for the privilege to apply because "the privilege serves to protect the processes by which 'governmental decisions' as well as 'policies' are formulated"), citing *Espy*, 121 F.3d at 737 and *N.L.R.B. v. Sears, Robuck & Co.*, 421 U.S. 132, 150, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975).[7]

And even if one were to draw a distinction between operational and policy-related matters, in *ICM Registry, LLC v. Dep't of Commerce*, 538 F.Supp.2d 130 (D.D.C. 2008), the district court recognized that internal deliberations about public relations efforts are not simply routine operational decisions: they are "deliberations about policy, even if they involve 'massaging' the agency's public image." *Id.* at 136

5. Given this argument, the Committee does not appear to be challenging the application of the privilege to records that have been plainly described as dealing with the development of policy, such as Doc. No. 3, a bulleted summary of ATF reports containing "draft reforms at ATF in wake of Fast and Furious." DOJ-FF-00003-00005, Revised Detailed List (Dec. 4, 2014).

6. The Committee cites *New York Times Co. v. U.S. Dep't of Defense*, 499 F.Supp.2d 501, 514 (S.D.N.Y.2007) for the proposition that the privilege does not reach "routine operating decisions." Pl.'s Mem. for Mot. to Compel at 26, but it is the *Mead Data* opinion that has precedential value here.

7. Even the cases the Committee cites indicate that the privilege covers agency deliberations about decisions, as well as the formulation of policy positions. In *Taxation with Representation Fund v. IRS*, 646 F.2d 666, 677 (D.C.Cir. 1981), the Court stated, "the privilege protects documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated ...." *See also Paisley v. C.I.A.*, 712 F.2d 686, 698–99 (D.C.Cir.1983), vacated on other grounds, 724 F.2d 201 (D.C.Cir.1984) (holding that in analyzing whether materials are protected from disclosure under Exemption 5 of FOIA—which protects materials covered by the deliberative process privilege—a "court must first be able to pinpoint an agency decision or policy to which these documents contributed," and stating that the decision whether to prosecute an individual is the type of decision protected by the privilege).

(holding that internal e-mails about how to present an agency decision to the public were covered by the deliberative process privilege). Other courts in this district have reached similar conclusions. *See Judicial Watch v. Dep't of Homeland Sec.*, 736 F.Supp.2d 202, 208 (D.D.C.2010) (holding that documents concerning "how to respond to on-going inquiries from the press and Congress" about the entry of a government witness and Mexican national into the United States fell under the deliberative process privilege); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Labor*, 478 F.Supp.2d 77, 83 (D.D.C.2007) (finding that deliberative process privilege covered email messages discussing the agency's response to news article); *Judicial Watch, Inc. v. Reno*, No. 00-0723, 2001 WL 1902811 (D.D.C. Mar. 30, 2001), at *3 (holding that deliberations about "how to handle press inquiries and other public relations issues" are covered by Exemption 5 under FOIA).

[7] Following the same reasoning, the Court holds that documents withheld by defendant that reveal the Department's internal deliberations about how to respond to press and Congressional inquiries into Operation Fast and Furious are protected by the deliberative process privilege.[8]

B. Plaintiff's need for the withheld documents outweighs the concerns that underlie the privilege in this case because the substance of these internal deliberations has already been made public.

On August 20, 2014, the Court ruled on the central issue it was asked to address in this lawsuit: are internal agency documents that do not involve communications with the President covered by the executive privilege? The answer was yes, if the documents are both deliberative and predecisional. And the Court has now ruled on the subsidiary issue it was subsequently asked to address: does that deliberative process prong of the executive privilege extend to cover internal discussions about communications with Congress or the press? The answer to that question is yes as well.

The decision that these withheld documents are privileged is just the first step of a two-step analysis, though, because the law is clear that the deliberative process privilege is a qualified one. *Espy*, 121 F.3d at 737.

> [8] [C]ourts must balance the public interests at stake in determining whether the privilege should yield in a particular case, and must specifically consider the need of the party seeking privileged evidence.

Id. at 746.

[9] Therefore, the question of whether the privilege has been outweighed is an essential aspect of the legal analysis the Court agreed to undertake, and this second step involves determining whether plaintiff's need for the documents outweighs the defendant's need to protect them. To resolve this question, the Court must balance the competing interests on a flexible, case by case, ad hoc basis, considering such factors as the relevance of the evidence, the availability of other evidence, the seriousness of the litigation or investigation, the harm that could flow from disclosure, the possibility of future timidity by government employees, and whether

8. In *Waters v. U.S. Capitol Police Bd.*, 218 F.R.D. 323, 324 (D.D.C.2003), a Magistrate Judge determined that a document about "a particular investigation rather than the adoption of a policy that applies to all cases of a particular nature or type" is not covered by the privilege, but this Court is not bound to follow that opinion, which is not directly on point in any event.

there is reason to believe that the documents would shed light on government misconduct, all through the lens of what would advance the public's—as well as the parties'—interests. *Id.* at 737–38.

One factor the *Espy* opinion directs the balancing judge to consider is whether the government is a party to the litigation, *id.* at 746, and in this case, the "government" is on both sides of the dispute. Under those circumstances, the necessary "ad hoc" balancing could give rise to the very concerns that prompted the Attorney General to argue that the case should be dismissed on prudential grounds and the Ranking Member of the Committee and other representatives to file an amicus brief in support of the motion. Mem. Amici Curiae at 9 (arguing that "this case implicates considerations of self-protection that are among the most important reasons for the rules of judicial restraint discussed above—to enable courts to resist being enlisted as one branch's pawn in political fights").

The Court is mindful of the principles that caution against judicial intervention in a dispute between the other two branches, and it recognizes that those principles derive from the balance of separate powers carefully enunciated in the Constitution. *See Allen v. Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), abrogated on other grounds, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, — U.S. ——, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014) ("federal courts may exercise power only in the last resort ... and only when adjudication is consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process") (internal quotation marks omitted). But in the unique situation presented here, the Court can decide this issue based on undisputed facts, without intruding upon legislative or executive prerogatives and without engaging in what could otherwise become a troubling assessment of the relative merit and weight of the interests being asserted by the either party.

Looking at the *Espy* factors, the Court first observes that the Attorney General has repeatedly firmly acknowledged the seriousness and legitimacy of the Committee's investigation. *See, e.g.*, Reply in Supp. of Def.'s Mot. to Dismiss [Dkt. # 27] at 1 ("The Department has never taken the position that the Committee lacks the authority to investigate ...."); Mem. in Supp. of Def.'s Mot. to Dismiss [Dkt. # 13-1] at 10 ("Ordinarily, the Department does not provide to Congress internal Executive Branch materials generated in the course of responding to a congressional inquiry. But in light of the acknowledged inaccuracies in the February 4 Letter, the Department made a rare exception to its recognized protocols .... The Department thereby gave the committee unprecedented access to deliberative materials reflecting how the letter came to be drafted.") (internal quotations omitted). And the defense acknowledged the relevance of the materials sought here when it emphasized to the Court that given the importance of the issues at stake, the Department had asked its Inspector General to review the same records in order to answer the same questions. *See* Mem. in Supp. of Def.'s Mot. to Dismiss at 9–10.

With respect to the harm that could flow from disclosure, the Department has explained that the privilege was invoked because the release of deliberative records concerning communications with Congress would cause significant damage. "In particular, 'it would inhibit the candor of such Executive Branch deliberations in the future and significantly impair the Executive Branch's ability to respond independently and effectively to congressional over-

sight.' " Mem. in Supp. of Def.'s Mot. to Dismiss at 16, quoting Letter from Eric H. Holder, Jr. to the President (June 19, 2012) ("June 19 Holder Letter") at 1–2.[9] The law recognizes the legitimacy of those concerns, and the principle that the Department sought to vindicate to protect its deliberations in the future has been upheld in this opinion and in the Court's previous rulings.

But the Court notes that in this case, the Department has pointed repeatedly to the existence and thoroughness of the Inspector General investigation. *See* Mem. in Supp. of Def.'s Mot. to Dismiss at 17–18 (stating that the "[t]he IG Report provides an extensive description of the very events that the Committee has pursued here, ... the Department's responses to Congress as they related to the disputed statements in the February 4 letter, ... and the withdrawal of the February 4 letter"); Reply in Supp. of Def.'s Mot. to Dismiss [Dkt. # 27] at 3 ("the IG report ... has changed the landscape, releasing a vast amount of information"); and *id.* at 24 (the IG report and the release of related documents "comprehensively addressed the Department's response to congressional inquiries"). While the Department outlined these circumstances as part of the its effort to persuade the Court to stay its hand altogether, and they relate—somewhat—to the *Espy* factor of whether the information can be obtained elsewhere,[10] in the end, they serve to persuade the Court that whatever incremental harm that could flow from providing the Committee with the records that have already been publicly disclosed is outweighed by the unchallenged need for the material.

What harm to the interests advanced by the privilege would flow from the transfer of the specific records sought here to the Committee when the Department has already elected to release a detailed Inspector General report that quotes liberally from the same records? *See* IG Report at 329–417; *see also* Reply in Supp. of Def.'s Mot. to Dismiss at 25 (stating that the IG Report "discloses vast amounts of information that the Committee purported to seek in its Complaint"). The Department has already laid bare the records of its internal deliberations—and even published portions of interviews revealing its officials' thoughts and impressions about those records. While the defense has succeeded in making its case for the general legal principle that deliberative materials—including the sorts of materials at issue here—deserve protection even in the face of a Congressional subpoena, it can point to no particular harm that could flow from compliance with this subpoena, for these records, that it did not already bring about itself.

Also, in this particular case, it is prudent for the Court to resolve the matter given the failure of the negotiation and accom-

9. The letter is not attached to defendant's motion to dismiss, but a copy is available on plaintiff's website at https://oversight.house.gov/wp-content/uploads/2012/08/May-19-2011 Holder-to-Obama.pdf.

10. The existence of the IG report does not necessarily establish that the evidence sought can be obtained elsewhere, because the report described the emails and internal documents and quoted them in part, but the source materials were not attached to the published report. According to defendant, though, the documents "referenced in the report" were provided to the Committee, Mem. in Supp. of Def.'s Mot. to Dismiss at 18, and that circumstance undermines the Committee's repeated assertions that the Department has been engaged in a wrongful exercise to conceal the truth. But given the fact that through the report, the barn door on these issues has been thrown wide open, why should Congress, if it is pursuing a legitimate investigation, be limited to the records selected by the Inspector General for inclusion in his report?

modation process with respect to this particular issue to date. The parties have been wrangling over the applicability of the deliberative process privilege since 2011, and the Court took the extraordinary step of delaying its proceedings twice to refer the matter to a senior U.S. District Judge to assist in the process, but those efforts did not succeed.

[10] So, under the specific and unique circumstances of this case, the Court finds that the qualified privilege invoked to shield material that the Department has already disclosed has been outweighed by a legitimate need that the Department does not dispute, and therefore, the records must be produced. This ruling is not predicated on a finding that the withholding was intended to cloak wrongdoing on the part of government officials or that the withholding itself was improper.

II. Withholdings and redactions for which defendant asserted no basis for its claim of privilege

[11] There are three smaller sets of records that present other concerns. First, the Committee complains that defendant has withheld several documents without identifying any grounds for the claim of privilege—that is, the "Withholding Basis" column of the detailed list was left blank. Pl.'s Mem. for Mot. to Compel at 8–9. According to plaintiff, the revised detailed list of December 4, 2014 included 380 of these entries. *Id.* at 8; Ex. E to *id.* The Court's review of the final revised detailed list of May 29, 2015—excluding duplicate documents and documents released in full—identified eight documents for which the "Withholding Basis" column remains blank.

883	DOJ-FF-03842 to DOJ-FF-03844
6592	DOJ-FF-25558 to DOJ-FF-25558
6594	DOJ-FF-25561 to DOJ-FF-25561
7038	DOJ-FF-26927 to DOJ-FF-26927
7987	DOJ-FF-29733 to DOJ-FF-29736
8002	DOJ-FF-29766 to DOJ-FF-29769

9685	DOJ-FF-37439 to DOJ-FF-37441
14768	DOJ-FF-60507 to DOJ-FF-60507.012

These records must be produced.

The Court ordered defendant to prepare a detailed list that would "identif[y] and describe[ ] the material in a manner 'sufficient to enable resolution of any privilege claims.' " Order on Mot. for Summ. J. [Dkt. # 81] at 4, quoting *Miers*, 558 F.Supp.2d at 107; *see also* Fed. R. Civ. Proc. 45(e)(2)(A)(ii). Failure to provide any grounds for withholding particular records does not comply with the order or enable the Court to resolve defendant's privilege

claims as to those documents. Accordingly, defendant must produce the material withheld without any proffered justification.

III. Documents that defendant did not produce originally and did not include on the detailed list

In its motion, the Committee asks the Court to compel defendant to produce *all* of the responsive records in its possession dated after February 4, 2011, including records that were not described in defendant's detailed list of documents covered by the deliberative process privilege. Pl.'s Mem. for Mot. to Compel at 3–8. The Department explains that the documents it did not include in the list are those that the Committee "took off the table" in 2012 when the parties were attempting to negotiate a resolution to the looming contempt proceedings. Def.'s Opp. to Mot. to Compel [Dkt. # 104] at 35–45. According to defendant, the Committee agreed to narrow the scope of the subpoena at that time, so when the President asserted the executive privilege in June of 2012, his action covered only the set of materials that was still at issue. Thus, defendant argues, any other records are not the subject of this lawsuit challenging that assertion of the privilege. *See id.* at 36–38.

The Committee takes the position that any accommodations were simply offers that were rejected by the Attorney General, and that this action to enforce a valid subpoena covers all records responsive to that subpoena. Pl.'s Mem. for Mot. to Compel at 3–8.

Both parties point to a series of communications in the spring of 2012 to support their positions. On May 3, 2012, Committee Chairman Darrell Issa reminded the rest of the Committee that when the Committee issued the subpoena "for Justice Department documents, the Committee specified 22 categories of documents it required the Department to produce." Mem. from Darrell E. Issa to Members, Committee on Oversight and Government Reform (May 3, 2012) ("May 3 Issa Mem."), at 9.[11] He then reported:

> [S]ome important areas remain cloaked in secrecy:
>
> - How did the Justice Department finally come to the conclusion that Operation Fast and Furious was "fundamentally flawed"? . . .
> - What senior officials at the Department of Justice were told about or approved the controversial gunwalking tactics that were at the core of the operation's strategy? . . .
> - How did inter-agency cooperation in a nationally designated Strike Force fail so miserably in Operation Fast and Furious?

May 3 Issa Mem. at 7–9.

After further negotiations, Speaker of the House Rep. John Boehner wrote a letter to the Attorney General stating that although the Department had provided some documents in response to the subpoena, "two key questions remain unanswered: first, who on your leadership team was informed of the reckless tactics used . . . and, second, did your leadership team mislead or misinform Congress in response to a Congressional subpoena?" Letter from John Boehner to Eric H. Holder, Jr. (May 18, 2012) [Dkt. # 63-9] ("May 18 Boehner Letter") at 1.[12]

11. This document is available at http://oversight.house.gov/wp-content/uploads/2012/05/Update-on-Fast-and-Furious-with-attachment-FINAL.pdf.

12. According to defendant, this accommodation eliminated plaintiff's demand for information about "how the inter-agency task force failed." Def.'s Opp. to Mot. to Compel at 37, quoting H.R. REP. NO. 112-546, at 38

On June 13, 2012, the Committee wrote to the Attorney General:

> [A] May 3, 2012, Committee memo identified three categories of documents necessary for Congress to complete its investigation into Operation Fast and Furious. On May 18, House leaders and I narrowed this request to two categories: (1) information showing the involvement of senior officials during Operations Fast and Furious, and (2) documents from after February 4, 2011, related to the Department's response to Congress and whistleblower allegations. . . .
>
> [O]n Monday, June 11, the Committee further narrowed the focus of what the Justice Department needs to produce to avoid contempt. This further accommodation . . . focused on the aforementioned relevant materials created after February 4, 2011—after Operation Fast and Furious ended. This accommodation by the Committee effectively eliminated the dispute over information gathered during the criminal investigation of Operation Fast and Furious . . . . Despite this proposed compromise by the Committee, the Department has not indicated a willingness to accept these terms.

June 13 Issa Letter at 1 [Dkt. # 63-8].

On June 14, 2012, the Attorney General responded to the Committee, expressing "appreciat[ion] that the Committee has narrowed its request for information related to its review of Operation Fast and Furious and now no longer seeks sensitive law enforcement information arising out of that investigation." June 14 Holder Letter [Dkt. # 13-4] at 1.

The parties met on June 19, 2012 but failed to resolve the impasse. *See* June 19 Cole Letter [Dkt. # 13-6] at 1.

That same day, the Attorney General wrote a letter to the President about the matter. "The Committee has made clear that its contempt resolution will be limited to internal Department 'documents from after February 4, 2011, related to the Department's response to Congress.'" June 19 Holder Letter, quoting June 13 Issa Letter at 1–2. He asked the President "to assert executive privilege over *these* documents." *Id.* at 1 (emphasis added). "They were not generated in the course of the conduct of Fast and Furious. Instead, they were created . . . in the course of the Department's deliberative process concerning how to respond to congressional and related media inquiries into that operation." *Id.* at 1–2.

On June 20, 2012, Deputy Attorney General Cole advised the Committee of the President's decision on the Attorney General's request: "I write now to inform you that the President has asserted executive privilege over the relevant post-February 4, 2011, documents." June 20 Cole Letter [Dkt. # 17-3] at 1.

According to defendant, the parties' negotiations left at issue only the "documents the Department refuse[d] to produce on the grounds that they reflect internal Department deliberations." Def.'s Opp. to Mot. to Compel at 29, quoting June 13 Issa Letter. It appears, as the complaint alleges and the records reflect, that it was this narrowed set that was submitted to the President for his consideration, and that the President's assertion of executive privilege related to those particular deliberative materials. *See* Am. Compl. ¶¶ 14–15. And it also appears from the correspondence that the focus of the Committee's inquiry became more sharply defined over time. But it is not clear from a review of

("As an accommodation to the Department, the letter offered to narrow the scope of documents the Department needed to provide in order to avoid contempt proceedings.").

the communications that the parties agreed that the Committee would forego any interest in the broader universe of responsive records for all time since there was no meeting of the minds. Yes, the Committee offered to take several categories of documents off the table, and yes, the Chairman said that this "effectively eliminated" the dispute over records created during the ongoing law enforcement operation, but it appears that those offers were made in the context of a negotiation, in return for something the Committee never received.

In any event, the Court is not obligated to unravel all of the threads that have become tangled in this dispute, and it would not be prudent for it to do so. It is not necessary to decide which of the parties' unduly argumentative pleadings—which rely heavily on their own self-serving correspondence—characterizes the state of the negotiations more accurately. And the Court does not need to define the scope of the "post-February 4 subset," a term apparently coined by the Committee and used in the complaint but none of the previous correspondence, or the "Executive Privilege Set," a term put forward by counsel for the Department. *See* Pl.'s Reply [Dkt. # 106] at 2, 3, 6, and 14. In the end, the Court did not—and it should not—accept an assignment to supervise the entire contentious relationship between these parties. It took jurisdiction over the single, legal issue presented by the complaint, and what the lawsuit is about is clear.

The lawsuit challenged the Attorney General's withholding of documents on the grounds of executive privilege, and the correspondence reveals that the President asserted executive privilege over the same records underlying the Committee's decision to hold the Attorney General in contempt: those related to the Department's response to the congressional investigation into Operation Fast and Furious. *See also* Am. Compl. ¶¶ 14–15.

As the Committee explained in both the amended complaint [13] and its opposition to the defendant's original motion to dismiss:

> The Committee legally is entitled to all documents responsive to the Holder Subpoena that have not been produced. Nevertheless, in this action, the Committee seeks to enforce that subpoena only as to a subset of post-February 4, 2011 responsive documents (the "Post-February 4 Subset," Compl. ¶ 62). That subset is particularly relevant to the Committee's efforts to determine whether DOJ deliberately attempted to obstruct the Committee's investigation by, among other things, lying to the Committee or otherwise providing it with false information.
>
> The principal legal issue presented in this case is whether the Attorney General may withhold this responsive subset on the basis of the President's assertion of Executive privilege over internal agency documents that reflect no advice to or communications with him.

Pl.'s Opp. to Def.'s Mot. to Dismiss [Dkt. # 17] at 3. Indeed, the Committee urged

13. Am. Compl. Introduction at 3 ("While the Committee is entitled to all documents responsive to the Holder Subpoena that have not been produced, the Committee seeks in this action to enforce the Holder Subpoena only as to a limited subset of responsive documents, namely those documents relevant to the Department's efforts to obstruct the Committee's investigation. The principal legal issue presented here is whether the Attorney General may withhold that limited subset on the basis of "Executive privilege" where there has been no suggestion that the documents at issue implicate or otherwise involve any advice to the President, and where the Department's actions do not involve core constitutional functions of the President."); *see also* Am. Compl. ¶ 67.

the Court to exercise jurisdiction to resolve the case precisely because it presented such a narrow, "quintessentially legal" question:

> The dispute here revolves around the applicability of the deliberative process privilege—which the Attorney General casts as a form of Executive privilege—to a congressional subpoena. By determining (i) whether this privilege may validly be asserted in response to the Holder Subpoena, and (ii) whether the Attorney General's failure to produce to the Committee the Post-February 4 Subset of documents is without legal justification and violates his legal obligations to the Committee, *see* Compl. ¶¶ 62–81, the Court definitively will resolve the controversy between the parties . . . .
>
> Once the limits and application of the deliberative process privilege in the context of the Holder Subpoena have been declared, the parties will know how to proceed.

Id. at 43–44.

According to the Committee, then, this Court's work is done, and the Court agrees.

What the Court undertook to address is whether the Attorney General could lawfully withhold those responsive documents dated after February 4 over which the executive had asserted the deliberative process privilege. On August 20, 2014, the Court answered the primary legal question and ruled that that the deliberative process privilege was a legitimate prong of the constitutionally-based executive privilege that could be validly asserted in response to a Congressional subpoena to shield records as long as they were both deliberative and predecisional. Order on Mot. for Summ. J. [Dkt. # 81]. The Court went further today and answered the remaining subsidiary legal question: whether internal deliberations concerning communications with the press and Congress fell within the scope of the privilege.

The Court has already ordered that any records that were withheld on June 20, 2012 but were not both deliberative and predecisional had to be produced, Order on Mot. for Summ. J. at 4, and, applying the *Espy* factors, it has ordered today that even the privileged, deliberative records related to how the Department would respond to congressional and related media inquiries into Operation Fast and Furious must also be produced. But any responsive documents that were not embraced in that privilege assertion are an entirely separate matter, and intervention in that dispute would entangle the Court in an ongoing political dispute of the sort that is not suitable to judicial resolution. *See Allen*, 468 U.S. at 752, 104 S.Ct. 3315; *see also Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *United States v. AT & T*, 551 F.2d 384, 390 (D.C.Cir.1976). The unresolved legal issue that posed the primary impediment to a negotiated solution has been alleviated, and the process of negotiation and accommodation has not been exhausted with respect to any of the other issues.

IV. Documents and redactions withheld on a basis other than the deliberative process privilege

Plaintiff also asserts that defendant must be ordered to produce any documents that were either redacted or withheld in their entirety for reasons other than the deliberative process privilege, Pl.'s Mem. for Mot. to Compel at 9–24—which defendant withheld because they contained "certain law enforcement sensitive material, records implicating sensitive foreign policy concerns, attorney-client privileged information, material protected by the attorney work product doctrine, and

personal privacy information." Def.'s Opp. to Mot. to Compel at 27–28. These issues are best left to the process of negotiation and accommodation as well.

The Committee takes the position that these privileges have been waived since the defense has never asserted them in this litigation. Pl.'s Mem. for Mot. to Compel at 10–14; Pl.'s Reply at 8–11. While both parties made it clear that the litigation was about the scope of the deliberative process privilege, and defendant formally eschewed any reliance on the Presidential communications privilege, Joint Status Report [Dkt. # 32] at 5, it has not been established that the Department waived its right to rely on the other grounds as it ordinarily does in response to Congressional subpoenas. *See* Letter from James M. Cole to Darrell E. Issa (May 15, 2012) [Dkt. # 63-3] (explaining why law enforcement sensitive information was redacted from document productions); Letter from Ronald Weich to Darrell E. Issa (Apr. 19, 2012) (requesting that the Committee refrain from contacting or subpoenaing cooperating and other witnesses in indicted federal criminal cases as part of its investigation of Operation Fast and Furious while the criminal matters remain pending), https://oversight.house.gov/wp-content/uploads/2012/08/April-19-2011-Weich-to-Issa.pdf; *see also* Mem. Amici Curiae at 15–16 [Dkt. # 30].

Indeed, at oral argument, counsel for the Committee acknowledged that these are privileges that are regularly respected in legislative requests for information as a matter of comity. But he took the position that the Committee "does not have sufficient trust in the Department of Justice to take the Department's word on [redactions]." Tr. of July 30, 2015 Hearing [Dkt. # 109] at 49. The legitimacy of these privileges is not an issue that was presented in the complaint, and prudential concerns dictate that these questions are more appropriately resolved by the parties in the first instance. As for whether the redactions are what they purport to be, the Court notes that counsel for even the most disputatious parties are often called upon to trust each other, and that the judiciary relies regularly on declarations by the executive branch that matters redacted from FOIA productions are what they are described to be in the *Vaughn* index. *See Loving v. U.S. Dep't of Def.*, 550 F.3d 32, 41 (D.C.Cir. 2008) (holding that district court had not abused its discretion by relying on agency's *Vaughn* index and declaration in determining whether a disputed document contained segregable portions); *Judicial Watch, Inc. v. Consumer Fin. Prot. Bureau*, 60 F.Supp.3d 1, 13 (D.D.C.2014) ("The reviewing court may rely on the description of the withheld records set forth in the Vaughn index and the agency's declaration that it released all segregable information."). The Court has been provided with no reason to believe that its assistance is needed to verify for counsel for one branch of government assertions made in pleadings by an officer of the court representing another, equal branch of government. If in the end, a neutral is required to read each individual redaction and confirm that what the Department claims is simply a name or a telephone number is in fact a name or a telephone number, the parties can arrange for that on their own.

CONCLUSION

For the reasons stated above, it is **ORDERED** that plaintiff's motion to compel [Dkt. # 103] is **GRANTED** insofar as it calls for the production of documents responsive to the October 11, 2011 subpoena that concern the Department of Justice's response to congressional and media inquiries into Operation Fast and Furious which were withheld on deliberative pro-

cess privilege grounds, and it is **GRANTED** with respect to the nine documents for which no justification for the invocation of the privilege has been provided: document numbers 9087, 883, 6592, 6594, 7038, 7987, 8002, 9685, and 14768. In all other respects, it is **DENIED**. Records subject to this order shall be produced to plaintiff by February 2, 2016.

It is further **ORDERED** that by February 2, 2016, defendant shall produce to plaintiff all segregable portions of any records withheld in full or in part on the grounds that they contain attorney-client privileged material, attorney work product, private information, law enforcement sensitive material, or foreign policy sensitive material. Whether any additional records or portions of records are to be produced is a matter to be resolved between the parties themselves.

Finally, it is further **ORDERED** that the parties shall file a notice by February 2, 2016 setting forth their joint position (or separate positions if they cannot agree) on whether, in light of this order resolving all of the pending issues in the case, the case should now be dismissed as moot, and if not, how the Court should proceed.

SO ORDERED.

Dartis Exzolus WILLIS, Plaintiff,

v.

GREEN TREE SERVICING, LLC and Citimortgage, Defendants.

Civ. Action No. 14–1544 (EGS)

United States District Court,
District of Columbia.

Signed March 5, 2015

Background: Property owner brought action raising challenges regarding mortgage on property and foreclosure action related to property. Defendants moved to dismiss.

Holding: The District Court, Emmet G. Sullivan, J., held that Eastern District of Michigan, rather than District of Columbia, was proper venue for action.

Motions granted in part and denied in part.

1. Federal Courts ⇐2944

In considering motion to dismiss for improper venue, court accepts plaintiffs' well-pled factual allegations regarding venue as true, draws all reasonable inferences from those allegations in plaintiffs' favor, and resolves any factual conflicts in plaintiffs' favor. Fed. R. Civ. P. 12(b)(3).

2. Federal Courts ⇐2825(11)

Eastern District of Michigan, rather than District of Columbia, was proper venue for property owner's action raising challenges regarding mortgage on property and foreclosure action related to property, where defendants were not located in District of Columbia, none of alleged acts committed by defendants occurred in District of Columbia, and property was located in Eastern District of Michigan. 28 U.S.C.A. § 1391(b).

3. Federal Courts ⇐2921

Decision whether to transfer is committed to court's sound discretion, but interest of justice generally favors transferring case to appropriate forum. 28 U.S.C.A. § 1406(a).

Dartis Exzolus Willis, Royal Oak, MI, pro se.

Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach From Congressional Subpoena

The Assistant to the President and Director of the Office of Political Strategy and Outreach ("OPSO") is immune from the House Committee on Oversight and Government Reform's subpoena to compel him to testify about matters concerning his service to the President in the OPSO.

July 15, 2014

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether Assistant to the President and Director of the Office of Political Strategy and Outreach ("OPSO") David Simas is legally required to appear to testify at a congressional hearing scheduled for July 16, 2014, in response to a subpoena issued to Mr. Simas by the House Committee on Oversight and Government Reform on July 10, 2014. We understand that the Committee seeks testimony about "whether the White House is taking adequate steps to ensure that political activity by Administration officials complies with relevant statutes, including the Hatch Act," and about "the role and function of the White House Office of Political Strategy and Outreach." Letter for David Simas from the Hon. Darrell Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives (July 3, 2014) ("Invitation Letter"). For the reasons set forth below, we believe that Mr. Simas is immune from compulsion to testify before the Committee on these matters, and therefore is not required to appear to testify in response to this subpoena.

I.

A.

The Executive Branch's longstanding position, reaffirmed by numerous Administrations of both political parties, is that the President's immediate advisers are absolutely immune from congressional testimonial process. *See, e.g.*, Memorandum for the Hon. John D. Ehrlichman, Assistant to the President for Domestic Affairs, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (Feb. 5, 1971) ("Rehnquist Memorandum").[1] This immunity is rooted in the constitutional separation of powers, and in

[1] *See also* Letter to Fred F. Fielding, Counsel to the President, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel (Aug. 1, 2007); *Immunity of Former Counsel to the President from Compelled Congressional Testimony*, 31 Op. O.L.C. __ (July 10, 2007) ("Bradbury Memorandum"), *available at* http://www.justice.gov/olc.opinions.htm; *Assertion of Execu-*

the immunity of the President himself from congressional compulsion to testify. As this Office has previously observed, "[t]he President is the head of one of the independent Branches of the federal government. If a congressional committee could force the President's appearance" to testify before it, "fundamental separation of powers principles—including the President's independence and autonomy from Congress—would be threatened." *Immunity of Former Counsel to the President from Compelled Congressional Testimony*, 31 Op. O.L.C. __, at *2 (July 10, 2007) ("Bradbury Memorandum"), *available at* http://justice.gov/olc/opinions.htm. In the words of one President, "[t]he doctrine [of separation of powers] would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purpose." Texts of Truman Letter and Velde Reply, N.Y. Times, Nov. 13, 1953, at 14 (reprinting November 11, 1953 letter by President Truman). Thus, just as the President "may not compel congressmen to appear before him," "[a]s a matter of separation of powers, Congress may not compel him to appear before it." *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 4 (1999) ("*Assertion of Executive Privilege*") (quoting Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 2 (July 29, 1982)).

For the President's absolute immunity to be fully meaningful, and for these separation of powers principles to be adequately protected, the President's immediate advisers must likewise have absolute immunity from congressional compulsion to testify about matters that occur during the course of discharging their official duties. "Given the numerous demands of his office, the President must rely upon senior advisers" to do his job. Bradbury Memorandum at *2. The President's immediate advisers—those trusted members of the President's inner circle "who customarily meet with the President on a regular or frequent basis," Rehnquist Memorandum at 7, and upon whom the President relies directly for candid and sound advice—are in many ways an extension of the President himself.

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tive Privilege with Respect to Clemency Decision, 23 Op. O.L.C. 1 (1999); *Immunity of the Counsel to the President from Compelled Congressional Testimony*, 20 Op. O.L.C. 308 (1996); Memorandum to Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (July 29, 1982); Letter for Rudolph W. Giuliani, Associate Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Demand for Deposition of Counsel to the President Fred F. Fielding* (July 23, 1982); Memorandum for Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Congressional Testimony by Presidential Assistants* (Apr. 14, 1981); Memorandum for Margaret McKenna, Deputy Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Dual-Purpose Presidential Advisers* (Aug. 11, 1977); Memorandum for the Hon. John W. Dean III, Counsel to the President, from Ralph E. Erickson, Assistant Attorney General, Office of Legal Counsel, *Re: Appearance of Presidential Assistant Peter M. Flanigan Before a Congressional Committee* (Mar. 15, 1972).

They "function[] as the President's alter ego, assisting him on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional responsibilities," including supervising the Executive Branch and developing policy. *Assertion of Executive Privilege*, 23 Op. O.L.C. at 5; *see also Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) (the Constitution "establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity," including "the enforcement of federal law" and the "management of the Executive Branch"); *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997) ("The President himself must make decisions relying substantially, if not entirely, on the information and analysis supplied by advisers."). "Given the close working relationship that the President must have with his immediate advisors as he discharges his constitutionally assigned duties," "[s]ubjecting [those advisors] to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned executive functions." *Assertion of Executive Privilege*, 23 Op. O.L.C. at 5.

In particular, a congressional power to compel the testimony of the President's immediate advisers would interfere with the President's discharge of his constitutional functions and damage the separation of powers in at least two important respects. First, such a power would threaten the President's "independence and autonomy from Congress." Bradbury Memorandum at *2; *cf. Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 370, 385 (2004) (citing the President's need for autonomy and confidentiality in holding that courts must consider constraints imposed by the separation of powers in fashioning the timing and scope of discovery directed at high-level presidential advisers who "give advice and make recommendations to the President"). Absent immunity for a President's closest advisers, congressional committees could wield their compulsory power to attempt to supervise the President's actions, or to harass those advisers in an effort to influence their conduct, retaliate for actions the committee disliked, or embarrass and weaken the President for partisan gain. Such efforts would risk significant congressional encroachment on, and interference with, the President's prerogatives and his ability to discharge his duties with the advice and assistance of his closest advisers. They also would promote a perception that the President is subordinate to Congress, contrary to the Constitution's separation of governmental powers into equal and coordinate branches.

Second, a congressional power to subpoena the President's closest advisers to testify about matters that occur during the course of discharging their official duties would threaten executive branch confidentiality, which is necessary (among other things) to ensure that the President can obtain the type of sound and candid advice that is essential to the effective discharge of his constitutional duties. The Supreme Court has recognized "the necessity for protection of the public interest

in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *United States v. Nixon*, 418 U.S. 683, 708 (1974). "A President and those who assist him," the Court has explained, "must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* The prospect of compelled interrogation by a potentially hostile congressional committee about confidential communications with the President or among the President's immediate staff could chill presidential advisers from providing unpopular advice or from fully examining an issue with the President or others.

To be sure, the President's advisers could invoke executive privilege to decline to answer specific questions if they were required to testify. *See, e.g.*, Rehnquist Memorandum at 8 & n.4. But the ability to assert executive privilege during live testimony in response to hostile questioning would not remove the threat to the confidentiality of presidential communications. An immediate presidential adviser could be asked, under the express or implied threat of contempt of Congress, a wide range of unanticipated and hostile questions about highly sensitive deliberations and communications. In the heat of the moment, without the opportunity for careful reflection, the adviser might have difficulty confining his remarks to those that do not reveal such sensitive information. Or the adviser could be reluctant to repeatedly invoke executive privilege, even though validly applicable, for fear of the congressional and media condemnation she or the President might endure. These concerns are heightened because, in a hearing before a congressional committee, there is no judge or other neutral magistrate to whom a witness can turn for protection against questions seeking confidential and privileged information. The committee not only poses the questions to the witness, but also rules on any objections to its own questions according to procedures it establishes. The pressure of compelled live testimony about White House activities in a public congressional hearing would thus create an inherent and substantial risk of inadvertent or coerced disclosure of confidential information relating to presidential decisionmaking—thereby ultimately threatening the President's ability to receive candid and carefully considered advice from his immediate advisers. To guard against these harms to the President's ability to discharge his constitutional functions and to the separation of powers, immediate presidential advisers must have absolute immunity from congressional compulsion to testify about matters that occurred during the course of the adviser's discharge of official duties.[2]

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[2] A number of senior presidential advisers have voluntarily testified before Congress as an accommodation to a congressional committee's legitimate interest in investigating certain activities of the Executive Branch. These instances of voluntary testimony do not undermine the Executive Branch's long-established position on absolute immunity. Unlike compelled testimony, voluntary testimony by a senior presidential adviser represents an affirmative exercise of presidential autonomy. It reflects a decision by the President and his immediate advisers that the benefit of providing such testimony as an accommodation to a committee's interests outweighs the potential for harassment and harm to Executive Branch confidentiality. Such testimony, moreover, may be provided on terms negotiated to

B.

This longstanding Executive Branch position is consistent with relevant Supreme Court case law. The Court has not yet considered whether Congress may secure the testimony of an immediate presidential adviser through compulsory process. But in an analogous context, the Court did conclude that legislative aides are entitled to immunity under the Speech or Debate Clause that is co-extensive with the immunity afforded Members of Congress themselves. *See Gravel v. United States*, 408 U.S. 606 (1972). "It is literally impossible," the Court explained, "for Members of Congress to perform their legislative tasks without the help of aides and assistants." *Id.* at 616. Legislative aides must therefore "be treated as . . . alter egos" of the Members they serve. As a result, they must be granted the same immunity as those Members in order to preserve "the central role of the Speech or Debate Clause," which is "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Id.* at 617.

The Court's reasoning in *Gravel* supports the position that the President's immediate advisers must share his absolute immunity from congressional compulsion to testify. As noted above, the President's immediate advisers are his "alter egos," allowing him to fulfill the myriad responsibilities of his office in a way it would be "literally impossible" for him to do alone. A congressional power to compel their testimony would (as we have discussed) undermine the President's independence, create the appearance that the President is subordinate to Congress, and impair the President's ability to receive sound and candid advice, thereby hindering his ability to carry out the functions entrusted to him by the Constitution. Subjecting immediate presidential advisers to congressional testimonial process would thus "diminish[] and frustrate[]" the purpose of the President's own absolute immunity from such process—just as in *Gravel*, denying "Speech or Debate" immunity to legislative aides would have "diminished and frustrated" the protections granted to Members of Congress under that clause. *Gravel*, 408 U.S. at 617.

To be sure, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court rejected a claim of absolute immunity made by senior presidential advisers. But it did so in the context of a civil suit against those advisers for money damages. In our view, *Harlow*'s holding that presidential advisers are generally entitled to only qualified immunity in suits for money damages should not be extended to the context of congressional subpoenas for the testimony of immediate presidential advisers, because the separation of powers concerns that underlie the need for absolute immunity from congressional testimonial compulsion are not present to the same

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focus and limit the scope of the questioning. Because voluntary testimony represents an exercise of presidential autonomy rather than legally required compliance with congressional will, it does not implicate the separation of powers in the same manner, or to anything like the same extent, as compelled testimony.

degree in civil lawsuits brought by third parties. *But see Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 100–02 (D.D.C. 2008) (reading *Harlow* to preclude absolute immunity for senior presidential advisers from compulsion to testify before Congress).

As explained above, subjecting an immediate presidential adviser to Congress's subpoena power would threaten the President's autonomy and his ability to receive sound and candid advice. Both of these prospective harms would raise acute concerns related to the separation of powers. A suit for damages brought by a private party does not raise comparable separation of powers concerns. It is true that such a suit involves a judicially supervised inquiry into the actions of presidential advisers, and that the threat of financial liability from such a suit may chill the conduct of those advisers. *See Harlow*, 457 U.S. at 814; *Miers*, 558 F. Supp. 2d at 101–02. But, in civil damages actions, the Judiciary acts as a disinterested arbiter of a private dispute, not as a party in interest to the very lawsuit it adjudicates. Indeed, the court is charged with impartially administering procedural rules designed to protect witnesses from irrelevant, argumentative, harassing, cumulative, privileged, and other problematic questions. *Cf., e.g.*, Fed. R. Civ. P. 26(b); Fed. R. Evid. 103. And mechanisms exist to eliminate unmeritorious claims. *See, e.g.*, Fed. R. Civ. P. 12(b), (c), (e), (f); Fed. R. Civ. P. 56. In contrast, in the congressional context (as noted earlier), the subpoenaing committee is both the interested party and the presiding authority, asking questions that further its own interests, and setting the rules for the proceeding and judging whether a witness has failed to comply with those rules. In part for these reasons, a congressional proceeding threatens to subject presidential advisers to coercion and harassment, create a heightened impression of presidential subordination to Congress, and cause public disclosure of confidential presidential communications in a way that the careful development of evidence through the judicially monitored application of the Federal Rules of Civil Procedure does not.

Harlow also contains a discussion of *Gravel*, in which the Court rejected the defendants' argument that, as "alter egos" of the President, they should be entitled to absolute immunity from civil claims for damages, derivative of the absolute immunity afforded the President. But we do not think *Harlow*'s discussion undermines the relevance of *Gravel* to the issue of immunity from congressional compulsion to testify. In *Harlow*, the Court conceded that the defendants' claim of absolute immunity based on *Gravel* was "not without force," but concluded that the argument would "sweep[] too far," because it would imply that Cabinet officials too should enjoy derivative absolute immunity, and the Court had already decided (in *Butz v. Economou*, 438 U.S. 478 (1978)) that Cabinet officials—"Presidential subordinates some of whose essential roles are acknowledged by the Constitution itself"—were entitled to only qualified immunity. *Harlow*, 457 U.S. at 810.

Given the dissimilarities between civil suits for damages and compelled congressional testimony just discussed, it is doubtful that this discussion in *Harlow* (or the holding in *Butz*) bears much on the question of whether immediate presidential advisers have absolute immunity from congressional compulsion to testify. Further, even if it is appropriate to harmonize the immunity afforded Cabinet officials and presidential advisers in the context of suits for damages, the same is not true in the context of compelled congressional testimony. This is because the prospect of compelled congressional testimony by a President's immediate advisers would, as a general matter, be significantly more damaging to the separation of powers than the prospect of compelled testimony by a Cabinet official. As a Department head, a Cabinet officer is confirmed by the Senate, and her authority and functions are generally established by statute. It may be a significant part of her regular duties to testify before Congress about the implementation of laws that Congress has passed. *Cf.* Rehnquist Memorandum at 8–9. By contrast, an immediate presidential adviser is appointed solely by the President, without Senate confirmation, and his role is to advise and assist the President in the performance of the President's constitutionally assigned functions. The separation of powers concerns identified above—the threats to both the independence of the presidency and the President's ability to obtain candid and sound advice—are significantly more acute in the case of close personal advisers than high-ranking Executive Branch officials who do not function as the President's "alter egos." *Cf. Harlow*, 457 U.S. at 828 (Burger, C.J., dissenting) (faulting the Court majority for "fail[ing] to distinguish the role of a President or his 'elbow aides' from the role of Cabinet officers, who are department heads rather than 'alter egos,'" and stating that "[i]t would be in no sense inconsistent to hold that a President's personal aides have greater immunity than Cabinet officers"); *id.* at 810 n.14 (majority) (acknowledging Chief Justice Burger's argument and noting that "it is impossible to generalize about the role of 'offices' in an individual President's administration" because some individuals have served simultaneously in both presidential advisory and Cabinet positions).[3]

Similarly, in *United States v. Nixon*, the Supreme Court expressly distinguished the privilege issues arising in criminal cases from the privilege issues that would

[3] The *Harlow* Court also observed that civil suits for money damages against presidential advisers "generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself." 457 U.S. at 811 n.17. This observation is consistent with *Nixon v. Fitzgerald*, a case decided the same day as *Harlow*, in which the Court held that the President "is entitled to absolute immunity from damages liability predicated on his official acts." 457 U.S. 731, 749 (1982). This logic too suggests that the President's immediate advisers should be absolutely immune from congressional compulsion to testify, because (as we have explained) compelling immediate presidential advisers to testify before Congress would risk serious harm to the separation of powers that is closely related to the harm that would be caused by compelling the President himself to appear, and because absolute immunity for the President's immediate advisers is necessary to render the President's own immunity fully meaningful.

arise in the context of compelled congressional testimony. In *Nixon*, the Court held that the President could assert only a qualified, rather than an absolute, privilege to resist a subpoena for tape recordings and documents issued in the course of a criminal proceeding brought against certain third parties. 418 U.S. 683; *see also Sealed Case*, 121 F. 3d at 753–57 (presidential communications privilege may be overcome by need for information in a grand jury investigation). But the Court made clear that it was "not . . . concerned with the balance between the President's . . . confidentiality interest and congressional demands for information." *Nixon*, 418 U.S. at 712 n.19; *see also id.* ("We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials."); *Sealed Case*, 121 F.3d at 753 (recognizing that the unique "constitutional considerations" in the "congressional-executive context" render limitations on executive privilege in the judicial context inapposite). Particularly in light of this explicit statement, we do not believe *Nixon* casts doubt on the President's—and by extension his immediate advisers'—immunity from congressional compulsion to testify. As with liability for private suits for damages, requiring the President to comply with a third-party subpoena in a criminal case is very different from—and has very different separation of powers implications than—requiring him to comply with a congressional subpoena for testimony. This is so in at least two respects.

First, as the Court explained in *Cheney*, "the need for information in the criminal context is" particularly weighty "because 'our historic[al] commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that the twofold aim of [criminal justice] is that guilt not escape or innocence suffer.'" 542 U.S. at 384 (quoting *United States v. Nixon*, 418 U.S. at 708–09) (internal quotation marks omitted) (alterations in original)). Outside the criminal context, "the need for information . . . does not share the [same] urgency or significance." *Id.* Comparing the informational need of congressional committees with that of grand juries, for instance, the en banc Court of Appeals for the D.C. Circuit explained that "while factfinding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events. . . . In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (en banc).

Second, the potentially harmful effect on the President's ability to carry out his duties and on the separation of powers is more serious in the context of subpoenaed congressional testimony than in the context of compulsory judicial process in a criminal case. As in the civil context, the criminal justice system imposes "various constraints, albeit imperfect, to filter out insubstantial legal claims" and minimize the damage to the President's ability to discharge his duties, such as

prosecutorial discretion (with its attendant ethical constraints) and Federal Rule of Criminal Procedure 17. *Cheney*, 542 U.S. at 386. Congress is not subject to such constraints. And, of course, a criminal subpoena does not raise the prospect of the President (or one of his immediate advisers) being summoned at Congress's will to appear before it to respond to a hearing conducted entirely on the terms and in the manner Congress chooses.

Two lower-court cases also bear mention. In *Senate Select Committee*, the Court of Appeals for the D.C. Circuit addressed a President's obligation to comply with a congressional subpoena, and concluded that the President could not assert a generalized claim of executive privilege to absolutely immunize himself from turning over certain tape recordings of presidential conversations. 498 F.2d 725. Again, we do not believe this holding undermines our conclusion that the President and his immediate advisers are absolutely immune from congressional compulsion to testify. In our view, Congress summoning a President to appear before it would suggest, far more than Congress compelling a President to turn over evidence, an Executive subordinate to the Legislature. In addition, when Congress issues a subpoena for documents, the Executive Branch may take time to review the request and object to any demands that encroach on privileged areas. Any documents that are produced may be redacted where necessary. By contrast (and as already discussed), a witness testifying before Congress may, in the heat of the moment and under pressure, inadvertently reveal information that should remain confidential.

Finally, in *Committee on Judiciary v. Miers*, the District Court for the District of Columbia considered a question very similar to the one raised here, and concluded that a former Counsel to the President was not entitled to absolute immunity from congressional compulsion to testify. 558 F. Supp. 2d at 99. The court's analysis relied heavily on *Harlow*, *Harlow*'s discussion of *Gravel*, and *Nixon*. *See* 558 F. Supp. 2d at 99–105. For the reasons set forth above, we believe those cases do not undermine the Executive Branch's longstanding position that the President's immediate advisers are immune from congressional compulsion to testify. We therefore respectfully disagree with the *Miers* court's analysis and conclusion, and adhere to the Executive Branch's longstanding view that the President's immediate advisers have absolute immunity from congressional compulsion to testify.

C.

Applying this longstanding view, we believe that Mr. Simas has such immunity. We understand that Mr. Simas spends the majority of his time advising or preparing advice for the President. He is a member of a group of the President's closest advisers who regularly meet with the President, as often as several times a week. In addition, Mr. Simas frequently meets with the President alone and with other advisers, at the President's or Mr. Simas's request. *See* Rehnquist Memoran-

dum at 7 (President's "immediate advisers" are "those who customarily meet with the President on a regular or frequent basis"). Mr. Simas is responsible for advising the President on such matters as what policy issues warrant his attention. He also advises the President on how his policies are being received, and on how to shape policy to align it with the needs and desires of the American public. Mr. Simas thus plays a crucial role in deciding how best to formulate and communicate the President's agenda across a wide range of policy issues. In these respects, Mr. Simas's duties are comparable to those of other immediate advisers who we have previously recognized are entitled to absolute immunity from congressional compulsion to testify. *See, e.g.*, Letter to Fred F. Fielding, Counsel to the President, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel (Aug. 1, 2007) (immunity of President Bush adviser Karl Rove); Bradbury Memorandum (immunity of Counsel to President Bush Harriet Miers). Consistent with these precedents, we likewise conclude that Mr. Simas has absolute immunity from compulsion to testify before Congress about his service to the President in the Office of Political Strategy and Outreach.

II.

For the reasons discussed above, we believe that Mr. Simas is entitled to immunity that is "absolute and may not be overborne by [the Committee's] competing interests." *Assertion of Executive Privilege*, 23 Op. O.L.C. at 4. But even if Mr. Simas were only entitled to qualified immunity, which could be overcome by a sufficient showing of compelling need, we would conclude that the Committee had not made the requisite showing.

A.

No court has yet considered the standard that would be used to determine whether a congressional committee's interests overrode an immediate presidential adviser's immunity from congressional compulsion to testify, assuming that immunity were qualified rather than absolute. But two decisions of the Court of Appeals for the D.C. Circuit suggest possible standards. In *Senate Select Committee*, in the context of a presidential assertion of executive privilege against a congressional subpoena for tape recordings of conversations between the President and his Counsel, the court held that the Committee could overcome the assertion only by showing that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of [its] functions." 498 F.2d at 731; *see also McGrain v. Daugherty*, 273 U.S. 135, 176 (1927) (congressional oversight power may be used only to "obtain information in aid of the legislative function"). And in *Sealed Case*, the court held that "in order to overcome a claim of presidential privilege raised against a grand jury subpoena, it is necessary to specifically demonstrate why it is likely that the evidence contained in presidential communications is

important to the ongoing grand jury investigation and why this evidence is not available from another source." 121 F.3d at 757. (To be "important" to an investigation, "the evidence sought must be directly relevant to issues that are expected to be central to the trial." *Id.* at 754.)

In our view, *Senate Select Committee* would provide the more appropriate standard for assessing whether a congressional committee's assertion of need had overcome an immediate presidential adviser's qualified testimonial immunity. As explained above, judicial proceedings—including criminal proceedings—differ in fundamental ways from congressional hearings. Because the *Senate Select Committee* standard was articulated in the congressional oversight context, and because it seeks to preserve the President's prerogatives while recognizing Congress's legitimate interest in information crucial to its legislative function, we believe it would be an appropriate standard for evaluating whether an immediate presidential adviser's qualified testimonial immunity has been overcome.

In applying this standard, it would be important to bear in mind the "implicit constitutional mandate" that the coordinate branches of government "seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977). Through this accommodation process, which has been followed for decades, the political branches strive to avoid the "constitutional confrontation" that erupts when the President must make an assertion of privilege, or when an immediate presidential adviser's testimonial immunity must be invoked. *See Cheney*, 542 U.S. at 389–90 (quoting *United States v. Nixon*, 418 U.S. at 692); *see also id.* ("[C]onstitutional confrontation between the two branches should be avoided whenever possible.") (quotation marks omitted). Accordingly, before an immediate presidential adviser's compelled testimony could be deemed demonstrably critical to the responsible fulfillment of a congressional committee's legislative function, a congressional committee would, at a minimum, need to demonstrate why information available to it from other sources was inadequate to meet its legitimate needs. *See Senate Select Committee*, 498 F.2d at 732–33 (noting that, in light of the President's public release of partially redacted transcripts of the subpoenaed tapes, the court had asked the Select Committee to state "in what specific respects the [publicly available] transcripts . . . are deficient in meeting [its] need," and then finding that the Committee "points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes").

B.

The Committee has not shown that Mr. Simas's testimony is demonstrably critical to the responsible fulfillment of its legislative function. The Committee's investigation began with a broad request for "all documents and communications, including e-mails, related or referring to the Office of Political Strategy and

Outreach or the reopening of the Office of Political Affairs," along with a request that White House officials brief Committee staff. Letter for Denis McDonough, White House Chief of Staff, from the Hon. Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives at 4 (Mar. 18, 2014). Over the course of letters exchanged during the next three months, the White House explained that the Office engages only in activities that are permissible under the Hatch Act, and that the White House has taken steps to ensure that OPSO staff are trained in Hatch Act compliance. In response to those letters, the Committee reiterated its broad request for documents, but did not articulate particular unanswered questions or identify incidents in which OPSO staff may have violated the Hatch Act or related statutes. *See* Letter for the Hon. Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives, from Kathryn H. Ruemmler, Counsel to the President (Mar. 26, 2014); Letter for Denis McDonough, White House Chief of Staff, from the Hon. Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives at 1 & n.5 (May 27, 2014); Letter for the Hon. Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives, from W. Neil Eggleston, Counsel to the President at 1–2 (June 13, 2014).

On July 3, 2014, the Committee requested Mr. Simas's testimony at a public hearing to understand "whether the White House is taking adequate steps to ensure that political activity by Administration officials complies with relevant statutes, including the Hatch Act," and to understand "the role and function of the White House Office of Political Strategy and Outreach." Invitation Letter. The Committee did not, however, identify any specific unanswered questions that Mr. Simas's testimony was necessary to answer. The White House responded with a letter providing additional information about White House efforts to ensure that OPSO was operating in a manner consistent with applicable statutes, and explaining that the activities cited by the Committee did not violate those statutes. *See* Letter for the Hon. Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives, from W. Neil Eggleston, Counsel to the President (July 10, 2014). At that time, the White House also provided various documents reflecting its efforts to ensure that OPSO staff comply with relevant laws, including materials on the Hatch Act used in a mandatory training for all staff assigned to OPSO, e-mail correspondence demonstrating that OPSO staff were directed to read critical reports issued by the Office of Special Counsel and the Committee regarding the activities of the previous Administration's Office of Political Affairs, documentation of a meeting between lawyers from the White House Counsel's Office and the Office of Special Counsel concerning compliance with the Hatch Act, and a memorandum sent to all White House staff from the President's Counsel reminding them of the law governing political activity by federal employees. *See id.* at 3. Finally, the White House Counsel's Office offered

to brief the Committee to address any outstanding questions regarding OPSO's activities. *See id.*

After receiving these responses, the Committee, on Friday, July 11, 2014, subpoenaed Mr. Simas to testify at a public hearing on Wednesday, July 16. At the same time, the Committee indicated that it would accept the White House Counsel's Office's offer to brief the Committee, and would determine after the briefing whether to withdraw the subpoena for Mr. Simas's testimony. *See* Letter for W. Neil Eggleston, Counsel to the President, from the Hon. Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives (July 11, 2014). The White House provided that briefing on Tuesday, July 15, the day before the hearing was to occur. Following the briefing, the Committee indicated that Mr. Simas's testimony remained necessary. It explained that, during the briefing, White House staff "declined to discuss compliance with the Committee's document requests or even describe the process and identify relevant officials involved in the decision to reopen the White House political office." Letter for W. Neil Eggleston, Counsel to the President, from the Hon. Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives at 1 (July 15, 2014).

The Committee has not adequately explained why, despite the information it has already received concerning OPSO's activities and the White House's efforts to ensure compliance with relevant statutes, it requires Mr. Simas's public testimony in order to satisfy the legitimate aims of its oversight investigation. Although the Committee has now indicated that it needs additional information on two specific topics, it has not explained why it must obtain that information from Mr. Simas at a Committee hearing. And to the extent that the Committee has other "outstanding questions for Mr. Simas," *id.* at 2, the Committee has not identified them, let alone explained why he must answer them at a public hearing. At this point, it is not evident that further efforts at accommodation would be futile, and hence that compelling an immediate presidential adviser to testify before Congress is a justifiable next step. Because the Committee has not explained why (and it is not otherwise clear that) Mr. Simas's live testimony is "demonstrably critical" to the responsible fulfillment of the Committee's functions, we conclude that the Committee has not met the standard that would apply for overcoming Mr. Simas's immunity from congressional compulsion to testify, assuming that immunity were qualified rather than absolute.[4]

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[4] Even if it were appropriate to apply the *Sealed Case* standard for overcoming qualified executive privilege in the context of congressional testimonial immunity, Mr. Simas's testimonial immunity would not have been overcome here. For the reasons set forth in the text, we do not believe that the Committee could show that the testimony it demands from Mr. Simas is directly relevant to issues that are central to the Committee's investigation *and* that the information that would be obtained through that testimony is not available from another source.

III.

For the foregoing reasons, we conclude that Mr. Simas is immune from the House Committee on Oversight and Government Reform's subpoena to compel him to testify about matters concerning his service to the President in the Office of Political Strategy and Outreach.

KARL R. THOMPSON
Acting Assistant Attorney General
Office of Legal Counsel

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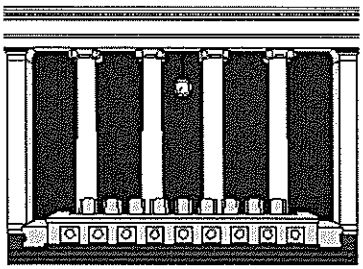
A Brief History of Supreme Court Nominations During a Presidential Election Year

February 15, 2016

*by **Neil J. Kinkopf**, Professor of Law, Georgia State University College of Law; Professor Kinkopf is the faculty adviser for the **ACS Student Chapter** at GSU College of Law*

Starting almost immediately after the reports of Justice Scalia's death, there has been controversy over whether President Obama can make a nomination to fill the vacancy and, if so, whether the Senate should consider a nomination given that it is a presidential election year. President Obama has announced his intention to make a nomination and Senate Majority Leader Mitch McConnell has expressed his opposition, asserting that "[t]he American people should have a voice in the selection of their next Supreme Court justice. Therefore, this vacancy should not be filled until we have a new president."



History clearly shows that President Obama is within his constitutional authority in making such a nomination. History also supplies virtually no support for Senator McConnell's plan to refuse to consider any Obama nomination. I have collected the relevant precedents in four tables appended to the end of this post.

The President's nomination power. The text of the Constitution grants the President the authority to nominate without qualification (except that his nomination does not blossom into an appointment without the advice and consent of the Senate followed by a commission that has been validly signed and sealed). This would seem to indicate, though not expressly, that the President may exercise the power at any time while in office without exception. Practice confirms this. Presidents have made 22 nominations to fill Supreme Court vacancies during an election year. In addition, Presidents have made 13 lame duck nominations – nominations made after an election had chosen a new President-elect but before that new President-Elect was inaugurated.

The Senate's Advise and Consent Role. "Delay, delay, delay." This is what presidential candidate Donald Trump urged the Senate to do during Saturday night's debate. Senator McConnell expressed the position more artfully, linking it to democratic principles. Of course, the incumbent President was elected to make nominations and the incumbent Senate was elected in part to perform the constitutional "advise and consent" role. Again, practice is instructive. In none of the 36 instances cited above does it appear that the Senate refused to consider a presidential nomination on the grounds that no nomination should be made. Indeed, the President's election year nominee was confirmed in 11 of 22 cases. (This success rate is skewed by President John Tyler, who nominated 3 individuals seven separate times during the 1840 election year. None of the three was ever confirmed. Discounting this episode, Presidents were successful in 11 of 15 cases.) Of the 11 nominations made by lame duck Presidents, 7 were confirmed. This should stand as powerful practical evidence that nominating and acting on a nomination in proximity to an upcoming presidential election does not offend the principle that the Supreme Court nominations should be accountable to the people.

If we expand our window slightly, the practical case for Senate action is even more powerful. In 4 cases (including that of Justice Anthony Kennedy), the Senate considered and passed on a Supreme Court nomination during a presidential election year where the nomination had been made just before the year began. These cases are instructive because the Senate could have followed the "delay, delay, delay" prescription but did not. Finally, in 10 more cases, the Senate acted on a Supreme Court nomination with less than a year until the next presidential nomination (*i.e.*, during November or December preceding an election.) In 8 of these cases, the nomination was also made within one year of the next presidential election. In 9 of these 10 cases, the Senate confirmed the President's nominee.

Proponents of delay are apt to find support in Abe Fortas's 1968 nomination to become Chief Justice. They shouldn't. It is true that the nomination was filibustered and the Senate failed to invoke cloture. But this was because of significant opposition to the

merits of Fortas's candidacy. The filibuster was not maintained on the grounds of the impending election, but rather because of serious concerns about Justice Fortas's ethics and fitness. (Indeed, he resigned his office as Associate Justice shortly afterwards in no small measure to forestall a brewing impeachment movement.)

Table 1: Presidential Election Year Nominations

YEAR	PRESIDENT	NOMINEE
1968	Johnson	Homer Thornberry
1968	Johnson	Abe Fortas
1940	Roosevelt	Frank Murphy
1932	Hoover	Benjamin Cardozo
1916	Wilson	John Clarke
1916	Wilson	Louis Brandeis
1912	Taft	Mahlon Pitney
1892	Harrison	George Shiras
1888	Cleveland	Melville Fuller
1852	Fillmore	Edward Bradford
1844	Tyler	Reuben Walworth
1844	Tyler	Edward King
1844	Tyler	Reuben Walworth
1844	Tyler	John Spencer
1844	Tyler	Edward King
1844	Tyler	Reuben Walworth
1844	Tyler	John Spencer
1828	Adams	John Crittenden
1804	Jefferson	William Johnson
1796	Washington	Oliver Ellsworth
1796	Washington	Samuel Chase
1796	Washington	William Cushing

Table 2: Lame Duck Nominations

YEAR	PRESIDENT	NOMINEE
1893	Harrison	Howell Jackson
1881	Hayes	Stanley Matthews
1880	Hayes	William Woods
1861	Buchanan	Jeremiah Black
1853	Fillmore	William Micou
1853	Fillmore	George Badger

1845	Tyler	John Read
1845	Tyler	Samuel Nelson
1841	Van Buren	Peter Daniel
1837	Jackson	John Catron
1837	Jackson	William Smith
1801	Adams	John Marshall
1800	Adams	John Jay

Table 3: Advice and Consent during Presidential Election Year

Nominee	President	Nomination	Confirmation
Anthony Kennedy	Reagan	Nov. 30, 1987	Feb. 3, 1988
Lucius Lamar	Cleveland	Dec. 6, 1887	Jan. 16, 1888
Philip Barbour	Jackson	Dec. 28, 1835	Mar. 15, 1836
Roger Taney	Jackson	Dec. 28, 1835	Mar. 15, 1836

Table 4: Advice and Consent within One Year of a Presidential Election

Nominee	President	Nomination	Confirmation
John Paul Stevens	Ford	Nov. 28, 1975	Dec. 17, 1975
William Rehnquist	Nixon	Oct. 22, 1971	Dec. 10, 1971
Lewis Powell	Nixon	Oct. 22, 1971	Dec. 10, 1971
Rufus Peckham	Cleveland	Dec. 3, 1875	Dec. 9, 1875
Benjamin Curtis	Fillmore	Dec. 11, 1851	Dec. 20, 1851
Smith Thompson	Monroe	Dec. 5, 1823	Dec. 9, 1823
Gabriel Duval	Madison	Nov. 15, 1811	Nov. 18, 1811
Joseph Story	Madison	Nov. 15, 1811	Nov. 18, 1811
Alfred Moore	Adams	Dec. 4, 1799	Dec. 10, 1799
John Rutledge	Washington	Dec. 10, 1795	Dec. 15, 1795

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Wednesday, November 29, 2017

Partisanship, Norms and Federal Judicial Appointments

Guest Blogger

Keith E. Whittington

The politics of federal judicial appointments is as heated and as high-profile now as it has ever been in American history. For an important segment of both political parties, the federal courts have become a critical policymaking institution, and as a result both parties have been pushed to treat judicial appointments as an important political battleground.

Political scientists have long argued that courts are inevitably political institutions. They decide important questions of public policy, and they are constituted by political means. Federal judges might sit one remove from electoral politics, but that is not enough to place them outside of politics. Voters, interest groups, and elected officials have not always been deeply motivated to focus their attention and energy on the courts, but courts have periodically taken the center stage of American politics.

The courts are the third branch of government laid out in the U.S. Constitution. While individual judges are made independent from the elected branches of government, the judiciary as a whole is largely made dependent on the goodwill of the legislature and the executive. The courts have been a political prize to be won and a lagging indicator of political success. Through that political influence, the effective constitutional rules of the political system itself are ultimately responsive to political currents. As Jack Balkin has noted, a party that can win the "constitutional trifecta" and control all three branches of government has enormous opportunities to reshape the political landscape.

Political parties can most directly shape the federal judiciary by placing judges on the bench. They can do that through the familiar process of selecting like-minded judges to fill vacancies, but they can also do that through the less-familiar process of increasing the number of vacancies to be filled by expanding the bench. The American political parties have periodically sought to create a friendly federal judiciary by creating more judgeships. As Justin Crowe had detailed, partisan and policy calculations have rarely been absent from congressional decisionmaking on whether to expand or reorganize the federal courts. President Franklin Roosevelt's ill-fated proposal for "judicial reorganization," or less euphemistically "Court-packing," not unlike the Federalist Party's lame-duck judicial reform of 1801, became an infamous case of political overreach. The reaction to those efforts to manipulate the federal judiciary for partisan ends helped construct our "small-c constitution," the norms and practices that bolster and extend the rules formally entrenched in our textual Constitution. We have taken the lesson of the Court-packing plan to be that elected officials should not push too hard to reshape the courts.

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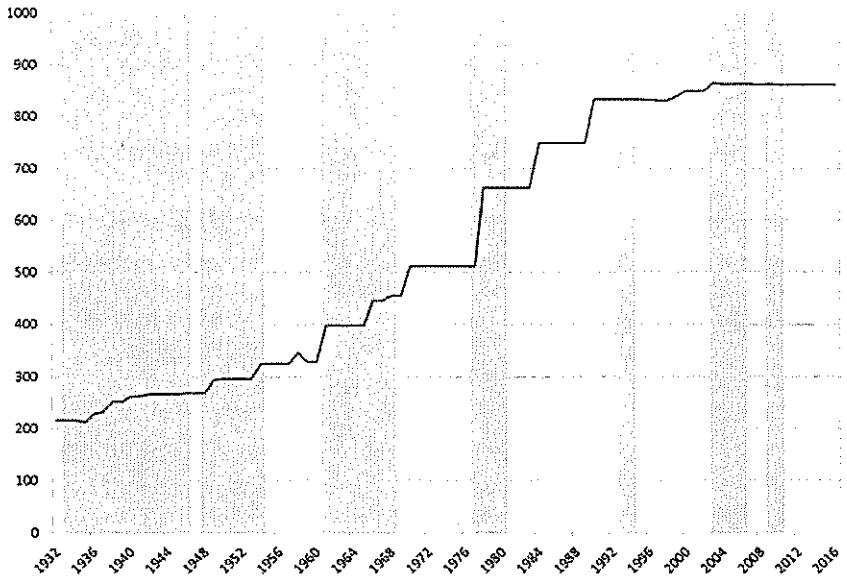
Total Federal Article III Judgeships, 1932-2016

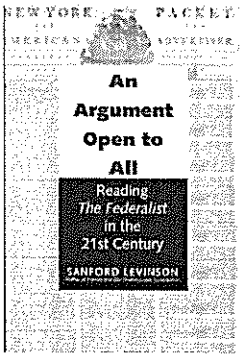


But what counts as "too hard"? In the summer of 1968, Chief Justice Earl Warren and President Lyndon Johnson tried to insure that a Democratic appointee would succeed Warren, even as the Democratic presidential hopes in 1968 looked increasingly dim. Warren's strategically timed retirement was called out for the political ploy that it was, and even a Democratic controlled Senate balked at confirming Abe Fortas as chief justice on the eve of the election, and so the seat fell to the Republican Richard Nixon to fill after the inauguration. On the other hand, the Democratic Party took advantage of their return to unified control of Congress and the presidency after Watergate to reorganize and expand the federal judiciary. President Jimmy Carter was somewhat unlucky in not seeing a Supreme Court vacancy during his one term of office, but thanks to Congress he was able to fill an unusually large number of seats on the federal circuit courts. Since the 1980s, Republicans have been routinely charged with trying to "pack the courts," not because they have been manipulating the number of available judgeships but because they have been unusually focused on the judicial philosophy of their nominees when filling routine vacancies.

The current political era has been remarkable not only because both parties have been focused on winning the constitutional trifecta and shaping the courts, but also because neither party has been particularly successful in doing so. In the past, these partisan battles over the federal judiciary have usually been decisively won by one side or the other. The Repeal Act of 1802 put an end to the Federalists' "midnight appointments." The Jacksonian reorganization of the courts gave the South a working majority on the bench. The Republican reorganization of the courts during the Civil War put the Court in a Northern hammerlock. The electoral success of the New Deal coalition smashed conservative obstruction in the federal courts.

Since the crack-up of the Democratic coalition in the 1960s, however, American politics has mostly been characterized by stalemate and gridlock. Partisan rotation, divided government and happenstance have extended the fighting over the courts rather than allowing one side to simply claim victory. Republicans have been able to push the courts in a more conservative direction, but their relationship with the U.S. Supreme Court has been as much one of frustration as cooperation. Justice Antonin Scalia's departure from the Court at the tail end of Barack Obama's administration and the likely prospects of a Hillary Clinton electoral victory might have been expected to finally tilt the balance of the Court and create a stable liberal majority, but late-term Republican control of the Senate and Clinton's improbable defeat wound up extending the impasse.

With the Supreme Court in limbo, partisans turned their attention to the federal circuit courts. Presidential nominations to the lower federal courts had long been routinely confirmed. Circuit court nominations only occasionally found themselves mired in controversy. That has changed, and the change is no longer recent. Ever since the Monica Lewinsky scandal consumed the latter portion of Bill Clinton's presidency, Senate obstruction of circuit court nominations has been at a record high. Regardless of administration or the partisan composition of the Senate, presidential nominations to fill circuit court vacancies could once have been expected to end with Senate confirmation. Since the late 1990s, the odds of a circuit court nomination being confirmed have been little better than a coin flip.



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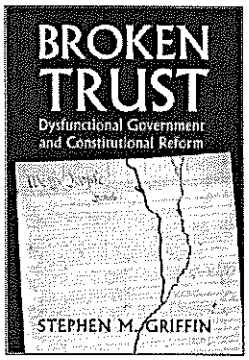

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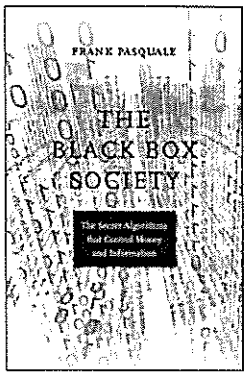

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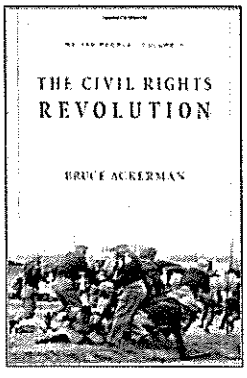

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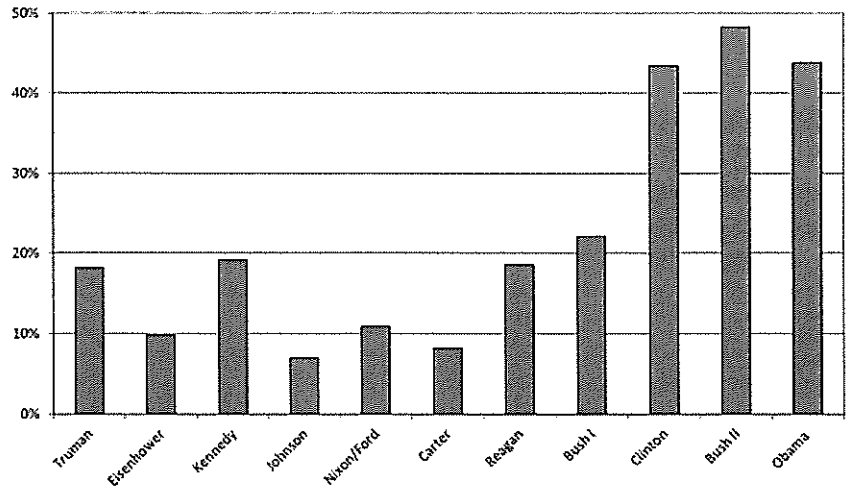
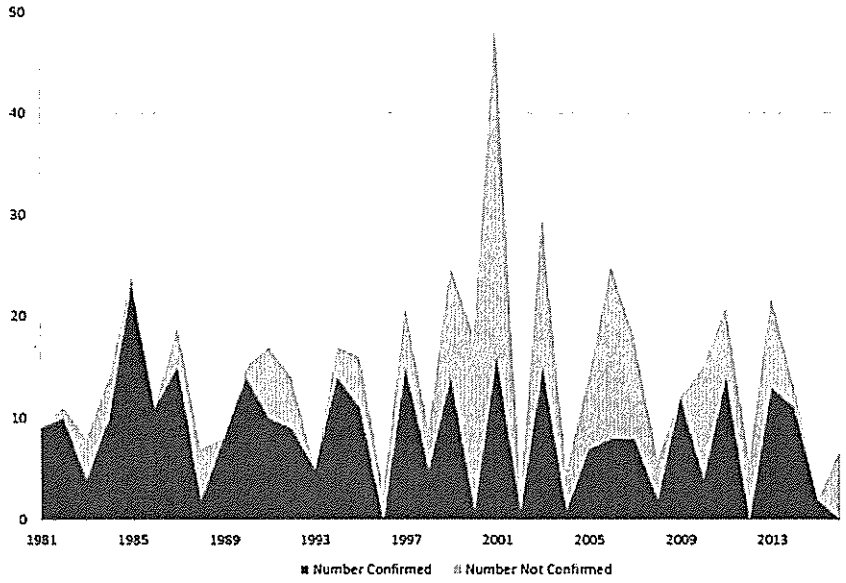
Percentage of Federal Circuit Court Nominations Not Confirmed, 1945-2016



For over a quarter century, the Senate has obstructed circuit-court nominations at a historically unprecedented rate. The new obstructionism reflects a shift in both presidential and Senate behavior. Beginning in the summer of 1991, the Democratic-controlled Senate dramatically slowed the pace of confirmations. With more a year left in his presidency, George H.W. Bush found his ability to place judges on the circuit courts to be significantly reduced. No similar slowdown can be seen at a comparable point during Ronald Reagan's second term of office, when he also had to deal with a Senate under the control of the opposite party. When the Republicans seized control of the Senate during the midterm election of President Bill Clinton's first term of office, they initiated a similar slowdown of the president's circuit-court confirmations a year before he faced reelection. The Republicans allowed the pace of confirmations to pick up again after the president won reelection, but when confirmations again began to slow a new election loomed Clinton took the unusual step of blitzing the Senate with an unprecedented number of election-year and lame-duck circuit-court nominees. Although such a maneuver might have been expected to succeed if the same party controlled both the White House and the Senate, it was doomed to failure when the Senate was in the opposition's hands and the rate of failed nominations spiked. President George W. Bush entered office unusually prepared to send judicial nominations to the Senate. The Senate had traditionally been very accommodating to presidential nominations at the opening of a presidential term, but the newly Democratic Senate in this case was unusually obstructionist. The rate of confirmation has never recovered, and the remainder of both Bush's and Barack Obama's presidencies were characterized by high rate of failures.

Outcomes of Circuit Court Nominations, 1981-2016



As a result of this unusual level of Senate obstruction, George H.W. Bush left a surprisingly small mark on the circuit courts. During his single term as president and aided by the 1978 judicial expansion, Jimmy Carter filled 50 percent more circuit court seats than did Bush. But Clinton, George W. Bush, and Obama also appointed fewer circuit court judges than would have been expected for two-term presidents. The degree

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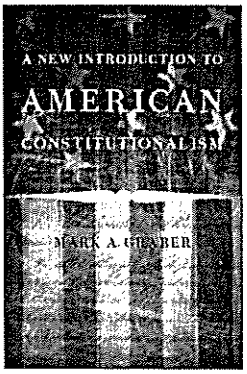

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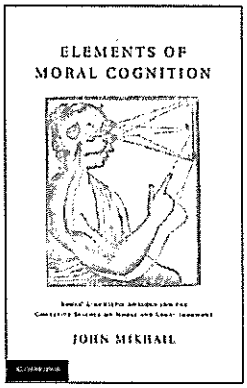

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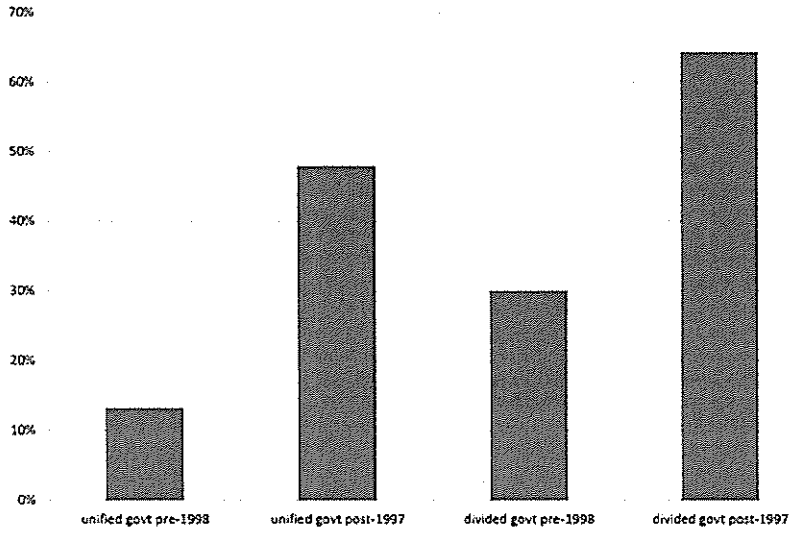
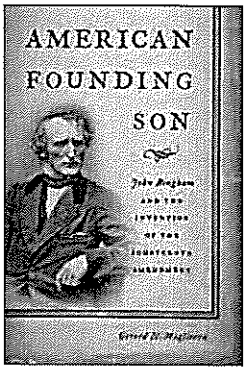
of Senate obstruction during this period is inflated a bit by the aggressiveness of the presidents in making nominations (e.g., George W. Bush sent twice 50 percent more nominations to the Senate than did Ronald Reagan), but the overall effect has been to leave the courts understaffed and to reduce the number of judges that either Democratic or Republican presidents could put into service.

The story of Senate obstruction of circuit-court nominations over the last several presidencies is only partly a story of divided government. The Senate and the White House have been controlled by different parties for a significant portion of the time since the final years of the Reagan administration, but there have also been several periods of unified government. George H.W. Bush did not see a unified government during his single term of office, but Bill Clinton, George W. Bush, and Barack Obama all enjoyed years of same-party control of the Senate. Unlike the modern U.S. House of Representatives, the U.S. Senate has traditionally allowed many avenues for obstruction by the minority party. A committed out party can find ways to gum up the works. Prior to the Monica Lewinsky scandal and President Bill Clinton's impeachment, they mostly had not done so when it came to circuit court nominations. Divided party control dampened the rate of Senate confirmations, but prior to 1998 even opposite-party Senates were relatively willing to confirm circuit court nominations. Since 1998, however, even same-party Senates have found themselves unable to confirm judges. When presidents have faced opposition-controlled Senates since 1998, circuit-court confirmations have been at a near standstill.

Percentage Not Confirmed by Divided Government and Pre- and Post-Lewinsky



Entering the twenty-first century, the Senate had become increasingly dysfunctional on the question of circuit-court confirmations. The increased political salience of lower-court judicial appointments intersected with growing political polarization in the Senate (as well as in the House). Minority obstruction of judicial confirmations through withholding blue slips and threatening filibusters might not have had much staying power if a significant component of the two parties overlapped ideologically. Finding a path to 60 votes for cloture might have been manageable if the more liberal wing of the Republican Party and the more conservative wing of the Democrat Party were largely in agreement and shared a similar perspective and electorate. That is no longer the case. The distribution of senators is now distinctly bimodal. The gap between the Republicans and the Democrats is substantial. Moreover, the ideological distance that would need to be travelled to get to 60 votes is now very large.



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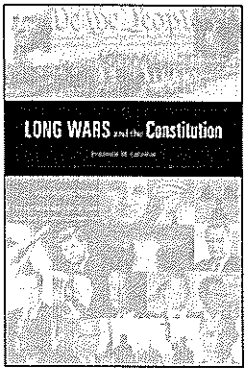

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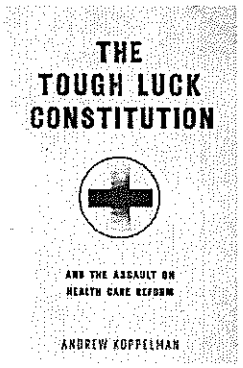

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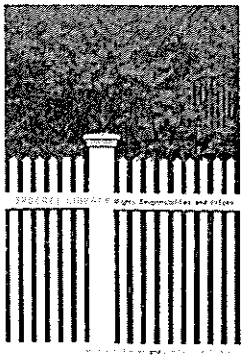
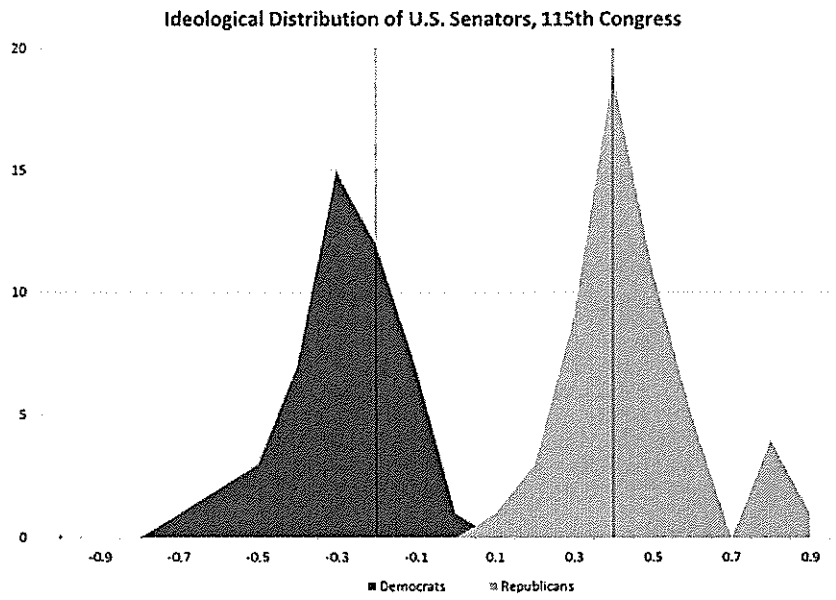


James E. Fleming and Linda C. McClain, Ordered Liberty: Rights, Responsibilities, and



For either party in the current Senate, constructing a filibuster-proof majority requires reaching far into the ideological center of the opposite party. That is simply a bridge too far. It is possible that the threat of minority obstruction might lead the president to moderate his judicial nominations and seek compromise candidates who could command 60 votes, but in the current environment it is not clear that any such compromise candidates exist. Requiring presidents to sell a judicial candidate to something close to the median senator of the opposition party would risk losing significant numbers from their own party and would negate much of the significance of winning either the White House or majority control of the Senate.

Given that political reality, it is no surprise that the Senate has instead moved to rein in the ability of the minority party to obstruct judicial confirmations. In 2013, the Senate Democrats under the leadership of Harry Reid nuked the filibuster option on circuit court nominees in order to facilitate the ability of President Obama to fill judicial vacancies when his own party controlled the Senate, and the president swiftly took advantage of the new rules. When the Democrats lost the chamber as a result of the 2014 elections, judicial confirmations largely ground to a halt. The current Republican move to curtail the ability of individual senators to use the blue slip to hold up nominees is the natural follow-up to Reid's effort to streamline the confirmation process.

The question now is what comes next. The Senate is now able to confirm judicial nominees when the same party controls both the White House and the Senate, returning us to an efficiency that would have been familiar for most of the twentieth century. There is no reason to think, however, that the Senate will be able to return to twentieth-century norms when we have a return to divided government. The recent rule changes have allowed the Senate majority to work around obstructionist minorities, but party polarization will mean that few judicial nominees will be satisfactory to a Senate controlled by the opposition party. Will a Senate controlled by the opposition party refuse to seat circuit-court nominees at the beginning of a presidential term in the same way that it has recently refused to seat those nominees at the end of a presidential term, or will presidents be able to enjoy a brief honeymoon even when working with the opposition party? Is a Senate willing to allow vacancies to accumulate in the lower federal courts rather than confirm a judicial candidate advanced by the other party's president be similarly willing to allow a vacancy to sit on the U.S. Supreme Court, not just for a period of months but for a period of years?

The norms and practices of the small-c constitution are ultimately sustained and enforced by political means. If extreme obstruction in the Senate proves to be a winning electoral strategy, then senators will engage in more of it. If presidents are able to hold senators accountable to the electorate and voters are willing to punish senators for obstructing judicial nominees, then senators might return to the old ways and once again vote to confirm judges nominated by the other party. If proposals to manipulate the size of the federal judiciary so as to create more seats for a friendly president to fill are electorally costless at worst, then the courts will be made into a partisan plaything. It will be difficult enough to preserve the independence and authority of the courts in the current politically polarized environment. It will be far more difficult if senators cannot find a way to allow judicial selections favored by their opponents to take a seat on the bench and insist that the only acceptable court is a partisan court. Political leaders on both sides of the partisan aisle need to recognize that the escalation of partisan conflict over the judiciary will ultimately only serve to damage the courts. Proposals to pack the courts by altering the size of the judiciary and suggestions that Senate majorities should deny opposition presidents the ability to appoint judges are subversive of basic constitutional norms that have worked over time to prevent constitutional crisis. The constitutional system functions best if the formal rules are supplemented by a robust set of norms and practices that deter government officials from using all the political weapons at their

Virtues (Harvard University Press, 2013)

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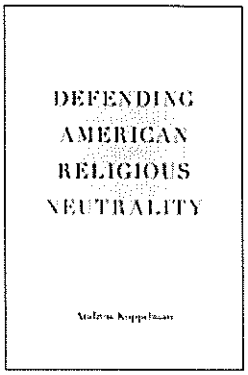

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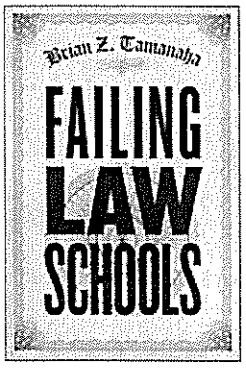

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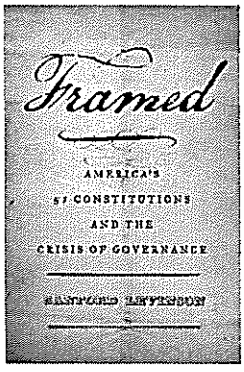

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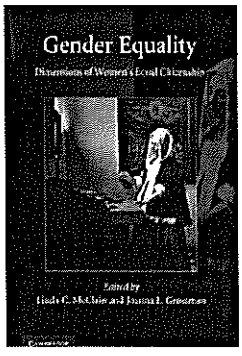

disposal. We should be cautious not to allow the prospect of short-term political gain to lead us into actions that could threaten the long-term blessings of the constitutional order.

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Writing the Book of Judges

PART 2: CONFIRMATION POLITICS IN THE 113TH CONGRESS

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SHELDON GOLDMAN, University of Massachusetts at Amherst

ABSTRACT

Building on the empirical portrait of federal judicial selection processes and outcomes in the 113th Congress published in part 1, we now turn to in-depth analyses, drawing on extensive interview data, of the confirmation battle over confirmations to the DC Circuit Court of Appeals, filibuster reform (the nuclear option) and its consequences, the role of the blue slip system in contemporary judicial selection, case studies of selection successes and failures, and the historic impact of the Obama appointments record on patterns of diversity and partisanship on the federal bench.

In part 1, we focused on President Barack Obama's selection of lifetime appointees to the lower federal courts of general jurisdiction during the 113th Congress (the first half of his second term). We placed those appointees within the context of the entire Obama judicial appointments record over his first 6 years in office. We noted the backgrounds and attributes of those confirmed and compared them to the cohorts of the president's four immediate predecessors. We observed that although the Senate of the 113th Congress confirmed 109 of the 123 nominees as well as 20 of the 22 nominated to the appeals courts of general jurisdiction, the confirmation process was far from smooth (Slotnick, Goldman, and Schiavoni 2015). Now we turn to confirmation politics during the 113th.

Partisan gridlock was a fairly accurate description of the confirmation process during the early months of the 113th. One particular locus of contention centered on the filling of four vacancies on the US Court of Appeals for the District of Columbia. Republicans were adamantly opposed to filling those vacancies claiming that they were unnecessary given the workload of the circuit. But Democrats believed that the real reason was the desire of Republicans to maintain the conservative majority on the circuit, which ob-

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viously would be upended by Obama appointees. Continued obstruction of the filling of the DC Circuit vacancies was the proverbial straw that broke the camel's back, coming on unprecedented obstruction and delay of mostly noncontroversial district judge nominees, added to the routine delaying tactics since the start of the Obama presidency. This led to a historic confrontation in the Senate that resulted in the so-called nuclear option being adopted by a simple majority of the Senate. This in effect ended the filibuster of judicial nominees by reducing the number of votes needed to cut off debate of a nomination from 60 to a simple majority. The details of the DC Circuit conflict and the adoption of the rule change will be recounted here. We also offer a broader assessment of the implications of filibuster reform by way of the so-called nuclear option.

Obstruction not only was a matter of the minority using the filibuster knowing that achieving 60 votes to break it was extremely difficult; it also took another form, the use of the blue slip by members of the minority party. In the pages ahead we will be telling the story of the blue slip's use to obstruct Senate Majority Leader Harry Reid's nominee by Reid's Republican colleague from Nevada. We will also tell the story of the administration's efforts to break deadlocks elsewhere by brokering package deals with Republican senators.

At the end of the day (and the 113th Congress), President Obama was able to place on the bench a remarkably diverse group of appointees. We devote special attention to the various forms of diversity that characterize Obama's appointees: racial, gender, sexual preference, and experiential. We also discuss the political impact of Obama's appointments on the partisan makeup of the bench. We conclude this article with informed speculation as to what is in store for judicial nominations for the remainder of the Obama presidency.

As noted in the first part of this article, our sources of data were the in-depth interviews we conducted with the key players in the confirmation process.[1] Statistics were derived from the judicial questionnaires nominees completed as well as various websites on the Internet. Political party data in some instances were obtained from registrars of voters.

THE BATTLE FOR THE DC CIRCUIT COURT OF APPEALS: GOING NUCLEAR

Any understanding of the Obama administration's efforts to seat judges on the critically important Court of Appeals for the DC Circuit would be incomplete and lacking in nuance were it to preclude consideration of the inextricable linkage between confirmation politics regarding the circuit and the Senate Democrats' invocation of the so-called

1. All the quotes in the text are from extensive interviews we conducted during the week of January 6, 2015, in Washington, DC. We are grateful to those who spoke with us. Because some of those, particularly Senate staffers on both sides of the aisle, spoke to us on a not-for-attribution basis, we have not identified them by name and also tried to conceal their identities.

nuclear option, which ultimately allowed Obama's DC Circuit nominees to be confirmed with a simple majority vote, effectively removing the possibility that Senate Republicans, in the minority in the 113th Congress, could stop them through the successful use of their power to filibuster. It is equally the case that any effort to understand the politics of confirmation to the DC Circuit during the Obama years acontextually, without considering the inextricable link between the efforts of President George W. Bush to fill vacancies on the circuit to those of President Obama, would be equally flawed. As with so much else in the decades of partisan conflict in judicial selection politics to the lower federal bench, the US district courts and the US courts of appeals, albeit with the stakes immeasurably higher for the DC Circuit, generally acknowledged to be second in importance in the federal judicial system to the US Supreme Court, the thrust of "the story" depends on one's political vantage point.

For Republicans and those on the political right, the DC Circuit story during the Bush years was dominated by the failure to confirm successfully one of President Bush's very first judgeship nominees, Miguel Estrada, to the DC Circuit bench, despite trying to do so from 2001 to 2003. Estrada was a young, high-profile conservative with impressive credentials who, with the kind of "seasoning" DC Circuit experience could provide, would become an ideal Hispanic American candidate for a future Supreme Court vacancy. The lengthy effort by Republicans to bring Estrada to the Senate floor for a confirmation vote culminated in 2003 in seven failed cloture votes to overcome a Democratic filibuster, and reluctantly concluding that he could not be confirmed, Estrada withdrew his candidacy from further consideration. Opposition to Estrada was largely based on characterizations of his extreme conservative views and concerns about what he might become. Democratic senators pointed to Estrada's lack of prior judicial experience, despite his "well qualified" rating from the American Bar Association, his alleged evasiveness in answering questions during his nomination hearing, and the administration's refusal to turn over his written work from his service in George H. W. Bush's Justice Department. Estrada's treatment and defeat by a Democratic filibuster were characterized as unprecedented by his supporters and seen as analogous to and nearly as egregious as President Reagan's Supreme Court nominee, Robert Bork's defeat by a Senate floor vote in 1987. Indeed, in the eyes of conservative supporters, Estrada had, effectively, been "Borked."

If Miguel Estrada served as a DC Circuit rallying cry early on in the W. Bush years, a comparable scenario emerged later in Bush's presidency with the failure to obtain DC Circuit confirmation for Peter Keisler in 2006 and 2007 to the seat vacated through John Roberts's promotion to chief justice. Keisler, like Estrada, was a youthful conservative "highflyer" with all the bona fides that would make him an attractive nominee to the conservative Republican base. Keisler was a cofounder of the Federalist Society, a bastion of conservative thinking and a veritable cradle for the emergence of strong conservative nominees for the federal courts. He had served as a law clerk to Robert Bork on the DC Circuit as well as on Bork's ill-fated Supreme Court nomination in the Reagan White

House. In W. Bush's administration, Keisler was heavily involved in defending the president's Global War on Terror. His pedigree rankled Senate Democrats, and like Estrada, he was seen as a potential Republican Supreme Court nominee should a vacancy arise. Keisler's nomination languished in the Senate Judiciary Committee and never reached the Senate floor. We think it is noteworthy that our sources on the Republican right never failed to bring up the cases of Miguel Estrada, Peter Keisler, and, indeed, even Robert Bork, perceived confirmation wounds inflicted nearly a decade, a decade and a half, and almost 30 years ago, respectively, when the subject turned to discussion of President Obama's nominations and the Democratically controlled Senate's efforts to seat judges on the DC Circuit Court of Appeals.

For their part, Democratic observers of the same historical period told a very different story. The failed nominations of Estrada and Keisler were characterized as extremely rare examples of nominees, chosen with their well-known ideology as a primary nomination criterion, who were simply too far outside of the political mainstream to withstand Senate scrutiny. For such observers, the more compelling story of the DC Circuit during the W. Bush years was the president's great success in seating four judges on that appellate tribunal: John Roberts in 2003, Janice Rogers Brown in 2005, Thomas Griffith in 2005, and Brett Kavanaugh in 2006, albeit not without significant opposition that could often be characterized as ideologically driven. John Roberts was confirmed to the court in 2003 by unanimous consent in the Republican-controlled 108th Congress after not being confirmed when the Democrats controlled the Senate in the 107th Congress. Janice Rogers Brown, a staunchly conservative libertarian, saw her nomination returned to the president in the 108th Congress but was ultimately confirmed after renomination in the 109th Congress by a vote of 56–43, with Senator Barack Obama among the naysayers. Brown's confirmation was part of a negotiated settlement fashioned by a bipartisan group of senators (including John McCain, a fact of considerable interest in the battle over President Obama's DC Circuit nominees) known as the Gang of Fourteen. The "gang's" primary goal was avoidance of the majority Republicans' need to resort to the nuclear option as a mechanism to confirm several judges whose nominations were being held up by Democratic filibusters. Under the terms of the agreement, which allowed the Senate filibuster rule to survive, Rogers Brown was among those specifically identified whom the seven Democratic signatories agreed to vote for in invoking cloture, thereby ensuring an end to the filibuster effort. Prospectively, nominees would be filibustered only under "extraordinary circumstances," as defined by each signatory's own discretion and judgment. Griffith was confirmed by a vote of 73–24 while Brett Kavanaugh's confirmation process was stalled for nearly 3 years before being confirmed by a vote of 57–36, with Senator Obama, once again, among the naysayers. Kavanaugh's background included working on the Starr Report calling for the impeachment of President Clinton, participating in the investigation of the suicide of Clinton aide Vincent Foster, serving on the legal team working for W. Bush in Florida during the critical 2000 presidential election recount processes, and subsequently taking a leading role in the

W. Bush White House in helping to identify and secure the confirmation of conservative judgeship candidates.

The broader point here is not to question the legal credentials of any of these nominees or their suitability for holding a seat on the DC Circuit Court of Appeals. Rather, our aim is to underscore that partisans on both sides of the aisle subscribed to two different versions of reality. While W. Bush failed to seat Miguel Estrada or Peter Keisler on the critical DC Circuit Court, he was ultimately successful in appointing four judges with stellar conservative credentials to the circuit, his two failed nominees notwithstanding. In the end, President Obama was equally successful in seating four judges to the DC Circuit, although, as our analysis suggests, partisan obstruction in the Obama case extended beyond the specific nominees to the court itself and any effort to fill its vacancies. In such a circumstance, in the absence of the kind of compromise negotiated by the Gang of Fourteen, a bipartisan group of Senate moderates in the W. Bush years, the Democrats felt compelled to resort to a filibuster rules change, the nuclear option, to gain confirmation for the president's DC Circuit nominees.

Specifically, while Democratic filibusters during the W. Bush years were focused on a subset of judicial nominees deemed the most doctrinaire conservatives, Republican filibusters causing obstruction and delay in President Obama's second term extended far beyond judicial nominees to include an unprecedented number of presidential nominees to positions in the executive branch. In the months leading up to filibuster reform, these included nominations to the positions of Environmental Protection Agency administrator; secretary of labor; three members of the National Labor Relations Board (NLRB), including its prospective chairman; the nominee to be the NLRB's general counsel; the director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives; an assistant secretary of defense; the director of the Office of Personnel Management; and the director of the Federal Housing Finance Agency. According to one member of the president's judicial selection team, what the Republicans were pursuing was tantamount to a broad-based policy of "nullification, filibustering institutions and offices, rather than people based on qualifications. That finally built up a lot and, then . . . they went ahead and filibustered the DC Circuit."

Second, as implied above, the climate for compromise exemplified by the Gang of Fourteen that avoided a nuclear outcome in the W. Bush years did not exist or materialize in 2013 in a Senate including many new members whose elections were won with Tea Party support. Finally, comparisons of all nominees to the DC Circuit during the W. Bush and Obama years suggest false equivalencies. At bottom, it is difficult to conclude that the Obama DC Circuit nominees resided as far to the liberal left on an ideological continuum as those nominated by W. Bush were located on the conservative right.

Despite this picture, there existed some hope and even expectation at the start of the 113th Congress in 2013 that things would run more smoothly for judicial confirmation processes generally as well as for nominees to the DC Circuit in the spirit of a gentle-

man's agreement between Democratic Senate Majority Leader Reid and Republican Minority Leader McConnell to lower the cloture time for debating sub-cabinet-level appointees as well as district court judgeship candidates. As noted by a staff member for the majority leadership team,

> We thought it was going to work much differently. . . . McConnell agreed to use the filibuster only in rare circumstances. Unfortunately, he couldn't deliver on his promise with some members of his caucus. . . . McConnell doesn't over promise, but at the same time he wasn't really driving the train. It was his right flank. . . . They just kept poking and prodding and making things so much more difficult than they needed to be. It wasn't like we were running roughshod over them. We included them in things from the beginning. I think we really tried to work in good faith. But there were so many people who were so disappointed in the outcome of the 2012 election that they took things to an extreme.

In addition to the failure of the gentleman's agreement to work as he anticipated, this same Democratic aide noted a "break point" that occurred soon after a temporary fix was negotiated, analogous to what the earlier Gang of Fourteen had accomplished, allowing for the staffing of positions on the NLRB. "We reached a crisis point over the summer and McCain and . . . others got together and said, 'We're not going to do this rules change. We're going to do this agreement. We're going to let you staff the NLRB.' They did this outside of McConnell. I think McConnell was ticked off. Certainly the Ted Cruz faction was livid. But we reached that crisis point and I thought we were done. Things will go back to normal." Soon, however, it became apparent that this would not be the case. "But we were right back in the soup with the DC Circuit. And it was interesting . . . because we had . . . some . . . senators . . . almost taunting us after we reached the brink on the NLRB. They thought if Reid wasn't going to do it then, he wasn't going to do it. . . . No one thought Reid had the votes which was the most interesting part. He had the votes. Even with the NLRB, we had the votes then—and we had the votes again when we had to change the rules for the DC Circuit."

During this period, as suggested, two interesting dynamics focusing on Majority Leader Reid that were highly related yet, ultimately, separable questions helped to frame the question of whether the Democrats would pursue filibuster reform to break the DC Circuit logjam. Did Harry Reid have the votes to do it and, as importantly, did he have the will? On the question of votes, it was pretty clear that several newer members of the Democratic caucus, many of whom had not experienced institutional life as members of the minority, supported and sought a fundamental rules change. Two senators in particular, neither members of the Senate's Judiciary Committee, led this charge. One liberal group activist noted, "Some interesting dynamics occurred during the past two years. There was a shift of power . . . away from the Senate Judiciary Committee to . . . Merkley [Democrat from Oregon] and Udall [Democrat from New Mexico] who,

through thick and thin, through good times and bad times, were pushing a rules change." A senior Democratic leadership staff member agreed: "There was a wing of the newbies, the folks who weren't there when we were in the minority, who were the agitators, and pretty relentless agitators in the Tuesday Caucus lunch meetings where this decision grew and became a reality. That and the Democratic base who care about this sort of thing were agitating for it." This joining of resolve was not lost on a staff aide to a Judiciary Committee Democrat: "I think it was the Senate Democrats' willingness to go all out and not back down. I think that was energizing in both this body as well as outside. And I think it was an interesting moment of Democrats actually caring and fighting for judicial nominations in a way that is rarely seen in the Senate Dems."

Such support notwithstanding, there remained serious concerns over whether Senator Reid could count on Democratic Senate icons considered "institutionalists" who revered the Senate's rules, norms, and traditions and whose votes would be necessary to bring about the fundamental rules change for the filibuster being considered. Undoubtedly the most central figure in this group was Patrick Leahy, the longest-tenured Senate Democrat and long-term chair of the Senate Judiciary Committee. Our interviews suggested that Leahy's decision to support the rules change took shape over time and, in the end, was precipitated by the DC Circuit controversy. A Judiciary Committee majority staff aide noted,

> We often talk here about the Patti Millett story. The filibuster of her nomination really troubled him, because he thinks long term. He's heard all of the arguments about why it should just be a majority vote. But the change in demeanor from the summer, where we almost had a rules change . . . then we heard positive things being said about Patti Millett, the nomination, the nominee, nothing but positive things—and also things like, "We should evaluate them individually on the merits." "She looks like an excellent candidate" becomes, in November, the same member [John McCain] who'd been involved in the Gang of Fourteen in 2005 came down to the floor [of the Senate] to say, "I deem this an extraordinary circumstance." Her nomination, a completely noncontroversial nomination. We were trying to work with them. And I truly believe, and . . . Senator Leahy alluded to this in a floor statement, that had it not been for her filibuster, it would be quite surprising that we would have seen a rules change.

Once Senator Leahy was on board with the rules change, other senior Democrats, such as Diane Feinstein, would soon follow, and it became clear in the Democratic caucus that filibuster reform could be accomplished.

It is impossible to know with certainty what exactly tipped the balance for Senator Reid to invoke the rules change, a filibuster reform that had been in the realm of possibility ever since President Obama first took office and encountered great difficulty in seating his judicial nominees. Why now, in the 113th Congress in President Obama's

second term? Those outside observers most cynical about Reid's ultimate decision to pursue the rules change have suggested that there was an element of the personal for Reid. For one, Republican obstruction had hit home. He, himself, had been embarrassed when he was unable to secure confirmation to the US District Court for Nevada of his favored candidate, Elissa Cadish, nominated by President Obama in early 2012. Cadish's nomination never received a Judiciary Committee hearing and was eventually withdrawn because Republican Senator Dean Heller, Reid's junior home state colleague from Nevada, refused to return a blue slip to the committee, which would have allowed her nomination to move forward. More central to the DC Circuit, one group advocate suggested that those seeking a rules change "were getting nowhere until a case was decided by the DC Circuit involving the placement of hazardous waste in Nevada at Yucca Mountain." Senate aides did not dispute that Reid was miffed at the defeat of his favored nominee by the Judiciary Committee's (and Chairman Leahy's) willingness to adhere to its norm allowing home state senators to defeat judicial nominees through a blue slip veto, and they admitted he would be aware of any DC Circuit Court decisions affecting his home state. Nevertheless, they remained dismissive of claims that he invoked the rules change for personal reasons.

Perhaps the most compelling reasons offered for Reid pulling the trigger on invoking the nuclear option were much simpler. Democratic aides suggested that earlier on in the struggle to confirm DC Circuit judges, while Senator Reid had the votes, he may have lacked the will. "You can fight up to a point. But things have to go on. You can't just deny government from functioning." Summarizing the position Reid found himself in, Nan Aron, president of the liberal advocacy group the Alliance for Justice concluded, "There was no choice, there was absolutely no choice about the need to change the rules. The Republicans completely overplayed their hand. . . . They made a huge strategic error and thought that Reid would never actually go forward with this rules change and they were wrong" (interview, January 6, 2015). A Democratic leadership aide added, "When he finally did it, he was gung-ho. He firmly believed in doing it."

Perhaps ironically, at the beginning of President Obama's second term, few on the Democratic side would have chosen "going nuclear"as the best vehicle for breaking the judicial logjam, especially since so many of the current players, senators and advocacy groups alike, had been against such an approach during the W. Bush years when it appeared the Republicans would invoke such a rules change in 2005, prior to the compromise resolution brought about by the Gang of Fourteen. As Nan Aron noted, "Changing the rules was not anything that anyone in the Senate or White House or advocacy groups started out thinking was a good thing. In fact, many of us had been very vocal supporters of the filibuster . . . during the Bush years. So nobody ever expected anything like that would be in play. But they . . . blocked everyone. And they were losing the argument in the public, to the extent that anyone in the public cared. The *New York Times*, some newspapers editorialized against the wholesale blockade of judges. So this was the only real option available to the Senate." The fact that there appeared to be lit-

tle or no alternative, notwithstanding, when the rules change came about, many were taken by surprise. Consultant Vincent Eng explains that "I was working very closely with Robert Wilkins [who would become the fourth Obama nominee confirmed to the DC Circuit]. We had discussed a number of times where the possibility of going nuclear was, the pros and the cons. But, quite frankly, I think it caught everybody by surprise. Obviously, it was a very happy day for Robert and his nomination, knowing that he would get confirmed. But it took all of us by surprise" (interview, January 7, 2015). A Democratic Senate leadership aide confirmed, "I don't think anybody really knew that we were going to go nuclear until it actually happened."

Interestingly, what surprised the Democrats was seen by many on the right as the natural unfolding of events. Curt Levey, president of the conservative Committee for Justice, recalled, "I probably said to you two years ago that it seemed inevitable that we were moving towards the nuclear option. Reid was getting as much as he could each time and he wasn't going to be satisfied" (interview, January 8, 2015). In a similar vein, a senior aide to a Senate Judiciary Committee Republican charged that changing the rules was a violation of the compromise struck between Senators Reid and McConnell in early 2013, "where the minority agreed to certain changes in the rules and in exchange for that Senator Reid said on the floor that we will not pursue any rules changes absent regular order." He also noted that "the majority threatened to change the rules very often. And with that hanging over your head, the threat of the change, it became clear to a lot of people that that was the end that was sought, not something that they were pushed to do. . . . Each time that Reid threatened to employ the tactic . . . he got what he wanted, he got his nominations confirmed. . . . And if he does that every time and the minority capitulates every time . . . could we envision it? Yeah, we could envision it."

In effect, what transpired, as it had in 2005, was a very high-stakes game of chicken between two highly partisan coalitions with little constructive dialogue aimed at a mutually beneficial solution. Whereas, in 2005, the Gang of Fourteen surfaced to forge such a solution and avoid the Republican resort to the nuclear option, most analysts concluded that, in 2013, the Republicans miscalculated both the votes and the Democrats' resolve while also seriously erring in their opposition to the specific nominees in the DC Circuit battle. And, in this regard, the White House's eventual nomination strategy for the DC Circuit, so very different from what George W. Bush had done previously, played a huge role in fashioning the administration's ultimate success in seating four judges to the DC Circuit, the same number as the W. Bush administration before it.

When George W. Bush became president, his first 11 judgeship nominees, all to the US Circuit Courts of Appeals, were introduced to the public in a White House Rose Garden ceremony. The nominees included two strong conservative candidates for the DC Circuit Court, John Roberts and Miguel Estrada. President Obama's nominations came more slowly and with little fanfare, with his first nominee in March 2009, David Hamilton to the Seventh Circuit Court of Appeals. A chief judge and 14-year veteran of the US District Court, Hamilton had the strong support of his home state senator, the

senior Republican in the Senate, Richard Lugar. Nevertheless, his confirmation required the overcoming of strong opposition, including a filibuster. Obama did not name a single candidate for a DC Circuit vacancy until September of 2010 with the nomination of Caitlin Halligan. While Halligan had strong legal credentials and liberal bona fides, she was not the iconic figure on the political left that Estrada and Roberts had been on the Republican right when they were nominated. Halligan had served for 6 years as solicitor general of the State of New York, during which time she had run afoul of the National Rifle Association and other gun lobbying interests for embracing a legal theory that would hold the gun industry responsible for crimes committed with firearms. Persevering through periods of Senate inaction as well as successful filibusters, Halligan was renominated in January 2011, June 2012, September 2012, and January 2013 before she withdrew her candidacy in March 2013. The failure to seat Halligan occurred despite the existence of four vacancies on the DC Circuit, leaving President Obama as the first president since Woodrow Wilson to fail to confirm a DC Circuit judge in his first term in office.

For a second vacancy on the DC Circuit, the president nominated Sri Srinivasan in June 2012 and then, again, in January 2013 after the nomination had been returned by the Senate. He was unanimously confirmed to the court in May 2013. In the Democratic liberal base, however, Srinivasan's confirmation was met by a mixed reception. While he possessed excellent legal credentials and received considerable mention as a potential and "safe" Supreme Court nominee should a vacancy arise during Obama's second term, Srinivasan struck liberals as an "establishment" nominee who, in his legal practice, often represented corporate interests in controversies with labor. In addition, his resume included service in the solicitor general's office during the presidency of George W. Bush. For the left, he fell far short of the DC Circuit "victories" that W. Bush had scored with John Roberts, Janice Rogers Brown, and Brett Kavanaugh. If President Obama was to leave a legacy on the DC Circuit, it would largely depend on what transpired with the three remaining vacancies on that critical court during the president's second term.

Once Srinivasan was unanimously confirmed, many Senate Republicans expected the pressure to seat additional judges on the DC Circuit to abate. Given the reality that President Obama put forward only two nominees to the circuit through the beginning of his second term despite the existence of three vacancies (with a fourth arising in 2013), it was not anticipated that he would take an aggressive posture toward the remaining openings on the court. For their part, many Senate Republicans felt that arguments about the DC Circuit's relatively low caseload could win the day and that any subsequent nominee could be obstructed and delayed for a lengthy period. At worst the president would confirm one more DC Circuit nominee. In our interview with a senior staff aide to a Republican Judiciary Committee member, the workload defense of Republican opposition was joined with tit-for-tat logic equating the situation in 2013 with that of 2005. "I think the record is clear that all the minority was doing during the

DC Circuit debate was trying to hold the then current majority to the same standard that they established when the DC Circuit debate was held in the last administration. . . . If you look at the arguments the then Senate minority made in the debates during the last administration, based on caseload, or in the case of Miguel Estrada that he didn't hand over stuff from the SG's office . . . those were the precise things, the same standard that we were trying to hold them to during this administration."

What was not anticipated was the actual strategy that the White House followed of simultaneously nominating three prominent candidates to the court, two of whom were women and one of whom was an African American man. Aides to a Senate Democrat on the Judiciary Committee confirmed that "it was the White House that decided when to send them up. They rolled the nominations out in the Rose Garden at the same time. But when the materials came in, which is usually the starting point, not the date of the nomination, Patti Millett's nomination came in first and a week or so later came Pillard and, then, Wilkins." Millett, a sterling nominee with superb legal credentials, would be the "first one up," and the most difficult among the three to oppose on the merits of her candidacy. With Millett's candidacy coming to the fore and two additional nominees queued up behind her, it would be difficult for the Republicans to sustain a caseload argument that would provide a credible justification for keeping all three seats vacant. Indeed, arguments questioning the "need" for additional judges on the circuit rang hollow for a number of reasons. An aide to a Senate Democrat on the Judiciary Committee pointed out with regard to other circuits such as the Tenth, "Even if you take away the argument that every lawyer knows, that the DC caseload is more complex than the Tenth Circuit . . . we were confirming nominee after nominee on the Tenth Circuit with lower caseloads." Further, and more germane to present politics, "when Roberts was confirmed by a voice vote to the DC Circuit, by any measure, the caseload was lower than it was when we were voting on Patti Millett." Adding additional fuel to the Democratic case for its three nominees, W. Bush was successful in seating two additional DC Circuit judges on June 10, 2005, more than 3 months before John Roberts resigned his seat on September 29, 2005, when he was elevated to the Supreme Court. That the workload strategy was a weak gambit for objecting to DC Circuit nominees was even noted by strong conservative voices such as Curt Levey. "A lot of Republicans on the Hill seemed to just think that saying the DC Circuit was underworked, that was their main argument, along with a little bit of 'We need to apply a level of higher scrutiny to the DC Circuit and look what they did to Estrada.' I never thought that was a powerful argument."

On a number of levels, the White House nomination strategy could be given high marks. As Michelle Schwartz, justice programs director at the Alliance for Justice saw it,

> I don't think the nuclear option would have happened with a different set of nominees. It worked out with those three because . . . Millett . . . was first. And nobody said anything bad about Millett. And then they said, "We don't want to

> confirm her because we don't want to confirm anybody." And everybody else kind of became linked in with that. And they would have to be filibustering two women and an African American man. And having had Caitlin Halligan already, "okay so now we're filibustering three women in a row. But you let the guy through." All of those things together. It's hard to know what would have happened without everything. It was a perfect storm. (Interview, January 6, 2015)

This metaphor was repeated in several of our interviews, including that with a senior Democratic Senate leadership aide. "It was the perfect storm. It's who they [the nominees] were. They weren't crazy people. They were highly qualified. They [the Republicans] made poor decisions in who they blocked, as far as goading us into the nuclear option."

According to virtually all of our sources on both sides of the partisan divide, both within the Senate and among the advocacy groups, the Republicans had a reasonable alternative to blocking all three nominees. They could have delayed Patricia Millett's nomination for a time but, ultimately, allowed it to be confirmed by the Senate. Successfully seating Millett, President Obama would have had two appointees on the DC Circuit. While there would have been a great deal of angst, push, and shove expended on the Pillard and Wilkins nominations, blockage of their confirmations likely would not have resulted in the invoking of the nuclear option by the Democrats. As argued by People for the American Way's (PFAW's) Marge Baker, had Millet been confirmed, "I think that would have totally defused it. We were able to make the case that they were taking obstruction to fundamental new levels that were fundamentally antidemocratic. If they would have let one nominee through, we would have been fighting about numbers" (interview, January 7, 2015). A senior Democratic Judiciary Committee aide added that, with Millett's confirmation,

> It's hard not to see that the winds would have gone out of the sails in terms of the rules change. She was so unquestionably qualified and noncontroversial that it was a sea change from what "extraordinary circumstances" was supposedly meant to be by the Gang of Fourteen. And it was also a wholesale vote. It was very clear that this was about this court, not this nominee, and it was for this seat and any seats going forward. . . . The decision of Republican members overreaching on the Patti Millett nomination is what turned things. . . . This was no longer going to be about fairness and the individual merits of the person, creating some controversy. You couldn't argue that with Millett. There was nothing.

Underscoring the special role of the Millett nomination in the playing out of the DC Circuit confirmation battle, PFAW's senior legislative counsel Paul Gordon noted, "In the committee hearing the Republicans had no objections to her. They didn't even manufacture something. They came right out and said, 'We think you're great, we think

you're qualified'" (interview, January 7, 2015). Marge Baker added, "It was this notion that they had this right as senators giving their consent to prevent the president from filling these three vacancies on the court, and so openly and brazenly doing it."

In short, the Republicans made a fatal miscalculation in successively filibustering all three DC Circuit nominees, rarely reaching the merits of the individual candidacies but, instead, seemingly questioning the right of this president to perform his constitutional duty to appoint judges. Central to this overreaching by the Republicans was, in effect, the implicit view that President Obama's efforts to fill vacant seats on the DC Circuit Court constituted, in and of itself, an "extraordinary circumstance" permitting a filibuster under the Gang of Fourteen's 2005 agreement. For a senior Democratic staff member who had worked in the Senate in 2005, the decision by Senator John McCain, one of the architects of the 2005 language, to use that language on Patricia Millett "was another turn of the screw. That standard meant something to those of us who knew the specific terminology of the Gang of Fourteen. It really meant that they were all in. That the entire Republican caucus was all in. That if this, Patti Millett, became exceptional, the wholesale filibuster of multiple seats on the court would follow. It was a total game changer." On the other hand, a senior Republican Judiciary Committee staff aide downplayed McCain's use of the "extraordinary circumstances" language to oppose Millett. "The so-called extraordinary circumstances agreement . . . was reached by a particular group of senators who were signatories to it for a particular time period. For that Congress and that Congress only by its own terms. For the signatories of that agreement it might have extended, but any member can use whatever standards he or she deems is appropriate."

While it is technically true that the extraordinary circumstances standard did not bind anyone in 2013, even the 2005 signatories to the agreement, the larger point is that it was being used by Senator McCain and, by implication, others for opposing Patricia Millett. That reality, when compared to the W. Bush nominees in 2005 to whom the standard did not, apparently, apply (such as for Janice Rogers Brown's confirmation to the DC Circuit), created an untenable false equivalency in the eyes of the Democrats that underscored just how far the rules of the game had changed between the nuclear confrontations of 2005 and 2013. This was, indeed, a "game changer." The conclusion that to some degree the Senate Republicans had brought the nuclear option on themselves was not lost on commentators on the conservative side of the spectrum such as the Committee for Justice's Curt Levey. "I felt like there was no point in pushing Reid to use the nuclear option on the DC Circuit. It would have been better to make a deal. . . . I think it would have been better to stop one or two of them . . . leaving Millett out of it."

The invocation of the nuclear option by Majority Leader Reid and the Senate Democrats broke the DC Circuit logjam and allowed three judges to be confirmed to that court. But what did "going nuclear" mean for judicial selection more generally, beyond the confines of the DC Circuit during the 113th Congress? And how will the decision of the Democrats to let the genie out of the bottle, altering filibuster rules so that judges

could now be confirmed by a simple majority vote, affect the judicial selection process well beyond the Obama presidency? These are questions to which we now turn.

WHAT DID THE NUCLEAR OPTION ACCOMPLISH? BEYOND THE DC CIRCUIT

In our interviews, the most extreme attribution of impact to the rules change came from a Democratic Senate leadership aide: "Twenty-five percent of the roll call votes with nominees confirmed after the nuclear option were confirmed with less than 60 votes. They would have absolutely been blocked." Such a view, however, treating final confirmation merits votes as fungible with votes on cloture to end a filibuster is difficult to sustain. Curt Levey, for example, disputed the notion that all those ultimately confirmed with under 60 votes would have been blocked in a pre–rules change world. "That's clearly not true. There are people where the cloture motion has succeeded and they've gotten less than 60 votes on confirmation, so that's just factually wrong." Christopher Kang, deputy counsel to the president, observed,

> I look at all of the press about the nuclear option, or filibuster reform, and its impact, and it feels a little bit overstated. . . . There's a lot of talk about how the filibuster reform sort of flipped a switch and, then, all of a sudden all of these judges went through. I don't think that's true. They didn't all suddenly go through. It took further leadership to file cloture on every single nominee and time and effort to go through that cloture process. Two, that doesn't account for the blue slip process, which limits the president's selections in the first place [discussed in detail below]. And, three, there were many nominees who had been nominated long before the filibuster reform and probably were not affected much by it.

It is also important to note that cloture votes and merits votes may both mean something quite different when taken in a postnuclear world. Marge Baker, for example, underscored how the voting calculus for confirmation might change. "The fight became how do you get to 51, not how do you get to 60. So different people were in play in getting to 51." That said, Michael Zubrensky, deputy assistant attorney general in the Office of Legal Policy, noted, "All of these folks who were confirmed after the nuclear option, on the cloture votes it was pretty much party line. On the merits, most nominees were confirmed unanimously. There were very few on the merits with significant numbers of 'No' votes. I think the protest votes on the nuclear option were at the cloture level. Some Republican senators were even voting against cloture for judges that they had previously supported. But it was just a protest vote. And then they voted for them on the merits" (interview, January 8, 2015).

Voting conventions aside, it is difficult to escape the conclusion that the nuclear option had an important impact on the outcome of judicial selection in the 113th Con-

gress, beyond the DC Circuit, although that impact may not always have been a direct consequence of the rules change per se or completely transparent. Thus, on one level, the consequences of the rules change on district court confirmation outcomes could be characterized as minimal since there is virtually no history of significant delay of district court confirmations via filibustering and none whatsoever of such nominees being defeated by a long-term failure to attain cloture. And, as Christopher Kang noted, "No district court judge has been defeated on the floor since Ronnie White, ironically now confirmed [discussed further below]. So I do think all of those judges would have continued to be confirmed. . . . I think all of the district court judges would have gotten through—although probably not as quickly without the filibuster reform."

In addition to picking up the pace of confirmations, as Christopher Kang observed, "[An] interesting thing that the filibuster reform had an effect on was the volume of nominees that Senator Reid could file cloture on—four or five nominees a week. It allowed Senator Reid to set his own agenda. This was at the expense of other items on his agenda—so it wasn't costless in that regard—but I think allowing Senator Reid to set his own pace and the leadership he demonstrated was perhaps the biggest impact of filibuster reform."

In the end, following the expedited path to attaining cloture that the rules change allowed, coupled with the limits placed on debate in cloture proceedings on district court nominees that predated the rules change, a significant impact was felt in the absolute number of postnuclear judicial confirmations. One senior Democratic Judiciary Committee staff member concluded, "I'm actually convinced that there's no way we would have come close to the numbers that we got, even the people who had 60-something votes, I still think would have been under threat." A Democratic leadership aide added, "The number of judges we got through was pretty amazing. I don't think anybody necessarily understood, even if we did go nuclear, how many nominees we'd be able to get through. . . . There were people who were confirmed who would not have been confirmed had we not gone nuclear."

Conjecture on who such people would have been is, of course, a risky and problematic enterprise. That said, several circuit court nominees who were confirmed readily come to the fore. Curt Levey, who in a nonnuclear world would have been an active opponent of a number of nominees advocating on behalf of the Committee for Justice, opined, "I think [David] Barron would have been stopped. [Cornelia] Pillard probably would have been stopped. [Pamela] Harris, my gut feeling is no, but that's just a guess." A senior Senate Judiciary Committee staff member offered a somewhat more expansive list. "I think you can definitely identify nominees, mostly circuit nominees, who would not have been confirmed had it been 60. Pam Harris, Barron, [Michelle] Friedland, Owens, Wilkins. Maybe Millett and Pillard. And also [district court nominee] Ronnie White." Marge Baker added that "there were other nominees where there would have been big fights that might have gotten through. But there would have been fights. But the more important thing is that they would have run out the clock," accentuating

the critical importance of the maintenance of an expedited pace to reach the numbers of confirmations that were accomplished.

Finally, in assessing the impact of the rules change, it must be stressed that the implications of invoking the nuclear option went well beyond the confirmation of individual nominees to include, in the eyes of some, critical symbolic changes in the prevailing judicial confirmation environment. As the Alliance for Justice's Nan Aron concluded, all one has to do

> is go back to the debates on Roberts and Alito where liberal groups asked the Democratic leadership to block those two justices. We had very serious meetings but they were never serious about using the filibuster. And that just fed into this ongoing assumption that Democratic senators don't really care about judgeships. And it wasn't until the nuclear option became viable after the blockage of the three DC Circuit judges that people sat back and said, "Okay, this is new, this is different. Senator Reid is taking some leadership on this issue and standing up." And that, in turn, caused the White House after the rules were changed to say, "We have an opportunity to fill some of these Circuit Court seats." It was a critically important moment, because I can't think of another time when Democrats really stood up and said, "We're not taking this anymore."

WILL THERE BE NUCLEAR FALLOUT?

Despite the great success the Obama administration enjoyed seating judges in the 113th Congress, there were many, including some supporters of the administration's judicial selection goals and performance, who, nevertheless, expressed grave concerns about the prospects for "nuclear fallout" from the Senate majority's actions. In the words of a long-serving Senate Democratic leadership aide,

> I did not favor the nuclear option because I started when we were in the minority. And I remembered the crazy people that the other side tried to get confirmed. I felt that the folks who were pushing for this, the senators who were new and didn't understand, and the advocates who were pushing for it, who I remember screaming at us when we were in the minority about blocking nominees that they opposed, for them to come back and push so hard on this I thought was just irresponsible. . . . The fact remains, we choose the rules, and when there's a Republican president who nominates ideologues, who aren't the equivalents of the folks who we nominated, they're going to be able to put them through and there's nothing that we can do to stop them. And we'll have nobody to blame but ourselves. I thought there was a lot of shortsightedness and short memories. . . . The pain we will feel was pushed off. . . . It will be the consequences the Democrats face when they're in the minority with a Republican president.

As Vincent Eng asked, "What kind of retribution will there be and how will that play out going forward?" Hinting strongly at the likely answer, an aide to a senior Republican Judiciary Committee member commented, "It was a very bad idea for Reid to do in the first instance because of the damage it did to the institution. But, whatever the rules are, there needs to be one set for both Democrats and Republicans. So that has to be a guiding principle. . . . It was unfortunate . . . for the majority to invoke the so-called nuclear option. But putting the genie back in the bottle is not an easy thing to do. That's not advisable." As a Democratic leadership aide admitted, "They'll quickly realize that what's good for the goose is good for the gander."

Democratic concerns about the postnuclear future were not primarily focused on immediate Republican retribution in the Senate of the 114th Congress with its new Republican majority because, as a leadership aide commented, "The situation was [already] so bad that there wasn't much room to go down. . . . As far as souring relations between the parties, they were pretty bad." Nevertheless, as a second leadership aide pointed out, the Democrats did experience some reaction with great immediacy.

> You saw McConnell say, "You're going to regret this day sooner than you think." We didn't regret the rules change, but McConnell made good on his promise to create even more gridlock. And, so, you saw the marathon sessions at the end of 2013. . . . We got back to the nuclear winter where we had to file [cloture] on every nominee whom we brought to the floor. And we got minimal cooperation. Ambassadors to Africa, career people. They were mad about the rules change and they had to retaliate. But some of the things they did to retaliate ended up hurting our country abroad. Hurting us in other ways.

In Nan Aron's view, however, the immediate costs were neither surprising nor, necessarily, very much different than they would have been without the Democrats having invoked the rules change. "My sense is that they would have been just as obdurate and resistant to confirming judges with or without the change in the Senate rules." Even when taking the longer view and conceding that the nuclear tables would be turned under a prospective Republican presidency coupled with a Republican Senate, Michelle Schwartz, also of the Alliance for Justice, downplayed the significance of such an eventuality. "I don't think there was a cost. I don't see what the cost is. Democrats never used the filibuster the way that Republicans did." While such a view may not be shared by observers on the other side of the partisan divide, it is also the case that, even if true, past Democratic behavior would not, necessarily, dictate future Democratic confirmation strategy in a context in which their worst fears about a Republican president's prospective judgeship choices came true. In such a scenario, the nuclear fallout could prove to be more than the Democrats bargained for as projected by Curt Levey. "And they knew that. That the next time there's going to be a Republican president and a Republican Senate that they're going to be sorry. How can they not be?"

Interestingly, despite seeing a prospective advantage for the Republicans in the future, Levey offered a thoughtful critique of the rules change, in the long run, premised in its absolute reliance on majority rule for confirming federal judges.

> We think of the battle over the nuclear option as being a short-term political battle. Who does it help right now? But I think that in the long term, it's really going to be transformative. When we look back 20 years from now, and I don't think the judicial filibuster is coming back, we're not going to remember who it helped in 2014. . . . I think we're going to remember the way it transformed the whole process because, roughly half the time, the president's party will control the Senate. Under those situations, and it's usually with less than 60, half the time now you're going to have a president who, basically, can appoint whomever they want. And I really think that changes the nature of judicial nominations. Looking back, that will really be the thing that's memorable about the last two years, even though right now we're focusing on the immediate politics. You're putting people on the bench for life. I certainly understand the idea of giving tremendous deference to executive appointments. But judicial appointments? I really think that if you're going to put someone on the bench for the rest of their life, it should be reasonable to require a supermajority, and I think that's really a good thing for the judiciary. I don't like the idea that one president appoints as many liberals and the next president appoints as many conservatives. I don't think that's what the founding fathers had in mind. If there were some way, and I don't pretend that there is, to appoint a bunch of nonideologues to the bench that would be ideal. I think that's how the judiciary should function. By requiring 60 votes, you get a little bit closer to that. Now we're going to have a situation where the president can appoint whatever ideologues he wants.

Levey's argument on behalf of requiring supermajorities to confirm judges is provocative. Democrats would contend, however, that it fails to solve the situation we have examined on the DC Circuit Court of Appeals in which, prior to invoking the nuclear option, they appeared to face a predicament in which they were unable to appoint anyone to the court, regardless of their qualifications or their ideology. In their view, the 60 vote rule for confirming judges had evolved to the point where it had broken down. Further, it should be noted that, even under the less arduous majority rule imposed by the Democrats for moving nominees to floor votes and subsequent confirmation in the Senate, there still remained mechanisms, including requiring cloture to be filed and reached on every nominee, that could slow the process down enormously, even, perhaps, to the point of running out the clock for confirmation calendar time on the Senate's agenda.

Indeed, this was a tactic the Republicans attempted to employ as the Senate session of the 113th Congress began to wind down. The tactic might have succeeded if not for a

strategic parliamentary error by Texas Senator Ted Cruz. Cruz held the Senate in session through a planned weekend recess in December in an effort to force a vote on a declaration that President Obama's executive actions on immigration policy were unconstitutional. This maneuver ultimately failed on the merits. With additional floor time available, however, Senator Reid was able to process confirmations for 12 additional district court judges. It was clear throughout the 113th Congress that Reid was willing to commit an unusual amount of floor time to confirming judges, particularly after the November 2014 election signaled that the Republicans would be taking over majority status in the 114th congressional session starting in January 2015. In this instance, Senator Cruz's actions helped to afford Reid the opportunity to clear the Senate floor of pending judgeship nominations that he may not otherwise have been able to confirm.

Whatever Cruz's role in allowing them, such lame-duck confirmations were viewed by Republicans as breaking with Senate norms. As argued by a senior Republican Judiciary Committee aide, the confirmations were "done in a way that was inconsistent with past practice with respect to confirming nominees." Of the 12 lame-duck confirmations,

> 11 were reported out [of committee] during the lame duck. And of those 11, three had their hearings during the lame duck. It's called a lame duck because there are members who are voting who have just been voted out or are retiring and it is a time to wrap up business that was done earlier in the Congress, not a time to start new business and try to get it done by the end of the year. Historically, the notion is that you want to let the new members have the opportunity to weigh in and have their voices heard. It's unfortunate that they did that heading out the door because it's just inconsistent with the way it has been done in the past. It's important to recognize that history and tradition matter. There are important reasons for it. It's for new members.

Senior Democratic Judiciary Committee staff members had a different view of the importance of such traditions and what they considered to be arbitrary markers.

> Heading down to the wire of those last 12 nominees to get confirmed we were really pushing hard. Why not? There were these artificial statements made by Senator Grassley. "We've never had a nominee who was reported out in the lame duck and confirmed in that lame duck." Yes we did. We had Dennis Shedd and Michael McConnell, the two of them very controversial circuit court judges who were reported out and confirmed. Okay, but maybe we never had a hearing lame duck and [the nominee] reported and confirmed the same year. What are these artificial frames of reference to say, "This is how we do or don't do things"? There was so much framing in the past year.

Democratic Senate staff members accentuated the importance of getting these judges "done" before the end of the congressional session. One asserted, "I think it was very important for us to clear the deck so we've given the Republicans a pretty clear slate." That said, he predicted that "the real story in the next Congress will be Republicans tying people up in committee. . . . If Senator Grassley wants to tie people up in committee, I'm sure he will."

THE BLUE SLIP SYSTEM AND THE 113TH CONGRESS

We have suggested that there are a number of ways in which Senate advice and consent processes can still be bogged down even with the existence of a purely majoritarian postnuclear filibuster rule for confirming judges. Indeed, invocation of the nuclear option, which altered dramatically the ability of minority senators to block judicial nominees, inevitably raises a question about the place of the blue slip system in ongoing advice and consent processes. Where the majority has imposed its will through filibuster reform, can a situation logically coexist in which a single home state senator can unilaterally derail a judicial confirmation? Yet following the blue slip convention, when a judicial nomination is received, the Senate Judiciary Committee provides each home state senator with a blue slip, which the senator can use to comment on the nominee. Under the practice followed by Judiciary Committee Chair Patrick Leahy, a home state senator's failure to return the blue slip brings to a halt any further committee processing of the nominee, including the holding of a confirmation hearing. This blue slip system, to which we now turn, played a central role during the 113th Congress in keeping many vacancies unfilled and can continue to do so even in postnuclear option confirmation processes.

Importantly, our interviews revealed critical and widely recognized analytical distinctions drawn between filibusters and blue slip vetoes. Perhaps most importantly, such distinctions were sufficiently compelling for Chairman Leahy that, while he was ultimately supportive of invoking filibuster reform at the institutional level, he never altered the committee's blue slip system. As Nan Aron noted, "Leahy has been such an adamant defender of it and refuses to waver." A senior staff aide to a Judiciary Committee Democrat confirmed the senator's belief "that someone should not be confirmed, even if the lower threshold institutionally remains, if there is strong opposition by the home state's senator." This is a reality that was brought home, as we have seen, even to the majority leader, as Harry Reid's own preferred district court nominee in Nevada, Elissa Cadish, ultimately withdrew her nomination after the committee failed to obtain a blue slip release from Reid's Nevada colleague, Republican Senator Dean Heller. One Democratic Senate aide admitted that "Senator Leahy's office took a lot of flak for that. The blue slip creates the need for some cooperation and Senator Reid was ticked off." That said, another senior Democratic staff member acknowledging Reid's frustration added, "But it's the chair's prerogative, and Senator Reid is not the sort of leader who forces his chairs

to do something that they don't want to do. He did push on Leahy, but not that hard, because it was Leahy's call."

"Leahy's call," quite clearly, is consistent with our characterization of him as a strong Senate "institutionalist," a point highlighted by his initial reluctance to support the institutional filibuster reform. Any effort to justify the blue slip system once filibuster reform has occurred starts with the recognition of what the committee norm is aimed at accomplishing. As a senior staff aide to a Judiciary Committee Democrat put it,

> Even in a post–rules change world, why wouldn't the dean of the Senate want to protect other senators in being consulted? People who talk about rules change, [and ask] shouldn't that have changed the blue slip rule don't understand the nature of the Senate and how senators actually do look out for each other vis-à-vis the other branches of government. . . . The story of the blue slip is really about consultation. . . . [Leahy] wants to make sure that this president, and future presidents, whether it's his party or not, is actually working with senators and negotiating with them. . . . From the stories he tells, there used to be more open communication and constant conversation, because you need cooperation. In a more politicized partisan environment, it's true that's going to give more power to the party opposite the president. That's true. But he has the long view of that and it stems from his institutional feelings about the Senate. . . . He still wants to make sure that even this president consults him on future nominations, and he knows that if it happens in his neighboring state, and that senator doesn't get consulted, he should stand up for that senator's rights because his state is next.

Echoing this posture, a minority Republican Senate aide confirmed that the blue slip system,

> albeit not a Senate rule, is a practice that goes back roughly a hundred years and it is a practice that is valuable. And it's valued by both majority and minority members. . . . It's good for the process. . . . The more senior members who have served in the body long enough to have seen it from every conceivable scenario, majority with your own party in the White House, majority with the opposite party in the White House, minority with your own party and minority with the opposite party in the White House—if you've witnessed it from every perspective, you appreciate why it has stood the test of time.

To many, these are sharp and meaningful distinctions that can justify continuation of the blue slip system as well as, simultaneously, support the invoking of radical filibuster reform, the nuclear option. A Senate Democratic Judiciary Committee aide explained, "When people were talking about the blue slip system not being addressed with the rules

change there was some implicit thematic marriage. 'Why, if you're doing that, aren't you doing this?' But it goes back to the Patti Millett story. I think the rules change was about systematic obstruction to filling a court regardless of who the nominee is. That's very different than making sure that the first branch and the second branch are working together and consulting." This distinction also rang true for a minority Republican Senate Judiciary Committee aide who recognized that support for filibuster reform did not necessitate similar support for altering the blue slip system, even among majority Democrats. "The use of the filibuster is underappreciated by the majority when they have the White House. The same is not true with the blue slip process because that matters to Democrats, right now, today—because the White House might not want to nominate their preferred candidates. So, as opposed to the filibuster debate where you have to try to convince Democrats that, at some time in the future, this may matter to them, the blue slip matters to them today."

Historically, as the Committee for Justice's Curt Levey noted of the blue slip, "It's always been used as a small 'p' political rather than a big 'P' political. They didn't think of it as a way to block nominees in general. They just used it as a way to have leverage over the president." A senior Democratic Judiciary Committee aide further underscored the blue slip's role in assuring the Senate's institutional role in judicial selection.

> If we didn't have something that gave teeth to advice and consent, especially the advice part and being consulted, then it [the president's appointment power] could be abused. And we actually did see it abused in the [W.] Bush years. Some home state senators were not consenting and Bush would nominate people over their objection. And you know what happened to those judges? They did not get confirmed. . . . And that's a story that I feel like people missed. . . . And I think part of that is the story of the Senate. Senators represent their states. They protect each other's interests in representing their states, especially when it comes to district court nominees.

In a sense, the blue slip is "a threshold issue. The blue slip is not the end, as the Boggs example [discussed below] shows us. Just because the president and the senators agreed that Boggs would make a good district court nominee, that does not speak for all 100 senators. However, it should be a threshold checkoff on whether they [the home state senators] have been consulted and whether there will be strong opposition."

As a practical matter, in the complicated Senate world,

> with all the things that go on in the Senate . . . you need to yell and scream to get what you want on the agenda. . . . If someone's not there before the president moves forward, before the Judiciary Committee moves forward, let's move on to the next nominee who has two home state senators that strongly support. There's lots of . . . nuance that relates to the practical purpose of the blue slip. It's really

> the threshold of how do we make sure that there's going to be a champion. So I think it's really important not just to see it as people using it as a veto. . . . It's also an early "tell" as to whether the person is confirmable. . . . The blue slip is one piece in a link of things that have to happen for a nomination to go through.

As suggested above, and noted by Kyle Barry of the Alliance for Justice, the blue slip process is one that is capable of being abused, and therein lies the possible rub. With the virtually unprecedented numbers of confirmations achieved in the 113th Congress, it is easy to miss the point that they disproportionately occurred in Blue states where the administration worked largely, and successfully, with Democratic senators to identify candidates and fill seats. In the wake of the 113th Congress, the overwhelming majority of pending judicial vacancies reside in Red or Purple states where the presence of one or two Republican senators with the blue slip prerogative changes the nature of judicial selection. As Barry notes, "That's something we've definitely been frustrated by at times. It gives an inordinate amount of power to a single senator to shut down a nomination entirely. Our view is it certainly makes sense to have some means to ensure that a home state senator has some say in who serves as a judge in their district. But in many cases, the courtesy is abused such that it goes well beyond that—even in cases where the senator has signed off on a nominee" (interview, January 6, 2015). Potential difficulties abound in situations in which the home state senators fail to identify candidates and/or refuse to sign off on any potential nominee suggested by the White House. Given any president's understandable reluctance to nominate judges who will not pass blue slip muster, a good deal of vacancy gridlock can result, and as Nan Aron notes, "I can think of a number of instances where really good people couldn't be nominated because of the blue slip," where, in effect, a senator has succeeded in exercising a "preemptive" blue slip veto.

Blue slip abuse can be difficult to recognize and equally difficult to remedy. Christopher Kang, deputy counsel to the president, worked with the White House Office of Legislative Affairs to work through blue slip issues with senators. He noted at the outset that, at times, objections to prospective nominees are difficult to divine. "Part of what our difficulty has been on these blue slips is it's just difficult to engage some senators, generally. So, sometimes they'll object to a candidate and we'll have no idea why." As Kang further underscores, there is a spectrum of understandings that senators take to the blue slips ranging from seeing it as assuring "consultation" to a prerogative that implies much, much more. "One of the biggest issues is how different senators react to the blue slip. Some senators have an approach like Senator [Lindsey] Graham, who talks about this all the time: 'A Democratic president is not going to nominate who I would nominate, but he's president, and elections have consequences.' These senators will return their blue slips on nominees that they might not personally agree with all of the time. Other senators have the view that 'I have a blue slip and I'm going to use it to ensure you nominate who I want you to nominate. Otherwise, this won't go forward.'"

While some are critical of the implications of an approach in which a senator may return the blue slip, allowing the process to move forward, and then oppose the nominee in a subsequent confirmation vote on the merits, Kang is not. Indeed, he has a good deal of respect for home state senators who take that approach to expressing opposition.

> There have been a handful of judicial nominees who have had their blue slips returned by Republican home state senators who then turn around and oppose the nominee on the Senate floor. . . . I don't think there's anything contradictory about that at all. Returning a blue slip does not have to mean "approval" to the extent that you will vote for the nominee yourself. Really, all returning the blue slip does is allow somebody to move forward to a committee hearing and vote and to not unilaterally veto them. So I have a tremendous amount of respect for the senator who will return a blue slip for somebody they might not personally agree with, would not have nominated themselves, but still don't think that there's anything disqualifying about the person. If more senators viewed the blue slip like that, maybe it would be a little bit easier for all of us to find nominees and continue filling the bench.

In a sense, what Kang is suggesting is that there's nothing wrong with the blue slip system per se but, rather, just those situations in which it has been subject to abuse. "The blue slip system itself is just about consultation. And I don't see anything wrong with the blue slip system when it works well, when all the parties come together in good faith. But it's when senators abuse that blue slip system that we run into trouble. And that's been a piece of this process that's been very difficult to work with."

Kang also raised a concern that the confidentiality necessary to negotiate in good faith is sometimes abused. "When a senator says that he or she is not going to support a nominee and not return a blue slip on a nominee, we take them at their word. Unfortunately, sometimes, these senators will tell outside stakeholders or the press that they're still thinking about it, or they haven't made a decision, or that it's up to the White House. We do our best not to talk about private conversations with senators so this can put potential candidates in an unfair position and make it difficult to find consensus nominees."

Ratcheting up the scale of possible abuses of the system occurs in a situation in which the senator's returned blue slip turns out to be a "false positive," followed by active and aggressive opposition to a nominee on the floor beyond simply voting against the nominee. While a very rare circumstance, without question, the most egregious example of such an occurrence was the case of Ronnie White, first nominated by President Bill Clinton to a district court seat in Missouri in 1997. The Missouri senators returned their blue slips on White, a justice on the Missouri Supreme Court and, later, the first African American chief justice of that court. White's nomination passed through the Judiciary Committee stages of the confirmation process without incident, only to become the rar-

est of circumstances, a district court judge nominee who would be defeated on the Senate floor in the subsequent confirmation vote. What had transpired between his nomination and confirmation vote was a change in the position of home state Republican Senator John Ashcroft, whose passive acquiescence at the blue slip stage (along with that of fellow Republican Senator Christopher Bond) grew into vitriolic opposition when the nomination was brought to the Senate floor. Senator Ashcroft, who was engaged in a difficult reelection challenge in Missouri, seized on White's candidacy as an example of a prospective judge who was soft on crime and, in particular, the death penalty. The campaign mounted against White was characterized as having racial overtones and blended in with the ongoing politics of the Senate race in Missouri. Just before the Senate's confirmation vote, in a closed-door Republican caucus meeting, Ashcroft implored his colleagues to vote against White and claimed that his own personal credibility (and possibly his reelection) was at stake here. White's nomination was defeated in a strict party line vote of 54–45 on the Senate floor, the first time a judicial nominee had been defeated in a confirmation vote in the Senate in over a decade. Ashcroft went on to lose his reelection bid, in a close race, to his Democratic opponent, with the controversy over Ronnie White seen as one among a number of issues that affected the result.

If Ashcroft's reelection defeat served as any solace to Ronnie White, who continued his service as justice and, later, chief justice of the Missouri Supreme Court, there is also a "rest of the story" element that closed the circle on White's nomination that took place in the 113th Congress. For in November of 2013, more than a decade and a half after his failed nomination by President Clinton, Ronnie White was renominated by President Obama to the same district court in Missouri's Eastern District. This time, there would be no shocking confirmation surprise, and he was confirmed as a federal district court judge in July of 2014, by a divided partisan vote of 53–44, reflecting the wide gulf still separating the Democrats and Republicans on postnuclear confirmation votes. Indeed, it is highly likely that, without the filibuster rules change, White would not have been able to be brought to the Senate floor as the 54 votes he gained to impose postnuclear cloture were well short of the 60 that would have been required under the prenuclear filibuster rules.

The White confirmation was a very special and bittersweet milestone for Democratic staff members whose service extended back to his earlier defeat. Citing the White confirmation as one that would likely not have come to pass without the filibuster reform, one such staff member characterized "the redemption of Ronnie White" as "really moving and powerful." Interestingly, the second White nomination underscores how a more cooperative approach to the blue slip can function to avoid a seeming abuse of the system. "Here is Senator Blunt. Although he didn't support Ronnie White he had to and actually did consent and allow him to be both nominated and go forward. . . . And one thing that's interesting about Ronnie White is the difference between support and opposition." Contrasting the two confirmation settings, Senator Ashcroft was characterized as

> coming out of the bushes to attack Ronnie White at the one-yard line and convincing his entire caucus to join him versus, one, working with and negotiating with the administration and deciding that makes sense. He was not treated fairly. And he [Senator Blunt] did not work against Ronnie White here. He basically allowed it to go forward and did not do anything to stop him. [Although Blunt did vote "Nay" both on invoking cloture and on the ultimate confirmation vote.] And it was so interesting. Because so much about this place is binary. It's strong support or strong opposition. . . . And this was one where [they] worked this very hard to make sure that it was predictable, if nothing else. Senator Leahy had some conversations with Senator Blunt. "I don't want any surprises. I want to make sure that you're okay with this because we've been through it before." And that was really powerful.

We have suggested ways in which the blue slip system can be utilized that go well beyond its fundamental goal of ensuring consultation between the president and home state senators. When such incidents occur, both the executive and the Judiciary Committee chair have little effective recourse. For the president, there is a necessity of taking the longer view extending beyond the judicial selection issue of the moment. As noted by Christopher Kang, "Long term, we tend to be repeat players with these senators whether it's on judicial nominations or anything else we're working on. If the senator says 'No' and you do it anyway, that may have some collateral impact. Also, long term, we would like to see these vacancies filled." For the Judiciary Committee chair, there remains the hypothetical possibility of altering or, perhaps, even ending the blue slip process, which is "just" a committee norm and tradition, not a rule per se. It has been suggested that this was even considered by Chairman Leahy after the filibuster rules change when Republicans relied heavily on the blue slip process to stall Judiciary Committee processes. One advocacy group leader took note that "Leahy made a statement where he pretty much suggested that he was open to changing the blue slip," while another commented that "he was clearly angered by the abuse." Yet, as a practical matter, Senator Leahy had very few realistic options. As a Judiciary Committee Democratic staff member opined, "Let's say that we change the blue slip. Do you think that six months out from an election where we're probably going to lose the majority is the time?" As Vincent Eng points out, "Leahy has a strong argument to make with Grassley if he wants to ignore the blue slip rule. Leahy was hammered by everybody on the issue including the White House and advocacy groups. Given the level of collegiality that's generally seen in the Judiciary Committee, I suspect that they will honor the blue slip."

As Eng implies, different occupants of the Judiciary Committee chairmanship have offered different conceptions of what the blue slip system actually requires. During the years when Ted Kennedy chaired the committee, he appeared to have altered the rule, such that he would not unilaterally table a nomination in instances in which a blue slip was not returned; rather, he would bring the nomination before the committee for a vote on whether or not to proceed. There is little evidence, however, that this process was

ever utilized. During the presidency of W. Bush, Committee Chairman Orrin Hatch allowed several circuit court nominees to proceed to a committee hearing and vote even though two blue slips were not returned.

Despite such putative deviations from the blue slip tradition, federal judicial nominees face a virtually impregnable confirmation hurdle, without the acquiescence of both home state senators, regardless of their majority or minority status. This is a point strongly brought home by a Republican Judiciary Committee staff member who noted that, even during periods of blue slip system ambiguity, "no district court nominee was processed out of the committee absent that blue slip and no circuit court nominee was ever confirmed absent the blue slip."

In the real world of Senate traditions where doing away with the blue slip system does not seem possible or, indeed, pragmatic, Chairman Leahy did institute a reform that was intended to make the operation of the system more open to public scrutiny while, perhaps, also working to minimize abuses. As a Democratic Judiciary Committee staff aide explained, Senator Leahy

> made the blue slip transparent. He warned every member that "this piece of paper is not going to be confidential between you and me. I am going to make whatever you send me on the blue slip paper public so that there will be more accountability." Because what he had experienced was senators saying publicly they supported someone and then privately writing on the blue slip, "Don't move this judge." And that, he thought, was completely unfair. One of the first decisions he made was to make it transparent so there would be some political accountability for that home state senator. And if the blue slip is not returned, he would report that as well. Make that public as well.

At the end of the day, it is important to underscore, as a senior Democratic Judiciary Committee staff aide did, that it is not the blue slip system, per se, that protects the interest of home state senators in judicial selection but, rather, the underlying justification for that system that would still prevail even without the existence of the Judiciary Committee norm. "I think people are looking for an answer to the obstruction that goes on and this [the blue slip system] is an easy thing to point to. That's the problem, without really understanding, that it's just a piece of paper. It represents a lot but it's just a piece of paper. If we got rid of it today, it wouldn't change the fact that people would [still] need buy in from the home state senators, that there's a need to talk to them, and that our Constitution requires advice as well as consent."

JUDICIAL SELECTION IN THE 113TH CONGRESS: SUCCESSES, FAILURES, AND POINTS IN BETWEEN

Thus far, our view of judicial selection and confirmation politics during the 113th Congress, the first half of President Obama's second term in office, has created a portrait of substantial success on a number of levels. For one, from the perspective of numbers

alone, there are few congressional sessions that measure up to the president's confirmation record during this period. Further, one can point to the president's unanticipated success in seating three judges on the DC Circuit Court of Appeals and, as well, the 12 lame-duck confirmations won in the waning days of the congressional session. Beyond these clear administration victories, there were numerous judicial selection opportunities that played out in the context of the states. Here, selection and confirmation processes were subject to the different conventions that defined senatorial prerogatives in each of these state settings, as well as the implications such conventions had for blue slip politics.

There is a wide variance in how senators handle their advice and consent role in nomination politics within the states, as explained by a staff member on the Judiciary Committee.

> The home state senators, it's up to them and their home state colleagues to figure out how to set it up with the White House. You have split delegations, two Democrats and two Republicans. By and large the home state senators sit down with their colleague and they say, "How do you want to do this? Do you want to do one and then I'll do one? Do you want to work together on both of them?" There are all kinds of different ways and we don't normally get involved. Occasionally, we get calls just to get ideas. . . . New members will call and ask, "We have a vacancy coming up. How do offices typically handle it?" And we'll say "some of them set up interview committees and some of them don't." Just give them the options that different members tend to use. Every state delegation has their own little processes that they follow.

The particular approach taken in a state clearly has implications and consequences for nomination and blue slip politics. As Christopher Kang explained, "In every case where we try to find a nominee we are necessarily constrained by the blue slip system and, when we're not as constrained, we have more options and flexibility." In a small Purple state such as Nevada, where judgeship vacancies are not plentiful, no convention for sharing the "advice" part of the senatorial advice and consent power exists, a reality that, as noted, resulted in the inability of Senate Majority Leader Harry Reid to have his preferred choice for a coveted district court vacancy, Elissa Cadish, confirmed over the blue slip veto exercised by Nevada Republican Senator Dean Heller. Eventually, a nominee passing the blue slip scrutiny of both home state senators, Richard Boulware II, was confirmed to the seat.

In other states, generally larger ones such as Pennsylvania and Illinois, different conventions exist for suggesting prospective judicial nominees. A Judiciary Committee staff member noted that, in Pennsylvania, "they have a split delegation and they've had an agreement that goes back a number of years and they do it three to one. When your party occupies the White House you get three for every one that the other member gets.

And if the party in the White House switches, that switches." Here, as long as the two senators play by their own rules, and the White House follows suit with a nomination, blue slip acquiescence to the nominees will not be an issue.

In states with multiple vacancies existing at one time, an additional possibility exists—that of a "package" of nominees agreed to by the senators, regardless of their party, and the White House. Such "package deals" have a lengthy history in judicial selection politics. Understandably, they are somewhat more likely to occur when a president faces a Senate delegation in which at least one senator is from the nonpresidential party. At bottom, nomination packages are a mechanism through which the White House can negotiate to avoid blue slip vetoes of high-priority nominees they wish to see confirmed. Indeed, as a Republican Judiciary Committee staff member revealed of the 113th Congress, "These packages . . . are not a new thing. This year there were dozens [of nominees] held up by the blue slip process. . . . The packages we saw over the last Congress were a product of a process that's been going on for a long time."

Commenting on the wisdom of negotiating packages to fill multiple vacancies, PFAW's Marge Baker offered a widely shared assessment. "Package deals are good if they produce results that you can live with." What one can "live with" is, of course, in the eyes of the beholder. Christopher Kang, who often served as the administration's lead "negotiator" for potential packages, described a case-by-case process. "It's a balancing act . . . to try to find nominees that both the president can nominate and that home state Republican senators can support. Some Republican home state senators are more agreeable than others." Looking ahead to the 114th Congress with its preponderance of vacancies in Red and Purple states, Kang pondered, "Will there be more packages? How do you decide when you fill these vacancies and when do you think the president would feel comfortable in nominating someone, but also the Republican home state senator would approve their moving forward. Over the next two years, that's going to be the challenge—handling the blue slip."

In several settings, including Arizona and Florida, "handling the blue slip" ultimately worked to assure confirmations, albeit not always without controversy. A Senate Judiciary Committee Democratic staff member perceived very positive "negotiated settlements" in these states: Arizona, with six district court judges all confirmed on the same day in May 2014 (including Rosemary Marquez, who waited almost 3 years between her original nomination and confirmation), and Florida (with a total of seven district court judges confirmed during the congressional session).

> A better story than abuses and how this administration has worked with Republican senators is Arizona. The state of Arizona nominees, when they came through, were really impressive. The first female Native American and not just her. There was other great diversity in that package. And [Republican Senator] Rubio and [Democratic Senator] Nelson working very well in Florida? I think the story of the last six years with people always talking about blue slips, what about Florida?

> And what about Arizona? We've actually made great progress [in these states] with people with higher aspirations than willful political motives not to work well with the president.

In discussing these successes and how they came about, Christopher Kang explained,

> The president nominated Rosemary Marquez without knowing for certain whether the Republican home state senators would return their blue slips. They didn't say "no," and we thought they could—and should—return them, but obviously that didn't happen right away. . . . In 2013, Senators McCain and Flake suggested all six nominations. [Marquez's name also had been suggested by Arizona's Democratic delegation in the House of Representatives.] It was very clear, obviously, that we continued to support Rosemary Marquez who had been nominated two years prior, we appreciated that she was on their list. And overall, it was a pretty good list. I actually don't know the party affiliation of most nominees, but I wouldn't be surprised if some of the nominees from Arizona were Republicans. But, looking at everyone's records, they had conducted themselves well as lawyers and judges and we felt pretty good that they would be good judges on the federal level.

Of the process pursued to reach an accord, Kang continued, "There's constant outreach. And, as more and more vacancies come up, there's more of an effort to engage to fill them. And, frankly, that's also when the senators start to feel more pressure from the legal community. Those six vacancies in Arizona were all judicial emergencies. . . . These empty slots have a big impact. Both on the sitting judges, but also on the legal community as a whole and their ability to move cases."

Two state settings, Georgia and Texas, with multiple federal judgeship vacancies, including seats on the US Circuit Courts of Appeals that serve their states, are exemplars of Red states that generated the greatest attention and significant controversy in the judicial selection realm during the 113th Congress, and for very different reasons. The Obama administration first became engaged in a controversy with Georgia's Republican Senators Johnny Isakson and Saxby Chambliss in the 112th Congress, when a seeming two-person package of district court nominees failed to be consummated. The nomination of Natasha Silas, strongly supported by the administration, was, effectively, vetoed by the senators through their withholding of their blue slip acquiescence, while Obama's nomination of Linda Walker, who was originally suggested by the Georgia senators, was allowed to expire by Senate Democrats in the absence of forward movement on the Silas front. At the same time, also left to languish in the 112th Congress was the nomination of Jill Pryor, an Obama nominee strongly supported for the Eleventh Circuit Court of Appeals.

At the start of the 113th Congress in January 2013, Jill Pryor's nomination to the Eleventh Circuit bench was resubmitted, and what followed for the course of almost a year were negotiations over multiple district court seats and a second Georgia vacancy on the Eleventh Circuit. During this time frame, the Pryor nomination continued on hold. Christopher Kang reports, "In Georgia, the senators actually publicly recommended Jill Pryor for a district court vacancy, so we knew that they were willing to support her for a lifetime federal judgeship. They just had a different view of which level." The setting was one in which, Kang added, "I think that confluence came together to help us more naturally come to a package."

In the end, the Georgia package was done on a grand scale, to include five district court and two Eleventh Circuit nominees, an outcome that was not, necessarily, anticipated throughout the process. In addition to Jill Pryor, a sitting district court judge from Georgia, Julie Carnes, who had been appointed by George H. W. Bush over two decades earlier in 1991, was elevated to the circuit, thereby creating an additional district court vacancy. The district court nominees were Mark Cohen, Leigh May, Eleanor Ross, Michael Boggs, and Leslie Abrams.

The package generated a great deal of controversy among liberal advocacy groups, most particularly because of the inclusion of Michael Boggs and the elevation of Carnes. One group advocate admitted, "I think they had to do that in Georgia. Otherwise we wouldn't have gotten anyone. Having said that, I wish the White House hadn't agreed to the package. Boggs is the laughingstock of that package but, to me, the more dangerous one is Julie Carnes. I just can't imagine a Republican president elevating a very liberal Democratic district court judge to a court of appeals seat. I think that's going to be damaging given the makeup of the Eleventh Circuit. I wouldn't have settled for that. I would have pushed harder. I would have demanded another person."

Clearly, however, most of the vitriol over the package was reserved for Michael Boggs's inclusion in the mix. As another group leader commented, "There were so many people who were so upset with that nomination. People all over the country were really upset by that. There were so many different issues. And it sent a very powerful message that people pay attention to this. There have to be acceptable outcomes, and Boggs was not acceptable." Boggs's "issues" were, indeed, many for the advocacy groups and included, at various times, his stances as a state legislator and judge to keep the Confederate emblem on the Georgia state flag, his embracing of several restrictive measures constraining abortion rights, and his opposition to same-sex marriage. Additional liberal opposition was aimed at the inclusion in the deal of Mark Cohen, a senior staff aide to former Republican Georgia Senator Zell Miller, who, as a litigator, had defended Georgia's allegedly discriminatory voter identification law.

Explaining the administration's actions, Christopher Kang asserted, "We were able to accept a package of nominees who the president thought would be good judges. That's not to say we agreed with every decision they ever made. But with Judge Boggs

in particular, we focused on his judicial record and, on balance, between his judicial record, his leadership on criminal justice reform, and his qualifications to be a federal judge, he was included in the package." Administration support notwithstanding, opposition to Boggs arose from civil and abortion rights groups as well as Georgia House Democrats and the Congressional Black Caucus. After his hearing, many prominent Democratic senators voiced their doubts, and in due course, Majority Leader Harry Reid announced his opposition to Boggs's candidacy while Judiciary Committee Chair Patrick Leahy indicated that he was not confirmable. While the rest of the Georgia package was confirmed by the Senate, the Boggs nomination was allowed to lapse.

A senior Judiciary Committee Democratic staff aide applauded the Georgia outcome on many levels.

> They originally agreed on six nominees and then, what happened, which was great, there was a seventh nominee who came down the pike, Leslie Abrams, who had the strong support of the civil rights community, the strong support of the Georgia House Dems, and the strong support of Chairman Leahy. And we were able to negotiate, and Chairman Leahy was able to leverage, making sure that the blue slip came in from the home state senators who were trying to just keep it to their six-member package. So, at the end of the day she [Abrams] gets confirmed and Judge Boggs does not. So, the original package was six, it became seven nominees. Of the six who got confirmed, five were women, there was diversity. It really turned out to be an impressive package for Georgia.

This final outcome struck some as resulting from a strategic error on the part of the Georgia senators and/or the failure of the administration to push hard enough for Michael Boggs. Curt Levey of the Committee for Justice asked, "Could Obama have interceded? The obvious answer was 'Yes.' Was that too much to expect, given that he hasn't been very visible in fighting for anything but Supreme Court nominees? To answer my own question, 'No' and 'Yes.' Publicly fighting for Boggs but, behind the scenes, I suspect he didn't do a lot." Taking issue with this characterization, a Democratic leadership staff aide said, "From the White House's perspective, they did what they needed to do. They got the blue slips done. If you run into a buzz saw in the Senate because somebody becomes so toxic, as Boggs became, there's not much you can do. The White House can say, 'We did everything on our end. We nominated him, we tried to fight for this guy.'" Also, the White House press secretary publicly affirmed the president's support for the Boggs nomination during the Senate's consideration.

Most of our interviewees denied that a strategic error had been made by the Georgia senators in not having Boggs confirmed first. As noted by a Judiciary Committee Democratic staff aide, "The Georgia senators realized how long these vacancies had been pending and that it would reflect poorly on them within their state if they took an ideological stance that it has to be all or nothing. There was some talk in the press

that it was an all or nothing package, but Senator Leahy said, 'I didn't sign off on that. And 98 of us didn't sign off on all or nothing. We don't vote on packages. You might have a package with regard to nominations. We weigh the merits of each individual nominee, and that's our role under the Constitution.'" Adding the White House perspective, Christopher Kang pointed to Senator Isakson's explanation. "If you look at Senator Isakson's statement, his view was that the package would all be nominated and that was the extent of the agreement. Having fulfilled that agreement everybody could consider these nominees on their merits. And on their merits, these other nominees all deserved unanimous support."

It remains the case, nevertheless, that the endgame of the Georgia package resulted in, as a Republican Judiciary Committee staff aide put it, "a teachable moment. If there's a lesson that comes out of this . . . it's that if you make an agreement, you have to make sure that agreement is going to be honored by the members up here. Otherwise, it might not be what you thought it was. Going forward, if members are . . . going to negotiate an agreement with the White House, they probably want to make sure that they have some sort of an understanding about how those nominees are going to be handled."

Perhaps the most difficult state judicial selection scenario to profile and the final example we will consider is the state of Texas, which, to date, has not been a party to any package of nominees negotiated between the Obama administration and Republican Senators Cornyn and Cruz. Presently, Texas is home to the largest number of judicial vacancies, seven on its US district courts and two Texas seats on the Fifth Circuit US Court of Appeals. This represents a significant improvement, however, over its previous position, as three Texas district court seats and one Fifth Circuit seat were filled in the 113th Congress, and three district court nominees from Texas were among the few Obama candidates confirmed by the 114th Congress in 2015. It still appears, however, that Texas represents the primary example, the poster child for judicial selection obstruction and delay. While one could, in fact, conclude that is the case, as have many liberal advocacy groups including the Alliance for Justice, whose considerable activity in judicial selection politics continues to focus on the state, in reality, the Texas situation is quite complex and not easy to characterize.

To understand the place of Texas in federal judicial selection politics, one must start with an understanding of the processes the state's senators employ to unearth and recommend prospective nominees. Those processes, as described by a Republican Judiciary Committee staff aide, are exacting (or exceedingly slow, depending on your perspective) and thorough (or cumbersome). "The Texans have an evaluation committee, 35 lawyers on it and anyone can apply. And they all get in there and they get interviewed. And some of those are then sent to the members [Senators Cornyn and Cruz] and they have this elaborate process." A senior Democratic Judiciary Committee staff member was ambivalent in addressing the question of whether the Texas processes were unduly slow.

> Stalling is one of those gray areas where it's tough to know. We have this situation in Texas where they have a gigantic selection commission. Some people could say that's stalling and some people could say that, when Kay Bailey Hutchison left the Senate and Senator Cruz came, he has a right to put on his own people. And these are people with full-time jobs, they work 40 hours a week. So I think that's a much more gray area to figure out if that's abuse. If you had a firebrand saying "I'm not going to give you any recommendations" or "I'm only sending you my college roommate," I think that's much more clear abuse, but that's not what we see. I know a lot of people do have questions about Texas specifically, but I would say that when Ted Cruz gets elected he does have the right. It's not abuse for him to disagree to whatever Kay Bailey Hutchison has agreed to.

The view that Texas utilizes a very slow process but, at the end of the day, produces good results, albeit at a snail's pace, was a common refrain in our interviews across many points on the political spectrum. A senior Democratic Judiciary Committee staff member volunteered, "The three that got confirmed in December were actually really great." While agreeing that "the process is very slow," Vincent Eng adds, "The senators have great faith in the committee that is vetting the candidates. The names that have come out of there, by and large, everyone has been pleased with. It's huge. Logistically, just arrangements to have all the committee members there when they have interviews is very onerous." Interestingly, Eng concludes, "Elevating the issue would not be helpful. If groups over-engage in Texas, that's a bad thing. It would just get Cruz more engaged."

And, indeed, even the groups that have been highly critical of the pace of judicial selection in Texas have not taken issue with the nominees who have emerged and been confirmed from these processes. The Alliance for Justice's Michelle Schwartz granted that "in Texas, they take a really, really, really long time but, in the end, they come out with people who are pretty decent." Marge Baker agreed that "the district court nominees have not been bad." From the perspective of the White House, Christopher Kang added, "We continue to work with the Texas senators. And I tell this to everybody. My only complaint . . . is that it's a much slower process than I'd like it to be. But when you look at the results and see the pretty good judges who are coming out of there? It turns out they have a lot of nominees. It's going to be slow. But these are nominees I feel good about."

Perhaps the major sticking point for those critical of the Texas processes is the speed with which the senators notify their selection committee of vacancies and, as well, their failure to move on prospective vacancies when a judge announces his or her intention to retire or take senior status. Thus, as Marge Baker notes, "Texas has a number of future vacancies and the senators are deliberately not moving to address those. They could very easily have their commission come up with potential nominees to fill the vacancies they already know are coming up and they are not being asked to do that and it slows the process down."

Additionally, as argued by a Senate Judiciary Committee Democratic staff aide, the senators do have a responsibility to address the unusual vacancy crisis that exists in their home state. "They have the accountability of the vacancies. It's embarrassing to have more vacancies than any other state. They get pressure about it from members behind the scenes too. Even during the immigration markup. 'We need to get more judges on the border and you're not even sending in names.'" Such an argument, however, does not ring true for those seemingly content to wait the clock out on Texas vacancies, hoping for the election of a Republican president in 2016, such as Curt Levey. "Among people who follow it, it's noteworthy that there's a disproportionate number in Texas. If the past is any measure, the idea that there's a particular circuit or state that has a lot of vacancies never gets traction. . . . How many people in the nation are riveted by judicial emergencies?"

ADVOCACY GROUPS AND JUDICIAL SELECTION IN THE 113TH CONGRESS

We have focused extensively on the DC Circuit confirmation battles and the invocation of the nuclear option in order to understand judicial selection processes and their outcomes during the first half of President Obama's second term in office. These two central themes also offer a useful palette for examining the activity of advocacy groups. Groups can be active players in both support of and opposition to specific nominees, and they can affect the judicial selection process in other ways.

In past iterations of our judicial selection studies, we portrayed the effective work of conservative advocacy groups in generating grassroots support for judgeship candidates among the Republican Party's conservative base. Conversely, groups from the political left, with occasional success, mounted campaigns to oppose selective nominees. We also suggested that, writ large, the judicial selection issue has been more successful motivating conservative groups on the political right and their followers, either in support of or in opposition to nominees, than it has for the liberal left. This appears to be the case because many controversial "social" issues that serve as primary rallying cries for the political right, such as restricting or banning of abortion and protecting traditional conceptions of marriage, have so often ended up being addressed in the courts.

The 113th Congress offers a somewhat unusual instance in which advocacy groups on the left were successful in raising the profile of judicial selection politics for the Democratic base in a manner that allowed these groups to serve as effective supports for the administration's selection goals and efforts. Liberal groups could reach the Democratic base by underscoring the critical importance of staffing the DC Circuit, the putative second-highest court in the land. They could also illuminate concerns explored earlier, that is, the allegation that through Republican obstruction and delay of judicial nominees, even noncontroversial district court nominees, the president was being deprived of his right to pursue his constitutional duty to appoint judges while the Senate was abdicating its responsibility to play its constitutional role to advise and

consent. The active and successful posture taken by liberal advocacy groups had an impact on groups taking the other side in judicial selection politics. Indeed, once the nuclear option was invoked, as Curt Levey of the Committee for Justice noted, groups opposing selective Obama nominees generally scaled back their activity regarding opposition to these candidacies. "There was just no point. . . . I was much less active in that area. The Committee for Justice isn't just [about] judicial nominations. Our ultimate goal is the rule of law. So we speak out on a variety of constitutional issues [and] I focused more on that and less on nominees. Some groups continued to grind away, but I felt what was the point? I've always thought that you should pick your battles."

For understanding group activity and success in the 113th Congress, as in any other time frame, it is important to recognize the tenuous environment in which groups must negotiate a fine line in their advocacy efforts, be it on behalf of or against a nominee. As one senior aide to a Senate Democrat in the leadership put it, "With the folks who go down, the only reason they go down is because of group advocacy. But on the folks who get through, sometimes group advocacy can be unhelpful in highlighting that someone is controversial. So that's a tough strategic call to make. And sometimes the groups will tone it down to help get somebody through that they want."

From the group's perspective, however, there may often be a felt necessity to "succeed," and sometimes, the need for making nuanced and pragmatic choices may not be recognized. As one liberal group advocate perceived their predicament, "Every time we get somebody who is more progressive it's a do or die moment for us. Because if that nominee, a real progressive nominee, doesn't get confirmed it's unspoken but, I think, sincerely felt, that the White House will never nominate somebody like that again. And that it's up to us, and that it will be our fault and we can never ask for somebody like that again."

How one perceives group advocacy can depend, of course, on one's vantage point. Thus, for example, an aide to a Judiciary Committee Democrat pointed out the realities when a group's frustration with the process leads to extending its reach too far, even when it is clear that a prospective nominee faces an uphill battle including, perhaps, the use of a blue slip by a home state senator to derail the nomination. "A lot of people say, 'Well, we just want him to nominate someone.' And advocates will be out there fighting for them. That's what happens—but I don't think it is very practical. I don't think people get the ends that they're really looking for, with the amount of energy it would take for one district judge to be confirmed under that method. It would take an enormous amount of time and energy on one district judge."

In short, the trick for successful group advocacy in judicial selection processes, as political consultant Vincent Eng notes, is quite simple. "Organizations that take a more pragmatic approach to the process will find that they are more successful than organizations that don't." As described by a senior Senate Judiciary Committee aide, it is critical for advocacy groups to approach their goals with nuance.

> We hear from advocates "Oh, this person needs to be nominated." But they need to ask this person very pointed questions that might be problematic to the Senate. You can't just say "missed opportunity" and blame it on the White House. If it was a missed opportunity, it was probably an error on many people's parts, the White House, the advocates and whomever to not be looking for people and asking the very hard questions very early on versus thinking that you could just recommend anyone and have them go through and blame the White House for not doing it. There's a lot of nuance to what we do here.

In the eyes of this aide, such nuance and pragmatism characterized the approach that liberal group advocacy generally took during the 113th Congress. "'Let's get in there, let's take our time' rather than criticizing our friends in a way that, maybe, we don't find very sophisticated. 'Let's get in and get all the nominees that we can.' You can't win them all. You can't make sure that every person that you wanted nominated gets there. But you have to keep doing what you're doing and there was a lot of great effort by the groups and . . . the added bonus of having more . . . judges than any time since the 96th Congress." Vincent Eng characterized this pragmatic group dynamic that ultimately defines a group's success. "Part of an advocate's role is to ask for a 10 and settle for a 7. . . . Regardless of Democrat or Republican, without someone asking for a 10, you're never going to get to 7."

When "friendly" group advocacy, the administration, and critical players in the Senate's advice and consent processes work relatively cohesively, as has most often been the case with conservative advocacy groups and their Republican governmental counterparts, groups may even find that the nature of their advocacy changes and they take on a greater participatory posture. Such was a development that one liberal group leader described during the 113th Congress. "We've shifted our activities somewhat to actually identifying and recruiting people for judgeships. We're much more involved earlier in the game than we were even two years ago. We're working with Senate offices a lot more. Suggesting nominees, making phone calls. That's new for us."

The leader of another advocacy group spoke in similar terms. "We're in touch all the time with the White House in terms of where they are and what they can tell us. Situations that they're worried about. They take suggestions from us. The access has always been there, but I think the sense of collaboration is greater now than it has been at other times. There is a real understanding of where we could, how we could help. Similarly on the DC Circuit there was a really good coordination between us and the White House."

Vincent Eng's take on advocacy groups entering such a relationship and taking on a more participatory role is that "it's not rocket science. I know what the White House wants for many of these seats. There has to be a match. For the most part, the White House has been very good about it. Every candidate that organizations put forward,

they always take a look at them. In many situations they get interviewed and they go forward."

The consequences of group advocacy in the 113th Congress can be seen in several specific confirmation settings. For example, Curt Levey credits such support as being an important factor in confirming David Barron to a seat on the US Court of Appeals for the First Circuit. Initially, it appeared that opposition to Barron's nomination would be mounted from among liberals because of discomfort over a secret memo he had written while serving in the Office of Legal Counsel in the Obama Justice Department. In short, the memo offered a legal justification for the use of drone strikes in targeting American citizens, without judicial processes, in support of the war on terror. According to Levey, "The left groups made a difference because one of his vulnerabilities was something that might anger the left. So it counts for something when the left says he's okay." Regarding another nomination, as we have seen, it is highly likely that liberal groups' unhappiness with Michael Boggs on civil rights issues drove a good deal of the Senate opposition to his district court nomination and doomed his candidacy.

In a very different situation engaging liberal group efforts, the move to process the lame-duck confirmations discussed earlier, a senior Judiciary Committee aide admitted, "We were really worried that senators were going to get on airplanes on December 11th. If you're not on the committee living and breathing judicial nominations, it turns out that you're not thinking about them all the time. So everyone was going to go home. The groups really did a good job getting some of the grassroots calling to say, 'Stay in and get all these nominations done.'"

On the biggest stage of the congressional session, the advocacy groups were given high marks for pressing the arguments for filling the DC Circuit vacancies and fostering support for invoking the nuclear option to do so, both in the Senate chamber and within the Democratic base support structure. As Marge Baker pointed out, "I think there was a sea change in terms of people understanding the importance of this court. It was very apparent how critical the DC Circuit was and a broader constellation of groups became involved." A Democratic leadership aide concluded, "In the perfect storm sense, it was ripe for them to make a difference. If they hadn't weighed in in the way they did, maybe it wouldn't have happened. Their voices often matter." Accentuating the point, Vincent Eng added, "I do think that the win on . . . the nuclear option has changed the perspective of the progressive groups. A lot of the groups felt that they didn't have much of a voice, they felt that they were being steamrolled on a lot of nominees, who was nominated, who wasn't nominated. I do think the recent wins showed that groups can be effective."

At the broadest level, liberal group advocacy on the DC Circuit battle and the invoking of the nuclear option may, in the long run, have raised the ante on the importance of judicial selection as an issue to the Democratic left, particularly in the context of the 2016 election, creating a scenario that more resembles the place that the issue

has historically held among the political priorities characterizing the Republican right base. Nan Aron pointed to "the Fix the Senate Now Coalition that grew up around changing the Senate rules and that was a real force behind this effort." Echoing the point, Marge Baker added,

> The fight over the DC Circuit and its connectedness to the rules change brought in a much broader swath of the progressive community than had ever been engaged before. The coalition was broad and active. It remains to be seen what happens in the next couple of years. But gearing up to 2016, the broader progressive community will have been energized and engaged in a way that they haven't been before about the significance of the courts for a presidential election. . . . There are plans to get people mobilized, keep people mobilized. You don't want to lose the fact that there has been some energy and people feel good about what got accomplished this year. So we want to keep building on that.

Before leaving our discussion of group activity in judicial selection processes in the 113th Congress and during the Obama administration more generally, some mention should be made of the return to a formal role for the American Bar Association's Standing Committee on the Federal Judiciary, which, since the Eisenhower years, has evaluated prospective federal judicial nominees, in an advisory capacity to the president, prior to the submission of a formal nomination. While during the W. Bush years the committee continued to perform its evaluative role, its ratings were done only after the actual nomination of prospective judges and at the behest of members of the Judiciary Committee, not the president. For his part, President Bush removed the ABA Committee from the administration's judicial selection processes in a 2001 letter in which White House Counsel Alberto Gonzales cited their "quasi official role" as "preferential treatment" that was neither "appropriate [nor] fair."[2]

During the Obama administration, the ABA Committee was reinstated to its traditional advisory role to the president. As is the case in any administration, President Obama would not relish the prospect of going forward with a nominee that the ABA deemed "not qualified." Administration officials have had an ongoing dialogue with the ABA, particularly with respect to the issue of experience. Christopher Kang, deputy counsel to the president, indicated, "Over the years, there have been some candidates that the ABA has found 'not qualified,' including some whom I continue to believe are 'qualified.' But it's all about understanding the context and the reasons for that rating—understanding where the candidates are and where the ABA is coming from. There hasn't been one yet whom the president has chosen to nominate notwithstanding the 'not qualified' rating, but obviously, he reserves the right to do so." Importantly, disputes with the ABA have never devolved to that point, a fact that Vincent Eng attributed to

2. See http://www.whitehouse.gov/news/releases/2001/03/20010322-5.html.

Christopher Kang, who "has a very, very good sense of calibrating where candidates will fall [on the ABA rating] when he evaluates them. And I know it's something that he thinks about a lot when candidates are recommended by the groups. Chris has done a remarkable job. He has established himself as a sound, reliable and engaged individual."

DIVERSITY ON THE BENCH

At this point in Obama's tenure it is almost unimaginable to discuss judicial selection without highlighting the administration's historic contribution to diversity on the federal bench. Building on the "firsts" of his first term, during which 61.8% of Obama's appointees were nontraditional, the administration continued its efforts to shape the judiciary. Here are a few highlights:

- Sri Srinivasan is the first Asian American/Pacific Islander (AAPI) judge to serve on the prestigious DC Circuit.
- Women were confirmed to district courts in two of the four states in which no woman previously had served (New Hampshire and Montana); the first AAPI judge was confirmed to district courts in Massachusetts, Maryland, and the District of Columbia; and eight openly gay judges were confirmed.
- Diane Humetewa is the first and only Native American woman ever to serve as a lifetime-appointed federal judge. She is currently serving on the US District Court, District of Arizona.

These historic firsts are not surprising given the high proportion of nontraditional appointees during Obama's first 6 years. Out of 299 appointments to lifetime judgeships on courts of general jurisdiction, 193 (64.5%) were nontraditional, that is, were not straight white males. As table 1 notes, 127 women were confirmed, which accounts for over 40% of Obama's appointees. Of these 127 women, 32% were women of color. The proportion of women confirmed far exceeds that of any previous president (including Clinton, who made the largest impact on diversifying the federal bench prior to Obama). African American appointees also enjoyed great success, as they made up almost 20% of those confirmed, and Obama's 32 Hispanic American appointees made up 10.7% of his total appointments. Both proportions are higher than in any previous administration. However, the most striking comparison across presidential administrations is for AAPI and openly gay individuals. During his first 6 years in office, Obama appointed 20 AAPI and 11 openly gay judges to the federal bench. The AAPI appointees constituted almost 7% of those confirmed over Obama's first 6 years in office; the next-largest proportion is 1.4% during Clinton's tenure, a noteworthy difference. Furthermore, by naming 11 openly gay individuals to the bench, Obama appointed more LGBT jurists than had ever served as federal judges in the entire history of our nation. Proportionately, in every category he has exceeded prior administrations. He lags

Table 1. Nontraditional Lifetime Judicial Appointees to Federal Courts of General Jurisdiction by Presidential Administration from Franklin Roosevelt through Barack Obama's First Six Years

	Women		African American		Hispanic American		Asian American		Native American		Openly Gay	
President	*N*	%[a]	*N*	%[a]	*N*	%[a]	*N*	%[a]	*N*	%[a]	*N*	%[a]
F. Roosevelt	1	.5	...	...	...	...	...	...			...	...
Truman	1	.8	1	.8	...	...	...	...			...	...
Eisenhower	...	...	...	...	...	...	...	...			...	...
Kennedy	1	.8	3	2.4	1	.8	1	.8			...	...
Johnson	3	1.8	10	5.9	3	1.8	...	...			...	...
Nixon	1	.4	6	2.6	2	.9	1	.4			...	...
Ford	1	1.5	3	4.6	1	1.5	2	3.1			...	...
Carter	40	15.5	37	14.3	16	6.2	2	.8	1	.4	...	...
Reagan	29	7.8	7	1.9	15	4.0	2	.5			...	...
G.H.W. Bush	36	19.3	13	7.0	8	4.3	...	...			...	...
Clinton	108	29.3	61	16.6	25	6.8	5	1.4	1	.28	1	.28
W. Bush	69	21.4	24	7.5	30	9.3	4	1.2			...	...
Obama	127	42.5	57	19.1	32	10.7	20	6.7	1	.33	11	3.7

[a] Percentage of total number of appointees to lifetime judgeships on courts of general jurisdiction (US district courts, US appeals courts, and US Supreme Court).

Clinton only in the absolute number of African Americans appointed to the bench, and as deputy counsel to the president Christopher Kang noted, "we certainly will [be ahead] by the end of the [114th] Congress."

Another useful evaluation is to compare what Obama had already accomplished by the end of his first term to what new happened in the subsequent 2 years. As of January 1, 2013, 28% of judges in active service were women, an increase of 10.8% from when he took office (table 2). In terms of racial and ethnic diversity, 11.7% of federal judges were African American, 8.2% were Hispanic American, and 2% were AAPI, an increase of 7.7%, 15%, and 112.5%, respectively. Finally, less than 1% of federal judges were openly gay, but this still represents a 200% increase from the start of Obama's first term. Overall, the percentage of nontraditional judges in active service (when not double counting women who also belong to a racial minority group or who are openly gay) totaled 42.1% at the end of the 112th Congress. This represents a noteworthy 8.6% increase for his first term.

From our interviews with Christopher Kang, it is clear that he thought of the first-term successes as a benchmark by which they would measure their efforts during the second term. "What we've done after the president's first term is use those statistics as a new frame of reference. . . . Based on our efforts in the first term, even if there was less diversity in the second-term confirmations, the overall percentages might not change much. We wanted to make sure that we continue to meet the standards we set for ourselves in the first term and not simply rely on those overall figures."

Table 2. Proportion of Nontraditional Lifetime Judges in Active Service on Courts of General Jurisdiction: January 1, 2013, and January 1, 2015

	2013		2015		
	%	*N*	%	*N*	% Increase
	A. US District Courts				
Women	27.9[a]	185	31.2[a]	207	11.9
African American	11.4	76	13.0	86	13.2
Hispanic	8.4	56	9.6	64	14.3
AAPI	2.3	15	3.3	22	46.7
Native American			.15	1	100
Openly gay	.5	3	1.7	11	266.7
Total		279[b]		322[b]	15.4[b]
	B. US Courts of Appeals				
Women	28.1[c]	47	33.5[c]	56	19.1
African American	12.6	21	12.6	21	0
Hispanic	7.2	12	7.2	12	0
AAPI	1.2	2	1.8	3	50
Total		71[b]		81[b]	14.1[b]
	C. US Supreme Court				
Women	22.2[d]	3	22.2[d]	3	.0
African American	11.1	1	11.1	1	.0
Hispanic	11.1	1	11.1	1	.0
	D. All Three Court Levels				
Women	28.0	235	31.6	266	13.2
African American	11.7	98	12.9	108	10.2
Hispanic	8.2	69	9.2	77	11.6
AAPI	2.0	17	3	25	47.1
Native American			.12	1	100
Openly gay	.4	3	1.31	11	266.6
Total nontraditional	42.1[b]	354[b]	47.6[b]	400[b]	13.0[b]

[a] Out of 664 authorized lifetime positions on the US district courts. Some double and triple counting is inevitable. In 2015, 69 women also were African American, Hispanic, Asian American/Pacific Islander (AAPI), Native American, or openly gay. Additionally, there were five women who fit into two other nontraditional categories. There was also one openly gay African American man and one man who identified as both African American and Hispanic. Both double-counted and triple-counted individuals are included only once for the purposes of calculating total nontraditional judges.

[b] Totals and percentages do not double count those who were classified in more than one category.

[c] Out of 167 authorized lifetime positions on the numbered circuits and the US Court of Appeals for the DC Circuit, all courts of general jurisdiction. Some double counting is inevitable. In 2015, 11 women also were either African American, Hispanic, or AAPI.

[d] Out of nine authorized positions on the US Supreme Court. One woman was also Hispanic.

By all measures they were able to meet their goals, illustrated by the impact Obama's second set of nominees had on the overall racial and gender diversification of the federal bench: as of January 1, 2015, 47.6% of judges were nontraditional, an increase of 13.0% during the 113th Congress (table 2). When we look at each individual category,

the results are even more notable. At the end of the 113th Congress, 31.6% of judges in active service were women, an increase of 13.2% during the first half of his second term. In terms of racial and ethnic diversity, 12.9% of federal judges were African American, 9.2% were Hispanic American, and 3% were AAPI, an increase of 10.2%, 11.6%, and 47.1%, respectively. Finally, just over 1% of federal judges were openly gay, but this still represents a 266% increase during the last 2 years. There is no mistaking that, according to Kang, the administration's attention to diversity is creating a judiciary "that more closely looks like the population of the country."[3]

District Courts

These trends hold when examining the district courts separately, where the proportion of nontraditional judges at the end of the 113th Congress is 48.5%—an increase of 15.4% from the preceding term. Every group made gains—women, +11.9%; African Americans, +13.2%; Hispanic Americans, +14.3%; AAPI, +46.7%; Native Americans, +100%; and openly gay individuals, +266.7% from the beginning to the end of the first 2 years of Obama's second term.[4]

Most obviously, the Obama cohort was able to further diversify the district courts because 63% of his appointees were nontraditional. Also, as we discuss throughout our article, Obama was more successful in getting his nominees confirmed during the 113th Congress. When combined—a larger cohort of judges, of whom the vast majority were nontraditional—the result is a 15.4% increase from the preceding term. One cautionary reminder, however, is that the president can affect bench diversity only if he is able to appoint nontraditional judges to seats previously held by a "traditional" judge—that is, a straight white male. Obama has benefited from comparable constancy in the proportion of vacancies being created by nontraditional judges leaving the bench. During his first term, approximately 42% of vacancies were created by nontraditional judges, and this crept up only slightly to 45% during the 113th Congress. Going forward, Obama's record over his final 2 years will depend in large part on his continued success in obtaining confirmation of a large and diverse set of appointees to counter what may be an increase in nontraditional judges leaving the bench.[5]

The aggregate increase in diversity is diminished a bit when we look at individual district courts. During the 113th Congress, women fared best as they were appointed to

3. Over his first 6 years, Obama has appointed a high proportion of "double-diverse" and now even "triple-diverse" nominees, i.e., those with two or three nontraditional characteristics. When examining "diversity" in the aggregate, this double or triple counting artificially inflates the number of judges credited to the president. However, when viewing nominations as a simple dichotomy, diverse or not diverse, the impact is lessened.

4. Obama appointed 14 double-diverse and four triple-diverse judges to the district courts during the 113th.

5. From January 1, 2015, through January 25, 2016, there have been 46 vacancies, of which 16 were created by nontraditional judges.

nine district courts in which there previously had been none; that leaves only six in which there has never been a female judge.[6] African American judges were confirmed to two district courts in which there previously had been none, but there are still 35 district courts (39%) that have never seated an African American judge. Sixty-two courts remain without Hispanic representation (68%) after Obama added only one Hispanic judge to a court in which none had previously served. AAPI judges are present on district courts in only nine states, but President Obama is credited with appointing the "first" AAPI jurist to district courts in two of those nine during the 113th Congress.

When considering the totality of his appointments, at the start of Obama's presidency, 14 district courts had never seated a nontraditional judge; at the end of 6 years, this number dropped to four.[7] Furthermore, it is worth noting that many of the district courts that have remained all white straight male are the smallest courts in the nation and thus provide fewer appointment opportunities. However, if these opportunities arise, it is likely that Obama will attempt to offer the "first" nomination.

Courts of Appeals

Largely because the filibuster rules change removed the logjam of President Obama's nominees, he was able to secure confirmation for 20 out of 22 nominees, of whom 14 (70%) were nontraditional. The new cohort certainly added to the aggregate diversification of the appeals courts: when not double counting women who also belong to a racial minority group or are openly gay, the proportion of nontraditional judges on the courts of appeals is 48.5%, an increase of 14.1% (or 10 seats) over Obama's first term (table 2). During the 113th Congress, the majority of the president's circuit judge appointees were women. This surpasses the previous benchmark of 35% female circuit judges in a single term, also set by Obama. However, in contrast to the district courts, the net gain of diverse seats in the courts of appeals came almost exclusively from the addition of women.

Over the past 2 years no Hispanic appeals court judge was confirmed to the bench and only one AAPI and one African American judge were confirmed. With the departure of Judge Andre Davis, one of President Obama's first appointees to the Fourth Circuit, the net gain for African Americans is zero. Currently, there are no Native American or openly gay appeals court judges, nor have there ever been.[8]

6. This is out of 91 district courts and does not include the three districts in the territories of Guam, the Virgin Islands, and the Northern Mariana Islands. The district courts that have never seated a female judge are Alabama (Middle District), Idaho, Mississippi (Southern District), North Carolina (Western District), North Dakota, and Oklahoma (Eastern District).

7. The district courts that remain all white straight male are as follows. The parentheses represent the number of seats on each of the district courts: Idaho (2), North Carolina-W (4), North Dakota (2), and Oklahoma-E (1).

8. Todd M. Hughes is President Obama's first openly gay nominee to serve at an appeals court level, on the US Circuit Court of Appeals for the Federal Circuit, which we do not include in our analysis since it is not a court of general jurisdiction.

Obama's appellate appointments during the 113th Congress led to a majority of nontraditional judges on two additional circuits—the Eleventh and DC—which, when added to the Second, Fourth, and Sixth, totals five circuits in which the majority of judges are nontraditional. This exceeds what W. Bush accomplished during his entire presidency. Gender diversity increased on seven courts of appeals (the Third, Fourth, Eighth, Ninth, Tenth, Eleventh, and DC Circuits) and decreased on one (the Fifth Circuit). Presently, all of the geographic circuits have at least two sitting female judges. The Ninth Circuit boasts the most female judges in absolute numbers (10), but the Sixth Circuit lays claim to more women proportionately (46%).[9]

Less significantly, racial and ethnic diversity increased on only the DC Circuit and decreased on the Fourth. Owing to Obama's appointments in his last term, every geographic circuit now has seated an African American; however, Hispanic judges have yet to serve on four of the 12 circuit courts of general jurisdiction (the Sixth, Seventh, Eighth, and DC Circuits). AAPI jurists currently sit on the Second, Ninth, and DC Circuit Courts.

Table 3 aggregates district courts by circuit. The table also lists the percentage of women judges in each district and compares the percentage of African Americans, Hispanics, and AAPI to the percentage of each group in the circuit's general population, since we expect states with more diverse populations to also have more diverse courts.[10] Women have the greatest presence on district courts within the Second, Eleventh, and DC Circuits and the lowest within the Sixth and Third Circuits.[11] The Sixth and Seventh Circuits saw the largest percentage increase (40%) with a net gain of four seats each during the 113th Congress. Notably, the number of women serving on district courts in the Fourth Circuit, which includes Maryland, North Carolina, Virginia, West Virginia, and South Carolina, has doubled during Obama's first 6 years—from eight to 16. Similarly, there are 50% more women serving on district courts in the First Circuit now than when Obama took office.

The highest concentration of African American district judges is in the Second Circuit, which benefited from the addition of four new African American appointees. The Fourth Circuit has the second-highest percentage, and it also is the circuit with the largest population of African Americans.[12] However, comparing overall representation

9. This percentage reflects 7/15 active judges on the Sixth Circuit and does not include the current vacancy. Using total judgeships as the denominator, rather than active judges, the DC Circuit has more women proportionately: 5/11 (45%).

10. Calculations for the First Circuit are performed with and without Puerto Rico to get a more reliable view of the congruence between the Hispanic population in that jurisdiction and its representation on the district bench.

11. These percentages are calculated using the number of district court judges in active service as the denominator, thus excluding any vacancies.

12. The African American population in the DC Circuit is actually the highest, but since the circuit consists only of one district court, the underlying unit of analysis is different; thus we excluded it from comparison.

Table 3. Diversity on the District Courts, January 1, 2015: Active Judges Aggregated by Circuit

		% African American		% Hispanic		% AAPI	
Circuit	% Female, District Courts	General Population	District Courts	General Population	District Courts	General Population	District Courts
First.1	31.0	8.1	3.4	33.1	24.1	3.7	3.4
First.2[a]	31.8	6.5	4.5	9.0	.0	4.9	4.5
Second	42.6	16.3	19.7	17.6	8.2	7.7	3.3
Third	29.1	13.3	12.7	11.7	10.9	5.8	1.8
Fourth	30.8	22.8	17.3	8.0	.0	4.2	1.9
Fifth	31.6	17.3	9.2	31.0	19.7	4.0	.0
Sixth	24.1	13.4	13.8	4.2	.0	2.9	1.7
Seventh	30.4	11.5	10.9	11.7	4.3	3.9	6.5
Eighth	31.7	8.2	14.6	5.4	.0	3.3	.0
Ninth	29.6	5.7	11.1	31.5	14.8	12.6	10.2
Tenth	29.4	4.6	8.8	18.6	20.6	2.8	.0
Eleventh	40.0	22.4	13.9	17.0	9.2	3.0	.0
DC	40	49	40	10.3	6.6	4.1	6.6

Note.—Data on the 2014 general population are compiled from the US Census Bureau. Note that according to the standards set by the Office of Management and Budget and implemented by the Census Bureau, race and Hispanic origin (ethnicity) are separate and distinct concepts, and when collecting these data via self-identification, two different questions are used.

[a] Excluding Puerto Rico.

on the bench to the general population, only five circuits have African American representation on the courts equal to or greater than their representation in the population (the Second, Sixth, Eighth, Ninth, and Tenth Circuits). The largest "overrepresentation" occurs on district courts within the Ninth Circuit, where 11.1% of the active district court judges are African American compared to 5.7% of the population. Conversely, there are seven circuits in which African Americans are underrepresented at the trial level, with the largest disparities occurring in the most southern circuits (the Fifth and Eleventh Circuits)

Underrepresentation is even more acute for Hispanic Americans, despite 43% population growth over the past decade according to the latest census; the states within the First, Fourth, Sixth, and Eighth Circuits have no Hispanic district judges, and relative to their representation in the population, the Seventh and Ninth Circuits have very few. The highest congruence between population and judicial representation is in the Third and Tenth Circuits.

Owing to Obama's historic record of appointing AAPI judges to the bench, they are present on district courts within eight circuits, of which he appointed the first AAPI judge on five. This underscores the fact that Obama is not simply appointing AAPI jurists to district courts in states where they are already represented, that is, New York and California.

There are no AAPI judges on districts within the Fifth, Eighth, Tenth, and Eleventh Circuits, despite having a very large (and growing) presence in Texas and Florida, ac-

cording to the US Census Bureau.[13] District court representation roughly equals that of the general population in the First and Ninth Circuits, and it is not particularly surprising that the highest concentration of AAPI district judges is in the Ninth Circuit—10.2%—since it also is the circuit with the largest population of AAPI (12.6%). Finally, with the confirmation of Judge Derrick Kahala Watson, the US District Court for the District of Hawaii is the first federal court in US history with a majority of AAPI judges.

Experiential Diversity

While the White House received nothing but accolades from liberal advocacy groups for the focus on nominating nontraditional judges to the bench, some advocacy groups were not as kind about what they perceived to be an overrepresentation of prosecutors and corporate lawyers. This criticism appears to have diminished a bit over the past 2 years, possibly because of "experiential diversity" becoming a more important factor in the administration's judicial selection process. One advocate from a left-leaning group emphasized this point. "We have been singularly focused on this question. A minuscule number of judges have been public interest lawyers. . . . I do believe the White House listened. The White House started tracking experiential diversity." Christopher Kang agreed, explaining, "Just as the judiciary benefits from people with different experiences, different backgrounds, there are people who have experience in a wide range of the legal profession. So what we're continuing to try to do is encourage people who have different legal experience to think about applying to be a federal judge."

This point was stressed by Elana Tyrangiel, principal deputy assistant attorney general in the Office of Legal Policy in the Department of Justice. "As part of our vet process, part of what we have a window into is some of the diversity of the people going to the bench, including experiential diversity, and that is something that we note and is part of the discussion" (interview, January 8, 2015). Michael Zubrensky added, "The White House always asks senators for three candidates for every judicial vacancy. That's a practice that goes back in time. To the extent that there's a choice among names, the White House will factor in experiential diversity." This last point emphasizes that, especially at the district court level, the White House is dependent on home state senators to generate a list of names from which the administration selects the final candidate. In response to some of the criticisms from left-leaning advocates about the lack of professional diversity, a staff aide to a Judiciary Committee Democrat made this suggestion: "Groups who complain about that underestimate the role of the home state senators in suggesting nominees. They should be directing that criticism at the senators, not the president."

Whether or not the White House or senators should be held responsible for the perceived lack of attention to professional diversity earlier in Obama's tenure, clearly the

13. Both Texas and Florida were ranked in the top 10 as states with the largest Asian alone or in combination populations in 2010; Texas ranked third and Florida was eighth.

White House is focused on getting the message out that this is now on its radar screen. Most telling is a comparison of two infographics from the White House website. In the first, from September 2013, there is very little attention paid to experiential diversity, focusing mainly on gender, racial, and ethnic diversity. However, in the second, published in December 2014, an entire section is devoted to "experiential diversity," which highlights the fact that "eighty-nine percent of President Obama's judges have worked outside of private law firms," among other statistics.

While the administration did indeed ramp up its public annotation of experiential diversity, many of our interviewees emphasized the complexity of "measuring" this kind of diversity as a possible reason why it was perceived as less important. Christopher Kang explained, "It's very easy for me to rattle off the statistics for women and minorities, and openly gay candidates who have become judges. It's a little bit harder to talk about experiential diversity because one lawyer can fall into four or five different categories, so counting them becomes harder to quantify. But that is—and has been—an incredibly important part of how we think about the judiciary." Regardless of the difficulty in quantifying this kind of diversity, the administration acknowledges that it is incumbent on it to target a pool of candidates with wide-ranging experiences to ensure experiential diversity is reflected on the bench.

Concluding Thoughts

It is clear that the administration has enjoyed great success in reshaping the judiciary to better reflect the populace in terms of race, gender, and sexual orientation. As a Democratic senatorial aide noted, "You look at these statistics, it's really trailblazing. They've done an amazing job in diversifying the bench. It will pay dividends down the road. Our country is changing and people are going to be able to walk into a courtroom and see a judge who looks like them. It's really been a sea change." The administration and left-leaning advocates alike see this as a long-term, as well as short-term, victory, believing that their making diversification of the judiciary such a public priority will affect the way future presidents view judicial selection. Indeed, each side seems optimistic that it will be easier going forward now that many of the barriers have been broken. As Marge Baker of PFWA observed, "There has been a qualitative change. The expectations are different. It would not be an issue for a Republican president to nominate an openly gay nominee, which would not have been the case before."

However, not all our interviewees viewed the focus on diversity as a positive. A representative from a conservative advocacy group lamented that a Republican president may feel pressure to include diversity among his criteria in judicial selection. "I think this country is only getting more politically correct, not less, so there's going to be as much or more pressure on the next president. The next president is going to want to have his own first, there won't be a lot left, but they'll figure out something."

It's not simply the pressure to consider diversity that seems to bother the right. From the same advocate:

> Obama has made diversity a high priority. I often say, unlike in something like admissions, it's impossible to know . . . to what degree he's lowering the standard. Now you might say that he's not lowering the standard at all, but of course you are. The priority that you can put on anything can only add up to 100%. . . . If you put more priority on what school they went to, you can put less on what they've accomplished as a lawyer. If you put more on their gender, you can put less on [something else]. So if a huge part of that 100% is used up on sexual orientation, color and gender then you can't put as much on merit. So, I think it's inevitable that there's been some lowering of standards to achieve that. . . . So the more anxious you are to pick an African American, the less strength you can put on other things. So it's inevitable. It's simple logic. You're not supposed to say it, but it's simple logic. I'm not saying that these people are not qualified. I'm saying there's got to be some lowering of standards. And I don't begin to know how big that is.

Naturally the administration does not share this view. In many of our discussions at the Department of Justice, the Senate Judiciary Committee, and the Office of Legal Policy, each emphasized that they had no difficulty finding qualified nontraditional candidates. Christopher Kang underscored this point. "There is a growing diversity of the legal profession. There are so many more qualified 'nontraditional' lawyers out there who are at that level now of becoming good candidates to be judges."

PARTISAN MAKEUP OF THE BENCH

It took 6 years and a near-record-setting number of district court appointments, but President Obama was finally able to shift the overall partisan balance on the lower federal courts in the Democrats' favor. At the start of the 113th Congress the proportion of authorized seats on lower federal courts held by judges appointed by Democratic presidents was 44.1%. It had increased to 53.3% as the 113th ended (see tables 4 and 5). When vacancies are excluded, the overall percentage increases to 55.2%. This is noteworthy when one considers that when Bill Clinton left office after 8 years, despite having appointed the largest cohort of district judges of any president and the second-largest complement of appellate judges (after Reagan), only 49% of all active lower court judges were appointed by Democrats. Another reference point: at this same point in W. Bush's second term, he had increased the proportion of Republican appointees by only 1.5% (51.1 to 52.6).

While it is instructive to examine the overall partisan change on lower courts, we also separately analyze the district courts and courts of appeals, as they tell two somewhat different stories.

District Courts

Owing primarily to the administration's ability to fill a large number of the vacancies left at the end of the 112th Congress, Obama was able to increase the proportion of

Table 4. Makeup of Federal Bench by Appointing President, January 1, 2015 (Lifetime Positions on Lower Courts of General Jurisdiction)

	District Courts				Courts of Appeals			
	Active		Senior		Active		Senior	
	%	*N*	%	*N*	%	*N*	%	*N*
Obama	37.0	246	. . .	. . .	27.5	46	.96	1
G.W. Bush	34.9	232	2.7	12	30.5	51	3.8	4
Clinton	16.0	106	29.1	128	23.4	39	12.5	13
Bush	4.4	29	16.6	73	4.8	8	18.3	19
Reagan	3.6	24	27.3	120	8.4	14	34.6	36
Carter	.45	3	15.2	67	1.2	2	19.2	20
Ford	.15	1	1.6	7	.6	1	2.9	3
Nixon	. . .	. . .	6.1	27	. . .	. . .	4.8	5
Johnson	.15	1	.9	4	. . .	. . .	2.9	3
Kennedy	. . .	. . .	.45	2	. . .	. . .	. . .	. . .
Vacancies	3.3	22			3.6	6		
Total	100%	664[a]	100%	440	100%	167	100%	104

Note.—Percentages were rounded to 100%.
[a] Does not include temporary district court judgeships.

authorized seats on district courts held by Democratic appointees by 9.5%, tipping the partisan balance from majority Republican to majority Democratic. As shown in table 5, at the beginning of the 113th Congress, Democratic appointees held 44.1% of the total authorized positions for the district courts, and by the end, the percentage had increased to 53.6%; when not including vacancies the proportion grows to 55.5%. Obama's

Table 5. Judgeships by Party (%)

	2013	2015
District courts:		
Democratic	44.1	53.6
Republican	49.1	43.1
Vacancies	6.8	3.3
Courts of appeals:		
Democratic	44.3	52.1
Republican	47.9	44.3
Vacancies	7.8	3.6
Overall:		
Democratic	44.1	53.3
Republican	48.9	43.3
Vacancies	7.0	3.7
Overall (not including vacancies):		
Democratic	47.5	55.2
Republican	52.5	44.8

imprint on the district courts during the 113th Congress extends the trend we saw during the 112th when the proportion increased by 6.8%.

During the 113th Congress, Obama obtained confirmation of 109 district court judges out of 123 nominations (88.6%) from 131 appointment opportunities, bringing the total confirmations for his first 6 years in office to 250.[14] Obama appointees accounted for 37.0% of federal district judges in active service at the end of the 113th.[15]

As we discussed earlier, Obama's successes at the district court level during the 113th Congress can be explained in part by the limited bipartisan rules reform agreed to in January 2013, which offered an expedited path to confirmation for district courts by allowing district court nominees to be confirmed with only a fraction of precious floor time. Additionally, Obama was able to fill a majority of the 45 vacancies left at the end of the 112th Congress.[16] At his 6-year mark, only 22 district court vacancies remained. Finally, while during the 111th and 112th Congresses a large majority—nearly 71%—of "new" vacancies were created by Democratic appointees leaving active service, this trend slowed during the 113th.[17] Of the 74 vacancies that occurred between 2013 and 2014, only 53% were from Democratic appointees leaving active service. Since the president's ability to alter the partisan makeup of the bench is contingent on his ability to replace appointees of the other party with his own, the slowdown of Democratic departures from the bench helped Obama significantly.

Also notable is that of the 86 judges who left active service on the federal district courts during the 113th Congress, 41 (47.4%) were Clinton appointees. This represents the "generational effect," which theorizes that the overall complement of departing judges in any given administration is dominated by the appointees of a specific predecessor of the same party as the sitting president. Carter appointees departed during Clinton's administration, Reagan appointees departed during W. Bush's 8 years, and now we see Clinton appointees leaving in abundance. In fact, nearly 58% of active Clinton judges left the district court during Obama's first 6 years in office.

As Obama's second term winds down, maintaining the Democratic edge in appointments into the future will depend on two things: (1) continued partisan equilibrium of judges leaving active service, which may be difficult given that Clinton appointees still make up 16% of active service judges; and (2) Obama's ability to appoint a critical mass of district court judges during his last 2 years. However, considering the current state of

14. By comparison, at this point in their presidencies, Clinton and W. Bush successfully appointed 248 (83.5% of nominees) and 203 (79.3% of nominees) district court judges, respectively.

15. At this juncture in his presidency, W. Bush had appointed only 30.3% of district court judges while Clinton had appointed 37.5% of district court judges after 6 years in office.

16. Of the 131 opportunities, 45 (34%) came from inherited vacancies, 69 from judges taking senior status, 4 from elevations to the courts of appeals, 10 from retirements and resignations, and 3 from death.

17. Vacancy data include judges who left the bench because of retirement, resignation, elevation, and death; the overwhelming majority, of course, took senior status.

the confirmation process—as we write at the end of January 2016, only 11 district court nominees have been confirmed and there are 59 vacancies—chances are President Obama will not be able to shift the partisan balance in the district courts much further during the 114th Congress.

Courts of Appeals

Turning our attention to the courts of appeals reveals a somewhat different picture. In terms of confirmations, Obama was significantly more successful during the first half of his second term than in previous years; he secured confirmation of 20 out of 22 nominations (90.9%) compared to 12 out of 21 (57.1%) and 15 out of 22 nominations (68.2%) during the 112th and 111th, respectively. This proportion of confirmations was at a level not seen for at least 20 years and increases his overall confirmation rate to 72.3% for the first 6 years.[18] Not surprisingly given this record achievement, Obama was finally able to attain a Democratic majority on the courts of appeals: 44.3% of authorized seats on the courts of appeals were held by judges appointed by Democratic presidents at the start of Obama's second term, and this number increased to 52.1% at the end of his 6 years in office (+7.8%). Moreover, taking into account only active judges, the Democratic advantage is even larger: 54.0% of active judges are Democratic appointees.

In a comparison of district courts to courts of appeals, a difference emerges when we analyze the size of the Obama cohort relative to that of other presidents. Whereas 37% of active service district judges were appointed by Obama, his appointees accounted for only 27.5% of the federal courts of appeals judges in active service at the end of the 113th, still lagging the W. Bush cohort of 30.5%.

However, and most importantly, the president can affect the balance on the bench only if he is able to appoint judges to seats previously held by the opposing party or newly authorized seats. This is where Obama's confirmations to the appeals court truly make their mark. Of his 47 total appointments, 25 were to seats in which the incumbent was appointed by a Republican and one was to a new seat (55.3%). Also, similarly to the district courts, we saw partisan equity in departures from the bench. At the courts of appeals, 53.8% of those who left active service were appointed by Democrats, which is almost identical to the 53.5% we saw at the district court level. This means that going forward, Obama does not have to play as much "catch-up." Indeed, Obama may be able to more greatly affect the overall partisan makeup of the bench because, at the court of appeals level, the Clinton cohort seems to be retiring and resigning at a far lower rate. While the vacancies created at the district court level were disproportionately attributed to Clinton judges leaving the bench, here we see an equal divide: two

18. At this same point in W. Bush's presidency, only 49 of his 91 nominees had been confirmed (53.8%); Clinton had confirmed 48 out of 68 nominees (70.1%).

judges left active service from each of the previous administrations—Carter, Reagan, H. W. Bush, Clinton, and W. Bush.

In total, over his first 6 years, Obama had 80 appointment opportunities to the courts of appeals for which he submitted 65 nominations. He succeeded in getting 47 nominees confirmed (59%), which is slightly less than the 250 of 384 opportunities at the district court level (65%).

Another way to evaluate the impact of a president's appointees on the partisan makeup at the appellate level is to aggregate by circuit and examine how many courts have Republican-appointed majorities or vice versa.[19] Analyzing Obama's first 6 years in this manner confirms the considerable impact of his appointees at the appellate level. At the start of Obama's presidency, nine of the 12 geographical circuits had Republican-appointed majorities, one had a Democratic-appointed majority, and two were evenly divided.[20] After his first 6 years in office, however, only four courts had Republican majorities and eight had Democratic majorities.[21] That means that seven courts of appeals on which Republican appointees had a majority or were evenly split at the start of his term now have Democratic-appointed majorities—the First, Second, Third, Fourth, Tenth, Eleventh, and DC.[22] The First and Tenth Circuits shifted during the 113th Congress as we had predicted they would: recent vacancies created by republican judges leaving active service combined with the Obama administration's increased promptness in offering nominees almost guaranteed the swing, but the DC circuit was not as predictable given the long history of entrenched partisan warfare over nominations to the court. However, as detailed in the text, once the dust settled after the filibuster rules change, three Obama appointees were confirmed to the DC Circuit, guaranteeing a Democratic majority on that court well into the future.

Besides shifting the partisan balance on courts of appeals, Obama also made significant strides in decreasing the number of courts on which Republicans, particularly W. Bush nominees, constitute a supermajority. When he entered office, six of the 12 geographical circuits had Republican supermajorities, where Republican appointees occupied at least twice the number of seats as Democratic appointees.[23] At the end of 6 years, only three remained—the Fifth, Seventh, and Eighth Circuits.

19. For our discussion of the partisan makeup aggregated by circuit, we are referring to majorities and supermajorities of active judges, not authorized judgeships.

20. Throughout our analysis we consider Roger Gregory to be a W. Bush appointee. At the start of the Obama presidency, the circuits with Republican majorities were First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and DC; even, Second and Third; Democratic majority, Ninth.

21. This stands in contrast to the changes Clinton and W. Bush were able to exact after their first 6 years, where they were each able to shift the court majority on only three courts of appeals.

22. The circuits with Republican majorities are the Fifth, Sixth, Seventh, and Eighth; Democratic majorities are the First, Second, Third, Fourth, Ninth, Tenth, Eleventh, and DC.

23. On January 1, 2009, the circuits with Republican supermajorities were the Fifth, Sixth, Seventh, Eighth, Tenth, and DC.

Besides detailing the partisan alignment of active judges, the data in table 4 also underscore the impact of judges opting to take senior status, since the number of senior judges is more than half the number of active judges on each court level. While senior judges have reduced caseloads, they nonetheless are a critical component of the judiciary, which is especially true in an era when the federal judiciary is rarely fully staffed yet the courts are faced with heavy (and growing) caseloads. Republican appointees make up a clear majority of senior judges—54% and 64% on the district courts and courts of appeals, respectively—and certainly the strong Republican majority has an impact on judicial decision making. Even with the increase in Clinton judges taking senior status, especially at the district court level, in the absence of a dramatic rise in the number of full retirements by senior judges, Republicans will have the numerical advantage for many years to come.

One final measure of Obama's impact on the partisan makeup of the bench solidifies our conclusion that his appointments during the 113th Congress were especially consequential. Combining both court levels and including both active and senior judges, 50.6% of all judges currently hearing cases were appointed by Democratic presidents.

LOOKING AHEAD

With the loss of Democratic Party control of the Senate in the 2014 congressional elections, the question at the beginning of the 114th Congress (and President Obama's last 2 years in office) was how the president's legacy would be affected. Certainly, there was a sense that the legacy was already essentially finished because with Republican control of the Senate, Obama nominees would make little headway toward confirmation. This expectation was reinforced when Senate Majority Leader Mitch McConnell revealed in an interview that he did not anticipate the Senate confirming either new circuit court nominees or a Supreme Court nominee were a vacancy to arise.[24]

In late July 2015, as the Senate was winding down its work in anticipation of the August recess, Democratic Senator Charles Schumer took to the Senate floor to complain about the excruciatingly slow rate of judicial confirmations since the start of the 114th Congress. He noted that "more than a half year into this new Congress, the Republican leadership has scheduled votes on only five federal judges."[25] Republican Senate Judiciary Committee Chair Chuck Grassley countered that the lame-duck confirmations in the 113th should be considered part of the 114th's record. He argued, "had we not confirmed those 11 judicial nominees during the lame duck last year, we'd be roughly at the same pace we were for judicial confirmations this year compared to 2007." And Grassley added, "put that in your pipe and smoke it."

24. As reported at http://thehill.com/blogs/blog-briefing-room/news/244107-mcconnell-highly-likely-senate-wont-appoint-new-judges-for.

25. As quoted in http://www.politico.com/story/2015/07/chuck-grassley-chuck-schumer-judicial-confirmations-pace-retort-pipe-smoke-120814.

Interestingly, during the fall of 2008, before the presidential election, Senate Judiciary Committee Chair Patrick Leahy cleared 10 Bush district court nominees who were confirmed despite misgivings by some Democrats anticipating that an Obama victory would have preferred leaving those positions vacant so that the new president would fill them. If Republicans McConnell and Grassley continue to obstruct and delay Obama nominees with the result that only a relative handful are confirmed during the 114th Congress, Democrats can be expected to respond in kind once the shoe is on the other foot. As of this writing (January 25, 2016), the confirmation record of the 114th Congress looks grim. There have been only 11 district court judges confirmed and one judge to the appeals courts of general jurisdiction (there was also one confirmation to the US Court of Appeals for the Federal Circuit, a court of specialized jurisdiction). This is the lowest confirmation rate since 1947, when Harry Truman faced a Republican Senate and only 10 judges were confirmed (Goldman 1997, 81). As a result, the vacancy rate on the lower federal courts has markedly increased—in contrast to the decreases during the last 2 years of the Clinton and W. Bush presidencies when the Senate was not controlled by the party of the president.[26]

Filling a Supreme Court vacancy presents a very special case. As long as Republicans believe that they will elect a Republican president in 2016, there will be little incentive to confirm an Obama nominee to fill a Supreme Court vacancy should one occur. Nevertheless, media attention would be focused on the Court, and were President Obama to nominate a particularly attractive individual, there might be considerable pressure placed on Senators McConnell and Grassley to allow the nomination to proceed and to come to an up or down vote on the floor of the Senate. For example, it is not hard to visualize the president nominating Sri Srinivasan to fill a vacancy. Srinivasan, a moderate and a person of color, would be the first Asian American to be named to the Court. He was unanimously confirmed by the Senate to the DC Circuit in 2013; thus it would be difficult for Republicans to assert principled objections to Srinivasan. There are other potential nominees, of course, who one would think would be acceptable to all but the most extreme ideologues and partisans in the Senate. Of course, there is no expected vacancy as none of the current membership of the Court has given any indication that stepping down is under consideration.

How then can we sum up Obama's judicial legacy thus far? As suggested in both parts of this article, the president's judicial appointments legacy has already been established. Will he be able to improve on it during the life of the 114th Congress? Thus far, the evidence suggests only marginally at best. Will Republican hardball on judicial confirmations return to haunt them? If the past is any indication, the vicious cycle will continue, underscoring the old adage that what goes around comes around.

26. See Russell Wheeler, "It's the Vacancies," at http://www.acslaw.org/acsblog/%E2%80%98it%E2%80%99s-the-vacancies%E2%80%99.

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No. 17-130

In the Supreme Court of the United States

RAYMOND J. LUCIA, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Securities and Exchange Commission's use of administrative law judges as hearing officers in administrative proceedings violates constitutional limitations on "Officers of the United States." U.S. Const. Art. II, § 2, Cl. 2.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-36a) is reported at 832 F.3d 277. The order of the en banc court of appeals denying the petition for review by an equally divided court (Pet. App. 1a-2a) is reported at 868 F.3d 1021. The opinion and order of the Securities and Exchange Commission (Pet. App. 37a-109a) are reported at 112 SEC Docket 1754, and are available at 2015 WL 5172953.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2016. The court granted rehearing and entered a new judgment denying the petition for review on June 26, 2017 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on July 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has created a comprehensive scheme for the commencement, adjudication, and judicial review of proceedings brought by the Securities and Exchange Commission (SEC or Commission) to enforce the Nation's securities laws. The Commission is authorized under the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.*, and the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.*, to address statutory violations by instituting administrative proceedings before the agency. See, *e.g.*, 15 U.S.C. 77h-1, 78u-3, 80a-9(b), 80a-41(a), 80b-3(e), (f), and (k); 15 U.S.C. 78d, 78*o* (2012 & Supp. IV 2016).

In an administrative enforcement proceeding, the Commission itself may preside and issue a final decision. 17 C.F.R. 201.110. In the alternative, Congress has authorized the Commission to delegate "its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board." 15 U.S.C. 78d-1(a). Exercising this authority, the Commission has provided by rule that it may delegate the initial stages of conducting an enforcement proceeding to a "hearing officer." 17 C.F.R. 201.110. The hearing officer may be an administrative law judge (ALJ), a single Commissioner, multiple Commissioners (short of a quorum of the Commission), or "any other person duly authorized to preside at a hearing." 17 C.F.R. 201.101(a)(5).

The Commission historically has chosen to assign ALJs to act as hearing officers in its proceedings. Under 5 U.S.C. 3105, "[e]ach agency shall appoint as many

administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title," which are provisions governing agency hearings where an adjudication is required by statute to be determined on the record after an opportunity for a hearing. See 5 U.S.C. 553, 556, 557. The Commission currently employs five ALJs, who are hired through a competitive examination process conducted by the Office of Personnel Management (OPM). 5 U.S.C. 1104(a)(2); 5 C.F.R. 930.201.[1] OPM scores the examinations, ranks the candidates, and prepares a list of eligible candidates. See 5 C.F.R. 332.401, 332.402. In appointing ALJs, agencies may select from a top-three list of eligible candidates provided by OPM, 5 U.S.C. 3317(a), 3318(a), or they may select an ALJ who has an existing appointment from the same or a different agency, 5 C.F.R. 2.2(a). The Commission's ALJs are selected by its Chief ALJ, subject to approval by the Commission's Office of Human Resources on the exercise of authority delegated by the Commission. Pet. App. 295a-297a; cf. 15 U.S.C. 78d(b)(1) (Commission's authority to "appoint and compensate officers, attorneys, economists, examiners, and other employees").

In the capacity of a hearing officer in an SEC enforcement proceeding, an ALJ "shall have the authority to do all things necessary and appropriate to discharge his or her duties." 17 C.F.R. 201.111. Among other responsibilities, the ALJ may administer oaths; issue, revoke, quash, or modify subpoenas; receive and rule on the admission of evidence; withhold a party's access to agency documents; and "rul[e] upon all procedural and

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[1] See U.S. OPM, *ALJs by Agency* (Mar. 2017), https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency.

other motions." 17 C.F.R. 201.111(h); see 17 C.F.R. 201.111(a), (b), and (c), 201.230(a)(1). In response to "[c]ontemptuous conduct" during a proceeding, the ALJ may exclude the contemnor from the hearing or may "[s]ummarily suspend that person from representing others in the proceeding." 17 C.F.R. 201.180(a)(1)(ii). If the ALJ concludes that a filed document "fails to comply" with the Commission's rules or with the ALJ's own orders, the ALJ may "reject" the filing, which "shall not be part of the record." 17 C.F.R. 201.180(b). The ALJ also may, under certain circumstances, deem a party to be "in default" and thus may "determine the proceeding against that party upon consideration of the record * * * , the allegations of which may be deemed to be true." 17 C.F.R. 201.155(a).

Following an administrative hearing, the ALJ must issue an "initial decision" within a specified number of days. 17 C.F.R. 201.360(a)(2). The ALJ's initial decision may be reviewed by the Commission *sua sponte* or at the request of a party or other aggrieved person. 17 C.F.R. 201.410, 201.411(c). If further review is not requested, or if the Commission declines to undertake such review, the ALJ's initial decision "shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission." 15 U.S.C. 78d-1(c); see 17 C.F.R. 201.360(d)(2). When review by the Commission does occur, the Commission may "make any findings or conclusions that in its judgment are proper and on the basis of the record." 17 C.F.R. 201.411(a). The Commission also may remand the case to the ALJ to take additional evidence or may itself take additional evidence. 17 C.F.R. 201.452. The Commission will either issue its own opinion or will issue a "finality order"

stating that the ALJ's initial decision has become final and effective. 17 C.F.R. 201.360(d)(2); see Pet. App. 90a.

A party who is aggrieved by a final order of the Commission may seek judicial review of that order by filing a petition for review directly in a federal court of appeals. See 15 U.S.C. 77i(a), 78y(a)(1), 80a-42(a), 80b-13(a).

2. Petitioners were registered investment advisers who marketed a wealth-management strategy, which they called "Buckets of Money," under which retirement savings were divided among assets of different risk levels (*e.g.*, bonds, fixed annuities, and stocks) and periodically reallocated as those assets changed in value. Pet. App. 38a, 41a, 127a. The Commission instituted administrative proceedings against petitioners based on allegations that petitioners had used misleading slideshow presentations to deceive prospective clients about how the Buckets of Money strategy would have performed under historical market conditions. *Id.* at 41a-51a; see *id.* at 54a-62a (describing effects of alleged misrepresentations). The Commission charged petitioners with violating the Securities Exchange Act, the Investment Advisers Act, and the Investment Company Act. *Id.* at 238a.

a. The Commission assigned the initial stages of the proceeding to an ALJ, who conducted a hearing that lasted nine days. Pet. App. 116a. The ALJ presided over witness testimony and cross-examinations, admitted documentary evidence, and ruled on objections. Pet. 5. In so doing, the ALJ established "the official record" of the administrative proceeding. Pet. App. 117a n.2.

After the hearing, the ALJ issued an initial decision finding that petitioners had made fraudulent misrepresentations related to one of their investment strategies.

Pet. App. 117a. After the Commission directed the ALJ to make additional factual findings with respect to other alleged misrepresentations, *id.* at 118a, the ALJ issued a revised initial decision finding that respondents had willfully and materially misled investors, in violation of the Investment Advisers Act, *id.* at 195a-225a. The decision ordered a variety of sanctions to be imposed on petitioners, including revocation of their registrations as investment advisers; a permanent bar on associating with investment advisers, brokers, or dealers; a cease-and-desist injunction against future violations; and a total of $300,000 in civil monetary penalties. *Id.* at 235a; see *id.* at 225a-233a.

b. On appeal, the Commission conducted "an independent review of the record, except with respect to those findings not challenged on appeal." Pet. App. 40a. The Commission determined that the ALJ had correctly found that petitioners, in marketing their Buckets of Money Strategy, had willfully made fraudulent statements and omissions in violation of the Investment Advisers Act. *Id.* at 66a-86a. The Commission also largely "affirm[ed]," with limited exceptions, "the sanctions imposed below" by the ALJ. *Id.* at 95a; see *id.* at 95a-107a. Commissioners Gallagher and Piwowar dissented with respect to one aspect of the Commission's liability determination. *Id.* at 110a-114a.

Petitioners argued before the Commission that the proceedings against them were unlawful because the ALJ who had conducted the hearing and issued the initial decision was an "Officer[] of the United States" within the meaning of the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2. See Pet. App. 86a. Petitioners noted that the ALJ had not been appointed, in accordance with that provision, "by the President, the head of

a department, or a court of law." *Id.* at 87a. The Commission rejected petitioners' argument. In the Commission's view, its ALJs were mere employees rather than constitutional officers because they do not exercise "significant authority independent of the [Commission's] supervision." *Id.* at 88a. Among other things, the Commission explained, its ALJs "issue 'initial decisions' that are * * * not final," *id.* at 88a-89a; a person aggrieved by an initial decision may seek review before the Commission, which "grant[s] virtually all petitions for review," *id.* at 89a (citation omitted); the Commission may review any ALJ decision *sua sponte*, *ibid.*; review of an ALJ's decision is *de novo*, *id.* at 90a-91a; and under the Commission's rules, "no initial decision becomes final simply on the lapse of time by operation of law," but instead becomes final only upon "the Commission's issuance of a finality order," *id.* at 90a (citation and internal quotation marks omitted). The Commission also distinguished this Court's decision in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), in which special trial judges of the Tax Court were determined to be inferior officers under the Appointments Clause. Pet. App. 92a-93a; see *id.* at 92a ("*Freytag* [is] inapposite here.").

3. On appeal of the Commission's order, a panel of the court of appeals denied the petition for review. Pet. App. 3a-36a.

The court of appeals first rejected petitioners' Appointments Clause challenge, holding that the Commission's ALJs are mere employees rather than officers under the Clause because they do not exercise "significant authority pursuant to the laws of the United States." Pet. App. 11a (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam)); cf. *Buckley*, 424 U.S. at 126 n.162 (employees are "lesser functionaries subordinate

to officers"). For that conclusion, the court rested on its prior decision in *Landry* v. *FDIC*, 204 F.3d 1125, 1133-1134 (D.C. Cir.), cert. denied, 531 U.S. 924 (2000), holding that ALJs of the Federal Deposit Insurance Corporation (FDIC) did not exercise significant authority because they could not issue final decisions on behalf of the agency. Pet. App. 12a. The court determined that an SEC ALJ's initial decision is similarly non-final, and it rejected petitioners' attempts to distinguish *Landry*. *Id.* at 13a-19a; see *id.* at 15a ("Until the Commission determines not to order review * * * , there is no final decision that can 'be deemed the action of the Commission.'") (quoting 15 U.S.C. 78d-1(c)). The court also rejected petitioners' argument that the SEC's ALJs "exercise greater authority than FDIC ALJs in view of differences in the scope of review of the ALJ's decisions." *Id.* at 18a. The court acknowledged that "the Commission may sometimes defer to the credibility determinations of its ALJs," but it concluded that "the Commission's scope of review is no more deferential than that of the FDIC Board." *Id.* at 18a, 19a.

The court of appeals further rejected petitioners' attempt to equate the SEC's ALJs with the special trial judges of the Tax Court who were held to be officers in *Freytag*. In the court of appeals' view, the special trial judges were distinguishable because, as "members of an Article I court," they "could exercise the judicial power of the United States" and "issue final decisions in at least some cases." Pet. App. 11a, 12a. The court of appeals also found special trial judges to be different than SEC ALJs because "the Tax Court in *Freytag* was required to defer to the special trial judge's factual and credibility findings unless they were clearly erroneous."

Id. at 19a (citation and internal quotation marks omitted). The Commission, by contrast, "is not required to adopt the credibility determinations of an ALJ." *Ibid.*

On the merits, the court of appeals determined that substantial evidence supported the Commission's finding that petitioners, acting with the requisite scienter, had made material misstatements and omissions in violation of the Investment Advisers Act. Pet. App. 21a-32a. The court also concluded that the Commission had not abused its discretion in ordering sanctions against petitioners. *Id.* at 33a-36a.

4. Petitioners sought rehearing en banc, which the court of appeals granted on February 16, 2017. Pet. App. 244a-246a. The order granting rehearing en banc vacated the panel's judgment but not its opinion. *Id.* at 245a. The order directed the parties to limit their briefs to two issues: (1) whether "the SEC administrative law judge who handled this case [was] an inferior officer rather than an employee for the purposes of the Appointments Clause"; and (2) whether the court should "overrule *Landry*." *Ibid.* On June 26, 2017, the en banc court issued a per curiam judgment denying the petition for review "by an equally divided court." *Id.* at 1a-2a.

DISCUSSION

As this Court has previously observed, the question "[w]hether administrative law judges are necessarily 'Officers of the United States' is disputed." *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 507 n.10 (2010) (quoting U.S. Const. Art. II, § 2, Cl. 2). In prior stages of this case, the government argued that the Commission's ALJs are mere employees rather than "Officers" within the meaning of the Appointments Clause. Upon further consideration, and in light of the implications for the exercise of executive

power under Article II, the government is now of the view that such ALJs are officers because they exercise "significant authority pursuant to the laws of the United States." *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam).

This Court's review is warranted. The courts of appeals are divided over whether the Commission's ALJs are officers. That division reflects pervasive uncertainty over the scope of this Court's holding in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), the only decision of this Court since *Buckley* to address the line between employees and officers under the Appointments Clause. The question presented has arisen frequently across the courts of appeals on petitions for review of the Commission's decisions, and it will continue to arise absent this Court's intervention. The question is also extremely important because it affects not merely the Commission's enforcement of the federal securities laws, but also the conduct of adversarial administrative proceedings in other agencies within the government. The petition for a writ of certiorari therefore should be granted, and this Court should appoint an amicus curiae to defend the judgment below.

A. The Commission's ALJs Are Officers Of The United States Rather Than Employees

1. The Constitution vests "[t]he executive Power" of the United States in the President, U.S. Const. Art. II, § 1, Cl. 1, who is charged with responsibility to "take Care that the Laws be faithfully executed," *id.* § 3. The Framers, however, recognized that, "in a republican government," the President would need to rely on the assistance of subordinate officials "to give dignity, strength, purity, and energy to the administration of

the laws." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1524, at 376 (1833). The Constitution accordingly authorizes the "establish[ment] by Law" of additional executive "Offices," and provides for them to be filled by "Officers of the United States." U.S. Const. Art. II, § 2, Cls. 1, 2; see William Rawle, *A View of the Constitution of the United States of America* 151, 152 (photo. reprint 2003) (2d ed. 1829) (describing the creation of "[s]ubordinate offices" as being "[a]mong the means provided to enable the president to perform his public duties").

The Appointments Clause sets out the exclusive method for appointment of all such Executive Branch officers whose appointments are not otherwise provided for in the Constitution. "[P]rincipal Officer[s]" are appointed by the President, by and with the advice and consent of the Senate; the same method applies to "inferior Officers," except where their appointments have instead been vested by law "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cls. 1, 2; see *United States* v. *Germaine*, 99 U.S. 508, 510 (1879) ("[A]ll persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment."). The requirements of the Appointments Clause are "among the significant structural safeguards of the constitutional scheme" and are "designed to preserve political accountability relative to important Government assignments." *Edmond* v. *United States*, 520 U.S. 651, 659, 663 (1997).

In *Buckley*, *supra*, the Court explained that "the term 'Officers of the United States' as used in Art. II"

includes all those who hold a position "under the government" and "exercis[e] significant authority pursuant to the laws of the United States." 424 U.S. at 125-126 (citations and internal quotation marks omitted). That description reflects the common understanding at the time of the Founding that "[a] public office is the right, authority and duty, created and conferred by law, by which for a given period * * * an individual is invested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public." Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 1, at 1-2 (1890) (summarizing English and early American sources); see 2 Giles Jacob, *The Law-Dictionary*, Tit. "Office" (1797) ("[I]t is a rule, that where one man hath to do with another's affairs against his will, and without his leave, that this is an Office, and he who is in it is an officer."); see also 20 Op. O.L.C. 124, 178-187 (1996).[2]

2. Since *Buckley*, this Court has only once addressed the line between constitutional officers and

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[2] Early decisions of this Court addressing the Appointments Clause were primarily concerned with the question whether Congress *intended* to treat a position it had created by statute as an "office," not whether the functions of the position were required to be performed by an officer appointed pursuant to the Appointments Clause. See, *e.g.*, *Germaine*, 99 U.S. at 509 (civil surgeon could not be prosecuted under criminal statute applicable only to an "officer of the United States who is guilty of extortion") (citation omitted); *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 391-392 (1867) (statute forbidding embezzlement by "officers" applied to clerk appointed by the assistant treasurer in Boston with the approbation of the Acting Secretary of the Treasury) (discussed in *Germaine*, 99 U.S. at 511). In those cases, the Court looked at whether the appointment had occurred in the manner contemplated by the Clause as evidence for whether Congress intended to treat the appointee as an officer.

mere employees. In *Freytag*, *supra*, the Court considered whether certain Tax Court proceedings could be assigned, "for [a] hearing and the preparation of proposed findings and written opinion," to a special trial judge appointed by the Chief Judge of the Tax Court. 501 U.S. at 877. The petitioners in *Freytag* were taxpayers who had objected to tax deficiencies assessed against them and sought review in the Tax Court. *Id.* at 870-871. The proceedings were initially assigned to a special trial judge, who issued "written findings and an opinion" concluding that the petitioners owed additional taxes. *Id.* at 871-872. After unsuccessfully appealing that ruling to the Chief Judge, the petitioners "contended that the assignment of cases as complex as theirs to a special trial judge * * * violated the Appointments Clause of the Constitution." *Id.* at 872.

In addressing that claim, this Court at the outset considered whether "special trial judges may be deemed employees * * * because they lack authority to enter a final decision." *Freytag*, 501 U.S. at 881. That argument, the Court explained, "ignores the significance of the duties and discretion that special trial judges possess." *Ibid.* Unlike special masters, who are hired "on a temporary, episodic basis" to perform ad hoc tasks, special trial judges occupy an office "'established by Law,'" and the "duties, salary, and means of appointment for that office are specified by statute." *Ibid.* (quoting U.S. Const. Art. II, § 2, Cl. 2). The Court placed particular emphasis on the fact that special trial judges, in presiding over preliminary proceedings, "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Id.* at 881-882. "In the course of car-

rying out these important functions," the Court explained, "special trial judges exercise significant discretion." *Id.* at 882.

The Court went on to hold that special trial judges would qualify as constitutional officers "[e]ven if" their ability to issue initial decisions in cases like petitioners' were not so "significant." *Freytag*, 501 U.S. at 882; *ibid.* ("[O]ur conclusion would be unchanged."). That is because, the Court explained, special trial judges are also authorized by law to "render the decisions of the Tax Court [*i.e.*, final decisions] in declaratory judgment proceedings and limited-amount tax cases." *Ibid.* Since it was not disputed that "a special trial judge is an inferior officer for purposes of" those proceedings, the Court concluded, their appointments must comply with the Appointments Clause for all purposes. *Ibid.* ("Special trial judges are not inferior officers for purposes of some of their duties * * * but mere employees with respect to other responsibilities."). Finally, having determined that the Appointments Clause applied to special trial judges, the Court held that their selection could properly be vested under that Clause in the Chief Judge of the Tax Court. *Id.* at 882-892.

Freytag demonstrates that the Commission's ALJs are "inferior officers" rather than "mere employees." 501 U.S. at 882. Like the special trial judges at issue there, the office of an SEC ALJ is characterized by significant "duties and discretion." *Id.* at 881. The position and its compensation have been established by law, see 5 U.S.C. 3105 (appointment authority), 5372(b) (compensation), and the Commission's ALJs have been entrusted with governmental authority "delegate[d]" from the Commission itself, 15 U.S.C. 78d-1(a). ALJs are authorized, among other things, to administer

oaths, hold hearings, take testimony and admit evidence, issue or quash subpoenas, rule on motions, impose sanctions on contemptuous hearing participants, reject deficient filings, and enter default judgments. See 17 C.F.R. 201.111(a), (b), (c), and (h), 201.180(a) and (b).[3] At the conclusion of a hearing, the ALJ issues an "initial decision" that "include[s] findings and conclusions * * * as to all the material issues of fact, law or discretion presented on the record and the appropriate order, sanction, relief, or denial thereof." 17 C.F.R. 201.360(b). If further review of the ALJ's decision is not sought, or a request for such review is denied by the Commission, the ALJ's initial decision "shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission." 15 U.S.C. 78d-1(c); see 17 C.F.R. 201.360(d)(2). In discharging these responsibilities, an ALJ "exercise[s] significant discretion." *Freytag*, 501 U.S. at 881-882. The ALJ is thus an "Officer[]" within the meaning of the Appointments Clause.

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[3] The special trial judges at issue in *Freytag* were authorized to "punish contempts by fine or imprisonment." 501 U.S. at 891 (citing 26 U.S.C. 7456(c)). The Commission's ALJs, by contrast, have the arguably less significant authority to punish "[c]ontemptuous conduct" either by "[e]xclud[ing]" the contemnor from the deposition or hearing or by "[s]ummarily suspend[ing] that person from representing others in the proceeding." 17 C.F.R. 201.180(a)(1). The Court's decision in *Freytag*, however, did not identify the power to fine or imprison as evidence of "the significance of the duties and discretion that special trial judges possess." 501 U.S. at 881. Rather, the contempt power was cited only as support for the Court's conclusion that the Tax Court was a "'Court of Law' within the meaning of the Appointments Clause." *Id.* at 890 (brackets omitted); see *id.* at 890-891.

3. In ruling that the Commission's ALJs are not officers, the court of appeals gave dispositive weight to its perception that those ALJs have no authority to issue final decisions that "bind third parties, or the government itself, for the public benefit." Pet. App. 12a-13a; see *id.* at 13a ("Our analysis begins, and ends, there."). The court relied for that conclusion on its prior decision in *Landry* v. *FDIC*, 204 F.3d 1125 (D.C. Cir.), cert. denied, 531 U.S. 924 (2000), where the court read *Freytag* as treating final decision-making authority as the *sine qua non* of officer status. Pet. App. 11a-13a; see *id.* at 12a ("This court understood that it 'was critical to the Court's decision' in *Freytag* that the special trial judge had authority to issue final decisions in at least some cases.") (quoting *Landry*, 204 F.3d at 1134). The Commission's ALJs, the court of appeals asserted, cannot issue final decisions: An ALJ's initial decision "becomes final when, and only when, the Commission issues [a] finality order, and not before then." *Id.* at 15a; see *ibid.* ("[T]he Commission has retained full decision-making powers, and the mere passage of time is not enough to establish finality."). As a result, the court concluded, the "initial decisions are no more final than the recommended decisions issued by FDIC ALJs" that the court had upheld in *Landry*. *Id.* at 17a.

As petitioners here explain (Pet. 20-22), however, the court of appeals erred in placing conclusive weight on the lack of final decision-making authority by the Commission's ALJs. Although *Landry* treated that factor as "critical," 204 F.3d at 1134, *Freytag* held that special trial judges—in light of "the significance of the duties and discretion that [they] possess"—are properly considered officers under the Appointments Clause *despite*

their "lack [of] authority to enter a final decision" regarding tax-deficiency claims. 501 U.S. at 881. To be sure, the Court went on to say that special trial judges would be officers "[e]ven if" their authority over such cases were less "significant," given their authority to render final decisions in other types of cases. *Id.* at 882. But "the Court clearly designated [that statement] as an alternative holding." *Landry*, 204 F.3d at 1142 (Randolph, J., concurring in part and concurring in the judgment). The Court in *Freytag* thus indicated that final authority to make certain discretionary decisions may be sufficient, but is not necessary, to render an official an "Officer[] of the United States" within the meaning of the Appointments Clause.

In attempting to distinguish *Freytag*, the court of appeals further emphasized the relatively low level of deference afforded by the Commission to ALJ decisions. The Commission "reviews an ALJ's decision *de novo* and 'may affirm, reverse, modify, or set aside' the initial decision, 'in whole or in part,' and it 'may make any findings or conclusions that in its judgment are proper and on the basis of the record.'" Pet. App. 18a-19a (quoting 17 C.F.R. 201.411(a)) (brackets omitted). And while the Commission has chosen, as a matter of practice, to "defer to credibility determinations where the record provides no basis for disturbing the finding," the Commission is "not required to adopt the credibility determinations of an ALJ." *Id.* at 19a. By contrast, the court of appeals emphasized, "the Tax Court in *Freytag* was required to defer to the special trial judge's factual and credibility findings unless they were clearly erroneous." *Ibid.* (citation and internal quotation marks omitted).

The court of appeals' proposed distinction from *Freytag* is not persuasive. The level of deference afforded to the decisions of special trial judges played no role in the Court's conclusion that they qualified as "Officers" within the meaning of the Appointments Clause. See 501 U.S. at 880-882. The Court mentioned deference in a different portion of *Freytag* addressing the petitioners' statutory-construction argument, and even there the Court stated that the "point [wa]s not relevant." *Id.* at 874 n.3. Nor, in this case, does the Commission's relative lack of deference to the decisions of its ALJs call into question that such ALJs are "Officers of the United States" under the Appointments Clause. Finally, there is no merit to the court of appeals' attempt to distinguish *Freytag* on the ground that special trial judges were "members of an Article I court [who] could exercise the judicial power of the United States." Pet. App. 11a. In determining that the special trial judges were officers, *Freytag* did not even mention their status as judicial officials.

B. The ALJs' Status As Officers Has Implications For Both Their Selection And Removal That The Court Should Address

The conclusion that ALJs are "Officers of the United States" has important implications under the Constitution regarding the permissible method of their appointment and the manner in which they may be removed from office. This Court's guidance on both issues is accordingly necessary to enable the United States to assess the status of ALJs in various roles across the government and to consider whether the rules governing the selection and removal of those officials comport with constitutional requirements.

1. Under the Appointments Clause, Congress may "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." U.S. Const. Art. II, § 2, Cl. 2. The appointment of the ALJ who presided in petitioners' case did not conform to that command. That ALJ was selected by the Commission's Chief ALJ, subject to approval by the Commission's Office of Human Resources. See pp. 2-3, *supra*. The Commission itself, as the constitutional "Head[] of Department[]," did not play any role in the selection. See Pet. App. 295a-297a.

2. Because "Article II confers on the President 'the general administrative control of those executing the laws,' * * * the President therefore must have some 'power of removing those for whom he can not continue to be responsible.'" *Free Enterprise Fund*, 561 U.S. at 492-493 (quoting *Myers* v. *United States*, 272 U.S. 52, 117, 164 (1926)). This Court has accordingly recognized that the Constitution forbids Congress from placing certain restrictions on the power to remove officers of the United States. In *Free Enterprise Fund*, the Court invalidated a statutory scheme that provided for two levels of protection against presidential removal authority: Members of the Public Company Accounting Oversight Board (PCAOB) could be removed by the SEC only for certain limited forms of wrongdoing, see 15 U.S.C. 7217(d)(3), and the Court assumed that the SEC's Commissioners could themselves be removed only for "inefficiency, neglect of duty, or malfeasance in office," 561 U.S. at 487 (citation omitted). The Court determined that the combined effect of those restrictions, which resulted in the PCAOB's exercise of executive authority without any meaningful presidential oversight,

had caused a constitutionally impermissible "diffusion of accountability." *Id.* at 497; see *id.* at 495-508.

Here, the statutory scheme provides for at least two, and potentially three, levels of protection against presidential removal authority: The Commission's ALJs may be removed by the Commission "only for good cause established and determined by the Merit Systems Protection Board," 5 U.S.C. 7521(a), and members of that Board in turn "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. 1202(d). And the Commissioners likewise may be insulated from removal (as the Court assumed in *Free Enterprise Fund*), although the Securities Exchange Act is silent on the question. 15 U.S.C. 78d(a). Under *Free Enterprise Fund* and other decisions, the status of the Commission's ALJs as constitutional "Officers" therefore has implications for whether the statutory restrictions on their removal are consistent with separation-of-powers principles.

Petitioners assert (Pet. 34) that the issue of removal authority should be of no immediate concern to the Court because they have not directly challenged the removal restrictions on the ALJ who presided at their hearing. But petitioners do not dispute that the question whether the Commission's ALJs are impermissibly insulated from presidential oversight is informed by the conclusion that such ALJs are constitutional officers who exercise significant authority. See *Free Enterprise Fund*, 561 U.S. at 507 n.10 (reserving the question, in part, because "[w]hether administrative law judges are necessarily 'Officers of the United States' is disputed") (citing *Landry*, *supra*). And even if petitioners are successful in obtaining invalidation of the proceedings against them in this case, and further proceedings occur

in front of a properly appointed ALJ, the removal question would continue to cloud the ALJ's authority. Indeed, another litigant has already raised a separation-of-powers challenge to ALJ removal protections alongside an Appointments Clause challenge; that case has been briefed in the D.C. Circuit and is being held pending the disposition of this petition. See 8/8/17 Order, *Timbervest* v. *SEC*, No. 15-1416.

It is critically important that the Court, in considering whether the Commission's ALJs are "Officers of the United States," address whether the restrictions imposed by statute on their removal are consistent with the constitutionally prescribed separation of powers. Addressing that issue now will avoid needlessly prolonging the period of uncertainty and turmoil caused by litigation of these issues. See pp. 24-26, *infra*. If the Court believes that petitioners' framing of the question presented is not broad enough to encompass the issue, the government has reframed the question to leave no doubt on that score. In the alternative, the Court may find it desirable to add a question presented that specifically addresses it. See, *e.g.*, *NLRB* v. *Noel Canning*, 133 S. Ct. 2861 (2013) (directing the parties to brief and argue an additional question, which had not been considered by the courts below). Whatever the appropriate course, the government respectfully submits that addressing both the appointment and removal of the Commission's ALJs will provide needed clarity to agencies and regulated parties, while minimizing what could otherwise be severe disruption to a large number of current and future administrative proceedings.

C. This Case Is The Preferable Vehicle For Resolving The Division Among The Courts Of Appeals

This Court's review is warranted because the question presented has led to significant disagreement in the courts of appeals. That disagreement has generated substantial confusion and disruption for the Commission in its enforcement of the Nation's securities laws, as well as for other federal agencies that use ALJs in administrative proceedings.

1. In the proceeding below, a panel of the D.C. Circuit held that the Commission's ALJs are employees rather than officers. The court subsequently granted rehearing en banc, Pet. App. 244a-246a, and ultimately denied the petition for review by an equally divided vote, *id.* at 1a-2a. Under D.C. Circuit Rule 35(d), an order granting en banc review vacates "the panel's judgment, but ordinarily not its opinion." Consistent with that rule, the court's order granting rehearing en banc vacated only the panel's "judgment," 2/16/17 Order 1, leaving the panel's opinion undisturbed.

The Commission has therefore explained, in other cases raising Appointments Clause challenges, that the panel's opinion in this case remains in effect. See, *e.g.*, Commission Br. at 62, *Gonnella* v. *SEC*, No. 16-3433 (2d Cir. July 17, 2017). The Commission has also urged the D.C. Circuit to hold follow-on cases raising the same question in abeyance pending this Court's disposition of the petition for a writ of certiorari. See, *e.g.*, Mot. to Hold Case in Abeyance, *Timbervest, LLC* v. *SEC*, No. 15-1416 (July 20, 2017). The D.C. Circuit has granted those abeyance motions. See, *e.g.*, 8/8/17 Order, *Timbervest, LLC* v. *SEC*, No. 15-1416.

2. In *Bandimere* v. *SEC*, 844 F.3d 1168 (2016), a divided panel of the Tenth Circuit reached the opposite

conclusion on the question presented under materially identical circumstances. There, an ALJ issued an initial decision finding that the respondent had violated anti-fraud and registration provisions of the federal securities laws by operating as an unregistered broker and by failing to disclose potentially negative facts to investors. *In re David F. Bandimere*, Securities Act Release No. 9972, 2015 WL 6575665, at *1 (Oct. 29, 2015). On review of the ALJ's initial decision, the Commission upheld the liability finding and imposed disgorgement and civil-penalty sanctions. *Id.* at *2. The Commission also rejected the respondent's argument that its ALJs are officers under the Appointments Clause. *Id.* at *19-*21.

The Tenth Circuit granted the respondent's petition for review, holding that the Commission's ALJs are invested with powers that require their appointment as inferior officers under the Appointments Clause. *Bandimere*, 844 F.3d at 1179-1182. In reaching that conclusion, the court relied on *Freytag*, which it interpreted as turning on the significance of the special trial judges' duties, not on their authority to render final decisions of the Tax Court. *Id.* at 1182-1185; see *id.* at 1179 (The Commission's ALJs "exercise significant discretion in performing 'important functions' commensurate with the [special trial judges'] functions described in *Freytag*.") (quoting 501 U.S. at 882). The court thus expressly "disagree[d]" with the D.C. Circuit's decisions in *Landry* and in this case, which, the Tenth Circuit determined, had "place[d] undue weight on final decision-making authority." *Id.* at 1182.

Judge McKay dissented, arguing that *Freytag* does not "mandate[] the result proposed here." *Bandimere*, 844 F.3d at 1194. Like the panel in this case, Judge

McKay distinguished the special trial judges at issue in *Freytag* because of their authority to enter final decisions in a number of cases and because "the Tax Court was required to defer to its special trial judges' findings." *Id.* at 1197. Judge McKay emphasized that the Commission's ALJs, by contrast, "possess only a 'purely recommendatory power.'" *Ibid.* (quoting *Landry*, 204 F.3d at 1132). In May 2017, the Tenth Circuit denied the Commission's petition for rehearing en banc, with Judges Lucero and Moritz dissenting. See *Bandimere* v. *SEC*, 855 F.3d 1128, 1128-1133.

On September 29, 2017, the government filed a petition for a writ of certiorari in *SEC* v. *Bandimere*, No. 17-475, urging this Court to resolve the question whether the Commission's ALJs are inferior officers rather than employees. But the government explained that this case, rather than *Bandimere*, presents the Court with the preferable vehicle for addressing that question. See Pet. at 9, *Bandimere*, *supra* (No. 17-475). The government accordingly "respectfully request[ed] that the Court hold th[e] petition" in *Bandimere* "pending its consideration of the petition" in this case. *Ibid.*

3. The disagreement in the courts of appeals has significant implications for the Commission's ability to discharge its statutory responsibilities. Congress has granted the Commission broad authority to conduct administrative enforcement proceedings to determine whether the securities laws have been violated and, if so, what remedies are appropriate. See 15 U.S.C. 77h-1, 78u-3; 15 U.S.C. 78d, 78*o* (2012 & Supp. IV 2016). Certain of the Commission's enforcement powers, such as the power to revoke the registration of a registered security under 15 U.S.C. 78*l*(j), can be exercised *only* through the initiation of an administrative proceeding.

In conducting such proceedings, the Commission historically has assigned an ALJ to preside over the hearing and issue an initial decision, which the Commission then reviews. See 15 U.S.C. 78d-1(a). The abeyance status of cases pending in the D.C. Circuit—which has automatic venue in securities cases, see 15 U.S.C. 77i(a), 78y(a)(1), 80a-42(a), 80b-13(a)—thus means that the Commission's ability to enforce the nation's securities laws has, in significant respects, been put on hold pending this Court's resolution of the question presented. Appointments Clause challenges to the Commission's ALJs have also been raised in several other cases across the courts of appeals, indicating that the gridlock will soon be even more widespread.[4]

4. Finally, the conflict in the courts of appeals on the question presented has created substantial uncertainty for other agencies that employ ALJs in a manner similar to the Commission. A panel of the Fifth Circuit recently granted a stay of an FDIC order, concluding that the respondent had established a likelihood of success on his claim that the ALJ who presided over his proceeding was an officer who was not properly appointed under the Appointments Clause. *Burgess* v. *FDIC*, 871 F.3d 297 (2017). In so ruling, the court expressly disagreed with the D.C. Circuit's decision in *Landry*. *Id.* at 301 ("We therefore conclude, contrary to the D.C. Circuit's decision in *Landry*, that final decision-making authority is not a necessary condition for Officer sta-

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[4] See, *e.g.*, *Gonnella* v. *SEC*, No. 16-3433 (2d Cir. filed Oct. 7, 2016); *Bennett* v. *SEC*, No. 16-3827 (8th Cir. argued June 7, 2017); *J.S. Oliver Capital Mgmt., L.P.* v. *SEC*, No. 16-72703 (9th Cir. filed Aug. 15, 2016); *Feathers* v. *SEC*, No. 15-70102 (9th Cir. filed Jan. 9, 2015).

tus."). Given the frequency with which ALJs are employed in administrative proceedings by a variety of federal agencies, see, *e.g.*, 7 C.F.R. 1.144, 1.411(f) (Department of Agriculture); 12 C.F.R. 1081.103 (Consumer Financial Protection Bureau); 18 C.F.R. 385.102(e), 385.708 (Federal Energy Regulatory Commission); 29 C.F.R. 102.35 (National Labor Relations Board); 40 C.F.R. 22.3(a), 22.4(c) (Environmental Protection Agency), this Court's resolution of the question presented is necessary to prevent the same disruption that has affected the Commission's proceedings from spreading throughout the government.

CONCLUSION

The petition for a writ of certiorari should be granted. If appropriate, the Court should reframe the question presented or add a question presented to address the issue of removal.

Respectfully submitted.

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