

# THE OFFICE OF LEGAL COUNSEL JUGGERNAUT: NO ONE IS ABOVE THE LAW

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## INTRODUCTION

Many have debated whether it is legal to criminally indict a sitting President, but it is rarely discussed who decides, and who should decide, that question. Richard Nixon resigned from the White House in the midst of a criminal scandal, narrowly avoiding impeachment and criminal charges.<sup>1</sup> Twenty-five years later, Bill Clinton was impeached by the House of Representatives and acquitted by the Senate, but the threat of criminal prosecution lingered throughout his presidency.<sup>2</sup> Independent Counsel Kenneth Starr ultimately never pressed charges against Clinton, which meant that the U.S. Supreme Court was unable to weigh in on the constitutionality of the matter.<sup>3</sup> Looking back through today's lens, we know that Ken Starr had an opinion letter from Ronald Rotunda<sup>4</sup> that gave him the constitutional

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1. Dan Nowicki, *In 1974, Goldwater and Rhodes Told Nixon He Was Doomed*, AZCENTRAL (Aug. 2, 2014, 9:27 PM), <http://www.azcentral.com/story/azdc/2014/08/03/goldwater-rhodes-nixon-resignation/13497493/>.

2. Robert W. Gordon, *The Independent Counsel Investigation, the Impeachment Proceedings, and President Clinton's Defense: Inquiries into the Role and Responsibilities of Lawyers, Symposium, Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 FORDHAM L. REV. 639, 641 (1999).

3. Erin Fuchs, *Where Are They Now: The Stars of the Clinton Impeachment Scandal*, BUS. INSIDER (May 2, 2014, 11:25 AM), <http://www.businessinsider.com/where-are-clinton-impeachment-lawyers-now-2014-4>. Criminal charges would have been necessary for the President to appeal to the courts the constitutionality of such charges.

4. See Charlie Savage, *Newly Disclosed Clinton-era Memo Says Presidents Can Be Indicted*, N.Y. TIMES (July 22, 2017), <https://www.nytimes.com/interactive/2017/07/22/us/document-savage-nyt-foia-starr-memo-presidential.html>. Ronald Rotunda is a constitutional scholar, most well-known for his Treatise on Constitutional Law, but his opinion was also sought by Independent Counsel Kenneth Starr as Starr was contemplating whether or not to bring criminal charges against President Clinton. Rotunda's opinion was obtained on June 16, 2017 by Charlie Savage of the New York Times in a Freedom of Information request. *Id.*

grounds to criminally indict Clinton.<sup>5</sup> However, the Office of Legal Counsel, the constitutional legal authority in the executive branch, stated through its own opinion letters that a sitting President cannot be criminally indicted,<sup>6</sup> reaching the opposite conclusion as that of Rotunda.<sup>7</sup> This note will argue that the Office of Legal Counsel (“OLC”) lacks the independence necessary to give its opinions precedential weight in this debate because it is under the influence of the President himself.

The question remains relevant because we find ourselves in a situation where the sitting President, Donald Trump, is under investigation.<sup>8</sup> Events have unraveled in a manner similar to what one might see on the soap opera drama *House of Cards*.<sup>9</sup> Immediately following the 2016 election, intelligence reports confirmed that Russia had meddled in the election.<sup>10</sup> The Attorney General, Jeff Sessions, recused himself from participating in an inquiry into Russian meddling because he was a surrogate in the Trump campaign.<sup>11</sup> The FBI continued its investigation in the face of an administration that did not want it.<sup>12</sup> Then, President Trump fired the

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5. Charlie Savage, *Can a President Be Indicted? A Long-Hidden Legal Memo Says Yes*, N.Y. TIMES (July 22, 2017), <https://www.nytimes.com/2017/07/22/us/politics/can-president-be-indicted-kenneth-starr-memo.html?mcubz=1>.

6. See Memorandum from Robert G. Dixon, Jr., Assistant Att’y Gen., Office of Legal Counsel, *Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution While in Office* 1 (Sept. 24, 1973), <https://fas.org/irp/agency/doj/olc/092473.pdf> [hereinafter 1973 OLC Memo]; A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 237 (2000), <https://www.justice.gov/olc/file/626926/download> [hereinafter 2000 OLC Memo].

7. Letter from Ronald R. Rotunda, Professor of Law, Univ. of Ill. Coll. of Law, to Kenneth W. Starr, Indep. Counsel, Office of the Indep. Counsel 7 (May 13, 1998), <https://www.nytimes.com/interactive/2017/07/22/us/document-Savage-NYT-FOIA-Starr-memo-presidential.html> [hereinafter Rotunda Letter].

8. Abigail Tracy, *Trump Trashes Comey’s Credibility As Mueller’s Noose Tightens*, VANITY FAIR: HIVE (Oct. 18, 2017, 10:43 AM), <https://www.vanityfair.com/news/2017/10/donald-trump-robert-mueller-james-comey-tweets>.

9. See Dominic Patten, *‘House of Cards’ Season 5 Review*, DEADLINE (May 29, 2017, 7:01 PM), <http://deadline.com/2017/05/house-of-cards-review-season-5-kevin-spacey-robin-wright-donald-trump-netflix-video-1202103074/> (comparing the multi-series Netflix drama, *House of Cards*, to a “full soap opera”).

10. See Office of the Director of Nat’l Intelligence, *Background to “Assessing Russian Activities and Intentions in Recent US Elections”: The Analytic Process and Cyber Incident Attribution*, at ii (Jan. 6, 2017), <https://assets.documentcloud.org/documents/3254235/ICreport010616.pdf> (explaining that Russian President Vladimir Putin ordered an “influence campaign in 2016 aimed at the US presidential election”).

11. Mark Landler & Eric Lichtblau, *Jeff Sessions Recuses Himself From Russia Inquiry*, N.Y. TIMES (Mar. 2, 2017), <https://www.nytimes.com/2017/03/02/us/politics/jeff-sessions-russia-trump-investigation-democrats.html>.

12. Eugene Kelly, *Timeline of the Russia Investigation: Key Moments in the FBI Probe of Russia’s Efforts to Influence the 2016 Presidential Election*, FACTCHECK.ORG (June 7, 2017), <http://www.factcheck.org/2017/06/timeline-russia-investigation/> (detailing the ongoing timeline of

Director of the FBI, James Comey, because of “the Russia thing.”<sup>13</sup> Finally, the Assistant Attorney General,<sup>14</sup> Rod Rosenstein, appointed a special counsel to conduct an independent investigation of the matter.<sup>15</sup> If the special counsel, Robert Mueller, finds that President Trump obstructed justice, colluded with Russia, or engaged in other crimes, such as conspiracy to violate campaign finance laws, money laundering, or tax evasion, will the special counsel be able to criminally indict him? And importantly, whose opinion on that question should matter?

This question is important because it is not clear if a sitting President can be criminally charged. The first charges are trickling down from the special investigation; including charges of conspiracy and money laundering by Trump’s former presidential campaign manager,<sup>16</sup> in which a jury trial ultimately found him guilty of eight counts of miscellaneous financial crimes and tax fraud.<sup>17</sup> Further, instead of facing a second trial, the same campaign manager agreed to cooperate with the special counsel and pleaded guilty to more counts.<sup>18</sup> Meanwhile, Mueller has indicted twelve Russian officers for their election interference,<sup>19</sup> all of whom will likely not face a trial as Russia will not extradite them to the United States. Additionally, the special counsel’s office has outsourced some of its findings to the Southern District of New York, as Trump’s own personal lawyer pleaded guilty to bank fraud, tax fraud and campaign finance violations, stating that he was “directed by

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the investigation that started with the FBI and continues with the special prosecutor, Robert Mueller).

13. James Griffiths, *Trump Says He Considered ‘This Russia Thing’ Before Firing FBI Director Comey*, CNN (updated May 12, 2017), <http://www.cnn.com/2017/05/12/politics/trump-comey-russia-thing/index.html>.

14. Rod Rosenstein is the Acting Attorney General regarding Russia because of Jeff Sessions’ recusal over the investigation into Russia meddling into the 2016 election.

15. Deputy Att’y Gen., *Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election & Related Matters* (May 17, 2017), <https://www.justice.gov/opa/press-release/file/967231/download> (naming Robert Mueller as the Special Counsel).

16. Matt Apuzo et al., *Former Trump Aides Charged as Prosecutors Reveal New Campaign Ties With Russia*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/us/politics/paul-manafort-indicted.html> (the first indictment from the investigation was revealed to include criminal charges against Paul Manafort, Rick Gates and George Papadopoulos).

17. Sharon LeFraniere, *Paul Manafort, Trump’s Former Campaign Chairman, Guilty of 8 Counts*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/politics/paul-manafort-trial-verdict.html>.

18. Sharon LeFraniere & Kenneth P. Vogel, *Paul Manafort Agrees to Cooperate With Special Counsel; Pleads Guilty to Reduced Charges*, N.Y. TIMES (Sept. 14, 2018), <https://www.nytimes.com/2018/09/14/us/politics/manafort-plea-deal.html>.

19. Erica R. Hendry, *Read Mueller’s Full Indictment Against 12 Russian Officers for Election Interference*, PBS (Jul. 13, 2018, 12:59 PM), <https://www.pbs.org/newshour/nation/read-muellers-full-indictment-against-12-russian-officers-for-election-interference>.

the candidate” and “with the intention of influencing the election.”<sup>20</sup> Trump and his presidential campaign are also under investigation by the House of Representatives and the Senate,<sup>21</sup> although it seems the House has wrapped up their investigation prematurely.<sup>22</sup> At this juncture, it is unclear whether the House or Senate, both controlled by Republicans, will find there was any wrongdoing of their Republican President.<sup>23</sup> Even if the Democrats regain control of the House or Senate after the 2018 elections, a supermajority vote from the Senate is required in order to convict the President of wrongdoing.<sup>24</sup> Despite all the other investigations, guilty verdicts and plea deals, the special counsel may, and we do not know if he can, bring criminal charges against the sitting President.<sup>25</sup>

Article II, Section 4 of the U.S. Constitution proscribes a method for relieving a President that has committed “high crimes and misdemeanors” from his duties: impeachment.<sup>26</sup> The process of impeachment, by design of the Framers of the Constitution, is supposed to be extremely difficult to carry out.<sup>27</sup> It is hard to imagine that a Republican Congress<sup>28</sup> will hold its

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20. Ryan Bort, *Michael Cohen Pleads Guilty, Admits Trump Directed Election Influence*, ROLLING STONE (Aug. 21, 2018, 4:26 PM), <https://www.rollingstone.com/politics/politics-news/michael-cohen-plea-deal-714146/>; *Read: Ex Trump lawyer Michael Cohen Plea Deal*, CNN (Aug. 21, 2018, 6:31 PM), <https://www.cnn.com/2018/08/21/politics/read-michael-cohen-plea-deal/index.html> (describing dates and payments by Cohen for Trump’s benefit); see Clare Hymes, Paula Reid & Kathryn Watson, *Former Trump Lawyer Michael Cohen Sentenced To 3 Years In Prison*, CBS NEWS (Dec. 12, 2018, 9:07 PM), <https://www.cbsnews.com/news/michael-cohen-sentencing-in-federal-court-12-12-2018-today-live-updates/> (at Michael Cohen’s sentencing, he stated he acted with “blind loyalty” to President Trump).

21. See Graham Lanktree, *Investigation Into Trump-Russia Collusion Only ‘20 Percent’ Done, Says Senator*, NEWSWEEK (June 19, 2017, 12:17 PM), <http://www.newsweek.com/investigation-trump-russia-collusion-627183> (explaining the slow movement of the Senate Intelligence Committee and the House Intelligence Committee).

22. Amber Phillips, *Did House Republicans End Their Russian Investigation Prematurely?*, WASH. POST (Mar. 13, 2018), [https://www.washingtonpost.com/news/the-fix/wp/2018/03/13/did-house-republicans-end-their-russia-investigation-prematurely/?noredirect=on&utm\\_term=.35ed43a40067](https://www.washingtonpost.com/news/the-fix/wp/2018/03/13/did-house-republicans-end-their-russia-investigation-prematurely/?noredirect=on&utm_term=.35ed43a40067).

23. Erin Kelly & Kevin Johnson, *What’s Next for the Russia Investigations? No End in Sight for Congress, Mueller Probes*, USA TODAY (Dec. 27, 2017, 7:18 AM), <https://www.usatoday.com/story/news/politics/2017/12/27/whats-next-russia-investigations-no-end-sight-congress-mueller-probes/942219001/>.

24. *Id.*

25. *Id.*

26. U.S. CONST. art. II, § 4.

27. CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 5 (1974) (describing the slow and deliberative process of the House of Representatives that votes on the articles of impeachment, then the Senate serves as the High Court of Presidential Impeachment; whereas a criminal indictment only needs a prosecutor to file charges).

28. Both the House of Representatives and the Senate were controlled by Republicans from 2016 – 2018, President Trump’s first two years in office.

President accountable for any possible crimes through impeachment due to the current polarized political climate in the United States.<sup>29</sup> In the alternative, the OLC insists the President cannot be criminally charged, which places the President in a position where the President is above the law.<sup>30</sup> To further the conundrum, Trump recently proclaimed that he has the “absolute right to do what I want with the Justice Department,”<sup>31</sup> thus implying that he can do what he wants with the OLC.

This note argues that the OLC, although created and structured to provide independent advice on questions of law to the executive, has not lived up to the ideal of independence originally imagined for it. The OLC’s independence has been abandoned in order to serve the President. A primary example of the OLC’s lack of independence is its position in the debate on whether a sitting President can be criminally prosecuted. Part I describes the OLC’s analysis and its insistence that the President is immune from criminal prosecution, and because OLC opinions are binding on the Justice Department, it would be unnecessary to consider outside legal analysis on the issue. Part II argues that while the OLC insists its stance is constitutionally sound, legal scholars are fundamentally divided on the issue of criminal prosecution; Professor Akhil Amar<sup>32</sup> argues that temporary immunity shields the President from criminal prosecution,<sup>33</sup> while Ronald Rotunda argues that there is no immunity, and immunity should not be inferred from the Constitution.<sup>34</sup> Part III argues that the OLC’s limit on the threat of criminal investigation through its memoranda is problematic if, and when, Congress fails to check a President that has acted criminally through impeachment. Part IV presents a solution to the OLC’s lack of independence and argues that a separate and truly independent entity be created to provide meaningful political constraint on presidential authority; however in the absence of such an extreme measure, the OLC should not be relied on or deferred to on questions of presidential prosecution.

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29. See Lee Drutman, *Will Republicans Impeach Trump?*, VOX (June 1, 2017, 4:00 PM), <https://www.vox.com/polyarchy/2017/6/1/15726278/will-republicans-impeach-trump> (stating that “impeachment is a political decision. Republicans hold the power in Congress”).

30. See 1973 OLC Memo, *supra* note 6, at 1; see 2000 OLC Memo, *supra* note 6, at 237.

31. Michael S. Schmidt & Michael D. Shear, *Trump Says Russia Inquiry Makes U.S. ‘Look Very Bad’*, N.Y. TIMES (Dec. 28, 2017), [https://mobile.nytimes.com/2017/12/28/us/politics/trump-interview-mueller-russia-china-north-korea.html?referer=https://m-huffpost-com.cdn.ampproject.org/v/s/m.huffpost.com/us/entry/us\\_5a45aa01e4b0b0e5a7a5b993/amp?amp\\_js\\_v=0.1&usqp=mq331AQECAEYQAQ%3D%3D](https://mobile.nytimes.com/2017/12/28/us/politics/trump-interview-mueller-russia-china-north-korea.html?referer=https://m-huffpost-com.cdn.ampproject.org/v/s/m.huffpost.com/us/entry/us_5a45aa01e4b0b0e5a7a5b993/amp?amp_js_v=0.1&usqp=mq331AQECAEYQAQ%3D%3D).

32. Akhil Amar is a professor at Yale Law School and one of the most respected scholars in Constitutional Law.

33. See Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11, 11 (1997).

34. See Rotunda Letter, *supra* note 7, at 1.

## I. THE OLC'S INSISTENCE THAT A PRESIDENT CANNOT BE CRIMINALLY INDICTED AND PROSECUTED

The OLC itself insists that the President is immune from criminal prosecution.<sup>35</sup> The Judiciary Act of 1789 established the structure and jurisdiction of the federal court system and created the position of the Attorney General.<sup>36</sup> Over time, the functions and duties evolved, but the basic parameters held steady: to represent the United States in suits in the Supreme Court and to give advice and opinion upon questions of law when requested by the President or other heads of executive departments.<sup>37</sup> Eventually, the Attorney General delegated much of its opinion writing authority to the OLC, with Congress codifying the transfer of authority in 2006.<sup>38</sup> By that same year, Newsweek labeled the OLC as “the most important government office you’ve never heard of.”<sup>39</sup> The OLC’s most important function is to issue legal opinions for the executive branch, especially on issues of constitutional law.

The OLC’s opinions have binding effect that is final and conclusive within the executive branch.<sup>40</sup> Much of the effect comes from traditions and norms, but also from two executive orders. In 1918, Executive Order 2877 provided that “any opinion of ruling by the Attorney General upon any question of law” arising within the executive shall be “treated as binding.”<sup>41</sup> Then, Executive Order 12,146 followed suit to encourage any inter-executive disputes to submit such disputes to the Attorney General prior to proceeding to any court.<sup>42</sup> The power of the opinions as binding on the executive is based on ten Attorneys General opinions that honor the legal opinions as legally binding.<sup>43</sup> To further exemplify the power of the opinions, the OLC’s

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35. See 1973 OLC Memo, *supra* note 6, at 1; 2000 OLC Memo, *supra* note 6, at 237.

36. *Primary Documents in American History*, THE LIBRARY OF CONGRESS, <https://www.loc.gov/rr/program/bib/ourdocs/judiciary.html> (last updated April 25, 2017) (describing the Judiciary Act of 1789).

37. *Id.*

38. 28 U.S.C. §§ 510-13, 15 (2006).

39. Daniel Klaidman, *Palace Revolt*, NEWSWEEK (Feb. 5, 2006, 7:00PM), <http://www.newsweek.com/palace-revolt-113407>; *Developments in the Law – Presidential Authority*, 125 HARV. L. REV. 2057, 2090 (2012) [hereinafter *Presidential Authority*].

40. See Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 442 (1993).

41. Douglas W. Kmiec, *OLC’s Opinion Writing Function: The Legal Adhesive for A Unitary Executive*, 15 CARDOZO L. REV. 337, 368-69 (1993).

42. *Id.* at 369.

43. See Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217, 217 (2012/2013).

opinions also confer complete civil and criminal immunity for officials that act in accordance with the OLC's view of the law.<sup>44</sup>

The OLC had the opportunity to exercise its constitutional authority regarding the amenability of a sitting President to criminal process in both 1973 and 2000.<sup>45</sup> The OLC issued two opinions stating that a President cannot be criminally indicted or prosecuted.<sup>46</sup> The first opinion declared that the office of the presidency was “unique,”<sup>47</sup> while the latter called for immunity.<sup>48</sup> Both claimed impeachment was the proper means the Framers intended to deal with a President who has committed crimes.<sup>49</sup> As this is an issue that will likely not see a federal court,<sup>50</sup> the constitutional analysis as laid out by the OLC is all but conclusive. Furthermore, the executive branch is unlikely to ask this matter of law to be checked again because the OLC's existing opinions are extremely favorable to a sitting President. At no time would a sitting President request the OLC to revisit its memos and find that they can be criminally indicted and prosecuted.

#### A. *The Origins of the Attorney General and the OLC*

Congress created the Attorney General through the Judiciary Act of 1789<sup>51</sup> and tasked it to provide opinions on questions of law to the executive, which would be “final and conclusive” on the executive.<sup>52</sup> The Attorney General later delegated that authority to the OLC.<sup>53</sup> Originally, the Office of the Attorney General was a low paying, part-time position that was not at the cabinet level.<sup>54</sup> George Washington gave the first Attorney General the position because he thought it would help him “attract clients.”<sup>55</sup> It took another eighty-one years for the United States Department of Justice to

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44. *Presidential Authority*, *supra* note 39, at 2092.

45. See 1973 OLC Memo, *supra* note 6, at 1; see 2000 OLC Memo, *supra* note 6, at 237.

46. See 1973 OLC Memo, *supra* note 6, at 1; see 2000 OLC Memo, *supra* note 6, at 237.

47. See 1973 OLC Memo, *supra* note 6, at 1.

48. See 2000 OLC Memo, *supra* note 6, at 237.

49. See *supra* text accompanying note 38.

50. See *infra* text accompanying notes 150-57.

51. See *Primary Documents in American History*, THE LIBRARY OF CONGRESS, <https://www.loc.gov/rr/program/bib/ourdocs/judiciary.html> (last updated April 25, 2017) (describing the Judiciary Act of 1789).

52. Lund, *supra* note 40, at 441 (1993) (quoting Attorney General Caleb Cushing's opinion letter to President Franklin Pierce in 1854).

53. 28 U.S.C. §§ 510-13, 515 (2006) (Congress codified the transfer of the Attorney General powers to the OLC).

54. Garrison, *supra* note 43, at 222.

55. *Id.*

actually come into existence.<sup>56</sup> In 1870, Congress gave the Attorney General the ability to oversee all criminal and civil litigation involving the United States, but it was not until 1934 that the modern Justice Department came into existence.<sup>57</sup>

The Attorney General was created by the Judiciary Act itself, an important distinction as it was not created through executive branch regulations, but rather by Congress.<sup>58</sup> Outside of being the custodian of the law for the executive departments, the Attorney General was tasked with the additional responsibility to “uphold and preserve the law and to do so according to legal standards, not political ones.”<sup>59</sup> The traditional view of the role of the Attorney General is best described by Attorney General Caleb Cushing in 1854, “to give his advice and opinion on questions of law to the President and to the heads of departments, the action of the Attorney General is quasi-judicial.”<sup>60</sup> He further explained the role as one where the Attorneys General opinions would define the law.<sup>61</sup> The quasi-judicial power of the Attorney General provided the President and the heads of departments with “authoritative and final determinations on the meaning of the law.”<sup>62</sup>

The OLC was originally named the “Office of the Assistant Solicitor General, but was statutorily separated in 1933 and renamed twenty years later.”<sup>63</sup> The OLC has often been referred to as the “Attorney General’s Lawyer,” as it has been delegated almost all of the attorneys general contemporary opinion writing.<sup>64</sup> The modern OLC has outlined its best practices and defined its core function, “to provide controlling advice to the executive branch officials on questions of law that are centrally important to the functioning of the Federal Government.”<sup>65</sup> A guiding principle that is mandated on an OLC attorney is to “always give candid, independent, and

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56. *Id.* at 223.

57. *Id.* at 224-25.

58. This distinction goes to the idea that this democratic system relies heavily on the separation of powers, but a certain amount of weight can be given to the Attorney General because it was Congress that created the office, not the Executive. And yet, the Attorney Generals’ often considered their powers “quasi-judicial.” *Id.* at 227-29.

59. *Id.* at 225.

60. Lund, *supra* note 40, at 441.

61. Garrison, *supra* note 43, at 226-27.

62. *Id.* at 227.

63. Kmiec, *supra* note 41, at 337.

64. *Id.*

65. Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, *Best Practices for OLC Legal Advice and Written Opinions* 1 (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [hereinafter 2005 OLC Memo] (“This memorandum updates a prior memorandum, ‘Best Practices for OLC Opinions,’ issued May 16, 2005”).

principled advice.”<sup>66</sup> As the OLC is often asked to “opine on issues of first impression that are unlikely to be resolved by the courts,” it is imperative that the attorneys honestly appraise the applicable law in any given situation.<sup>67</sup>

*B. Stare Decisis on the Executive*

The OLC is the primary interpreter of the Constitution for the executive branch.<sup>68</sup> The opinions it issues have a stare decisis effect on the branch.<sup>69</sup> The Judiciary Act did “not expressly declare what effect shall be given” to the Attorney General’s opinion,<sup>70</sup> but the general practice of the Government has been to follow it.<sup>71</sup> Prior Attorneys General opinions and those of the OLC serve as precedent for current opinion making by the OLC, in that there is now over 200 years of a legal foundation and tradition that govern.<sup>72</sup> The idea is that this tradition would serve to combat the personal views of the current OLC. Further, because the OLC is often opining on issues of first impression, its “advice may effectively be the final word on the controlling law.”<sup>73</sup>

The OLC rarely departs from its prior opinions.<sup>74</sup> Part of the reason that the OLC’s opinions carry precedential weight is because its opinions consist of the “largest body of official interpretation of the Constitution outside of the volumes of the federal court reporters.”<sup>75</sup> The OLC will rarely overrule itself, but the best indicator that the OLC will depart from its prior opinions is if there is a direct request from the executive.<sup>76</sup> The Best Practices Memo from 2010 guides the OLC to “give great weight to any relevant past opinions of Attorneys General and the Office,” instructing the attorneys not to “lightly depart” when the opinions decide “a point in question.”<sup>77</sup> The OLC’s “carefully worded opinions are regarded as binding precedent.”<sup>78</sup> Because

66. *Id.*

67. *Id.*

68. *See* Garrison, *supra* note 43, at 236-38.

69. *Id.* at 230.

70. *Id.*

71. *Id.*

72. *Id.* at 231-32.

73. 2005 OLC Memo, *supra* note 65, at 1.

74. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1448 (2010).

75. *Id.* at 1451; John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 376 (1993).

76. *See* Morrison, *supra* note 74, at 1458.

77. 2005 OLC Memo, *supra* note 65, at 2.

78. Daniel Klaidman, *Palace Revolt*, NEWSWEEK (Feb. 5, 2006, 7:00 PM), <http://www.newsweek.com/palace-revolt-113407>.

of the significant body of interpretation and instruction to stick to precedent, it is not likely the OLC will stray from a past opinion.

*C. The OLC'S Memoranda Regarding Criminal Amenability of the President*

Following both the Watergate scandal of President Richard Nixon and the impeachment of President Bill Clinton, the OLC issued opinions stating that the President was immune from criminal prosecution.<sup>79</sup> In 1973, post-Watergate, the OLC argued that the President was too “unique” to be subjected to criminal prosecution because it would undermine his ability to perform constitutionally assigned functions.<sup>80</sup> The author, Dixon,<sup>81</sup> argued that any argument as to immunity had to be based on the “doctrine of the separation of powers.”<sup>82</sup> Furthermore, the President was not “an ordinary citizen,” so any claims that a court could have jurisdiction over him had to be balanced with the “normal functions of the courts and the special responsibilities . . . of the Presidency.”<sup>83</sup> He also argued that the following components of a criminal proceeding worked against trying a sitting President: he would not get a fair trial and he has the “power to control prosecutions, to exercise executive privilege, and to grant pardons” to all involved; possibly even himself.<sup>84</sup> The OLC made the distinction that the President should submit himself to the courts for minor offenses, but that under the constitutional plan as outlined under Art 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.”<sup>85</sup>

In 2000, following the impeachment of President Clinton, the OLC re-examined the 1973 OLC Memo and determined that the 1973 OLC’s analysis was the correct analysis because criminal indictment of a President would be a constitutional violation of the separation of powers.<sup>86</sup> In examining the 1973 OLC Memo, the 2000 OLC confirmed that all federal civil officers

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79. See 1973 OLC Memo, *supra* note 6, at 26-29, 34; 2000 OLC Memo, *supra* note 6, at 60.

80. See 1973 OLC Memo, *supra* note 6, at 28-29.

81. Assistant Attorney General Robert G. Dixon, of the Office of Legal Counsel, was the author of the 1973 OLC Memo. See *id.* at 41.

82. Stephen M. Griffin, Article: *Presidential Immunity from Criminal Process: Amateur Hour at the Department of Justice*, 5 WID. L. SYMP. J. 49, 53 (2000); see 1973 OLC Memo, *supra* note 6, at 41.

83. Griffin, *supra* note 82, at 53.

84. *Id.*; see 1973 OLC Memo, *supra* note 6, at 25-26.

85. See 1973 OLC Memo, *supra* note 6, at 28.

86. See 2000 OLC Memo, *supra* note 6, at 244.

except the President are subject to indictment and criminal prosecution while still in office, but the “President is uniquely immune” to such a process.<sup>87</sup> Additionally, the 2000 OLC Memo broadened the scope with further support from a brief filed in federal court against Vice President Agnew just two weeks after the 1973 OLC Memo, that argued “the Framers could not have contemplated prosecution of an incumbent President because they vested in him complete power of the execution of the laws, which includes, of course, the power to control prosecutions.”<sup>88</sup> The 2000 OLC Memo considered the additional Supreme Court cases that were decided in the interim that were relevant to criminal prosecution.<sup>89</sup> First, in *United States v. Nixon*,<sup>90</sup> the Court opined when the President or those he communicates with can assert executive privilege. Second, in *Clinton v. Jones*,<sup>91</sup> the Court held that constitutional immunity would not extend to conduct unrelated to the official duties of the President. Third, in *Nixon v. Fitzgerald*,<sup>92</sup> the Court found that there would be absolute presidential immunity from damages liability for official responsibilities of the President. Within the consideration of the additional case law, the 2000 OLC Memo concluded that the Constitution requires recognition of presidential immunity from indictment and criminal prosecution of a sitting President.<sup>93</sup>

Both the 1973 Department of Justice and the 2000 Department of Justice came to the same constitutional conclusion, after an almost identical analysis.<sup>94</sup> Likely, the 2000 OLC Memo was following precedent as the question of criminal amenability of the sitting President had been raised and debated previously by the 1973 OLC.<sup>95</sup> In the absence of binding law from a court addressing such a claim, the OLC continued to insist that a sitting President is immune from indictment and criminal prosecution.<sup>96</sup>

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87. *Id.* at 222.

88. *Id.* at 236 (quoting Solicitor General Robert Bork in the brief he filed in the United States District Court for the District of Maryland).

89. *See supra* notes 82-84.

90. 418 U.S. 683, 707-13 (1974).

91. 520 U.S. 681, 693-95 (1997).

92. 457 U.S. 731, 749, 756 (1982).

93. *See* 2000 OLC Memo, *supra* note 6, at 244, 260.

94. *See* 1973 OLC Memo, *supra* note 6, at 20-32; 2000 OLC Memo, *supra* note 6, at 260.

95. *See* 1973 OLC Memo, *supra* note 6, at 1 (as evidenced by the existence of the 1973 OLC Memo).

96. *See id.* at 33; 2000 OLC Memo, *supra* note 6, at 260.

## II. IMMUNITY, INDICTMENT, IMPEACHMENT

While the OLC insisted its stance was constitutionally sound,<sup>97</sup> legal scholars are fundamentally divided on the issue of criminal prosecution.<sup>98</sup> Professor Akhil Amar argues that temporary immunity shields the President from criminal prosecution, while Ronald Rotunda argues that there is no immunity, and immunity should not be inferred from the Constitution.<sup>99</sup> The crux of Amar's argument is that the President has to be temporarily immune; otherwise, the executive branch would be paralyzed with an arrest, indictment, and trial.<sup>100</sup> Professor Rotunda's argument is much more strict and allows for no inferences of immunity from the Constitution;<sup>101</sup> he further clarifies that the 25<sup>th</sup> Amendment can solve the paralysis problem, even claiming that the Vice President's only job is to wait and fill the President's shoes if something were to happen to the President.<sup>102</sup> Still other scholars, like Professor Jonathan Turley, argue that there is no need to impeach first and prosecute second because the lines have been blurred between impeachment and indictment. Each serve very different functions.<sup>103</sup>

A. *Presidential Immunity*

Professor Amar claims that presidential immunity in both criminal and civil cases is implied from the Constitution, stressing that "impeached officials are subject to 'indictment, trial, judgment and punishment' after their conviction by the Senate."<sup>104</sup> Professor Amar's argument is rooted in the constitutional text, history, structure and precedent, specifically of Justice Story,<sup>105</sup> that "sitting Presidents cannot be prosecuted."<sup>106</sup> Amar broadens Story's theory to include criminal and civil immunity.<sup>107</sup> He argues that if the President has committed a crime, then the President can be held accountable after he leaves office, and to hasten this, Congress can impeach

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97. See 2000 OLC Memo, *supra* note 6, at 223.

98. See *infra* notes 99-147.

99. See Amar & Kalt, *supra* note 33, at 11; Rotunda Letter, *supra* note 7, at 6-7.

100. See Amar & Kalt, *supra* note 33, at 12.

101. See Rotunda Letter, *supra* note 7, at 6-7.

102. See *id.* at 33.

103. Jonathan Turley, "From Pillar to Post": *The Prosecution of American Presidents*, 37 AM. CRIM. L. REV. 1049, 1052-53 (2000).

104. See Amar & Kalt, *supra* note 33, at 11.

105. Justice Joseph Story's conclusion was that presidents have at least some immunity, especially in civil cases. See Akhil Reed Amar & Neal Kumar Katyal, *Commentary: Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 716 (1995).

106. Amar & Kalt, *supra* note 33, at 11.

107. See *id.* at 21 n.1.

him.<sup>108</sup> Thus, the impeachment court is the only court that can correctly try a sitting President.

The first part of Professor Amar's immunity claim is that the President is constitutionally distinct from other prosecutable officials.<sup>109</sup> First, the President is a unitary executive; where the legislature consists of 535 Senators and Representatives, and the judiciary consists of over 1300 Article III judges and nine Supreme Court Justices, the President alone is the entire executive authority.<sup>110</sup> If the President is prosecuted, the entire presidency itself is prosecuted, or in the alternative, if the President is arrested, the entire executive is arrested, too.<sup>111</sup> Second, because the President is nationally elected and represents 325 million Americans,<sup>112</sup> he argues that if he were "prosecuted, the steward of *all* the People would be hijacked from his duties by an official of *few* (or none) of them."<sup>113</sup> Finally, the President is distinct because he must be ready to act "instantly and decisively, 24 hours a day, 365 days a year" and any distraction would have an enormous impact on the well-being of the nation.<sup>114</sup>

The second part of Professor Amar's immunity claim is a structural argument, that a federal prosecutor cannot prosecute because there is a separation of powers between the judicial, executive, and legislative branches.<sup>115</sup> The scenario where a President is prosecuted would place "the entire executive branch at the mercy of the judicial branch."<sup>116</sup> Additionally, the Constitution designates Congress as the court that tries Presidents.<sup>117</sup> As he makes his immunity argument, Professor Amar often speaks of a "skeptic" who asks, "Isn't this supposed to be a government of laws, not men?"<sup>118</sup> Professor Amar seems comfortable with justice being served after a President is removed from office, either after he is voted out or impeached, but not while sitting as President. Further, he has to be immune, otherwise he would

108. *See id.* at 11.

109. *See id.* at 11-12.

110. *Id.* at 12.

111. *Id.*

112. Population of the United States in 2017, UNITED STATES CENSUS BUREAU, <https://www.census.gov/search-results.html?q=total+U.S.+population&search.x=0&search.y=0&page=1&stateGeo=none&searchtype=web&cssp=SERP> (last visited Oct. 14, 2018).

113. Amar & Kalt, *supra* note 32, at 12 (describing how a single prosecutor, who perhaps did not even vote in the presidential election, can file charges and put the President behind bars).

114. *Id.* at 13.

115. *Id.* at 16-17.

116. If the President is called into court, the executive branch would be at the mercy of the judicial branch, which is the core of the most basic principles of the separation of powers doctrine. *Id.* at 17.

117. U.S. CONST. art. II, § 4; *see* BLACK, JR., *supra* note 28, at 5.

118. Amar & Kalt, *supra* note 33, at 16.

just pardon himself.<sup>119</sup> Thus, in his view, a President is temporarily immune from criminal prosecution<sup>120</sup>

*B. Newfound Rotunda Memo*

In a memo procured by Independent Counsel Kenneth Starr, Ronald Rotunda opined that where *Clinton v. Jones*<sup>121</sup> denied immunity to the President for civil damages, that denial of immunity naturally extends to criminal prosecution.<sup>122</sup> He argued that if there were no recourse against the President, he would be “above the law.”<sup>123</sup> Further, if the Framers intended for the President to be immune, then they would have written an immunity clause, “[b]ut they wrote nothing to immunize the President. Instead they wrote an Impeachment Clause, treating the President [as] all other civil officers . . . .”<sup>124</sup> If a grand jury were to conclude that the President committed serious crimes, but failed to indict, then the President has no means to seek vindication via the judicial system.<sup>125</sup> Rotunda strengthens his argument by using the structural language of the Constitution, clarifying Justice Story’s stance<sup>126</sup> and ruling out that impeachment must precede an indictment.<sup>127</sup>

The Constitution provides two specific sections that refer to some type of “immunity” from the ordinary reach of the laws: (1) the privilege from arrest clause,<sup>128</sup> which limits arrest in a civil case, and (2) the speech or debate clause,<sup>129</sup> which is narrowly interpreted by the Supreme Court and only applies to the legislature.<sup>130</sup> Rotunda argued that because the Framers knew how to write an immunity clause, had they meant for the President to be immune, they would have expressly written it in the Constitution. However,

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119. *Id.* at 20.

120. *Id.* at 21.

121. 520 U.S. 681, 709-10 (1997).

122. See Rotunda Letter, *supra* note 7, at 28 (opining that if public policy allows a private litigant to sue a sitting President for alleged acts that are not part of the President’s official duties, 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.”).

123. See *id.* at 5.

124. See *id.* at 7.

125. *Id.* at 10.

126. See *id.* at 24-25 (quoting Justice Story, “The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office.”) Rotunda emphasizes that the immunity exists only “while he is in the discharge of the duties of his office . . . .”

127. *Id.*

128. See *id.* at 16.

129. See *id.* at 17.

130. See *id.*

what the Constitution is left with is the Impeachment Clause, and there is only one clause, not one per member of the government, so it must be construed to apply equally to all members of the elected government. “[T]he [Impeachment C]lause makes clear that double jeopardy would not bar a criminal prosecution . . . . [it] does *not* state that criminal prosecution must come after impeachment.”<sup>131</sup>

In *Clinton v. Jones*, the Court rejected any immunity, even temporary immunity, but it noted that Clinton’s strongest argument was that “burdening him with litigation” would violate the constitutional separation of powers.<sup>132</sup> However, the Court rejected that argument, stating that the separation of powers “does not mean that the branches ‘ought to have no partial agency in, or no controul (sic) over the acts of each other.’”<sup>133</sup> As Rotunda’s memo moves away from the holding in *Clinton*, he furthers his own claim that a sitting President is subject to criminal indictment because of another separation of powers problem.<sup>134</sup> If impeachment has to come before indictment, then there is a separation of powers problem because Congress controls the decision whether to prosecute the President and the Congress has no role in the execution of the laws.<sup>135</sup> Thus, Rotunda concludes that the President can be indicted and that the President does not need to be impeached first in order to indict.<sup>136</sup>

### C. *Blurred Lines Between Impeachment and Indictment*

Not only does a sharp division exist between the two schools of thought, other scholars point out that those who believe impeachment is the *only* method for dealing with a sitting President’s crime have blurred the lines between impeachment and indictment.<sup>137</sup> Impeachment protects the office of the presidency, while indictment punishes an individual for criminal offenses against the State.<sup>138</sup> Professor Turley argues that others often mistakenly presume indictment and impeachment are a common theme and serve the same function.<sup>139</sup> He claims that instead, impeachment and indictment are

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131. *See id.* at 19 (emphasis added).

132. *See id.* at 36 (quoting *Clinton v. Jones*, 520 U.S. 681, 696-97 (1997)).

133. *See id.* at 37 n.108 (quoting both *Jones*, 520 U.S. at 703 and James Madison in THE FEDERALIST PAPERS, Federalist No. 47, pp. 325-326 (J. Cooke ed. 1961)).

134. *See id.* at 44.

135. *See id.*

136. *See id.* at 55-56.

137. Turley, *supra* note 103, at 1052.

138. *Id.* at 1053.

139. *Id.* at 1052-53.

two separate processes.<sup>140</sup> While the Impeachment Clause is “designed to protect the office of the presidency and the country from” a negligent executive, indictment is designed to “punish an individual for an offense committed against other individuals or the State.”<sup>141</sup>

Professor Turley therefore concludes that there is no need to impeach first, then prosecute. If there must be an impeachment before a prosecution, what happens in the case where the President committed a crime, but the crime does not rise to the level of an impeachable offense because it is a less severe crime?<sup>142</sup> Yet, regardless of the crime, it is not necessary to distinguish between a less severe crime and that of willful murder.<sup>143</sup> “The [P]resident, like everybody else, is generally bound by the criminal law.”<sup>144</sup> And they should be bound by the criminal law. In contrast, Charles Black Jr. is a proponent of tolling the statute of limitations until the President has left office,<sup>145</sup> similar to the argument the OLC made in its conclusion of the 2000 OLC Memo.<sup>146</sup>

The legal scholars’ strong division on whether a President can be criminally prosecuted suggests that the OLC’s position is not particularly persuasive and even challenges the soundness of the OLC’s conclusion.

### III. THE OLC’S LACK OF INDEPENDENCE

The OLC limits the threat of criminal investigation through its memoranda which is problematic if, and when, Congress fails to check a President that has acted criminally through impeachment. The OLC is held together by “principles that have guided and will continue to guide OLC attorneys,”<sup>147</sup> yet these are not enough to keep it independent from the executive in order to write the most objective and fair legal opinions. The President is often asking whether a policy issue is constitutional, and the OLC feels compelled to please its client, the President.<sup>148</sup>

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140. *Id.*

141. *Id.* at 1053.

142. *Id.* at 1104 (opining that if the crime was a lesser crime then the idea of impeachment would not be entertained, but then justice goes unserved for the lesser crime).

143. *See generally* BLACK, JR., *supra* note 28, at 40.

144. *Id.* at 40-41.

145. *Id.*

146. *See* 2000 OLC Memo, *supra* note 6, at 237.

147. 2005 OLC Memo, *supra* note 65, at 1.

148. *See Presidential Authority*, *supra* note 39, at 2100.

### A. Lack of Independence

The OLC's lack of independence from the executive branch places it in the position where its norms are not sufficient to combat political pressure from the President and his policy makers. The Attorney General and the OLC should strive to find the best view of the law, not to endorse the President.<sup>149</sup> The OLC's job is to create the strongest legal arguments supported by the Constitution, so that the executive can take care that the law is "faithfully executed."<sup>150</sup> The OLC's internal safeguards of independence include requiring: 1) consultation before the government takes any action, 2) transparency in drafting opinions, and 3) stare decisis of prior opinions.<sup>151</sup> However, this is not enough; one request from the President, the OLC's boss, is enough to uproot tradition and norms because the Constitution has charged the President with faithfully executing the laws.<sup>152</sup>

Despite norms of independence, the OLC is not formally independent because its actions are internal to the executive branch.<sup>153</sup> It does not have the protections of a truly independent agency, like the Federal Reserve Board, where Congress has granted "broad rule making authority."<sup>154</sup> The OLC is headed by an Assistant Attorney General, who is nominated by the President and confirmed by the Senate. The position is a political one as this Assistant Attorney General serves at the pleasure of the President.<sup>155</sup> However, within the OLC, the tenure of line attorneys is limited to two or three years.<sup>156</sup> With the large turnover of attorneys, the Assistant Attorney General is able to appoint attorneys that likely align more with the jurisprudence of the administration in which they serve.<sup>157</sup> Ultimately, there is very little job protection for the lawyers within the OLC and the Assistant Attorney General herself. It is likely that the OLC will feel beholden to the President.

Therein lies the problem: If the sitting President has acted criminally, he can instruct the Attorney General to again issue an opinion to support his policy goal of rebuking a criminal indictment on constitutional grounds. "The data show[s] that the OLC rarely departs from its prior opinions, but

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149. Randolph D. Moss, *Recent Developments Federal Agency Focus: The Department of Justice: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1311 (2000).

150. U.S. CONST. art. II, § 3, cl. 4.

151. 2005 OLC Memo, *supra* note 65, at 1.

152. *See Presidential Authority*, *supra* note 39, at 2097.

153. The OLC sits within the Office of the Attorney General, which is not an independent agency, but rather an office within the executive branch.

154. *See Presidential Authority*, *supra* note 39, at 2097.

155. McGinnis, *supra* note 75, at 422.

156. *Id.* at 425.

157. *Id.*

that an ‘express request’ for overruling from the executive entity most affected by the opinion is [the best] predictor of such a departure.’<sup>158</sup> In recent years, Presidents have asked the OLC for support in reaching their policy goals. For example, President Bush needed justification to torture and received it in the infamous torture memo. The quality of that analysis has been heavily critiqued, and one of the authors of the memo has been described as misunderstanding his role, treating his client as President Bush, rather than the office of the Presidency.<sup>159</sup> On the other hand, President Obama short-circuited the OLC’s norms altogether by bypassing it to achieve his own ends, asking for informal, rather than formal, advice on the legality of staying in Libya, and thereby indicating to OLC attorneys that if their advice was not supportive of the current President’s policy goals, it was likely to be ignored if even requested.<sup>160</sup>

### B. *Limits of the Political Question*

Justiciability issues, specifically the political question doctrine, might prevent judicial review of the prosecutorial decision to indict a sitting President, thereby leaving the OLC as the final arbiter of whether indictment would violate the Constitution, despite the office’s compromised independence on this question.<sup>161</sup> For instance, in *Nixon v. United States*,<sup>162</sup> the Court was asked to determine what the impeachment process should look like for a federal judge,<sup>163</sup> and the Court found that it would be inappropriate for the judicial branch to decide that question because Congress was in charge of impeachment.<sup>164</sup>

However, the courts should deem themselves equipped to arbitrate this indictment question, as was the case in *Nixon v. Sirica*.<sup>165</sup> Although the issue

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158. Morrison, *supra* note 74, at 1448.

159. See *Presidential Authority*, *supra* note 39, at 2102-03. OLC lawyer, John Yoo, assumed his client was President Bush, not the institution of the presidency and neglected the OLC’s duty to balance competing concerns in favor of aiding the President. *Id.*

160. See *id.* at 2106-07. Rather than getting the OLC’s formal view, President Obama asked for an informal view on whether he would need further authorization to stay in Libya. He did not like the OLC’s view, so he did not formally ask for it and the OLC’s norms failed to constrain possible unconstitutional behavior by the President as its opinion writing function was bypassed. *Id.*

161. If the U.S. Supreme Court considers a claim brought before it as a “political question” then it will rule the claim nonjusticiable and not hear it.

162. 506 U.S. 224 (1993).

163. *Id.* at 226.

164. *Id.* at 235, 238.

165. 487 F.2d 700, 711 n.50 (D.C. Cir. 1973) (en banc) (per curiam) (citing the Impeachment Clause, Art. II, § 4) (“Because impeachment is available against all ‘civil officers of the United States,’ 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”); see also

in that case was not specifically that of indictment, the Court was asked to affirm a determination by a lower court that the President was subject to the traditional Article III jurisdiction.<sup>166</sup> The main question was whether President Nixon could claim immunity or executive privilege with respect to the “Watergate” tapes.<sup>167</sup> The court answered that question in as narrow terms as possible: “the Constitution makes no mention of special presidential immunities. Indeed, the executive branch generally is afforded none. This silence cannot be ascribed to oversight.”<sup>168</sup> Essentially, the President was made subject to federal courts in criminal matters and ordered to turn over the tapes. Therefore, this is now precedent for future federal courts when claiming jurisdiction over sitting Presidents. Unfortunately, though, if prosecutors feel they are bound by the OLC’s memo, it is unlikely they will attempt indictment, and therefore unlikely for a court to review the question of a President’s amenability to criminal process. But until the OLC can be reformed and made truly independent, prosecutors should not feel bound by the memos, given the lack of independence from the office and person who is the subject of the memos—the President. The next Part outlines potential reforms to improve OLC independence.

#### IV. IMPROVING THE OLC

The OLC and legal scholars struggle in finding a consensus as to why the President should be immune from criminal indictment or, in the alternative, subject to the jurisdiction of the judiciary; similarly, the whole concept of the OLC defies the basic separation of powers doctrine generally. The Attorney General and the OLC have been tasked to issue opinions of law to the executive, yet the President appoints the head of the OLC.<sup>169</sup> The OLC’s opinions are treated as binding, but the executive can instruct the OLC on the direction of the opinions and get the results he asks for. Thus, the independence that gives the OLC’s opinions weight is immediately diminished by this lack of separation of powers.

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Rotunda Letter, *supra* note 7, at 7 (explaining that “it would be anomalous and aberrant to interpret the Impeachment Clause to immunize the President of alleged criminal acts, some of which . . . [are] far removed from any of the President’s enumerated duties”).

166. *See Sirica*, 487 F.2d at 704.

167. *See id.*

168. *Id.* at 711; *see also* Rotunda Letter, *supra* note 7, at 16-18.

169. DEP’T OF JUST., GEN. LEGAL ACTIVITIES: OFF. OF LEGAL COUNS. (2017) (explaining that the OLC is headed by an Assistant Attorney General who is appointed by the President and confirmed by the Senate).

This strange dichotomy has also been noticed by constitutional scholars. For example, Bruce Ackerman<sup>170</sup> claims that the opinions that come out of the OLC are symptoms of a deeper structural problem in the White House and the Justice Department.<sup>171</sup> The OLC does not have to subject itself to the checks and balances that constrain professional legal judgment.<sup>172</sup> Ackerman thinks the OLC should be organized more like a court where it must hear both sides of a legal argument before reaching its opinions on the merits.<sup>173</sup> He argues for the reversal of Executive Order 12,146 so the OLC can turn into a tribunal of multimember panels.<sup>174</sup> Clearly, Ackerman is aware that the task he suggests in re-designing an institution like the OLC is no small order, but stresses how important it is to build the best institution possible because in the words of Madison, “the enlightened statesmen will not always be at the helm.”<sup>175</sup>

Perhaps there is a more middle-of-the-road approach. In order to achieve the independence necessary for these important opinions, the OLC would function more efficiently and fairly if it were set up like an “independent agency.”<sup>176</sup> Congress can grant the OLC broad rule making authority and stipulate that the President shall not have the power to remove the agency’s officers the way he can remove members of the executive branch.<sup>177</sup> If the OLC still served as the official opinion writer for the executive, but operated at an arm’s length from the President, then it would also solve the separation of powers issue. On the other hand, *Morrison v. Olson*,<sup>178</sup> which permits limitations on removal of members of the executive

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170. Bruce Ackerman is another leading constitutional scholar who has written extensively on the process of judicial review.

171. Bruce Ackerman, *Abolish the White House Counsel*, SLATE (April 22, 2009, 3:47 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/04/abolish\\_the\\_white\\_house\\_counsel.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/04/abolish_the_white_house_counsel.html).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. The SEC, FCC, and the Federal Reserve Board are all examples of constitutionally independent agencies that are immune from presidential influence. These three examples of independent agencies have “commission” members who are appointed by the President, but cannot be fired by the President and demonstrate independence apart from the executive branch. See Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 278 (1988); *id.* at n.12 (referring to the SEC); *id.* at n.37 (describing the inability of the President to remove the chair of the Federal Reserve Board).

177. The President must have removal power over a position that is within the executive in order for the position to be constitutional, but that power can be limited in certain circumstances. For example, if the position is considered an inferior position then the President’s removal power is limited. See *Morrison v. Olson*, 487 U.S. 654 (1988).

178. *Id.*

branch, may be overturned or severely constrained in the years to come, given the changing composition of the Supreme Court.<sup>179</sup>

In the absence of making a huge structural change to the system in place at the OLC, the alternative is to strip the OLC opinions, or at least those that directly affect the liability of Presidents, both criminal and civil, of their precedential weight; specifically, not defer to the 1973, nor the 2000 OLC Memo on the issue of the criminal amenability of the President. The whole constitutional system was designed by the Framers to self-regulate, but we are now in a time where partisanship has undermined the robustness of the various checks and balances built into the document. The best case scenario would be to trust the system we have by stripping OLC opinions of their weight, on at least the most concerning topics such as this one, thereby letting a prosecutor file charges against the sitting President. Then the President has an opportunity to have his day in court or appeal the charges to the Supreme Court. The Supreme Court, a body that is actually independent of the President, can either hold the President to be within Article III jurisdiction, at least in some circumstances, or declare the issue is a political question better left to Congress. This would leave the decision of an individual prosecutor to indict in place, but Congress could weigh in on the matter if it chose to limit the ability of prosecutors to indict sitting Presidents. Although it has been hundreds of years since the Framers came up with the construct of our democracy, we have to trust that it can still hold us in these partisan times.

#### CONCLUSION

With legal scholars split on the amenability of a sitting President to indictment and prosecution, the OLC has held strong in its opinion that a sitting President cannot be prosecuted.<sup>180</sup> Both sides have valid constitutional arguments, yet only one side carries any practical precedential weight.<sup>181</sup> The OLC's lack of independence from the executive and its desire to serve the President are problematic because the opinions carry a *stare decisis* effect.<sup>182</sup> With little desire to stray from past opinions unless expressly asked, the opinions remain intact in the face of times that might call for them to change.

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179. *Id.*; see also Alvin Chang, *Brett Kavanaugh and the Supreme Court's Drastic Shift to The Right*, *Cartoonsplained*, VOX (Sept. 14, 2018, 11:12 AM), <https://www.vox.com/policy-and-politics/2018/7/9/17537808/supreme-court-brett-kavanaugh-right-cartoon>.

180. See 1973 OLC Memo, *supra* note 6; see 2000 OLC Memo, *supra* note 6.

181. See *supra* notes 61-71 and accompanying text.

182. See *supra* notes 61-71 and accompanying text.

In the absence of impeachment, the lack of a threat of criminal prosecution places the President in the unique position where the President is above the law. With the OLC rooted in the Judiciary Act and tasked with the opinion writing function for the Attorney General, the OLC is likely the final arbiter of constitutional matters as the matters almost never make it to court. The OLC has concluded on multiple occasions that a sitting President cannot be criminally indicted and prosecuted. However, the OLC's memoranda on the criminal amenability of the President should not be deferred to or relied because their lack of independence from the President, combined with the lack of review of their analyses by other branches of government, violates a fundamental principle that "we are a government of laws, not men."<sup>183</sup>

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183. Amar & Kalt, *supra* note 33, at 16.

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