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Nixon Now: The Courts and the Presidency After Twenty-five Years

Michael Stokes Paulsen†

*United States v. Nixon*¹ was, and remains today, a case of enormous doctrinal and political significance—easily one of the five most important Supreme Court decisions of the last fifty years. The decision proximately led to the forced resignation of a President of the United States from office. The decision helped spawn a semi-permanent statutory regime of Independent Counsel, exercising the prosecutorial power of the United States and investigating executive branch officials²—a regime that has fundamentally reshaped our national politics. *Nixon* provided not only the political context that spawned the Independent Counsel statute, but a key step in the doctrinal evolution that led the Court to uphold its constitutionality, incorrectly, fourteen years later, in *Morrison v. Olson*.³

United States v. Nixon also established the principle that the President possesses no constitutional immunity from compulsory legal process, a holding that led almost inexorably to the Supreme Court's unanimous rejection of presidential immunity from civil litigation for non-official conduct, twenty-three years later, in *Clinton v. Jones*⁴—a holding that helped set in motion a series of events that led to the (self-inflicted) crippling of another presidency.⁵ In addition, by specifically

† Julius E. Davis Professor of Law, University of Minnesota Law School. I would like to thank Jill Radloff for invaluable research assistance and comments on an earlier draft, the other participants in this conference for their comments and critiques, and the staff of the *Minnesota Law Review* for producing and publishing such an excellent symposium and inviting me to participate in it.

1. 418 U.S. 683 (1974).

2. 28 U.S.C. §§ 591-599 (1994).

3. 487 U.S. 654 (1988).

4. 117 S. Ct. 1636 (1997).

5. The Supreme Court's decision in *Clinton v. Jones* obviously did not cause President Clinton's apparent perjury and obstruction of justice. These acts, and their discovery, led to the year-long investigation, impeachment, and

rejecting executive privilege in the context of an Independent Counsel subpoena in a criminal proceeding, *Nixon* led unavoidably to judicial rejection of President Clinton's assertions of executive privilege,⁶ governmental attorney-client privilege,⁷ and Secret Service "protective functions" privilege⁸ twenty-four years later—judicial decisions that prevented President Clinton from successfully covering up his own (likely) criminal conduct, just as the Supreme Court's decision in *Nixon* prevented President Nixon from hiding his crimes behind claims of the institutional prerogatives of the Presidency.⁹

trial in the Senate. Bill Clinton's acts in response to the Supreme Court's *Jones* decision were done of his own volition. Even on the assumption that *Jones* was wrongly decided, the subsequent damage to the Clinton presidency was done by Clinton, not by the Court.

6. See *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998) (President Clinton initially appealed the adverse ruling on his executive privilege claims, but then abandoned the claims when Independent Counsel Starr sought certiorari before judgment in the U.S. Supreme Court. See Peter Baker, *Clinton May Drop Appeal on Privilege; Strategy Could Avert Supreme Court Review*, WASH. POST, June 1, 1998, at A1; *Clinton to Limit Legal Appeal; Executive Privilege Claim to Be Dropped*, CHI. TRIB., June 1, 1998, at 1.

7. See *In re Lindsey*, 148 F.3d 1100, 1102 (D.C. Cir.) (per curiam), cert. denied, 119 S. Ct. 466 (1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), cert. denied, 117 S. Ct. 2482 (1997). See generally Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473 (1998) (discussing issues presented by claim of attorney-client privilege by government attorneys as against Independent Counsel grand jury subpoenas).

8. See *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998), reh'g denied, 146 F.3d 1031 (D.C. Cir. 1998), stay denied, Office of the President v. Office of the Independent Counsel, App. No. 1-108, 1998 WL 438524, at *1 (U.S. Aug. 4, 1998), and cert. denied, 119 S. Ct. 461 (1998).

9. Unlike President Nixon, however, President Clinton may nonetheless escape the full political consequences of his actions. In February 1999, the Senate declined to convict President Clinton by the constitutionally required two-thirds majority of the articles of impeachment brought by the House of Representatives, even though it appears that a substantial majority of senators agreed that Clinton in fact engaged in the conduct of which he was accused and for which he was impeached. A sufficiently large number of members of the Senate, comprised chiefly of members of Clinton's political party, took the position that the conduct in question, even if criminal, did not rise to the level of seriousness justifying conviction and removal from office of a President who retained substantial popular political support. See *Trial of the President; Excerpts of Debate Comments; Senators Spell out Their Convictions*, L.A. TIMES, Feb. 11, 1999, at A27 (excerpting debate testimony from Senators who voted to acquit because in their view the conduct did not rise to the level of constitutional high crimes); *The Senate Verdict; Excerpts of Vote Comments; Respect for Law, Defense of Presidency Cited As Impetus for Votes*, L.A. TIMES, Feb. 13, 1999, at A22 (citing statements from Senators voting to acquit who explained that their decision was in large part because the American people

Finally, and perhaps most significantly of all, *United States v. Nixon* explicitly and unequivocally asserted the principle—arguably for the first time—of absolute judicial supremacy over the President in matters of constitutional law involving the scope of the President's powers and prerogatives.¹⁰ This was a holding of immense consequence, then and now, and was a necessary step in all of the Court's other holdings in the Nixon Tapes Case.

continue to support President Clinton). President Nixon, by the time of his resignation, had lost the political support of the public and of substantial numbers of senators and representatives of his own political party.

President Clinton has not completely escaped legal jeopardy and punishment, however. As this article goes to press, the federal district judge in the *Jones* litigation has held Clinton in contempt for "intentionally false" testimony before the court in Clinton's deposition. *Jones v. Clinton*, No. LR-C-94-290, 1999 WL 202909, at *11 (E.D. Ark. Apr. 12, 1999); see also *id.* at *7 ("[T]he record demonstrates by clear and convincing evidence that the President responded to plaintiff's questions by giving false, misleading, and evasive answers that were designed to obstruct the judicial process."). Judge Wright imposed monetary sanctions and also referred the matter to Arkansas Bar disciplinary authorities. *Id.* at *10-12. In addition, President Clinton could face criminal prosecution after leaving office, and quite possibly even before leaving office. See *infra* note 113 and accompanying text.

10. See *Nixon*, 418 U.S. at 704-05. The strongest competitor for this honor is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in which the Court declared unlawful the actions of President Truman's Secretary of Labor (Sawyer), at Truman's direction, in seizing the nation's steel mills to avoid a strike. Though nominally directed to a cabinet officer, and not the President, *Youngstown Sheet & Tube* is the most prominent pure case of a judicial injunction directed at the executive, sustained by the U.S. Supreme Court, on an issue of constitutional law concerning the scope of the President's powers and prerogatives. The Court's opinion did not, as subsequently has become fashionable, directly assert judicial supremacy over a coordinate branch, but the Court did uphold the issuance of an injunction against an executive officer carrying out a presidential directive. The Court did not, except by implication, assert an executive duty to obey—though the implication is a very strong one.

A standard example often cited for the proposition of judicial supremacy over the executive, and on which the Court relied in *Nixon*, is *Marbury v. Madison*. *Marbury*, however does not assert judicial supremacy over the President. Indeed, quite the contrary, *Marbury* explicitly denies any such claim to supremacy. The Court did not order the Jefferson administration to deliver to Mr. Marbury his commission as a justice of the peace, and Chief Justice Marshall's opinion expressly denied any judicial power to "intermeddl[e] with a subject over which the executive can be considered as having exercised any control." 5 U.S. (1 Cranch) 137, 170 (1803). Moreover, the reasoning supporting the Court's conclusion that the judiciary may not give effect to unconstitutional acts of Congress decisively refutes any proposition that one branch is supreme over the others in matters of constitutional interpretation. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 241-45, 257-62 (1994).

Great cases make bad law, the maxim goes, and *United States v. Nixon* was unquestionably a great case. It is also something of a doctrinal train wreck. Each of its three major holdings—(1) the supremacy of the judiciary over the executive on constitutional issues of presidential power;¹¹ (2) the creation of an ad hoc judicial “balancing” test for the scope of constitutional executive privilege;¹² and (3) the implied holding of lack of presidential supremacy even *within* the executive branch (that is, presidential supremacy over the actions of subordinate executive officers)¹³—is, if not flatly wrong, at least very seriously flawed. Moreover, each of those holdings has had very serious repercussions for our constitutional system over the last quarter century.

In this essay, I discuss *Nixon*’s three main holdings. Section I addresses the issue of judicial versus presidential supremacy on executive privilege questions and argues that neither the position advanced by President Nixon’s lawyers (executive supremacy) nor that decided on by the Supreme Court (judicial supremacy) is constitutionally sound. Contrary to President Nixon’s assertion, the scope of executive privilege is not subject to the President’s sole determination, with the courts reduced to the role of ciphers, bound to honor and ratify the President’s determination. Contrary to the Supreme Court’s opinion in *Nixon*, the judiciary is not supreme over the President either. My proposition is as follows: as a matter of fundamental constitutional structure—the cornerstone constitutional principle of separation of powers and the autonomy of each branch within its sphere of operation—*neither branch may bind the other with, or demand acceptance from the other of, its assertions concerning the scope of their respective constitutional powers*. It follows that the judiciary may not issue orders directed to the President concerning the scope of the President’s constitutional powers and prerogatives—at least not orders that the President is constitutionally *obliged* to obey. *Nixon*, in its assertion of judicial supremacy over the executive, is fundamentally wrong. The President, *qua* President, is not constitutionally subject to compulsory judicial process and orders at the judiciary’s sole and exclusive judgment.

11. See *Nixon*, 418 U.S. at 703-05.

12. See *id.* at 707-14.

13. See *id.* at 694-97.

Section II addresses the question of the proper scope of "executive privilege"—the specific merits holding of *Nixon*. My thesis on this point is that executive privilege *is* a sound inference from constitutional structure but that the text of the Constitution supplies *no rule*, enforceable by courts, concerning its proper scope. Consequently, its scope is left, as with so many other matters, to the interaction and competition of the three branches of government. It is *not* left to an ad hoc judicially-created constitutional balancing test exclusively the province of the courts, as *Nixon* held, and certainly not to the poorly-designed balance the Court constructed in *Nixon*. The Constitution simply does not authorize creation of a mushy judicial balancing test for determining the scope of constitutionally-based executive privilege.

The courts may, however, recognize common law privileges (if so authorized by Congress, and subject to change by Congress). But even as a matter of judicial development of a common law executive privilege based on constitutional policy, *Nixon's* rule for the scope and applicability of that privilege is clumsy and unsound, being both too broad and too narrow. It is too broad in giving the President apparently absolute and unreviewable discretion to invoke "national security" to bar any further judicial inquiry.¹⁴ And it is too narrow in providing insufficient protection for the confidentiality of executive branch deliberations: *Nixon* provides less protection to the confidentiality of executive deliberations on high matters of government than is provided to communications between a lawyer and client for purposes of drafting a simple will. Surely the former communications should be as privileged as the latter. The judicial rule should be that the President possesses a nearly absolute evidentiary privilege, parallel to the common law attorney-client privilege, to refuse to divulge and to direct other executive branch officials not to divulge, confidential communications between himself and his advisors, or among

14. Cf. *id.* at 706 ("Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection . . ."). As Professor William Van Alstyne has argued, the implication of this passage is that in the *presence* of a claim of need to protect military, diplomatic, or sensitive national security secrets, the judicial rule is that the executive's determination must be accepted in the courts. See William Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 UCLA L. REV. 116, 123 (1974).

his advisors, made for the legitimate lawful purposes of deliberation concerning matters relevant to lawful executive branch policy and action involving any subject within the range of the President's sphere of action under Article II, but subject to defeasance upon a sufficient showing that the communications were made for purposes of furthering a crime or fraud.¹⁵

Section III addresses the question of presidential supremacy *within* the executive branch and argues, again *contra United States v. Nixon*, that the President of the United States must have the final say as to all matters concerning the execution of the laws of the United States by officers of the executive branch. He cannot constitutionally be required to accede to the decisions of a designated subordinate, even if the President has designated the subordinate and assigned him or her the power in question. *Nixon* left the President an escape hatch—rescind the regulation delegating power to the Special Prosecutor—which might, barely, make the Court's decision constitutionally tolerable as a matter of Article II constitutional structure.¹⁶ Under *Nixon*, the President may countermand the Special Prosecutor's executive actions, but only by firing him.¹⁷ President Nixon was simply required to bear the (unbearable) full political cost of exercising his constitutional authority to countermand a subordinate executive branch officer. *Morrison v. Olson* and the Independent Counsel statute, however—"Son of *Nixon*" on this point—are constitutionally intolerable: the President may countermand the executive decisions of an Independent Counsel only by firing him, and legal limitations—enforceable by courts against the President's will—exist on the

15. See *infra* text accompanying notes 128-137. Congress possesses power under the Necessary and Proper Clause to prescribe a statutory rule of executive privilege in order to help the President carry into execution his powers, as Professor Prakash's outstanding contribution to this symposium sets forth at length. Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143 (1999). Congress has authorized the Courts to recognize common law privileges. See FED. R. EVID. 501. Congress may create, or revise, a common law privilege, modifying whatever (nonconstitutional) judicial rule the courts create on the subject.

16. For a perceptive argument that, if this is the case, then an intra-executive suit to compel presidential compliance with a subordinate's subpoena violates Article III, see Professor Kelley's contribution to this symposium. William K. Kelley, *The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 MINN. L. REV. 1197 (1999).

17. See *Nixon*, 418 U.S. at 696.

power to fire.¹⁸ Such limitations render the Independent Counsel relationship unconstitutional.¹⁹

United States v. Nixon is, of course, inconsistent with each of my three major propositions of constitutional law. Yet, oddly, in spite of what I believe are its huge defects of reasoning and constitutional principle, *United States v. Nixon* was rightly decided, in the narrow sense that its outcome is correct and remains defensible even if each of my criticisms is right. Indeed, looking back twenty-five years later, the result in *Nixon* seems unavoidable. The Court pretty much *had* to rule as it did. It is almost unimaginable that the case could have come out any other way, because—to put it bluntly—Richard Nixon was a crook. In the end, it would have been unthinkable for the Supreme Court, with evidence before it of Nixon's likely connection with a criminal conspiracy, to have honored Nixon's claim of presidential immunity from judicial process or absolute executive privilege to refuse to produce the tapes in response to the Special Prosecutor's subpoena. But *that* should have been the rationale of the decision: as far as the courts are concerned, a claim of executive privilege must yield in the face of evidence showing that the communications were in furtherance of a criminal conspiracy and not for lawful purposes of carrying out the President's constitutional duties. The Court had difficulty translating this sound intuition into sound constitutional doctrine, and it did not succeed.

The *Nixon* case, I submit, thus suggests a corollary to the maxim that great cases make bad law: bad Presidents make bad law. By "bad" Presidents I mean here Presidents who corruptly abuse the Office of the Presidency to engage in, or to hide, the criminal activity of themselves or others. (Presidents might be "bad" in other respects as well, of course.) By "bad law" I mean here constitutional decisions of the courts harmful to the institution of the Presidency and destructive of its proper constitutional powers. President Nixon was a bad President—Richard Nixon was a crook—and it is therefore not surprising that *United States v. Nixon* is bad law.

18. See 28 U.S.C. § 596(a) (1994).

19. My constitutional argument is in no way intended as an attack on Independent Counsel Kenneth Starr. Indeed, Starr's willingness to persist in his assigned legal task, despite great opposition by the President, the President's agents, the press, and the public, shows the importance of the value of independence in an "Independent Counsel." See *infra* note 157 and accompanying text.

The corollary, as with the Nixon Tapes Case itself, has direct application today, twenty-five years later. President Clinton is a bad President—Bill Clinton is a crook. Indeed, Clinton is a rather extraordinary white-collar criminal, skilled in the arts of deception, lying and intimidation—and in legal and political defense of the same—in ways that make Richard Nixon look like a bungling amateur. Yet, for all his political skills, the judicial landscape is littered with the products of Clinton's unsuccessful and destructive attempts corruptly to employ claims of privilege in order to conceal personal wrongdoing. The results in *Clinton v. Jones*, *In re Grand Jury Subpoena Duces Tecum*, *In re Lindsey*, *United States v. Clinton*, and *In re Sealed Case*,²⁰ each rejecting a claimed privilege or immunity of the President from compliance with compulsory judicial process, all follow more or less directly from *Nixon*, but each of these decisions has also further contributed to a weakened institutional Presidency. So too has Clinton's acquiescence in the power of a criminal grand jury to compel the "voluntary" testimony of a sitting President weakened the office.²¹ That weakening, in all of the above respects, is attributable to President Clinton's misconduct and his attempts to enlist the judiciary in support of his resistance to the discovery of evidence showing such misconduct.

President Clinton has left his stain on the Presidency. Like President Nixon twenty-five years ago, he has weakened the Office. He has weakened its powers and prerogatives by abusing them for his personal purposes. Clinton is the first elected President to be impeached. The political loyalty of the senators of his own party, combined with the state of the economy and plausible arguments that the criminal conduct in question involved little or no misuse of *presidential* power, spared him removal from office.²² Even in technical acquittal, though, Clinton has weakened the moral and political prestige of the Presidency: the argument that won the day—that prevented a two-thirds majority for conviction—was some variant or another of the proposition that it is (sometimes) permissible

20. See *supra* notes 4, 6-8 and accompanying text.

21. See Peter Baker & Susan Schmidt, *Clinton Agrees to Testify for Grand Jury; Sources Say Lewinski Has Physical Evidence*, WASH. POST, July 30, 1998, at A1.

22. See 145 CONG. REC. S1458-59 (daily ed. Feb. 12, 1999) (recording a 45-55 vote to convict on the perjury article of impeachment and a 50-50 vote to convict on the obstruction of justice article of impeachment).

for the President of the United States to be a felon and remain in office; i.e., that criminal acts are not sufficient to warrant impeachment and removal and that actual criminal prosecution of the President, *after* he leaves office, is sufficient to protect the character and integrity of the Office of the Presidency.

All of which leads to two critical questions, which I address in Section IV: Can the full constitutional power and constitutional prestige of the Presidency be reasserted and recovered? And more importantly, can this be accomplished in such a way as not to enable future corrupt Presidents to escape accountability for wrongdoing? The answer to the first question is *Yes*—the constitutional prerogatives of the Presidency can and should be restored, notwithstanding *Nixon* (and notwithstanding Clinton), by a strong President or succession of Presidents committed to the constitutional defense and rehabilitation of the Office, under circumstances in which such defense is principled and not for purposes of hiding personal wrongdoing. The answer to the second question is *Maybe*. The Presidency can be strong yet effectively checked—indeed, this was the framer's original vision. But this depends on whether Congress's impeachment power is also reasserted and recovered, a question which has been put to the test in circumstances as important to the future of our constitutional system as they were twenty-five years ago, and answered in the negative, largely along party lines. History may well choose not to treat the Clinton acquittal as an admirable precedent. For now, however, it may signal the inability of our constitutional system to check a determined and politically savvy President who holds himself above the law, leaving the prospect of a reinvigorated Presidency something perhaps to be feared rather than cheered.

I. NIXON AND THE DEATH OF PRESIDENTIAL INTERPRETIVE AUTONOMY

By far the most important holding of *Nixon* is the Supreme Court's rejection of Nixon's claim that his invocation of executive privilege is unreviewable by the judiciary and the Court's assertion that, quite the reverse, resolution of questions of executive privilege lies within the exclusive, unreviewable power of the courts.²³ The power of the judiciary "to say what the law

23. See *United States v. Nixon*, 418 U.S. 683, 703-13 (1974).

is,"²⁴ the Court said, augustly quoting *Marbury v. Madison* as if it supported this proposition, "can no more be shared with the Executive Branch than the Chief Executive . . . can share with the Judiciary the veto power."²⁵ Put less grandiloquently, the interpretation of the President's constitutional powers is the exclusive province of a supreme judiciary—according to the judiciary.

This was far more than a statement that the President was *not* the exclusive judge of the scope of executive privilege, for other branches as well as for himself, as Nixon's lawyers had argued. (That was an absurdly foolish argument to press *to a court*, as I will discuss presently).²⁶ Rejection of Nixon's extreme argument that the judiciary must recognize in the President an absolute prerogative to invoke executive privilege and refuse to comply with a judicial subpoena was all that the Court needed to say in order to rule against President Nixon in the Tapes Case. The Court went further, though. It asserted not only that the President *is not* the sole arbiter of the scope of executive privilege but that the judiciary *is* the exclusive judge of the scope of executive privilege.²⁷ (The Court did this even though it had just given lip service, the page before, to the responsibility of the other branches "initially" to interpret the Constitution in the course of exercising their powers.²⁸)

By 1999, we have become habituated (and thus desensitized) to the Court's assertion of judicial supremacy over the other branches of government. In 1974, this was still a fairly extraordinary assertion of judicial power. It is not clear that the Supreme Court had ever before genuinely asserted such a power.²⁹ *Cooper v. Aaron's* assertion of judicial supremacy (1958) was directed at the power of *states*, and can be read as an assertion of federal supremacy, not judicial supremacy.³⁰ *Cooper* did not command the President to take action the

24. *Id.* at 703, 705 (quoting *Marbury*).

25. *Id.* at 704.

26. See *infra* notes 34-37 and accompanying text.

27. See *Nixon*, 418 U.S. at 705.

28. *Id.* at 703.

29. See *supra* note 10 and accompanying text.

30. 358 U.S. 1, 18 (1958) (asserting that *Marbury* established the proposition "that the federal judiciary is supreme in the exposition of the law of the Constitution"). See Paulsen, *supra* note 10, at 314-15 ("Whatever the weight of the[] arguments against Calhoun-style nullification, they do not add up to a justification of federal judicial supremacy over the other branches of the federal government.").

President disagreed with on constitutional grounds. The Eisenhower administration had argued for the result in *Brown*,³¹ and President Eisenhower had sent the troops to Little Rock a year before the Supreme Court's opinion. *Baker v. Carr* (1962) repeated *Cooper's* dictum, in another case involving an assertion of federal judicial power over the states.³² *Powell v. McCormack* (1969) with great care refrained from asserting judicial supremacy over Congress; it granted a declaratory judgment but no coercive relief.³³

The circumstances of 1974 were different. In *United States v. Nixon*, the Court probably felt it *had* to make a bold, *Cooper*-esque unanimous assertion of its constitutional authority over the President, if its judgment that Nixon must turn over the tapes was to be honored. *Nixon* was similar to *Cooper* in that the Court probably felt it necessary in each instance to bring the full prestige of the judiciary to bear behind its judgment and opinion in order to assure that the Court's decision would be obeyed and enforced. (After all, what court wants its judgments flouted? Lose such a political-constitutional battle just once, in a case that matters, and the courts are in danger of confirming Hamilton's observations about "the natural feebleness of the judiciary."³⁴)

It is hard for us, twenty-five years later, to appreciate fully the very real anxiety at the time that President Nixon might refuse to abide by the Court's judgment. Nixon's lawyers had argued in their brief to the Court—in block capital-lettered point headings that left little room for misunderstanding—that

31. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

32. 369 U.S. 186 (1962).

33. 395 U.S. 486, 501-06, 517-18 (1969) (relief against House employees, but not against Members or House itself, was appropriate; declaratory relief was permissible regardless of the appropriateness of a coercive remedy). As noted above, see *supra* note 10, the only true precedent supporting the Court's sweeping statement in *Nixon* is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in which the Court held that President Truman's labor secretary lacked power to seize the nation's steel mills. But in *Youngstown Sheet & Tube* the Court did not issue an order directly to the President and did not issue a *Cooper*-like assertion of judicial supremacy over the President. See *id.* It simply declared its understanding of what the law was. The President obeyed, but the Court had not explicitly decreed that the President was *constitutionally obliged* to obey its decision. That rhetorical gambit did not appear in the Court's standard arsenal until six years later, in 1958, with *Cooper*.

34. THE FEDERALIST NO. 78, at 394 (Alexander Hamilton) (Garry Wills ed., 1982).

"A PRESIDENTIAL ASSERTION OF PRIVILEGE IS NOT REVIEWABLE BY THE COURT." And, further: "THE SEPARATION OF POWERS DOCTRINE PRECLUDES JUDICIAL REVIEW OF THE USE OF EXECUTIVE PRIVILEGE BY A PRESIDENT."³⁵

The point was not lost on the justices. At oral argument, the President's lawyer, James St. Clair, was quizzed on whether the President would abide by the judgment of the Court:

MR. JUSTICE MARSHALL: The difference between ignoring [a subpoena duces tecum] and filing a motion to quash is what?

MR. ST. CLAIR [counsel for Nixon]: Well, if Your Honor please, we are submitting the matter—

MR. JUSTICE MARSHALL: You are submitting the matter to this Court—

MR. ST. CLAIR: To this Court under a special showing on behalf of the President—

MR. JUSTICE MARSHALL: And you are still leaving it up to this Court to decide it.

MR. ST. CLAIR: Yes, in a sense.

MR. JUSTICE MARSHALL: In what sense?

MR. ST. CLAIR: In the sense that this Court has the obligation to determine the law. The President also has an obligation to carry out his constitutional duties.

MR. JUSTICE MARSHALL: You are submitting it for us to decide whether or not executive privilege is available in this case.

MR. ST. CLAIR: [T]he problem is the question is even more limited than that. Is the executive privilege, which my brother concedes, absolute or is it only conditional?

MR. JUSTICE MARSHALL: I said "in this case." Can you make it any narrower than that?

MR. ST. CLAIR: No, sir.

MR. JUSTICE MARSHALL: Well, do you agree that that is what is before this Court, and you are submitting it to this Court for decision?

MR. ST. CLAIR: This is being submitted to this Court for its guidance and judgment with respect to the law. The President, on the other hand, has his obligations under the Constitution.

MR. JUSTICE MARSHALL: Are you submitting it to this Court for this Court's decision?

MR. ST. CLAIR: As to what the law is, yes.

35. Respondent's Opening Brief at 48, *United States v. Nixon*, 418 U.S. 683 (1974) (No. 73-1766, 1834).

MR. CHIEF JUSTICE BURGER: If that were not so, you would not be here.

MR. ST. CLAIR: I would not be here.³⁶

Clearly, Mr. St. Clair was attempting at least to leave open the possibility that President Nixon might *not* obey the Court's decision rejecting executive privilege.

In this context, and given the fevers that raged in the capital over Nixon and Watergate, the Court's assertion of judicial supremacy over the executive must be seen as an extraordinary response to an extraordinary constitutional provocation. Richard Nixon had raised the stakes with his constitutional bluff (if bluff it was) and the Court responded by raising them yet further. The result was a sweeping assertion of judicial supremacy and a judicial holding that the Supreme Court may issue binding orders to the President of the United States concerning the scope of his constitutional powers and duties:

Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, §1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. 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. We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case.³⁷

This holding was inevitable, given Nixon's position. Yet, this holding, to the extent it is meant to be an assertion of judicial supremacy, is dead wrong. The claim of judicial supremacy finds *no* support anywhere in the Constitution. No provision of the text confers supremacy on the judiciary. The courts possess the "judicial power" to decide "cases" and "controversies," including cases arising under the Constitution, but nothing in history, logic, or the intrinsic meaning of any of these terms of Article III implies judicial supremacy and none of the Constitution's defenders and advocates ever suggested as much.³⁸ No prominent framer, advocate, or defender of the Constitution—indeed, no obscure one, as far as I know—at any

36. Oral Argument at 60-62, *Nixon* (No. 73-1766, 1834). I am indebted to the outstanding article of Professor William Van Alstyne, twenty-five years ago, for calling my attention to this passage in the oral argument. See Van Alstyne, *supra* note 14, at 123.

37. *Nixon*, 418 U.S. at 704-05 (citations omitted).

38. See U.S. CONST. art. III, § 2, cl. 1; Paulsen, *supra* note 10, at 294-300.

time during the framing, ratification, or early implementation of the Constitution *ever* embraced or endorsed the notion that the Constitution provides for judicial supremacy over the other branches in constitutional interpretation. Again, quite the opposite is true. *All* prominent public defenses of the Constitution at the time of its adoption are explicit in denying the notion of judicial supremacy. The only contrary statements during the ratification era appear in writings of the Constitution's *opponents*.³⁹ The first early-implementation era statements to the contrary appear a dozen years later, in the form of northern state attacks on the legitimacy of the Virginia and Kentucky resolves.⁴⁰ The first prominent scholarly assertion of judicial supremacy over the other branches appears in Justice Joseph Story's *Commentaries on the Constitution of the United States*, in 1833.⁴¹ Its first appearance in an important opinion by a Supreme Court Justice, in an actual case or controversy presenting the issue, is not until Chief Justice Taney's opinion

39. See *Essays of Brutus*, No. XI, reprinted in 2 THE COMPLETE ANTI-FEDERALIST §§ 2.0.138-2.9.148 (Herbert J. Storing ed., 1981). Brutus argued, perhaps genuinely and perhaps with deliberate exaggeration, that the judiciary to be created by the new Constitution *would* be supreme over the elected branches in matters of constitutional interpretation, and that such a prospect would have the effect of concentrating power in that branch, at the expense of republican principles, the rights of the states, and ultimately individual liberty. It is interesting and instructive that *The Federalist No. 78* is a *rejoinder* to the *Essays of Brutus* on the judicial power, explaining judicial review as an unexceptional and logical consequence of the coordinacy of the branches, least of all to be feared from the "least dangerous" and weakest of branches, which needed life tenure in order to protect its independent judgments and would in any event be dependent on the executive branch for enforcement of its judgments. See *infra* note 58 and accompanying text; see also Paulsen, *supra* note 10, at 245-52.

40. The first serious post-enactment arguments in favor of judicial supremacy were advanced by northern state legislatures responding to the Virginia and Kentucky resolves in the late 1790s—more than a decade after the Philadelphia convention—and took place in the context of a bitter political fight between defenders and opponents of the Adams administration over the constitutionality of the Alien and Sedition acts. See, e.g., 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 533 (Jonathan Elliot ed., 2d ed. 1891). To the extent this post-enactment "legislative history" is of any weight at all in determining the original meaning of the Constitution on the question of judicial supremacy, it is surely significant that the election of 1800 appeared decisively to repudiate the "Federalist" (that is, pro-Adams), judicial supremacist view.

41. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 375 (1833). For discussion of Story's views as a second-generation theory that strayed from the original understanding of judicial review, see Paulsen, *supra* note 10, at 311-20.

(as circuit justice) in *Ex Parte Merryman*, in 1861.⁴² Judicial supremacy is simply not an originalist position. It is consistent with none of the evidence we have of the original meaning of the Constitution.

Nor is judicial supremacy fairly deducible from the constitutional structure of separation of powers (as the *Nixon* Court suggested, with its citation to *The Federalist* No. 47).⁴³ Quite the reverse, judicial supremacy is irreconcilable with the structural postulates of the Constitution: separation of powers and the coordinacy and autonomy of the three branches. The fundamental premise of the Constitution's separation of powers into three great Departments is that they are all independent of and co-equal with each other.⁴⁴ None has a superordinate power over any of the others—that is, a peremptory constitutional power to tell another branch what it must do or must not do. The intersection and interaction of the three Departments' respective powers provides the means for mutual checking of one another; but they are checks only, not trumps. The Constitution gives no branch, including the judiciary, an ultimate trump power over the others.

The framers could scarcely have been more clear on this score. The most succinct expression of their view comes in *The Federalist* No. 49's discussion of separation of powers: "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."⁴⁵ That is a sweeping, categorical rejection of one-branch interpretive supremacy. It necessarily includes a rejection of the idea of judicial supremacy over the other branches (a position reinforced by *The Federalist* No. 78's discussion of judicial review, as we shall see in a moment).⁴⁶

42. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487). See generally Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993).

43. See *United States v. Nixon*, 418 U.S. 683, 704 (1974).

44. The arguments made in this paragraph of the text, and in those that follow, are developed at great length in Paulsen, *supra* note 10. I present here a greatly compressed account of the evidence.

45. THE FEDERALIST NO. 49, at 255 (James Madison) (Garry Wills ed., 1982).

46. See THE FEDERALIST NO. 78, *supra* note 34, at 394; see also *infra* notes 57-66 and accompanying text.

How, then, to check government power and keep each branch within its sphere? What is the method (if it is not judicial supremacy) "for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution"?⁴⁷ The answer, according to *The Federalist*, lies neither in making one branch superior to the others nor in holding regular or periodic constitutional conventions (possibilities discussed but rejected in No. 49).⁴⁸ Rather, "the defect must be supplied by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."⁴⁹ Thus, "each department should have a will of its own" and be as independent of the others as possible, in the means by which their members are selected, in the security of their members' salaries, in their ability to carry out their constitutional powers (subject to the checks of other branches), and in their ability to resist the attempted or pretended aggressions of the others, either singly or in combination.⁵⁰ In Madison's famous words as Publius,

the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.⁵¹

Thus, the structure of the Constitution—separation of powers—would, by spurring "opposite and rival interests" supply "the defect of better motives."⁵²

Where is judicial supremacy in this discussion? It is nowhere to be found. Where is the suggestion, even the discussion as a mere possibility, that disputes among the branches are to be resolved by the courts as arbiters of constitutional meaning, as part of the judicial power? Such an option is not even on the menu. Constitutional conventions are given serious discussion as a possibility for resolving constitutional disputes, but judicial supremacy is not.

47. THE FEDERALIST NO. 51, at 261 (James Madison) (Garry Wills ed., 1982).

48. See THE FEDERALIST NO. 49, *supra* note 45, at 255.

49. THE FEDERALIST NO. 51, *supra* note 47, at 261.

50. *Id.*

51. *Id.* at 262.

52. *Id.* at 263.

Further confirmation of this comes from a seemingly unlikely but extremely important source: Alexander Hamilton's argument for judicial review in *The Federalist No. 78*.⁵³ Hamilton, fully in accord with Madison, his co-author as Publius, takes pains to deny the legitimacy of any inference of judicial hegemony.⁵⁴ Indeed, the paper is a more or less direct rebuttal of the anti-Federalist writer "Brutus," who had charged that "[t]he opinions of the supreme court . . . will have the force of law" and that "because there is no power provided in the constitution, that can correct their errors, or controul their adjudications" the courts would acquire a practical omnipotence over the other branches, resulting in "an entire subversion of the legislative, executive and judicial powers of the individual states."⁵⁵

This was a charge that mattered to the founding generation—judicial supremacy equaled rule by an elite, appointive oligarchy with life tenure and subject to no republican check, a killer argument against ratification, if valid.⁵⁶ Refutation of Brutus is the object of *The Federalist No. 78*, which in form is simply an extended defense of the idea of life tenure for federal judges. Recent scholarship has shown that Hamilton's argument for judicial review was not itself original or especially controversial.⁵⁷ The discussion of judicial review is, within the structure of Hamilton's argument for life tenure, almost incidental; it serves to illustrate the value of life tenure for protecting the necessary independence of an intrinsically weak judiciary. Since the judiciary "is beyond comparison the weakest of the three departments of power" and "can never attack with success either of the other two," it is necessary to provide life tenure to enable the judiciary "to defend itself" against attempts by the political branches to coerce or overawe.⁵⁸ Such independence is "peculiarly essential in a limited constitution" where certain powers are granted and certain acts forbidden,

53. THE FEDERALIST NO. 78, *supra* note 34, at 394.

54. *See id.*

55. Essays of Brutus, No. XI, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 39, §§ 2.9.138, 2.9.139; *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 186-87 (1997); GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 126-36 (1981).

56. *See* Paulsen, *supra* note 10, at 246.

57. For an excellent study, *see* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990).

58. THE FEDERALIST NO. 78, *supra* note 34, at 394.

Hamilton adds, making the transition to his discussion of judicial review.⁵⁹

Hamilton then turns to Brutus's argument (without identifying his opponent by name):

Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void.⁶⁰

Not so, Hamilton maintained. The inference of judicial review does not "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both."⁶¹

Hamilton's discussion fits perfectly with Madison's description of separation of powers in Numbers 47 to 51. Hamilton's justification of judicial review is premised on the same theory of coordinacy of the branches. The Constitution trumps acts of mere government agents. Thus, where the two conflict, a court must follow the Constitution rather than an Act of Congress. The judgment of Congress as to the constitutionality of its own acts cannot be conclusive on the courts, because of the independence and coordinacy of the branches: the members of one branch are not "themselves the constitutional judges of their own powers" and it thus cannot be presumed that "the construction they put upon them is conclusive upon the other departments."⁶² Each branch's obligation is to obey the Constitution, not each other.

The logic of Hamilton's argument—and, later, of John Marshall's in *Marbury v. Madison*⁶³—suggests the very antithesis of judicial supremacy: the executive and Congress are not strictly bound by the Court's views either. The essence of the argument for judicial review is that the Constitution must be preferred to the contrary acts of a mere department, and that one department cannot be bound by the views of another concerning the propriety of that other branch's own acts. The logic of the argument does not vary depending on which

59. *Id.*

60. *Id.* at 395.

61. *Id.*

62. *Id.*

63. I will address *Marbury* presently. See *infra* text accompanying notes 68-72.

branch's act is being judged and which branch is passing judgment (Congress, Court, or Executive).⁶⁴

Hamilton did not explicitly draw this further conclusion, but at almost every turn, *The Federalist No. 78*, in its repeated emphasis of the weakness of the courts vis-à-vis the political branches, is completely inconsistent with the contrary notion of judicial supremacy. Hamilton's observation that the judiciary "can never attack with success" either of the other two branches (and indeed is barely able to defend itself) is not consistent with modern notions of judicial supremacy.⁶⁵ Rather, the power of judicial review is a function of having a limited constitution and the autonomy of the three branches within their sphere of operation. There is nothing exceptional about constitutional review by one branch of the acts of another, and nothing to be feared about such a consequence, least of all in a judiciary that possesses "neither Force nor Will, but merely judgment" and, Hamilton adds in an important clincher, that "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."⁶⁶

64. The general point is most succinctly expressed by James Wilson, probably the second most influential framer at the convention (after Madison), in his famous *Lectures on Law* (1790-1792): "The supreme power of the United States has given one rule: a subordinate power in the United States has given a contradictory rule: the former is the law of the land: as a necessary consequence, the latter is void, and has no operation." 1 THE WORKS OF JAMES WILSON 330 (Robert Green McCloskey ed., 1967).

65. THE FEDERALIST NO. 78, *supra* note 34, at 394.

66. *Id.* Professor Steve Calabresi, in his insightful Comment on this paper for this symposium, is unwilling to accept the proposition that the President's coordinate power of constitutional interpretation includes a right to decline to enforce judicial judgments that the President concludes, in good faith, are founded on an incorrect interpretation of the Constitution or other law. See Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1425 (1999). (In the end, however, Calabresi comes close to conceding exactly this proposition, although wishing, sensibly enough, to confine its application to extreme or at least very clear cases of judicial error, see *id.* at 1425, 1433 & n.54, a concession which in principle gives up the game, as I will discuss momentarily.)

Professor Calabresi offers essentially three arguments for judicial supremacy as to judgments. All of them strike me as flawed in important respects. First, Calabresi argues that the traditional bar on the judiciary's issuance of "advisory opinions" implies a more general principle that "there must be a substantial likelihood that judicial opinions will have some real world effect," *id.* at 1426, and that "[n]o such likelihood could exist if . . . the President ha[d] the power independently to make his own de novo decision about whether any judicial judgment was constitutional or not before he executed it." *Id.* I think this overreads, and overextends, the "no advisory opinion" doctrine. That doctrine is properly understood as a prohibition on courts is-

suing legal opinions while not engaged in *the judicial task* of deciding actual "cases or controversies." As I have set forth at greater length elsewhere, however, the fact that a judicial decree does not control the Article II executive in the exercise of his independent constitutional interpretation does not mean that such a decree is not a proper exercise of courts' *Article III* powers. The opinion is not "advisory" in the sense in which advisory opinions are thought improper, i.e., that they do not involve the genuine application of the Article III power of rendering a judgment in a case or controversy. See Paulsen, *supra* note 10, at 303-06 (discussing *Hayburn's Case*).

Second, Calabresi remarks (almost in passing) that everybody has always understood the judicial power as being a power to issue binding judgments. See Calabresi, *supra*, at 1426. This point is not proved by any stretch of the imagination. To be sure, such a position is widely *assumed* today, but the historical evidence for it is remarkably weak; and Hamilton's statement in *The Federalist No. 78* that the judiciary must depend on the executive for the efficacy of its judgments seems a powerful refutation of this assumption. See Paulsen, *supra* note 10, at 251. Calabresi's only refutation of *The Federalist No. 78* on this point is to disparage it as "Alexander Hamilton's loose language"! This is a rather surprising position for Calabresi, a noted originalist, to take, especially when he is arguing about historical understanding of the meaning of the judicial power. I'll take Hamilton and *The Federalist No. 78* over assumptions from silence any day, especially when the logic of Hamilton's argument for judicial review (and that of James Wilson and John Marshall, and numerous others) implies a fully coordinate power of executive review, with all that that implies. See Paulsen, *supra* note 10, at 244-55.

Third, Calabresi argues that fully coordinate, co-equal executive review would leave the courts "ciphers," see Calabresi, *supra*, at 1432 ("federal courts without the power to execute their judgments would be ciphers"), and make Presidents "democratic Caesars," *id.*, or, switching dictators, "Napoleonic strongm[en]," *id.* at 1431. But the fact that an executive power not to enforce judgments that the President believes are founded on unconstitutional usurpations or constructions of power by the judiciary might weaken the present political power of courts, or be a fearsome power to vest in an evil and willful chief executive, does not mean the proposition is wrong as an original matter. The potential abuse of a power does not disprove the existence of such a power. In addition, there is much historical evidence that the framers regarded the judiciary as "least dangerous" *because it had the least power* and thus the least ability to force its constitutional pretensions on the other branches. See Paulsen, *supra* note 10, at 300-03. (Professor Lawson and Mr. Moore make the same argument as Professor Calabresi, see Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1325 (1996), which can be met with the same rejoinder.) To be sure, executive review, unchecked by the other branches, or divorced from a practice of "executive restraint" and a restrained, originalist interpretive method, would be a dangerous thing. But I have set forth these checks and restraints at length. See Paulsen, *supra* note 10, at 321-42. Use of the name "Caesar" is not a sufficient rebuttal. Finally, while it is true that, under this theory, a new President can change executive branch constitutional interpretations suddenly and radically and thereby alter the constitutional equilibrium, the same can be said of changes in the composition of the courts. Again, this objection at most furnishes an argument for a theory of "executive restraint" and principled, text-based constitutional interpretation—a position I have advanced in conjunction with the larger theory. See *id.* at 331-43.

In short, *The Federalist* No. 78 is scarcely a defense of judicial supremacy.⁶⁷ Neither is *Marbury*: nowhere does Chief Justice Marshall ever assert a superordinate power of the judiciary to say what the law is; his entire argument is for a coordinate power with that of the other branches—one branch cannot be bound by the constitutional determinations of another. *Marbury* essentially tracks the analysis (and sometimes even the verbal formulations) of *The Federalist* No. 78 in this respect.⁶⁸ The Court explicitly denies any power to “intermeddle

(Changes in administration can radically change other policies, too, and some of those might be of much more consequence to the nation than differences between subsequent administrations' positions on questions of constitutional interpretation.)

In the end, however, Calabresi's (and Lawson & Moore's) concession that the President rightfully possesses the power to refuse to enforce a *clearly* wrong judgment of the courts gives up the point in principle. See Calabresi, *supra*, at 1425, 1433 & n.54; Lawson & Moore, *supra*, at 1324-26. Calabresi has to make this concession of course; otherwise, the courts would concededly have the power to order anything they like, which eviscerates the departmentalist position to which Calabresi (rightly) clings in every other respect. See Paulsen, *supra* note 42, at 83 (arguing that every attempted “middle ground” position attempting to reconcile the premises of judicial supremacy or interpretive coordinacy ultimately collapses into one of the two polar cases). But that gives up the “middle ground” game: as I challenged Professor Calabresi during the question-and-answer session of our panel, is *Roe v. Wade* a case of clear constitutional error? If yes, his position (and Professor Lawson's) collapses into mine. If no, then the notion of “clear error” has little content and Calabresi's position collapses into complete judicial supremacy over the executive, (except, apparently, in time of Civil War). See Calabresi, *supra*, at 1427, 1430 & n.44. In the end, Professor Calabresi and I are just arguing about which judicial decisions are “clearly” wrong, as opposed to “merely” wrong, and engaged in interpersonal comparisons of what degree of certainty ought to be required before acting on one's best judgment as to the meaning of the Constitution. (Really, Steve, the only “clear error” by the courts, justifying presidential noncompliance or nonenforcement, was Taney's decision in *Ex Parte Merryman*? I can think of a good dozen more clearly and horribly wrong judicial interpretations of the constitution—*Dred Scott*, *Plessy*, *Lochner*, *Roe*, *Casey*—can't you?) To borrow a phrase, Calabresi has conceded the point in principle. We are now just haggling over the price.

67. Hamilton's observation that the judiciary must depend on the executive for the efficacy of its judgments at least implies a power of “executive review”—a power of the President *not* to enforce judicial decrees he sincerely believes are contrary to law and contrary to his duties under the law. Such a conclusion is consistent with the rest of *The Federalist* No. 78. If the President were constitutionally obliged to follow the commands of the courts, Hamilton's argument that the liberty of the people can never be endangered from the courts “so long as the judiciary remains truly distinct from both the legislative and executive,” *THE FEDERALIST* NO. 78, *supra* note 34, at 394, falls apart, for the power of the judiciary then *would* be fused with the power to execute the laws.

68. See Paulsen, *supra* note 10, at 248.

with the prerogatives of the executive," calling such a notion "[a]n extravagance, so absurd and excessive" that it "could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion."⁶⁹

To rely, then, as the Court in *Nixon* did, on *Marbury's* statement that "it is emphatically the province and duty of the judicial department to say what the law is,"⁷⁰ wrenched from its context, as if it supported a power of one-branch interpretive supremacy—and a power of the courts to give orders to the President—is utterly remarkable. Taken seriously, such an atextual, ahistorical assertion makes the judiciary the *most* dangerous branch. If the Supreme Court is really the Supreme Branch, there is no limit to what the Court may hold in the name of the Constitution, other than the Court's selective forbearance, political caution, or moderate policy goals. The courts may from time to time assert sundry doctrines of "judicial restraint" or exercise supposed "passive virtues," but that is just modest exercise of an immodest assertion of power.⁷¹ The Constitution remains (or becomes) whatever the judges decree. Even if the courts go absolutely mad, it is still improper for the political branches to resist them or rein them in, for it is the province of the courts, and not Congress or the President, to say what the law is. Defiance of the judicial branch is defiance of the Constitution.⁷²

So saith the judicial branch. The judiciary's assertion of hegemony does not make it so, of course. The Court's assertion is almost laughably inconsistent with the tripartite structure of

69. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

70. *United States v. Nixon*, 418 U.S. 683, 703 (1974).

71. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) (advancing a judicial philosophy of originalism and judicial restraint as an essential limitation on the power of courts that exercise supremacy in constitutional interpretation); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1988) (defending the "passive virtues" of decision-avoidance and justiciability limitations on the Court's decisionmaking, as a necessary method for the judiciary to conserve its political capital and avoid getting out too far in front of the political branches). Both Bork and Bickel are concerned with *how* judicial supremacy should be exercised, not with *whether* judicial supremacy is the correct starting point. Both assume that it is.

72. See *Nixon*, 418 U.S. at 704 (stating that the judicial power to say what the law is "can no more be shared" than the President's veto power).

the federal government, with the Constitution's careful scheme of calibration and separation of powers and checks-and-balances, and with every word the framers ever said on the subject. Unfortunately, however, acceptance of the judiciary's assertion of hegemony by the *other* branches tends to validate such hegemony as a practical matter, and the *Nixon* case—both the decision and even more so President Nixon's seeking of it and compliance with it—has become a huge precedent for executive acquiescence in judicial supremacy over the executive as a constitutional norm. *Nixon* looms much larger than *Youngstown Sheet & Tube* in this regard, for *Nixon* was a judgment against the President personally (not a subordinate officer), explicitly rejected the President's claim that the courts had no authority to contest his claim of executive prerogative, and essentially ordered coercive relief against a sitting President. The Court had called the President's bluff and asserted its own primacy. And Nixon folded.

Such executive passivity makes a mockery of *The Federalist No. 51*'s description of the Constitution's plan for preserving separation of powers: "giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others" and thus "supplying by opposite and rival interests, the defect of better motives."⁷³ Madison's plan doesn't work if the political branches cede to the judiciary supremacy in defining the meaning and application of the Constitution, including construction of the powers and privileges of the legislative, executive, and judicial branches.

Passivity and quiescence would not seem to describe Richard Nixon. What more perfect example could there have been (prior to Clinton) than President Nixon of "the interests of the man" supplying "the defect of better motives" for asserting "the constitutional rights of the place"?⁷⁴ Yet Nixon accepted the Court's assertion of supremacy and rejection of presidential privilege, erasing in substantial part the successes of Presidents Jefferson, Jackson, Lincoln, and Roosevelt in resisting judicial authority. My contention, however, is that by the time the case was decided by the Supreme Court, Nixon pretty much *had* to give in, for two reasons.

73. THE FEDERALIST NO. 51, *supra* note 47, at 262-63.

74. *Id.*

First, Nixon was too politically weakened and discredited by the mounting evidence of his guilt to make a credible stand on supposed constitutional principle against the unanimous authority of the Supreme Court. In 1974, the existence of evidence that the President of the United States had apparently committed obstruction of justice shocked and offended the public and the political classes, and eventually overcame the natural instinct to defend a popularly elected President. In short, Nixon was a crook and the public was coming around, finally, to accepting that uncomfortable truth. (Today, the reaction to evidence of similar types of action by the President has been split, disturbingly, along largely partisan lines. Conservatives have been unwilling to distinguish between different cases of lying and obstruction of justice; liberals have strained to draw such lines.) Second, and somewhat relatedly, Nixon had already gone, hat in hand, to the judiciary, *asking* for its help in resisting the subpoena.⁷⁵ He could not readily turn around and spurn its adverse decision. Each of these reasons has import of its own worth exploring.

By the time the Court rendered its decision on July 24, 1974, Nixon was decisively weakened in his ability to continue to assert absolute privilege, in the teeth of the Court's decision, by the increasingly evident illegitimacy of his personal motives. Nixon could not just order Jaworski to withdraw the subpoena because he had bargained away his power to do so in the face of widespread congressional and public suspicion that his reason for firing Archibald Cox (the "Saturday Night Massacre") was simply that Cox was getting too close to the truth. And the claim of plenary executive power to assert absolute executive privilege against a unanimous Supreme Court is just too bold a claim to come out of the mouth of an unindicted co-conspirator.

Is this too glib an observation? I don't think so. More to the point, the Supreme Court in *United States v. Nixon* didn't seem to think so. There are several important clues in the opinion that suggest that Richard Nixon's probable criminality was relevant to the way it viewed and resolved the legal issues before it. There is the fact that Nixon had been named an "unindicted co-conspirator," a characterization that Nixon's lawyers argued vigorously was beyond the province of the grand jury and should be ignored by the Court, but which the

75. See *supra* text accompanying note 36.

Court not only left undisturbed,⁷⁶ but then seemed to rely on in the course of determining that the evidence sought was relevant and *presumptively admissible*—thus satisfying the Rule 17(c) standard necessary to justify issuance of a subpoena in the first place.⁷⁷ There are also the pregnant ambiguous references to facts transmitted “under seal.”⁷⁸ There is the footnote, seemingly combining both the preceding points, noting that the admissibility of out-of-court declarations of a co-conspirator depends upon the existence of “substantial, independent evidence of the conspiracy, at least enough to take the question to the jury.”⁷⁹ And finally, there is the discussion, late in the opinion, following the Court’s rejection of the claim of absolute presidential privilege, and explaining how such privilege claims are to be considered by the district court:

Upon receiving a claim of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged and to require the Special Prosecutor to demonstrate that the Presidential material was “essential to the justice of the [pending criminal] case.” Here the District Court treated the material as presumptively privileged, proceeded to find that the Special Prosecutor had made a sufficient showing to rebut the presumption, and ordered an *in camera* examination of the subpoenaed material. *On the basis of our examination of the record we are unable to conclude that the District Court erred in ordering the inspection.*⁸⁰

In light of what had gone before—the holding that Rule 17(c) was satisfied upon a showing of, among other things, admissibility, which depended on independent substantial evidence of the declarant’s involvement in a conspiracy; the refusal to disturb the grand jury’s naming of President Nixon as an undicted co-conspirator; the references to the Court’s careful review of the sealed record—the holding that the district court *did not err* in finding a presumptive privilege overcome by the

76. See *Nixon*, 418 U.S. at 687 & n.2. The Court dismissed as improvidently granted its writ of certiorari addressing this issue, on the ground that “we find resolution of this issue unnecessary to resolution of the question whether the claim of privilege is to prevail.” *Id.* at 687 n.2.

77. *Id.* at 701 (explaining hearsay rule’s exception for statements of co-conspirators against each other, including “declarations of coconspirators who are not defendants in the case on trial”).

78. *Id.* at 689, 700.

79. *Id.* at 701 n.14.

80. *Id.* at 713-14 (emphasis added) (quoting *United States v. Burr*, 25 F. Cas. at 192).

Special Prosecutor's showing that the evidence was "essential to the justice of the case" screams out for more clear language:

The President is a crook. We have read the record. There is substantial independent evidence of his involvement in a criminal conspiracy involving obstruction of justice. Given this record, we have no trouble holding that the claim of absolute executive privilege to shield the contents of conversations between co-conspirators, concerning matters not claimed to involve national security, military, or diplomatic secrets, should be rejected. Let the facts come out.

That is not, of course, what the Court said. But I believe it is the practical import of its more deferential-sounding opinion. (Courts, lawyers, journalists, Presidents, were all a little more decorous in 1974 than in the late 1990s.) The substantive lesson is simply this: claims of grand constitutional principle, in defense of the prerogatives of The Office and against an imperial judiciary, do not sit well when coming from dishonest Presidents.

The second reason why Nixon could not readily resist the Court's ruling was that he had sought the judiciary's endorsement of *his* assertion of supremacy. *He* had come to court with a motion to quash the subpoena, seeking to enlist the courts' assistance in his battle with the Special Prosecutor. Let's return to the first question posed by Justice Thurgood Marshall in the oral argument exchange quoted at length earlier:

MR. JUSTICE MARSHALL: The difference between ignoring [a subpoena duces tecum] and filing a motion to quash is what?

The answer is that the latter involves *enlisting the aid of the judiciary in resistance to the subpoena*. That is why Mr. St. Clair was "submitting the decision to the courts." (If that were not so, he "would not have been there."⁸¹)

Nixon's claim was absolute executive privilege—executive *immunity*, really—from the compulsory process of another branch, on the ground of separation of powers. As I will argue at greater length below, I believe this proposition has considerable merit as an inference from the structural autonomy of the three branches. But, by the same token, the very idea of such a claim of absolute executive immunity from the authority of another branch seems fundamentally inconsistent with going to one of those other branches on bended knee, begging for the *permission* of that branch to exercise what is asserted to be the *executive's* constitutional privilege flowing from his *structural*

81. Oral Argument at 60-62, *United States v. Nixon*, 418 U.S. 683 (1974) (No. 73-1766, 1834); see *supra* text accompanying note 36.

independence from the authority of the other branches and, consequently, from their demands on him. If a constitutionally-based executive privilege exists at all, it is the constitutional prerogative of the President to decline, on grounds of separation of powers, to accede to the demands of another branch for access to executive branch communications and deliberations as of right and to seek to make his position prevail in the political process. He is not constitutionally bound by any other branch's determination of the scope of his duty to comply with that branch's (or anybody else's) demands.

In the process of seeking to make his position prevail in the political pull-and-tug of the interaction of the branches' various powers, the President may, if he so chooses, try to enlist the aid of another branch (like the courts) against attempted incursions into what he believes is the Presidency's sphere of constitutional autonomy. For example, the President might seek judicial protection against congressional subpoenas, by opposing Congress's attempts to secure judicial enforcement or (more dubiously) by filing declaratory judgment actions of his own.⁸² Likewise, the President might enlist the assistance of Congress, asking it to pass a statute providing for enhanced executive privilege in the courts.

However, seeking the assistance of another branch—of the courts, in particular—has risks. It has the feel of a “waiver” of the right of the President to resist the purported incursion on his own, if the court's judgment proves adverse to the President—witness the pained, awkward colloquy of James St. Clair with the Supreme Court, set forth above.⁸³ Moreover, the President has no right to expect or demand that the courts will see the issue his way. No branch is bound by the views of the others as to the proper construction of the powers divided among them—that is the essential premise justifying judicial review and executive review. For the identical reasons that the President is not bound by the Court's determination of the scope of executive privilege, the Court surely is not bound,

82. The Reagan administration attempted this, in the infamous dispute over congressional subpoenas of EPA documents that eventually led to the investigation producing the *Morrison v. Olson* decision. See *United States v. House of Representatives of the United States*, 556 F. Supp. 150 (D.D.C. 1983); see also *Morrison v. Olson*, 487 U.S. 654, 700 (1988) (Scalia, J., dissenting) (opining that the District Court was correct not to attempt to resolve the dispute).

83. See *supra* text accompanying note 36.

within the sphere of *its* authority, by the President's assertion of absolute privilege. That was Nixon's lawyers' truly extravagant claim—and huge tactical blunder. Why would anyone expect *the courts* to hold that the existence and scope of a constitutionally-based presidential immunity *from judicial process* is a matter solely for *the President* to decide, however he will, subject to no review by the courts?

Aside from being naive, the claim is just flat-out wrong: the fact of coordinacy and co-equality of the branches does not imply a total immunity of each to the processes of the others; it just means that no one branch is bound by another's views as to whether such immunity exists. That does not mean that the President is not amenable to judicial process (and that the Supreme Court should have so held); it means that he is not amenable to judicial process *just because the judiciary says so*. The fact that the judiciary is not supreme over the executive does not mean that the President's assertion of immunity from judicial process must be endorsed by the judiciary, if the judiciary is persuaded, in the exercise of its independent judgment, that the Constitution supports no such rule. The Constitution establishes neither judicial supremacy over the executive nor judicial subordinacy to the executive's demands that the courts recognize absolute executive immunity from judicial process.

The reasons President Nixon lost both the judicial battle and the separation-of-powers war were (1) that the facts tended to show his criminality (and thus made his assertions of privilege and immunity seem disingenuous, indeed further evidence of his abuse of power); and (2) that he had already submitted the matter to the courts.⁸⁴ One simply cannot

84. President Clinton was not in a position to resist judicial rejection of his claims of privilege and immunity in 1998, for similar reasons: the facts and circumstances strongly suggest that Clinton invoked executive privilege and other privileges for corrupt reasons—hiding his own wrongdoing—rather than genuinely to protect the constitutional prerogatives of the Presidency. In light of that, defiance of the Court's holdings—by, say, ordering aides not to appear before the grand jury—would have been politically untenable. In addition, having litigated and lost the privilege battles in the courts would have made any claim by Clinton that the courts' holdings did not matter politically unacceptable for that reason as well. Finally, Clinton litigated his claims of privilege in the shadow of *Nixon*, in two senses: First, the litigation was governed by the legal precedent of *Nixon* concerning the scope of executive privilege—a precedent unfavorable to the executive. See *infra* Part II. Second, the litigation was “governed” by the *political* precedent of the Tapes Case: a President whose actions are themselves the subject of inquiry must abide by the courts' decisions concerning asserted privileges to withhold evidence rele-

imagine the great practitioners of presidential power vis-à-vis the courts—Jefferson, Jackson, Lincoln—allowing a fundamental question of presidential power to be resolved by the courts under such circumstances.

Consider President Jefferson, who tangled with Chief Justice John Marshall on more than one occasion on issues of judicial-versus-executive power.⁸⁵ Jefferson's consistent position was that the judiciary has no right to issue orders to the President, the head of a coordinate branch, and expect that the President will obey them where *the President* believes that compliance would interfere with the powers or prerogatives of the executive, interfere with the executive's performance of his constitutional duties, or violate the executive's sense of what the Constitution requires or prohibits.

This was Jefferson's position in response to the order to his Secretary of State, James Madison, to appear and defend in *Marbury*. Jefferson directed Madison not to show up. The administration did not litigate the merits of William Marbury's claim for a commission, and President Jefferson almost surely would have directed Secretary Madison not to deliver Marbury's commission had Marshall been so audacious as to order it.⁸⁶ The *Marbury* litigation, had it played out that way, would have become an early and powerful precedent for the proposition that the courts are constitutionally unable to issue enforceable orders against the executive branch that involve commands to the executive to take or refrain from taking certain action—the complete reverse of *Nixon*. (That *Marbury* does not stand for such a proposition is a tribute to the judicial politics of John Marshall who (unlike Nixon) knew when not to take on a coordinate branch under circumstances where the other branch was likely to win.)

vant to that inquiry.

85. I will use President Jefferson as the primary example here, though the point could be expanded upon by discussion of President Jackson and President Lincoln as well. In brief, Jackson did not treat the Marshall Court's upholding of the constitutionality of the Bank of the United States as controlling his exercise of the constitutional power of the veto. See Paulsen, *supra* note 10, at 259. Lincoln did not obey Taney's order in the *Merryman* case. See Paulsen, *supra* note 42, at 95. Even more important are the cases Lincoln did not *allow* to become judicial decisions, such as the constitutionality of secession, the validity of the North's suppression of the insurrection, the multitude of questions concerning executive power under such circumstances, and the constitutionality of the Emancipation Proclamation. Sometimes it's better not to ask the courts for their opinion or permission.

86. See Paulsen, *supra* note 10, at 307-08.

This was also Jefferson's position with respect to John Marshall's subpoena duces tecum in the *Burr* treason trial, though he chose not to press his point.⁸⁷ President Jefferson provided the subpoenaed letter in question (after first making some redactions).⁸⁸ But a President's agreement to provide material, or to provide testimony, does not establish judicial supremacy over the executive; it could constitute the President's voluntary cooperation in a judicial proceeding that he does not oppose on the merits (which was surely the case with the prosecution of Aaron Burr).⁸⁹

President Jefferson reserved his constitutional argument for a letter to the prosecuting attorney for the United States, Mr. George Hay. But that argument was *not* the Nixonian one that the *courts should grant* the President an absolute privilege from compulsory judicial process,⁹⁰ but that the President,

87. For a fascinating discussion of the intricacies and lessons of the *Burr* case, see Professor John Yoo's contribution to this symposium. John C. Yoo, *The Burr Trial*, United States v. Nixon, and *Presidential Power*, 83 MINN. L. REV. 1435 (1999). I have profited much from Professor Yoo's discussion of the history and agree with virtually all of his conclusions. As the discussion in the text indicates, however, I read the evidence somewhat more strongly in favor of an understanding by President Jefferson that the Constitution does not require the President to obey the orders of the judiciary with respect to determinations of the scope of the President's constitutional powers. In my view, Jefferson did not fight to the finish for this principle in the *Burr* case because there was no practical reason not to provide the letters in question and two powerful reasons to provide them: First and foremost, Jefferson wanted Burr hung. Second, he did not want to furnish Burr (or Marshall) either a diversion or a pretext; quite the reverse, if Marshall were to steer the trial to acquittal, Jefferson hoped at least to profit politically from that undesirable outcome. See Yoo, *supra*, at 1441-42 (discussing Jefferson's political objectives).

88. *United States v. Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694) ("Mr. Hay presented a certificate from the president, annexed to a copy of Gen. Wilkinson's letter, excepting such parts as he deemed he ought not to permit to be made public.").

89. Many Presidents have provided testimony in judicial proceedings. See *Clinton v. Jones*, 117 S. Ct. 1636, 1649-50 (1997) (describing testimony provided by sitting Presidents both voluntarily and in response to court orders). In July 1998, President Clinton agreed "voluntarily" to testify before a grand jury, and Independent Counsel Starr thereupon withdrew a subpoena requiring Clinton to appear, but it is difficult to believe that Clinton's "voluntary" appearance was done because Clinton wished to cooperate with a judicial proceeding he supported on the merits. In this case, it appears more that Clinton did not wish to fight the subpoena on constitutional grounds, at great political cost, when it was clear (under *Nixon*) that he could not win.

90. Others have made an argument similar to Nixon's argument in support of President Clinton's claim to immunity from suit while in office in the *Clinton v. Jones* case—i.e., that the Constitution requires *courts to grant* the

as a matter of the Constitution's separation of powers, *may judge for himself* whether and when it is proper to honor a judicial subpoena, or other judicial process, and may use the constitutional powers at his disposal to enforce his view.

The leading principle of our Constitution is the independence of the Legislature, executive, and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?⁹¹

Jefferson's views on the relationship of the President to the courts, expressed (mostly intra-executive) in *Burr*, are of a piece with his famous remarks to Abigail Adams, in a letter justifying his pardons and non-prosecutions of persons subject to the infamous Sedition Act of the Adams administration:

You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass sentence of fine and imprisonment; because the power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power has been confided to them by the Constitution. That instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch.⁹²

What, then, *should* the President's position be, when confronted with compulsory judicial process directed to him? Should President Nixon have refused to obey Jaworski's subpoena? Should he have defied the Supreme Court's judgment? And for today's front-burner issues, the questions are echoes of *Nixon*: What should President Clinton's position have been with respect to responding to civil litigation against him in his personal capacity? Was the Court right or wrong in *Clinton v.*

President immunity from private-capacity civil litigation while he holds office. See, e.g., Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 718 (1995).

91. Letter from Thomas Jefferson to George Hay (June 20, 1807), in 10 WORKS OF THOMAS JEFFERSON 403-04 (Paul Leicester Ford ed., 1905).

92. Letter from Thomas Jefferson to Mrs. John Adams (Sept. 11, 1804), in 10 WORKS OF THOMAS JEFFERSON, *supra* note 91, at 89.

Jones?⁹³ What is the legally correct position for the President to take with respect to assertion of privilege claims against an Independent Counsel's grand jury subpoenas? Against a possible criminal *indictment* by a federal grand jury?

The answers to these specific questions must await consideration of the specific substantive constitutional question decided in *Nixon*: what is the proper scope of executive privilege (or immunity) under the Constitution? My only points so far have been that the judiciary's answer to that question ought to be no more binding on the executive than the executive's is on the judiciary; and that *Nixon's* assertion to the contrary is a great constitutional error of enormous consequence to our constitutional order, but a relatively unsurprising one given the circumstances presented to the Court by the legal claims and illegal conduct of President Nixon.

II. NIXON & CLINTON: POINT OF PERSONAL (AND EXECUTIVE) PRIVILEGE

My starting point in this section is the question addressed in detail by a different panel of this symposium: is there really such a thing as "executive privilege" under the Constitution and, if so, what are its proper parameters? *United States v. Nixon*, of course, is the seminal modern case on this point, and the issues and variations presented in *Nixon* obviously remain of tremendous importance today. Indeed, it is not too much to say that the gravitational weight of the Nixon Tapes Case, if not its specific holding, has led almost unavoidably to the Supreme Court's unanimous rejection of presidential immunity from defending a civil suit while in office (*Clinton v. Jones*⁹⁴), to the rejection by lower courts of claims of privilege concerning communications between President Clinton and his advisors, including government lawyers, against grand jury subpoenas in the Independent Counsel's investigation of possible crimes by Clinton and others,⁹⁵ to the emphatic rejection by lower courts of claims of privilege for fact knowledge held by members of the President's personal Secret Service protective de-

93. 117 S. Ct. 1636 (1997).

94. *Id.*

95. *In re Lindsey*, 148 F.3d 1100 (D.C. Cir.), *cert. denied*, 119 S. Ct. 466 (1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997).

tail,⁹⁶ and to the obvious futility of presidential resistance to a grand jury subpoena calling for his personal testimony—all events that (along with the physical evidence of a stained dress) helped to box President Clinton into admitting (in part) a seven-month course of public deception and lies involving use of the resources of the United States government, and which likely involved numerous crimes of perjury and obstruction of justice.⁹⁷

The legal holdings of the courts in these cases follow quite readily from *Nixon's* rejection of the claim of absolute executive immunity from compulsory judicial process and from application of *Nixon's* balancing test for consideration of privilege claims: if the President may be compelled to produce taped conversations of deliberations with his advisors in the oval office, it is hard to say that the President may not be compelled to answer a civil lawsuit or provide deposition testimony at a suitably convenient time for use in such a suit, upon a sufficient showing of need for such evidence. If *Nixon* is right in its striking of the balance, *Clinton* is right, too. And if tapes of presidential conversations with advisors are subject to subpoena in a criminal matter, testimony by persons present at such conversations (the President or his advisors) is likewise subject to subpoena, upon a like showing of need. The rule should be no different with respect to conversations with government lawyers. They are government employees, representing the interests of the United States government, not the (potentially conflicting) interests of the individual serving as President, and thus may not claim attorney-client privilege against the United States government (represented in these matters by the Independent Counsel). They thus stand in no

96. *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998), *reh'g denied*, 146 F.3d 1031 (D.C. Cir. 1998), *stay denied*, Office of the President v. Office of the Independent Counsel, App. No. 1-108, 1998 WL 438524, at *1 (U.S. Aug. 4, 1998), *cert. denied*, 119 S. Ct. 461 (1998).

97. See generally COMMUNICATION FROM INDEPENDENT COUNSEL KENNETH W. STARR, H.R. DOC. 105-310 (1998). The issues concerning the likely criminality of President Clinton's actions have been so thoroughly discussed in so many sources that extensive citation of the debate is unnecessary. Nor do I wish to add to that literature here. Suffice it to say that there is substantial evidence that could support a determination of actual criminality, and my discussion in the text frequently assumes familiarity with such evidence and the inferences that most reasonable people have drawn concerning Clinton's conduct. The reference to Clinton's "likely crimes" is not meant to be contentious or provocative, but as a shorthand for the most probable generally accepted public judgment about the true state of the facts.

different position than any other government officials who may possess relevant information.⁹⁸

Finally, if, as *Nixon* and *Clinton* hold, the President has no constitutional immunity from compulsory judicial process, it quite possibly follows that a sitting President may be *indicted* and forced to stand trial for federal crimes. Nothing in the impeachment power precludes a criminal indictment and even trial. To be sure, the framers no doubt expected that impeachment would precede indictment: a state prosecution of the President would appear to present substantial constitutional issues of state interference with a federal instrumentality, under the reasoning of *McCulloch v. Maryland*.⁹⁹ And a

98. For discussion of the attorney-client privilege issues in the government context, and the responsibilities of government lawyers to report information concerning possible criminal acts by government officials to the appropriate federal law enforcement authorities, notwithstanding a sense of personal loyalty to the particular officeholders or employees involved, see Paulsen, *supra* note 10; and Michael Stokes Paulsen, *Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and Its Limits*, 61 LAW & CONTEMP. PROBS. 83 (1998).

99. 17 U.S. (4 Wheat) 316 (1819); see also *Clinton v. Jones*, 117 S. Ct. at 1642 n.13:

Because the Supremacy Clause makes federal law "the supreme Law of the Land," Art. VI, cl.2, any direct control by a state court over the President, who has principal responsibility to ensure that those laws are "faithfully executed," Art. II, § 3, may implicate concerns that are quite different from the interbranch separation of powers questions addressed here.

Still, any conclusion that a state grand jury indictment of a sitting President would be *unconstitutional* seems too strong: What of the case where a sitting President commits rape or first degree murder, but no federal crime? Would a state grand jury really be constitutionally barred from indicting him? The most likely answer is that principles of federalism would preclude a state from taking any *physical action*—arrest, imprisonment—against the President without the cooperation or acquiescence of the federal government. Specifically, if Congress does not impeach and remove the President for committing rape, murder, armed robbery, embezzlement of private funds, burglary, or some other serious felony (and several defenders of President Clinton have advanced the rather bracing argument, whether sincerely or for the present case only, that the impeachment power does not extend to removal of a president for commission of felonies in his "private capacity"), it may be that the President's refusal to appear, defend, or be bound by a judgment of conviction renders any such state criminal proceeding ineffectual as a practical matter. So long as the President retains the executive power of the United States government, a state court's criminal process against him is ineffective. Whether this structural reality ought to require a state court judge to dismiss an indictment at the outset is a more troubling proposition. The practical resolution probably should be that the state grand jury legitimately may issue an indictment but the President legitimately may refuse to appear if doing so would interfere with the operation of the executive branch of government.

federal prosecution would seem quite odd and remarkable—especially if a state prosecution were barred. Since federal prosecutors are (or at least were, in the world before *Nixon* and *Morrison v. Olson*), subordinates of the President, federal prosecution of a sitting President would seem to have an underling prosecuting his own boss. Were it not for *Nixon's* sanctioning of a suit between the President and his subordinate, it would otherwise seem to make sense to conclude that a criminal indictment could only follow the President's removal from office through the political trial of impeachment. That at least is the implication of the fundamental structural principle of Article II, the unitary nature of the executive, and that appears to have been the general premise under which the framers operated.

However, in a constitutional world of Special Prosecutors and Independent Counsels subordinate to the President in name only—the third disastrous legacy of *Nixon*¹⁰⁰—the premise that a federal prosecutor could never indict a sitting President is no longer valid. The Constitution does not, after all, say that the President cannot be indicted; it merely says how he may be impeached and specifies that an impeachment conviction does not bar a criminal prosecution.¹⁰¹ The rest is all inference from silence and extrapolation from structural and practical assumptions that, in the world after *Nixon* and *Morrison*, no longer hold true.

Actually putting the President behind bars is a different matter. It seems plain that impeachment is the exclusive means of removing a President from office and physical incarceration, while not literally effecting a removal from office, surely is the practical equivalent of removal of the powers of the office (ingenious arguments about the President's ability to

The state courts are without constitutional power to compel the President's submission to their judicial authority while he is in office and the President is without constitutional power to insist that the indictment be dismissed. (He may not even grant pardons for state law offenses.) Thus, a state grand jury's criminal indictment of a sitting President, if otherwise consistent with constitutional requirements, stands as a state's expression of the importance of its interest in enforcement of its criminal law—kind of a “free speech” interest in pointing out that the President is acting unlawfully, not altogether different in character from the Virginia and Kentucky Resolves' condemnation of an unconstitutional act of Congress. But the state's criminal law probably cannot actually be enforced against a sitting President, without the cooperation of Congress through the impeachment power.

100. See *infra* Part III.

101. U.S. CONST. art. I, § 3, cl. 7.

sign bills and receive ambassadors in prison to the contrary notwithstanding). But that does not mean a President could not be *indicted*—formally charged by a grand jury. The impeachment-punishment clause suggests a logical division among the stages of a criminal prosecution: “the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to law.”¹⁰² It would seem that the first three stages—indictment, trial, and judgment—do not have the effect of removal from office that actual imposition of punishment (incarceration) would. While it at one time might have seemed outlandish, it is not at all clear in light of *Clinton v. Jones* that the President of the United States may not be compelled to *stand trial* while in office: the President “is subject to judicial process in appropriate circumstances,” the Court said.¹⁰³ The fact that a federal court’s exercise of its jurisdiction “may significantly burden the time and attention of the Chief Executive” does not create a constitutional immunity of the President from compulsory judicial process.¹⁰⁴ *Clinton v. Jones* even found it “an abuse of discretion” for the district court to have stayed the trial of a civil suit until after the President leaves office.¹⁰⁵ “[D]elaying 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.”¹⁰⁶

The same considerations at least arguably apply in a criminal case. There is no persuasive reason to think the President should have a judicially-created absolute privilege from trial for crimes against the United States while in office but not have any such privilege from trial in a civil case, unless the impeachment power forbids trial in one case but not the other. Nothing in the impeachment clauses *divests* courts of jurisdiction they otherwise have—impeachment merely provides a political-judicial process for removal from office. The fact that the President may be impeached for commission of criminal offenses does not mean he might not first be tried in the courts for such offenses (as has happened with some federal judges Congress has impeached).¹⁰⁷ And if the President

102. *Id.*

103. 117 S. Ct. at 1649.

104. *Id.* at 1648-49.

105. *Id.* at 1651.

106. *Id.*

107. See Don Van Natta, Jr., *House Prosecutors Compare Clinton to Judges*

were immune from prosecution on this score, that would be in tension with *Clinton v. Jones*' denial of immunity from civil suit while in office, since a serious civil wrong could, in the judgment of Congress, constitute an impeachable offence—imagine for example a President who engaged in twelve proven instances of non-criminal quid pro quo sexual harassment with executive branch employees.¹⁰⁸ The fact that a wrongful act might also provide grounds for impeachment does not itself confer litigation immunity on the President for those acts. It would not seem to make a principled difference whether the non-impeachment litigation in question is civil or criminal.¹⁰⁹ If anything, the judicial system's interest in enforcement of the criminal law would appear to be higher.¹¹⁰

All of this—presidential amenability to civil suit; rejection of executive privilege for Clinton's advisors; presidential amenability to grand jury subpoena; presidential amenability to criminal indictment—seems to follow once it is conceded that the President is, as a matter of constitutional law, subject to the compulsory process of the courts and, further, that the province of "executive privilege" is narrow, qualified, and defined by the judiciary's assessment of the importance of recog-

Who Lied and Were Ousted, N.Y. TIMES, Jan. 17, 1999, § 1, at 26 (discussing the Senate convictions of Judge Walter Nixon, who was found guilty of lying before a federal grand jury prior to impeachment, and of Judge Alcee Hastings, who had been acquitted of bribery in state court).

108. I discuss (in general terms) the scope of the impeachment power below. See *infra* text accompanying note 158.

109. To be sure, the President possesses the power to grant pardons for federal crimes. While some have argued that the pardon power does not permit a president to pardon himself, see, e.g., Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779 (1996), the dominant view is that the President's pardon power is plenary. In any event, however, the bare *existence* of a pardon power does not confer an immunity from indictment or prosecution. It just means that the indictment or prosecution could be negated in the event the President were in fact to grant himself a pardon.

110. The discussion in the text is *not* a prediction of what the Supreme Court would hold if presented with the issue today. Rather, my argument is that the logical implications of *Nixon* and *Clinton* (combined with *Morrison v. Olson*, 487 U.S. 654 (1988)) suggest this outcome. Courts, of course, do not always follow the logical implications of their prior holdings.

It follows, almost a fortiori, from the argument in the text, that the courts may subject a President to contempt sanctions for abuse of the judicial process, whether or not the acts constituting such abuse are also punishable as crimes. Once again, the Clinton situation has become the leading precedent on this point. *Jones v. Clinton*, No. LR-C-94-290, 1999 WL 202909 (E.D. Ark. Apr. 12, 1999).

nizing it in a given context. In the myriad legal battles involving President Clinton, we have seen new applications of *Nixon*, and Clinton has lost *all* of the judicial battles over these issues.¹¹¹ Independent Counsel Starr spared the presidency a formal ruling that the President may be subpoenaed to give testimony to a grand jury (which was the inevitable answer after *Nixon* and *Clinton v. Jones*) by allowing President Clinton to testify "voluntarily" and not subpoenaing him to testify subsequently, after Clinton refused to answer certain questions.¹¹² But the outcome of the negotiation is probably nearly as important a precedent as if it had come from a reported judicial ruling: the President lost again. And we may yet be presented with the question of whether a sitting President may be indicted.¹¹³

I would like to take a step back, however, and ask if *Nixon's* holding that the President possesses a qualified, constitutional privilege against judicial process makes sense as an original matter. The Constitution's answer strikes me as painfully obvious—painful, because *Nixon's* answer labors so hard to squeeze a balancing test out of a constitutional text that so plainly does not provide one; and obvious, because the correct answer strikes me as clear, the moment one steps out of a judicial supremacist mindset.

The answer to the riddle of executive privilege lies at the intersection of two propositions. First, as *Nixon* correctly recognized, the constitutional structure of separate, independent branches necessarily implies that each branch properly possesses a sphere of constitutional autonomy in its operations, with which the other branches may not rightfully interfere. That principle necessarily suggests the right of the executive to some degree of confidentiality, vis-à-vis the other branches, in executive branch deliberations concerning matters within the province of the President's responsibilities under Article II of the Constitution (which is quite a broad province) and some degree of immunity from the compulsory processes or demands of the other branches.¹¹⁴ In other words, yes, there *is* such a thing as a constitutionally-based executive privilege. *Nixon*

111. See *supra* notes 5-9 and accompanying text.

112. See *supra* note 21.

113. See Don Van Natta, Jr., *Starr Is Weighing Whether to Indict Sitting President*, N.Y. TIMES, Jan. 31, 1999, at A1.

114. Some supporting evidence for these premises is contained in Paulsen, *supra* note 10, at 228-40, 252-57.

was right in finding that executive privilege has a constitutional basis.¹¹⁵

But the second point is that the text of the Constitution quite obviously does not supply any rule of law for courts to apply concerning the proper scope of executive privilege. *Nixon* was wrong to take this silence as authorizing the Court to invent a rule of its own liking (and, of course to make it a suitably mushy rule, since the Constitution does not really supply a rule at all).¹¹⁶ Instead, I submit, the correct answer is that the

115. *United States v. Nixon*, 418 U.S. 683, 711 (1974) ("Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.").

Writing soon after the *Nixon* case was decided, Professor William Van Alstyne argued that, aside from some "very narrow zone of implied power without which [the President] would be quite unable to perform his express duties at all," executive privilege is a function of Congress's powers under the Necessary and Proper Clause. Van Alstyne, *supra* note 14, at 118-19. There is much to Van Alstyne's argument, but it shortchanges considerations of executive branch autonomy flowing from the Constitution's structural separation of the branches. As I argue presently, however, that is a matter to be determined by the give-and-take among the branches—the executive branch fighting for its view against Congress and the courts. I agree with Van Alstyne to the extent his argument suggests that the Constitution does not supply a rule concerning the proper scope of executive privilege and that *the courts* therefore cannot properly find as a rule of law that the President possesses a constitutional privilege any broader than that which is strictly necessary to perform his duties.

Professor Saikrishna Prakash, in his contribution to this symposium, makes a very similar argument. See Prakash, *supra* note 15. Professor Prakash emphasizes even more strongly than Professor Van Alstyne that the usefulness and utility of executive privilege as a means for the effective carrying out of executive power does not itself make it a constitutional power of the President; rather, it suggests that the privilege falls solely within Congress's powers under the Necessary and Proper Clause.

The difference between Prakash's and Van Alstyne's perspective and mine is that I do not see executive privilege as a "power" of government at all, but an *immunity* of the President from the powers of *other* branches. Executive privilege is not a coercive power with which the President can "do" something to someone else. It thus does not seem to me the sort of thing that Congress has power to control as a means of "carrying into execution" executive powers. It is, rather, a privilege—a defensive shield—that flows from the separation of powers and the autonomy of each branch within its sphere. If one accepts this view of what executive privilege *is*—not a power, but a privilege—one can accept all of Professor Prakash's arguments in principle about the power of Congress to control the incidental means for "carrying into execution" the executive powers of Article II and still not accept his conclusion that executive privilege lacks a constitutional basis.

116. See *Nixon*, 418 U.S. at 711-13. The signal that a mushy balancing test is coming comes in the opening words of the paragraph that starts to explain

scope of executive privilege, as an incident of the autonomy of the executive from the other branches, is a function of the circumstances of any particular situation and the vigor with which the executive branch resists the demands of the other two branches of government for information or materials concerning confidential executive branch deliberations, or for the personal presence of executive branch officers, and the result of the struggles between or among the branches on this point—not a function of a judicial balancing test.

This answer is of a piece with my discussion above, criticizing *Nixon's* holding of judicial supremacy over the executive. If ever there was an issue for which judicial hegemony was inappropriate, it would be one like executive privilege, for which there is a constitutional basis flowing from implications of the separation of powers, but no constitutional rule of law fairly discernible from text or structure. It is the President's autonomy and his independent duty and prerogative to interpret the Constitution that gives rise to *the President's* constitutional power to assert and, to the extent he can, maintain a sphere of executive privilege and immunity as against the other branches. Executive privilege is a function of independent presidential power to interpret the Constitution, not judicial power to interpret the Constitution.

Does this mean that executive privilege issues are nonjusticiable "political questions?" Not quite—and certainly not in the sense in which the so-called political question doctrine has been articulated by the Supreme Court. The scope of executive privilege is not the subject of a "textually demonstrable constitutional commitment of the issue to a coordinate political department," (i.e., the executive) under the first branch of the political question doctrine.¹¹⁷ Quite the contrary, executive privilege is an inference of indefinite extent from constitutional structure and relation—a penumbra, if you will—not the subject of a clear textual command.

Nor is the judiciary obliged to recognize a *de facto* absolute executive privilege against compulsory judicial process simply because of a "lack of judicially discoverable and manageable standards for resolving" executive privilege claims—the buzz-

it: "In this case we must weigh . . ." *Id.* at 711. For the Court's full test, see *infra* text accompanying note 125.

117. *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

words of the second branch of the political question doctrine.¹¹⁸ Certainly the judiciary has a presumptive power to issue compulsory process to all persons in a case in which it has jurisdiction. The absence of a constitutional rule of privilege does not mean that anyone who claims a privilege wins; the absence of a standard could as easily lead to the conclusion that the privilege does not exist at all. A "lack of judicially discoverable and manageable standards" does not tell a court how to decide a claim of executive privilege against compulsory judicial process. It merely tells the court that the Constitution supplies no rule for the court to apply; the "law" (if any) on this issue must come from someplace else.¹¹⁹

Least of all is the judiciary obliged to defer entirely to the executive on privilege issues merely because of "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" or because of "an unusual need for unquestioning adherence to a political decision already made" or because of "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."¹²⁰ Taken seriously, this grab-bag of miscellaneous political question principles would mean that courts should never get involved in separation of powers cases at all, even when the Con-

118. *Id.*

119. I have written elsewhere that the "textual commitment" and "absence of judicially discoverable standards" branches of the political question doctrine are not true "nonjusticiability" doctrines but in actuality are two different *substantive* holdings. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 713 (1993); see also Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 600-01 (1976). A decision holding that resolution of a particular issue is committed to another branch is a substantive ruling on the meaning of the Constitution: the Constitution supplies a rule, and that rule is that the decision lies within the exclusive province of another branch. Cf. *Nixon v. United States*, 506 U.S. at 228. A decision finding a "lack of judicially discoverable and manageable standards" is also a substantive ruling on the meaning of the Constitution: the Constitution supplies no rule of law, and so decision of the case depends on some other source of law or on some baseline default rule (such as that the challenged action is not disturbed by the courts). See Paulsen, *supra*, at 713 & nn. 124-27. In the case of a claim of executive privilege, there is no basis for choosing between a baseline default rule that the privilege claim succeeds and a baseline rule that the Constitution fails to supply a rule invalidating the issuance of compulsory judicial process, so that the privilege claim fails.

120. *Baker*, 369 U.S. at 217; accord *Powell v. McCormack*, 395 U.S. 486, 518-19 (1969); *INS v. Chadha*, 462 U.S. 919, 941 (1983); *United States v. Munoz-Flores*, 495 U.S. 385, 389-90 (1990).

stitution does supply a rule of law to be applied. Nor, taking such principles seriously, should courts ever hold congressional acts unconstitutional. Such a free-form principle of pseudo-"restraint" (abdication, really) has no place in our constitutional order.

Such a notion is certainly not what I propose for questions of executive privilege. Rather, executive privilege questions are "political" constitutional questions in the straightforward sense that their resolution cannot pretend to come from a *rule* supplied by the Constitution's text, structure, or history. Their resolution is determined by the constitutional politics of the situation. A court, which can only apply rules of law, has no constitutional rule on which to base a decision disturbing the status quo ante, and thus may not properly purport (except, perhaps, in the most extreme of cases) to settle a claim of executive privilege or immunity on constitutional grounds. Where the Constitution supplies a rule, the courts must apply it. Where the Constitution fails to supply a rule but a constitutional principle is implicated, the courts have no warrant for making up a balancing test to try to "split the difference." They must simply hold that the Constitution fails to supply a rule of law for courts to apply, even though a constitutional principle is implicated. A court can do no more in the name of the Constitution—at least not if they are being faithful to the judicial role. Thus, outside of extreme cases, a claim of *constitutional* executive privilege should have no status in the courts, and should supply no defense to an otherwise appropriate judicial subpoena, summons, or other order.¹²¹

What a court *can* do, however—and what Congress has specifically empowered the federal courts to do—is to recognize and develop the common law of privileges.¹²² This common law could reasonably include a policy-based executive privilege for which the Constitution fails to supply a rule governing its practical application. It could take into account the fact that the Constitution provides a constitutional principle justifying such a privilege, even though it fails to provide a constitutional

121. So explicated, it is not clear that my position is radically different from Professor Van Alstyne's and Professor Prakash's at all, *see supra* note 115: the text of the Constitution supplies no rule of law for courts to apply concerning executive privilege, and courts may not in the name of the Constitution infer such a rule and apply it to trump other applicable substantive law providing for compulsory process.

122. *See* FED. R. EVID. 501.

rule mandating one. It could also take into consideration the executive branch's considered views in this regard—as well as the executive's expected response to the Court's decision, in the exercise of its independent duties under the Constitution. In short, the courts' common law development of the privilege could take into account constitutional concerns, as well as accommodate the view of the judiciary to the view of the executive.¹²³

To the extent executive privilege claims are presented in federal courts, then, it follows that the courts may recognize and apply something like the Nixon Tapes Case's description of the privilege, *as a matter of the common law of privilege*. That is not what the *Nixon* opinion purported to do, of course—the Court purported to derive its balancing test straight from the Constitution, in typical early-1970s judicial activist fashion¹²⁴—but it is a better description of what the Court was in reality doing, and a better normative account of the extent to which what the Court was doing can be regarded as legitimate.

But even as common law judicial privilege doctrine, however, *Nixon* is wanting. It is both too broad—in its apparent *carte blanche* to the President, if he invokes the magic words “national security”—and, for most purposes, far too narrow. Worse, it suffers from all the imprecisions and uncertainties of unfocused, multi-factor balancing tests. Here is the *Nixon* Court's statement of its “test,” in all its splendor (with snide commentary thrown in along the way):

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities [“weigh” using what kind of scale?] against the inroads of such a privilege on the fair administration of criminal justice. [Guess which branch is going to win the judiciary's balance.] The interest in preserving confidentiality is weighty indeed [weighty *indeed*—how reassuring!] and entitled to great respect [which the Court will now disparage in practice]. However [here it

123. On accommodation, in this sense, see Paulsen, *supra* note 10, at 337-40; see also *id.* at 332-37 (discussing the idea of “deference” as distinguished from “accommodation”).

124. Compare *Roe v. Wade*, 410 U.S. 113 (1973). *Roe* and *Nixon*, the two most important constitutional decisions of the 1970s, resemble one another in methodology: a constitutional “principle” is inferred, at a highly abstract level of generality; the Court then fashions a highly specific, quasi-legislative “test” to implement this principle; finally, that test is read back into the constitutional text as if the text actually stated such a rule. See also *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (similar methodology for Establishment Clause issues).

comes], we cannot conclude that advisers will be moved to temper 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. [Perhaps a fair point, if somewhat weak. I'm curious, though: why are Supreme Court deliberations secret?]

On the other hand [balancing, balancing, all is balancing], the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts [with which we are much more familiar and thus value more highly]. A President's acknowledged need for confidentiality in the communications of his office is general in nature [so it should lose every time?], whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. [Yep, a general claim of confidentiality will lose almost every time, as against a specific claim of evidentiary need.] Without access to specific facts a criminal prosecution may be totally frustrated. [Nixon is a crook, and is just protecting his henchmen.] The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases. [It will be vitiated whenever the courts vitiate it, and deterred in other cases. More importantly here, Nixon is a crook.]

We conclude [this is the rule of the case:] that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.¹²⁵

Once again, what seems to be driving the balancing in this case is the reality the Court knows from the sealed record: Nixon was involved in criminal activity. But the Court cannot quite bring itself to say so. And so it settles on an imprecise formulation that, ironically, gives even *legitimate* deliberations between the President of the United States and his most senior advisors concerning matters of national policy less legal protection than is given for attorney-client communications concerning the most ordinary of matters. The confidentiality of presidential conversations is subject to ex post balancing, and consequent uncertainty—factors that the Court has recently

125. *United States v. Nixon*, 418 U.S. 683, 711-13 (1974) (footnotes omitted) (cynical commentary added).

found unacceptably dangerous to the attorney-client privilege.¹²⁶

In stark contrast, attorney-client communications are almost absolutely protected, absent use of the relationship for a crime or fraud. That last proviso is key: the attorney-client privilege applies absent use of the relationship for a crime or fraud.¹²⁷ An analogous standard supplies a better common law rule than *Nixon's* rule. Surely the policy interests in protecting the confidentiality of presidential conversations with advisors, concerning matters of national policy within the scope of the President's Article II province (and not just military or diplomatic matters), in order to enable the President to receive uninhibited, fully-informed advice, is *at least* as great as the policy interest in protecting the confidentiality of attorney-client communications. If courts are concerned that such confidentiality might be abused as a cover for criminal activity, they should hold—just as with attorney-client privilege—that the privilege must yield in the face of a sufficient showing of probability that the communication was in furtherance of a crime or fraud, and not for the legitimate purpose of providing or obtaining advice on confidential matters not implicating illegal conduct.¹²⁸

126. See *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2086-87 (1998) (rejecting argument that attorney-client privilege will not be greatly impaired because of the limited nature of proposed exception where client is deceased and there is a demonstrated substantial need for the information in a criminal proceeding).

[A] client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance. Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the [attorney-client] privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege.

Id. at 2087. For an analysis of the *Swidler & Berlin* case, see Michael Stokes Paulsen, *Dead Man's Privilege: Vince Foster and The Demise of Legal Ethics* (Nov. 15, 1998) (unpublished manuscript, on file with the *Minnesota Law Review*). While I believe that *Swidler & Berlin* was incorrectly decided, the argument against *ex post* balancing and uncertainty is a strong one and persuasively (although perhaps unintentionally) refutes *United States v. Nixon* on this score.

127. See *infra* note 128 (discussing cases).

128. The crime-fraud exception to the attorney-client privilege generally permits the party seeking to invoke the exception to obtain in camera inspection by a court upon "a showing of a factual basis adequate to support a good faith belief by a reasonable person' that in camera review . . . may reveal evi-

That is the reality of what the *Nixon* opinion holds, though it is not (quite) what the *Nixon* opinion says. The formula for the judicial common law of executive privilege, however, should reflect both its policy justification and its reality limitation. I propose a rule along the lines of the following, closely tracking the basic elements of the common law attorney-client privilege:

- (1) Confidential communications
- (2) between officers, employees, or other members of the executive branch of the United States government, acting within the scope of their employment,
- (3) for purposes of formulating or implementing executive branch policy or providing advice to the President,
- (4) concerning governmental matters within the fairly arguable scope of the executive branch's Article II constitutional powers,
- (5) are, at the direction of the incumbent President or his designee,
- (6) protected from compelled disclosure by any court or by Congress,
- (7) absent waiver,
- (8) unless the communications are made for the purpose of furthering a crime or fraud.¹²⁹

dence to establish the claim that the crime-fraud exception applies." *United States v. Zolin*, 491 U.S. 554, 572 (1989); *see also In re Sealed Case*, 107 F.3d 46, 50 (D.C. Cir. 1997) (discussing standard necessary, upon in camera review, to establish the crime-fraud exception: "The government satisfies its burden of proof if it offers evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud."); *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985); *In re Marc Rich & Co. v. United States*, 731 F.2d 1032, 1039 (2d Cir. 1984) (framing test as one of "probable cause to believe that a crime or fraud had been committed and that the communications were in furtherance thereof").

129. Compare this formulation with Wigmore's classic formulation of the attorney-client privilege:

- [1] Where legal advice of any kind is sought
- [2] from a professional legal adviser in his capacity as such,
- [3] the communications relating to that purpose,
- [4] made in confidence
- [5] by the client,
- [6] are at his instance permanently protected
- [7] from disclosure by himself or by the legal adviser,
- [8] except the protection be waived.

8 WIGMORE ON EVIDENCE § 2292, at 554 (John T. McNaughton ed., 1961).

The courts have power to adopt the version of executive privilege pro-

Under this test, President Nixon still loses, for all the reasons subtly identified by the Court in the *Nixon* opinion: if there was substantial "independent evidence of a conspiracy" to support admissibility of the conversations under the co-conspirator exception to the hearsay rule (as the Court held in *Nixon*),¹³⁰ there was undoubtedly sufficient evidence in the sealed record before the Court "to support a good faith belief by a reasonable person, that in camera review . . . may reveal evidence to establish the claim that the crime-fraud exception applies" (the "crime-fraud" standard as it exists with respect to the attorney-client privilege).¹³¹ Applying a "crime-fraud" exception to a broad executive privilege should thus yield in camera review of the materials or testimony in question to see if there is in fact sufficient justification for overruling the claim of privilege. And in camera review is exactly what the *Nixon* opinion ordered. The end result is the same, but with the difference that the executive branch is not weakened just because Nixon was a crook: the privilege claim is rejected, Nixon is forced to cough up the so-called "smoking gun" tape, and resigns very shortly after his criminality is exposed to public view.¹³²

posed in the text as a matter of the common law of executive privilege to be applied in federal courts. (They can do this whether or not *Nixon's* constitutional holding is rejected. To the extent my proposed common law formulation is broader, it does not contradict *Nixon*, but expands on it.) By the same token, Congress has power (under the Necessary and Proper Clause) to adopt such a broadened standard for executive privilege claims, whether or not the courts adhere to *Nixon* as setting a constitutional floor. To the extent that executive privilege is thought to exist purely as a matter of judicial common law development, of course, Congress may displace judicial doctrine with whatever rule it thinks most appropriate.

130. 418 U.S. at 701.

131. *Zolin*, 491 U.S. at 572 (citation omitted).

132. The ending of the story is worth retelling briefly, because it again contrasts so sharply with the events involving President Clinton twenty-five years later. (I am indebted to Professor Van Alstyne's article once again for this account of events. See Van Alstyne, *supra* note 14, at 127-30.) Following the Supreme Court's decision in the Nixon Tapes Case, the mandate issued quickly and the case was returned to Judge Sirica in the District Court for in camera inspection of the subpoenaed tapes. Sirica directed Nixon's personal lawyer, James St. Clair, personally to listen to the subpoenaed tapes (quite possibly to assure that there would not be any new eighteen-and-a-half minute gaps). See *id.* at 128-29. I turn to Van Alstyne's account:

On Monday, August 5th [1974], the full consequences linked with these quickening developments became apparent when the President admitted that he had previously misstated the extent of his knowledge of the Watergate burglary, that he had in fact attempted to impede the F.B.I. inquiry, and that he had knowingly withheld this in-

Under this proposed crime-fraud exception to a strong executive privilege, it is most probable that President Clinton's claims of executive privilege concerning conversations with Bruce Lindsey and Sidney Blumenthal would also have lost (just as they in fact lost under the *Nixon* analysis). Some of those conversations probably did not fall within the ambit of

formation from the House Judiciary Committee as well as from his own counsel, contrary to his numerous earlier public statements. A story in the Washington Post the following day ventured an explanation for the President's wholly unexpected, and fatal, admission. Claiming access to information from a suitably knowledgeable source, the story asserted that Mr. St. Clair had listened to a tape establishing these devastating facts. Resolving his ethical and legal responsibilities appropriately, Mr. St. Clair had allegedly advised the President that he would be forced to resign and to advise the district court of the truth of the matter, to avoid complicity in any continuing misrepresentation.

Id. at 129 (footnotes omitted). President Nixon resigned within three days of the disclosure.

A lot has changed in legal ethics in the past twenty-five years. While the formal rules have in some respects become more clear in insisting on lawyer candor to the court and forbidding assistance to client illegality, the practice of prominent attorneys in high profile matters—including President Clinton's—has clearly become less ethical and honorable. At some point, very shortly after it had become publicly known that the President in all probability had made false and misleading statements in his civil deposition in the *Jones* litigation, the President's private attorneys in that civil matter (Robert Bennett) and the resulting criminal investigation (David Kendall) knew or should have known of their client's ongoing fraud on the courts. (Bennett himself was implicated, unwittingly, in the fraud.) Whether or how strongly Bennett or Kendall counseled rectification of the fraud we cannot know for certain. (To echo Senator Howard Baker's famous Watergate question, "What did the President's lawyers know, and when did they know it?") But we do know this: the President did not in fact rectify his false statements. Instead, he employed these lawyers to attempt to delay and prevent disclosure of facts from other witnesses which could expose the falsity. When those efforts ultimately failed, the President employed these same lawyers to help him prepare testimony before a federal grand jury defending the false statements as in fact "legally accurate." The House of Representatives ultimately impeached Clinton over that falsity (and other false statements to the criminal grand jury), not the original falsity of his civil deposition testimony. And, finally, we know that neither Bennett nor Kendall resigned from the representation of the President.

The ethical and honorable equivalent of James St. Clair is nowhere to be found among the leading attorneys representing President Clinton twenty-five years later. No one, apparently, was willing to speak legal truth to corrupt power, as St. Clair was to Nixon; and no one, apparently, was willing to resign rather than act in complicity with, and in furtherance of their client's misdeeds. For further discussion of this point, see Stephen Gillers, *A Fool for a Client?*, AM. LAW., Oct. 1998, at 74, 74-75. On the question of the ethics of the government attorneys involved in the Clinton affair, see Paulsen, *supra* note 98, at 96-104.

deliberations concerning executive branch policy or decision-making.¹³³ Furthermore, U.S. District Judge Norma Holloway Johnson's opinion rejecting Clinton's claim of executive privilege (which Clinton then abandoned in the Court of Appeals, in favor of fighting only the attorney-client privilege issue)¹³⁴ with respect to Clinton's conversations with these persons comes close to suggesting that the Independent Counsel's in camera submission provided a basis for believing these conversations were likely to have been made in furtherance of deception and possible illegality: "If there were instructions from the President to obstruct justice or efforts to suborn perjury, such actions likely took the form of conversations involving the President's closest advisors, including Lindsey and Blumenthal."¹³⁵

It doesn't take too much to read between the lines: the Independent Counsel had made a sufficient evidentiary showing, as early as spring 1998, that conversations between Clinton and advisors Blumenthal and Lindsey likely were not for purposes of legitimate deliberations concerning governmental matters. Rather, there was a substantial possibility that the conversations at issue were in furtherance of a crime or fraud. Judge Johnson's opinion in the district court does not explicitly invoke a crime-fraud exception rationale because she was working within the parameters of executive privilege set by *Nixon* and by D.C. Circuit precedent applying *Nixon*.¹³⁶ But the simple point remains: as with *Nixon*, the outcome is probably the same whether one employs *Nixon's* balancing test or a

133. See *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998) (per curiam), cert. denied, 119 S. Ct. 466 (1998) (noting that several of the conversations on which Deputy White House Counsel Bruce Lindsey invoked attorney-client privilege did not involve Lindsey acting in his capacity as an attorney, but concerned political or policy discussions).

134. After Clinton had filed a notice of appeal from the district court's decision rejecting both executive and attorney-client privilege in the combined Lindsey and Blumenthal cases, the Office of Independent Counsel petitioned the Supreme Court for a writ of certiorari before judgment. At that point, probably to lessen the sense of importance of the case and discourage granting of the writ, Clinton abandoned the executive privilege claim. See Paulsen, *supra* note 7, at 477.

135. *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 29 (D.D.C.) *aff'd in part, rev'd in part sub nom.*, *In re Lindsey*, 158 F.3d 1263, and cert. denied, 119 S. Ct. 466 (1998); see also *id.* at 28-29 (discussing the Independent Counsel's ex parte submission).

136. See *id.* at 25 (citing *Nixon* and *In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (the "Espy case") as providing the relevant legal framework for the district court's consideration of executive privilege claims); see generally *id.* at 25-30.

more protective common law executive privilege with an exception for communications in furtherance of a crime or fraud. As with *Nixon*, the latter approach is a more straightforward explanation for what is really going on in the case. The subtext of the District Court's opinion in the Clinton privilege case, as with the *Nixon* case, is that evidence in the sealed record showed substantial reason to believe that the President of the United States was a crook.¹³⁷

President Clinton's claims of executive *attorney-client* privilege fail, too. The short explanation, as alluded to above, is that the "client" in this situation is the United States government, not Bill Clinton personally, and the United States government is represented in the matter by Independent Counsel Starr. As both the D.C. Circuit and the Eighth Circuit have held, there is no governmental attorney-client privilege against the government.¹³⁸ Important to both the Eighth Circuit's and especially the D.C. Circuit's judgment was the anomaly that would exist if presidential conversations with attorney-advisors were more privileged than presidential conversations with non-attorney advisors. As the D.C. Circuit put it:

The Supreme Court's recognition in *United States v. Nixon* of a qualified privilege for executive communications severely undercuts the argument of the Office of the President regarding the scope of the government attorney-client privilege. A President often has private conversations with his Vice President or his Cabinet Secretaries or other members of the Administration who are not lawyers or who are lawyers, but are not providing legal services. The advice these officials give the President is of vital importance to the security and prosperity of the nation, and to the President's discharge of his constitutional duties. Yet upon a proper showing, such conversations must be revealed in federal criminal proceedings. Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, or politics, or why a President's conversation with the most junior lawyer in the White House Counsel's Office is deserving of more protection from disclosure in a grand jury investigation than a President's discussions

137. Subsequent testimony of Mr. Blumenthal provided support for the charge that the President attempted to obstruct justice by planting misinformation with key advisors, knowing that it would be repeated to the grand jury investigating the President. See COMMUNICATION FROM INDEPENDENT COUNSEL KENNETH W. STARR, *supra* note 97, at 128 n.1116-22.

138. See *In re Lindsey*, 148 F.3d 1100, 1114 (D.C. Cir.), *cert. denied*, 119 S. Ct. 466 (1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997). I have written elsewhere that the best explanation for the result in these two cases is that the government's attorney-client privilege is controlled in these circumstances by the Independent Counsel. See Paulsen, *supra* note 7, at 479.

with his Vice President or a Cabinet Secretary. In short, we do not believe that lawyers are more important to the operations of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters.¹³⁹

Nixon's executive privilege analysis unquestionably affected the courts' evaluation of executive branch attorney-client privilege in *Lindsey* and in *In re Grand Jury Subpoena Duces Tecum*.¹⁴⁰ Under my reformulation of common law executive privilege, the two privileges would almost completely overlap, not because of any narrowing of government attorney-client privilege but because of broadening of the common law executive privilege. Conversations with or among administration attorneys should stand on no different footing with respect to "privilege" in the courts than conversations with or among non-attorney executive branch personnel.

This approach to common law executive privilege also provides an appropriate framework within which to evaluate the Clinton administration's assertion of an unprecedented Secret Service "protective functions" privilege. As a free-standing evidentiary privilege, the claim borders on the absurd, and the courts—the district court, a unanimous panel of the D.C. Circuit, a unanimous vote to deny rehearing en banc by the D.C. Circuit, an emphatic stay denial by Chief Justice Rehnquist—were right to reject it.¹⁴¹ What made the Clinton administration's claim so extreme and untenable was that it sought to keep Secret Service agents—law enforcement officials—from testifying as to *facts* and *observations* relevant to a criminal investigation, not just *communications* to which they were privy by virtue of their need to be in close physical proximity to the President. Independent Counsel Starr apparently did not even seek the latter. That is as it should be. Just as the attorney-client privilege may extend to persons whose presence or inclusion is necessary to the attorney-client relationship (investigators, paralegals, secretaries), so too the presence of Secret Service agents is necessary for many of the President's meet-

139. *Lindsey*, 148 F.3d at 1114 (citations omitted).

140. See *Grand Jury Subpoena*, 112 F.3d at 919 (arguing that common law attorney-client privilege should not provide a shield to disclosure where constitutionally-based executive privilege would not).

141. See *In re Sealed Case*, 148 F.3d 1073, 1078-79 (D.C. Cir.), *reh'g denied en banc*, 146 F.3d 1031 (D.C. Cir.) (per curiam), *stay denied*, 148 F.3d 1079 (D.C. Cir.) (per curiam), *stay denied*, 119 S. Ct. 1, and *cert. denied*, 119 S. Ct. 461 (1998).

ings and conversations. The content of the communications themselves should remain privileged, notwithstanding the presence of a Secret Service agent. But just as the attorney-client privilege does not extend to the attorney's observations of the client (including such matters as physical appearance and demeanor),¹⁴² so too there is no "executive privilege" extension that should bar a Secret Service agent from testifying concerning facts and observations based on his personal presence.¹⁴³

Finally, there is the "privilege" issue of asserted presidential immunity from civil suit while in office. The common law privilege I have described is an *evidentiary* privilege, not an immunity from judicial process itself, and thus would not affect the result in *Clinton v. Jones*. The *Jones* decision has been much-maligned by defenders of President Clinton, but this seems more because of its consequences (as if Clinton's subsequent perjury were somehow the Supreme Court's fault!) than any defect in its reasoning. *Clinton v. Jones* is plainly correct either under *Nixon* or under this modified version of it. There is no common law basis for finding presidential immunity from compulsory judicial process in a case otherwise proper for judicial resolution. At most, courts have a power to control the timing and procedures of litigation. Nor does the Constitution supply any rule of presidential immunity for courts to apply. If the President is thought not to be subject to compulsory judicial process in a particular case, on constitutional grounds, it can only be because of *the President's* assertion of a constitutional power to refuse to honor judicial process and his political success in doing so.¹⁴⁴

142. See GEOFFREY C. HAZARD JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 264 (2d ed. 1994) ("[T]he physical characteristics of a client, such as complexion, demeanor and dress, are not generally considered privileged . . ."). The same applies to client whereabouts, client identity, and fee arrangements. See *id.* at 264-65; see also *United States v. Hodge & Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977).

143. An exception might exist where disclosure of the *fact* of a particular presidential or executive branch meeting, or of the persons involved in such meeting, would itself constitute disclosure of the content of "communications" intended to be confidential. Again, there is an analog in the common law of attorney-client privilege. Normally, a client's identity is not covered by the privilege. Under some circumstances, however, the client's identity itself constitutes a confidential communication. See *Hodge & Zweig*, 548 F.2d at 1353 (citing the "*Baird* exception," *Baird v. Koerner*, 279 F.2d 623, 630 (9th Cir. 1960)).

144. I must therefore side with the unanimous Supreme Court against my

As noted above, it was politically untenable for President Nixon to resist the Court's holding that the President is subject to the Court's authority and that he must turn over the tapes. I doubt, however, that it would have been politically impossible for President Clinton to refuse to accede to the Court's judgment in *Clinton v. Jones* in the summer and fall of 1997. Indeed, I think Clinton could have pulled it off: "I respect the Court's judgment, but for the sake of the Presidency I must disagree with it and refuse to permit the Presidency to be held hostage to private litigants in civil cases. I have instructed my attorneys to notify the district court that we will not file an answer or participate further in this matter. If the court wishes to enter a default judgment, it may do so, but I will not allow the Office of the Presidency to be subjected to a spectacle and an indignity, merely to preserve my reputation and public standing."¹⁴⁵

As matters turned out, this would have been a better "strategy" for Clinton than lying at his deposition. The problem of course turns out to have been, in the Jones suit as well as with the subsequent assertions of privilege against Independent Counsel Starr's investigation, that Clinton was *not* genuinely concerned with the Presidency, but only with his reputation and public standing, and was willing to lie to protect the latter even at great cost to the former. As with President Nixon, bad Presidents have once again made bad law.

friend Akhil Amar on the question of whether *the Constitution* creates a *mandatory judicial obligation* to grant the President immunity from civil suit while in office. See Amar & Katyal, *supra* note 90. Amar & Katyal's historical arguments—particularly their reliance on Jefferson's views—support my conclusion that the President rightfully may refuse to honor compulsory judicial process as a matter of assertion of his own constitutional independence, not the conclusion that the Constitution creates a rule of temporary presidential immunity that binds the courts. Amar & Katyal almost entirely ignore the key relevant precedent that sunk Clinton's claims: *United States v. Nixon*.

145. I first proposed this notion at a lunch with faculty members at the University of Utah College of Law, following a presentation in October 1997. It has since become fashionable—following Clinton's deposition, the explosion of the Lewinsky affair into public view, the resulting Independent Counsel investigation, and the impeachment of President Clinton—for Monday-morning quarterbacks to argue that this is what Clinton should have done, and that this is what his lawyers should have advised him to do. At the time, however, such an idea would have been thought an almost outlandish defiance of the Supreme Court's authority, on par with Nixon refusing to turn over the tapes. (Our notions of what would be "unthinkable" presidential actions have shrunk significantly in the time that has elapsed since fall of 1997, however.)

Executive privilege is properly a doctrine of presidential prerogative to be pressed by Presidents exercising their own prerogative, not beseeching the blessing of the courts. The judicial role is to recognize common law privileges, not to create a constitutional balancing test out of the penumbras of the Constitution's empowerments of each branch to resist the encroachments of the others. In a perfect constitutional world, presidential assertion of a constitutional immunity from compulsory judicial process and judicial recognition of a common law privilege for executive communications would tend to converge at a common core of consensus as to the proper scope of executive privilege—perhaps along the lines I have sketched for the common law privilege. Rarely, if ever, would a President acting in good faith require any broader privilege than the executive privilege I have outlined, which is extremely deferential to the executive. The need for autonomy does not justify a privilege that would protect communications not related to the President's performance of his constitutional role, or that involve a crime or fraud. The rule I propose would seem fully to protect the interests of the Presidency in assuring the degree of immunity from compulsory judicial process necessary to the fully effective exercise of the President's Article II powers.

Instead of this convergence, we have had a weakening of the institutional presidency along two fronts: not only is executive privilege reduced to a matter of judicial grace, but the judiciary has not been gracious in its construction of the privilege. This is not entirely surprising, given the circumstances in which the courts have been called upon to rule on these questions. When the Presidents claiming privilege are not acting in good faith, the judiciary is not inclined to rule in favor of generous constructions of their prerogatives or immunity.

III. NIXON AND THE DEATH OF PRESIDENTIAL EXECUTIVE SUPREMACY

The third great error of *United States v. Nixon* was its holding, almost sub silentio, that the President is not supreme even within the executive branch. That is the astonishing, but necessary, implication of the Court's holding that a nominally subordinate executive branch officer may issue a subpoena to the President;¹⁴⁶ that the President is powerless to order the subordinate officer to withdraw the subpoena (short of firing

146. See *United States v. Nixon*, 418 U.S. 683, 688 (1974).

the subordinate);¹⁴⁷ and that the courts may side with the subordinate, against the President, and direct the President to comply with the subpoena.¹⁴⁸

That the Constitution provides for a unitary executive has been set forth and elaborately defended in several convincing articles, most recently and impressively in an exhaustive study by Professors Calabresi and Prakash, two contributors to this symposium, in an article published in the *Yale Law Journal*.¹⁴⁹ I have little to add to their arguments other than the observation that the death of the unitary executive in the Supreme Court's caselaw began with *Nixon*, not *Morrison v. Olson*. *Morrison* may have buried the unitary executive, but it had been mortally wounded in *Nixon*. And it was the mugging of the unitary executive in *Nixon* that paved the way for our brave new world of Independent Counsels litigating against the Presidents in whose executive branch they (nominally) serve, invoking the executive authority of the United States against the chief executive of the United States, making impeachment referrals to the Congress (on behalf of the executive branch?!), and perhaps even indicting the Presidents to whom they are subordinate.

The reality of *Nixon's* blow to presidential supremacy within the executive branch was seen first by Professor William Van Alstyne, whose prophetic commentary on the Nixon Tapes Case in 1974 ranks among the most insightful law review articles I have read.¹⁵⁰ His perspective on *Nixon's* disastrous implications for the structural integrity of the Article II executive—at the time, expressed as fears, not as inevitable consequences—has essentially become my own. My short summary here owes a tremendous intellectual debt to Professor Van Alstyne's treatment of *Nixon*, and the subsequent unitary executive scholarship of Professors Calabresi and Prakash.

The short of it is that *Nixon* rejected the President's argument that the dispute between Nixon and the Special Prosecutor was a purely intra-executive dispute in which the Court could not legitimately play any role. Article II of the Constitution provides that the executive power—all of it—is "vested in

147. See *id.* at 696.

148. See *id.* at 714.

149. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

150. See Van Alstyne, *supra* note 14.

a President of the United States."¹⁵¹ In *Nixon*, the President had delegated some executive authority to a subordinate executive branch officer, the Watergate Special Prosecutor, and agreed by regulation to restrictions on the traditional right of the President to remove subordinate executive officers. The Supreme Court held that President Nixon could remove the Special Prosecutor only by rescinding or modifying the regulation by which the President had invested the Special Prosecutor with power in the first place.¹⁵²

It is not high praise to say it, but this is the least unconvincing part of the *Nixon* opinion. There is a certain logic to the formalism that the only way to rescind the Special Prosecutor's authority is to rescind it directly, by employing the reverse of the process by which it was granted. Nothing in the Supreme Court's opinion says that President Nixon could not make his will prevail within the executive branch, merely by firing the Special Prosecutor. By giving President Nixon this escape hatch, the Court's opinion on this point may, just barely, be defensible—or at least not as strongly objectionable as its other features.¹⁵³

But even granting this concession, the fact that the President may not *remove* the Special Prosecutor except by rescinding the regulation granting him his powers should not mean that the President cannot *countermand* one of the Special Prosecutor's actions. Article II requires that the President at all times have the superordinate authority to direct and control the exercise of any portion of the executive power. *Nixon* holds, under the misleading label of justiciability, that the President was without power to do so in this case. But the question should not have been whether the dispute between the Special Prosecutor and President Nixon was genuinely adversarial (unquestionably it was, as a practical matter) and of the type that generally may be resolved by a court (unquestionably it was not, as a realistic matter). The real question lurking under the veneer of a justiciability inquiry, goes to the

151. U.S. CONST. art. II, § 1.

152. See *Nixon*, 418 U.S. at 694-97.

153. However, as Bill Kelley's fine article argues, the more one strains to read *Nixon* in a way that does not do violence to Article II of the Constitution, the harder it is to reconcile *Nixon* with Article III of the Constitution. See Kelley, *supra* note 16. It is hard to see why the Nixon Tapes Case is properly a matter for resolution by the courts if it involves an intra-executive dispute as to what the executive branch's policy should be with respect to the desire to use particular evidence in a trial.

heart of the issue of Presidential control over the executive power: who exercises ultimate authority as to a dispute over the exercise of executive power—the President or a subordinate executive officer?

On that question, Article II supplies a clear answer: the President is the chief law enforcement officer of the nation; he gets to make the call—for better or for worse. The Court had no business reaching the executive privilege issue and ought not to have had occasion to reach out with its judicial supremacist rhetoric, either. For in the Nixon Tapes Case, the subpoena issued only in response to an executive branch officer's request for it and the Chief Executive had made clear to the courts his disapproval—and consequent overruling—of that request. The Court should have respected the command of the superior, not the subordinate. The executive authority of the United States government—the President—had directed that the subpoena not be enforced. The Supreme Court was wrong to hold, at the instance of a subordinate executive officer, that the subpoena was to be enforced.

Consider an analogy: what if the President were confronted with an order from an inferior federal court (say, for example, District Judge Sirica in the Tapes Case itself), but the Supreme Court had issued an order directing that the inferior court's order was invalid and should not be enforced. Which one constitutes the decision of the Article III branch of government? The decisions of the Supreme Court are of superior status, as judicial interpretations of the law, to those of lower federal courts, even though the Supreme Court has no authority to remove the judges of inferior courts. Whether the Supreme Court promulgates a regulation or not, the tenure of lower court judges is protected against interference from the authorities who may reverse their decisions.¹⁵⁴

So too, the fact that the President may not remove (or simply *has not* removed) a subordinate officer does not and should

154. Consistent with my position above, I believe the President may constitutionally conclude that a district court's position is correct and the Supreme Court's position is incorrect, for purposes of evaluating what *the executive's independent* constitutional position will be. But it would be a gross error to think that the district court's decision is the authoritative statement of the position of *the judiciary*. Make no mistake: if the President were to follow the decision of a lower court rather than that of the Supreme Court in direct opposition to it, he would not be abiding by the decision of the judiciary. He would be exercising his independent constitutional prerogative in opposition to the expressed will of a coordinate branch.

not imply that he is without power to countermand that subordinate's actions. To be sure, in the usual case the more direct route for the President would be to order his subordinate to withdraw the request for the subpoena. Nixon was limited in his ability to do so, the Court held, because the regulation delegating authority to the Special Prosecutor had the effect of preventing the President from countermanding the Special Prosecutor's decisions unless he was prepared to take the larger step of firing him. But even accepting that proposition, it simply does not follow that the courts should find that the Special Prosecutor, rather than the President, holds the supreme executive power on matters within his jurisdiction. It only means that the President could not *fire* the Special Prosecutor without going through the formal process of promulgating a new executive branch regulation.

Morrison v. Olson took the further step of upholding the constitutionality of the Independent Counsel provisions of the Ethics in Government Act, which include legal restrictions on the ability of the President to discharge an Independent Counsel.¹⁵⁵ The President, acting through the Attorney General, can discharge an Independent Counsel only "for good cause," and the discharge can be challenged by the Independent Counsel and set aside by the courts.¹⁵⁶ Even if the discharge is upheld, that does not end the authority of the Independent Counsel's office; a successor is simply appointed. Thus, the President cannot be sure that he can effectively countermand an Independent Counsel's actions on behalf of the executive power of the United States even by firing him. The President's *sole* means of directing and controlling this exercise of executive power is through the blunt weapon of the pardon. *Nixon* plus *Morrison* equals lack of presidential supremacy over the actions of subordinate executive branch officers except by removing them *and* lack of effective power to remove them—a double whammy to the logic of Article II.

A curious byproduct of Ken Starr's investigation of President Clinton's misconduct has been virtual unanimity that the Independent Counsel arrangement is, if not flatly unconstitutional, deeply problematic and should be scrapped. This is the right prescription but the diagnosis is a bit off. The Independent Counsel arrangement is unconstitutional; Justice Scalia's

155. See 28 U.S.C. § 596(a) (1994); *Morrison v. Olson*, 487 U.S. 654 (1988).

156. See *id.* § 596(a)(3).

dissent in *Morrison* was right on the money.¹⁵⁷ But the problem is not with Judge Starr's investigation, which was faithful to the task set before him. One can disagree with Starr's judgment as to the merit of investigating these particular crimes; but one should not think the investigation improper on the ground that a President should be immune from investigation if he is really determined to cover up his misdeeds.

If anything, Starr's investigation of Clinton seems to highlight the need for genuine independence in an independent counsel. If ever there were an example of why it might be important that investigations of possible unlawful conduct by the President and high administration officials be done by individuals not controlled by the President, Clinton's case is that example. There can be little doubt that a President who would commit perjury and obstruction of justice, and who would attempt to cover up such misdeeds with vigorous legal resistance to discovery of evidence and testimony that could reveal them, would effectively prevent a subordinate executive branch officer, lacking true independence, from pursuing an investigation into such alleged wrongdoing. Few people would have had the fortitude to press on, in the face of such determined resistance, personal attacks, and public opposition. In a very real sense, Ken Starr's continued pursuit of the truth has been little short of heroic.

But if Ken Starr is an American hero, he is nonetheless an *unconstitutional* American hero. The text, structure, and history of the Constitution simply do not permit the existence of a nominally subordinate executive branch officer whose actions may not be effectively countermanded by the President of the United States. Does this view place the President above the law? Not at all. It places him above all subordinate executive branch officers, which is where he belongs. It is the role of *Congress* to hold the President accountable to the law, through the power of impeachment. Short of that, Congress may insist that the President appoint a genuinely independent prosecutor, fully accountable to and removable by the President, but subject the President to immense political reprisal if he should dismiss the prosecutor for reasons that Congress distrusts.

The trick is to assure both practical independence and constitutional accountability. One possible statutory solution is to provide for the appointment, upon a finding of grounds for fur-

157. See *Morrison*, 487 U.S. at 697-734 (1988) (Scalia, J., dissenting).

ther investigation of executive branch officials, of a "special litigation committee," akin to the arrangement sometimes used in derivative suits against corporate officers. The President would nominate and, with the advice and consent of the Senate, appoint a panel of three independent "outside directors" to represent the executive branch's investigative and prosecutorial interests in the matter. The goal would be to select individuals of sufficient stature that their objectivity could not reasonably be questioned. Imagine, for example, a blue ribbon panel of former President Ford, former President Carter, and retired Supreme Court Justice Byron White, appointed to oversee the criminal investigation of President Clinton. (President Reagan's appointment of the "Tower Board"—former Senator John Tower, former Senator and former Secretary of State Edmund Muskie, and former National Security Advisor Brent Scowcroft—for an intra-executive investigation of Iran-Contra is roughly analogous.) The panel, consisting of constitutionally appointed principal officers of the United States, could then appoint a genuinely subordinate "special prosecutor" or "independent counsel" to manage the day-to-day details of the investigation but whose judgments would remain subject to the direction and oversight of the panel of outside directors—the Special Litigation Committee.

The President would retain the power to countermand the decisions of the Committee, as he constitutionally must, and even to remove its members. But the object would be to make it politically costly for the President to do so for any illegitimate reason—such as a desire to be rid of an investigation that was getting too close to the truth. The prestige of the Committee's members would serve as a check against any future Saturday Night Massacre. Indeed, such prestige could serve to restrain the President from interference with the Committee's work: resignation en masse of former Presidents Ford and Carter and former Justice White would send a powerful message. Such a panel also could serve as a superior panel of arbitrators of disputes concerning executive privilege—executive officers balancing legitimate presidential interests in confidentiality against legitimate interests in law enforcement.

Finally, and perhaps most importantly of all as a practical matter, such a Special Litigation Committee could serve as a "buffer" to *protect* a special prosecutor from political attack, as well as to *check* the special prosecutor's decisions. The biggest problem with Ken Starr's investigation has been its relative

inability to defend itself politically against Clinton administration and press charges of overreaching, of misconduct, of poor judgment, and of political bias. Yet almost all of Starr's contested judgments have been routinely upheld by the courts. I can think of few of these charges that could have had any political staying power if they had been reviewed and approved by a Ford-Carter-White committee, or a similarly prestigious panel.

Would such an arrangement simply be a different device for weakening the constitutional position of the Presidency? No: unlike the Independent Counsel arrangement we have today, it would preserve the President's constitutional authority over the actions of subordinate executive branch officers; unlike the arrangement we have today, it would provide a mechanism for intra-executive resolution of executive privilege disputes and, thus, a justification for a President's refusal to submit such disputes to the judiciary (which, under the regime of *Nixon*, has made the President subordinate to the judiciary on questions of the scope of his constitutional prerogatives); and it would indirectly strengthen the Presidency by providing a better check against presidential lawlessness than a more politically vulnerable Independent Counsel can provide.

IV. CONCLUSION: CONSTITUTIONAL ADVICE FOR THE NEXT HONEST PRESIDENT

Bad Presidents make bad law. *Nixon* is the product not only of its circumstances but of the President who provoked the situation. The Court's result was inevitable given Nixon's evident criminality; doctrinal tidiness gave way to the need for unanimity and a correct outcome. The result was, as a matter of judicial doctrine at least, a weakened presidency: presidential subordinacy to judicial commands concerning the scope of presidential powers and prerogatives; a weak, ill-defined sphere of presidential and executive branch privilege; a precedent for the further carving-up of the Article II executive power, at least in the area of criminal law enforcement; and a stripping from the President of some measure of his constitutional control over the execution of the laws of the United States.

So too, the judicial extensions of *Nixon* in the Clinton era are the inevitable product of circumstance and presidential character. Given Clinton's duplicity and abuse of claims of executive privilege and immunity, such claims have again been

judicially rejected and politically discredited. The result, again, is a weakening (at least as a matter of judicial doctrine and public perception) of the Presidency: the President is subject to civil suit while in office for his personal conduct, without meaningful constitutional limitation. The President is subject to contempt citations for violations of discovery orders or for giving false and misleading answers to interrogatories and deposition questions, so long as those sanctions do not interfere with his ability to perform the duties of his Office. The President personally may be compelled to appear before a federal grand jury conducting a criminal investigation of his conduct, without apparent constitutional limitation. The President's Secret Service detail can be compelled to testify before a grand jury as to the President's conduct. Indeed, given the courts' holdings, it appears possible that a sitting President can be indicted, and perhaps even compelled to stand trial on criminal charges (but not actually incarcerated).

Have *Nixon* and its progeny, including its Clinton-era extensions, irretrievably weakened the constitutional position of the presidency? Not necessarily. A strong President (or succession of Presidents) might well be able to reassert and restore the constitutional prerogatives of the Office. The problem is that these types of issues—executive privilege, independent counsel investigations, civil and criminal litigation involving the President—tend to arise in administrations and in circumstances where the President cannot credibly claim that he is fighting to preserve the constitutional rights of the place, rather than the individual interest of the man. Richard Nixon was a crook. His invocation of executive privilege in the Tapes Case was at least in part designed to cover up his crimes. His firing of one Special Prosecutor, and his agreement to severe removal restrictions on another, was not a stand on high constitutional principle about the need for a unitary executive. It was a desire to derail a prosecutor who was getting too close to the truth. So too with President Clinton. His invocations of executive privilege, attorney-client privilege, and secret service privilege were not genuinely for the purpose of protecting the Presidency as a constitutional office. They were designed to cover up his misdeeds.

But it need not always be so. The next (honest) President should, and in light of public weariness of both the pervasive presidential dishonesty and the Independent Counsel investigations of the Clinton years probably *could* as a political mat-

ter, announce (in advance) the following constitutional principles for his or her administration:

Notwithstanding *Morrison v. Olson*, the Independent Counsel Statute is unconstitutional in providing for a federal prosecutor not subject to the effective direction, control, and removal power of the President. The Supreme Court's judgment as to the constitutionality of this arrangement is not constitutionally binding on the executive branch, as each branch must make an independent judgment on questions of constitutionality arising within its sphere. [Here, the President may cite President Andrew Jackson's veto of the Bank Bill on constitutional grounds, and President Thomas Jefferson's pardons of persons convicted under the Alien and Sedition acts.] If the need for an investigation of administration officials arises and the Attorney General has a conflict of interest, I will appoint a special counsel or a special committee to appoint and supervise a special counsel. But that special counsel or special committee must always remain under the control of the executive branch of the government. The actions and policy of the executive branch of the United States, including assessment of the interests of the executive branch of the United States in connection with any criminal investigation or prosecution, must always be subject to the direction and control of the President of the United States. *If the President of the United States cannot be trusted in such matters, that person should not be the President of the United States.*

Notwithstanding *Clinton v. Jones*, the President of the United States must decide for himself whether it is appropriate to appear and defend a civil lawsuit brought against him during the time that he is in office. The courts may take what action they deem appropriate in this regard, in the exercise of their constitutional responsibilities, including entering default judgments, and the executive branch will never seek to interfere with the proper functioning of the judicial system. But the ultimate decision as to whether a judicial decree, summons, subpoena, or order interferes with the ability of the President of the United States to perform his constitutional duties cannot rest solely and exclusively with the judiciary. The courts may make their orders, but it is for the executive to determine whether and how they will be enforced. *If the President of the United States cannot be trusted in such matters, that person should not be the President of the United States.*

Notwithstanding *United States v. Nixon* and other cases interpreting executive privilege, the President of the United States must have the ability to maintain the confidentiality of deliberations within the executive branch concerning matters legitimately within the province of the executive branch. The President cannot be bound by the judgment of the judiciary in this regard, and ultimately must decide for himself whether it is appropriate to invoke executive privilege to shield the confidentiality of such communications from the other branches of government, or from civil litigants. Again, the courts are free to exercise their responsibilities within their spheres, but the ultimate decision concerning the propriety of any invocation of executive privilege cannot rest solely and exclusively with the judi-

ciary. *If the President of the United States cannot be trusted in such matters, that person should not be the President of the United States.*

I do not think these statements of principle are unrealistic. A strong, trustworthy President (or succession of Presidents) could make such statements and stick with them, and the public would, I suspect, accept them as correct. Ours is not a perfect constitution, but it is the only one we have. The prospect—the reality, now twice in twenty-five years—that the President of the United States may prove to be corrupt and criminal, does not warrant a warping of the Constitution. Rather, it is a testament to the necessity of choosing wisely the person who holds this most important of constitutional offices, and of attending closely to issues of character and commitment to constitutional principle in making that choice.

It is also a testament to the importance of taking seriously the very real checks on presidential abuse of power set forth in the imperfect Constitution we have, rather than to jerry-rig new ones that distort the Constitution. The Constitution's critically important check against a President who abuses the prerogatives of the office for personal purposes (whether corrupt, venal, or base), who interposes the immunities of the office for corrupt purposes (as, for example, by asserting unmeritorious claims of official privilege in order to cover up wrongful conduct), who violates his oath to uphold the laws of the United States, who engages in conduct deemed disgraceful to the office, who commits crimes that would warrant imprisonment, or who engages in other serious misconduct of a criminal or non-criminal nature while in office, is *impeachment*.

The impeachment process is the constitutionally-prescribed political remedy for such "high crimes and misdemeanors" (a constitutional term of art denoting misconduct of this sort by high political officials, whether or not also a violation of federal or state criminal law). There is reason to fear, however, that the Independent Counsel statute's arrangement—by vesting investigative power in and requiring a report to Congress of possible impeachable offenses by a *public prosecutor* whose responsibilities otherwise are directed at criminal offenses—may have the ironic, unintended dual effect of both sapping the energy out of Congress's exercise of the impeachment power (by allowing and almost requiring Congress to defer to an ongoing criminal investigation that might not be tak-

ing place in the absence of an Independent Counsel statute)¹⁵⁸ and unduly narrowing the focus of the impeachment power to criminal law violations (which is necessarily the primary focus of a prosecutor's inquiry).

This is yet another legacy of *Nixon*. The ironic effect of the Supreme Court's decision in the legal realm was that it cut short impeachment proceedings in Congress by forcing Nixon to reveal evidence that quickly proved his undoing and that led to his resignation within a matter of just a few weeks. When the Independent Counsel statute was enacted in the wake of Watergate, the Independent Counsel quickly became Congress's de facto designated impeachment investigator, permitting such investigations to be launched more easily and with less political cost, but also with some damage to Congress's ability and willingness to exercise the hard, independent constitutional responsibility associated with the impeachment power. At the same time that *Nixon* impaired the Constitution's structural separation of powers by enshrining the principle of judicial supremacy over the executive, it led to a perhaps equally destructive diminution of the role of Congress as the body primarily responsible for checking a runaway President.

As the events of 1999 have unfolded, twenty-five years after the Nixon Tapes Case, we have seen answered, unclearly and uncomfortably, the question of whether the impeachment power will be reinvigorated by the first serious situation calling for its application since President Nixon, or whether it will continue gradually to recede into irrelevance—an anachronistic scarecrow that Congress lacks the will to make a serious

158. The problems that result if Congress proceeds forward with its own investigation of matters that are also the subject of an ongoing criminal investigation by an Independent Counsel are well illustrated by the "Iran-Contra" prosecution of Oliver North. See *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990); *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990). In order to obtain information concerning the events in question, Congress was required to grant Colonel North use immunity for his compelled statements under oath before Congress. See *North*, 910 F.2d at 851. This in turn created enormous difficulties (insuperable difficulties, as it turned out) for the Independent Counsel in showing that no evidence, testimony or information subsequently used against North in his criminal trial was "tainted" fruits from his immunized-compelled congressional testimony—testimony receiving enormous national attention for nearly an entire week. The practical realities of competing congressional and Independent Counsel investigations of potential criminal matters, as illustrated by the North case, probably influenced Congress's decision in the Clinton perjury/obstruction of justice matter(s) to stay its hand and not conduct an investigation that might inadvertently interfere with the Independent Counsel's ability to conduct his criminal investigation.

part of the Constitution's plan of checks and balances. The impeachment and acquittal of President Clinton is likely to evoke hot debate for decades—as heated as the debate that still rages over President Nixon. Time will tell, ultimately, but it seems hard to avoid the conclusion that the consequence of the Clinton impeachment and acquittal will be both a general weakening of the impeachment power and a ratcheting down of the standards of conduct expected of men and women holding the office of President of the United States. The acquittal of President Clinton, largely along party lines, leaves in office—and still under criminal investigation—a President who very likely has committed serious federal felonies. It is almost unimaginable that President Nixon would have been permitted to remain in office under similar circumstances. Yet, if history had reversed the order of the two cases, it seems likely that Nixon would have made a determined stand against removal by the Senate, based on the Clinton precedent. Nixon might well have survived in such a scenario, especially if he could have used the military situations more skillfully to boost his public approval ratings; or even if he simply possessed greater charm and political skills. In any event, the Clinton precedent doubtless increases the likelihood that a future President who has committed crimes in office, or otherwise abused the public trust, will fight impeachment, using the Clinton acquittal as something of a constitutional benchmark: the President's offenses are arguably no worse than President Clinton's; obstruction of a legal investigation should not be impeachable (he might argue) if a plausible argument exists that the investigation ought not to have been conducted in the first place; in any event the President ought not to be removed if the nation could survive his continuance in office for the remainder of his term; and a President should not be impeached if he retains the support of his own political party.

None of this is good for the Presidency. The impeachment power is an essential one in a constitutional regime with a strong President strongly asserting the full measure of presidential authority and autonomy. The Constitution the framers gave us (as opposed to the *Nixon-Morrison* modified regime under which we now operate) contemplates a strong executive subject to the strong check of the impeachment power. The Presidency may only be reinvigorated if Congress's power of impeachment is likewise reinvigorated, and a strong, honest President should not fear—and perhaps should even wel-

come—such reinvigoration. Perhaps a President making the statements of principled defense of executive power, set forth a few pages ago, should add a further proviso along the lines of the following:

If the President of the United States cannot be trusted in such matters, that person should not be the President of the United States. A President should not continue to serve if he has committed serious crimes against the laws of the United States, if he has engaged in serious misconduct in office, or if he has betrayed the trust of the people. Congress possesses the rightful power to impeach, convict, and remove the President of the United States for such offenses. The Presidency is more important than any individual occupant of the office. I will defend the powers and prerogatives of the Presidency with all the power at my disposal and I will do my best to preserve, protect, and defend the Constitution of the United States and to advance the best interests of the nation. I will never put my own personal interest above that of the nation. I expect to be held to these standards. If I violate them, I should be impeached and removed. While disagreement is possible in any given situation as to how these high standards apply to particular conduct, *I will never defend against impeachment on the ground that the standards as I have stated them are too high to be expected of a President of the United States or that the violation of such standards falls short of the constitutional standard of "high crimes and misdemeanors" required to impeach and remove a President.* A President who would defend against impeachment on such a ground is not worthy of the Office.

It is possible to restore some of the damage done to the Presidency by the Clinton acquittal if a strong President or, better yet, a series of strong Presidents, is willing thus to reject the lowering of the standards for impeachment that appears to be the crux of the Clinton precedent.

The alternative to a strong impeachment power is a weak Presidency. Congress, of course, may simply prefer that alternative. Congress, and the courts, may choose to have the Presidency hobbled by Independent Counsel investigations, judicial proceedings, and the chopping up of the executive power generally. If the price to be paid for a weakened presidency is a diminished impeachment power, Congress may consider that price small. And to the extent the impeachment power is weakened, the perceived checks against a bad President must come from elsewhere, creating pressure to alter the Constitution's arrangements. (In this way also, bad Presidents make bad law.)

Such a regime, however, exacts a large cost from the Constitution. The *Nixon* case illustrates this point distressingly well. If we care about the Presidency and the Constitution, we

need to pay better attention to the lessons and mistakes of *Nixon*—now more than ever.