
“LAW AND” THE OLC’S ARTICLE II IMMUNITY MEMOS

Kimberly L. Wehle*

*In the wake of former President Trump’s two impeachments, the integrity of the Constitution’s separation of powers and, in particular, accountability for wrongdoing in the White House short of a presidential election is legitimately in question. Yet to date, there has been no thorough scholarly analysis of the source-of-law underpinnings of the virtually universally accepted aphorism that “a sitting president cannot be indicted” and is thus immune from judicial oversight for criminal wrongdoing. That apothegm comes not from the Constitution itself, from a ruling by a majority of the U.S. Supreme Court, or from a statute enacted by the U.S. Congress. Nor does it arise from a regulation with the force of law promulgated through the notice-and-comment process. It instead derives from two memoranda produced by lawyers for Richard Nixon and Bill Clinton during periods in which their respective presidencies were in crisis. These memoranda issued by the Department of Justice’s Office of Legal Counsel are nonetheless treated as legally definitive for purposes of excising the judicial branch from the separation of powers framework establishing constitutional oversight for the office of the presidency. This Article asks the question: What is an OLC memo as a source of law? It applies constitutional and administrative law principles to conclude that, considered together, these particular OLC memos either constitute a categorical prosecutorial declination determination within the ambit of the president’s Take Care prerogative or a non-legislative rule within the meaning of the Administrative Procedure Act. Neither pronouncement has—or should have—the force of law akin to an act of Congress, a Supreme Court decision interpreting the Constitution under *Marbury v. Madison*, or even a regulation—which presumes the existence of a delegating statute in the first instance. The article concludes that adherence to core separation of powers and federalism principles warrants legislation clarifying the limited role of the OLC as an advocate. Barring congressional intervention to shore up executive branch accountability for potential crimes in office, the courts could be invoked through a writ of mandamus requiring DOJ to exercise its law enforcement functions without categorical barriers, absent a limiting*

* Professor of Law, University of Baltimore School of Law; B.A. Cornell; J.D. University of Michigan; Legal Analyst, CBS News, BBC World News, and C-SPAN; regular guest legal analyst, NPR, PBS Newshour; opinion contributor, *Politico*, *The Atlantic*, *The Bulwark*, *The Hill*; former Assistant U.S. Attorney and Associate Independent Counsel in the Whitewater Investigation; author of *How to Read the Constitution—and Why* (HarperCollins 2019); *What You Need to Know About Voting—and Why* (HarperCollins 2020). Please note that my works on SSRN are under a former name, Kimberly N. Brown. Thanks to Adeen Postar, DeVaughn Jones and Jesse Spiegel for valuable research assistance.

constitutional judgment by the highest court.

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INTRODUCTION

Consider a hypothetical crime committed by a hypothetical president that everyone would agree is a violation of the criminal laws as well as the “high crimes and misdemeanors” standard for impeachment: an actual monetary bribe (which is an express basis for removal in the Constitution, after all). Imagine, too, that in his first term in office, a president accepts \$100 million in largely untraceable gold bullion from a terrorist organization in exchange for the president’s agreement to influence United States national security and

intelligence agencies to look the other way while it establishes terrorist cells across the Middle East. Suppose, further, that a reporter embedded in the terrorist organization breaks the story of the president's acceptance of the bribe in *The New York Times*. The president vehemently denies the charge, and viciously attacks the media on Twitter, claiming that the story is totally false and aimed at destroying him politically and disempowering his base.

The base is enraged. Members of Congress who hail from the president's political party cower and say nothing, as they know that if they come out against the president, the base will support the nomination and election of primary challengers who are more loyal to the president personally. The members decide that it is better to keep their jobs than speak out and get fired.

What does the Constitution have to say about this scenario? Recent events provide some insight, but it is hardly dispositive.

From May 2017 to March 2019, the American news cycle was inundated with daily reports of "breaking news" regarding the investigation of Special Counsel Robert Mueller.¹ That probe was initiated by former Deputy Attorney General Rod Rosenstein when then-Attorney General Jeff Sessions recused himself due to his role in the Trump campaign for president.² Mueller's mandate ultimately covered the Russians' interference in the 2016 presidential election, the Trump campaign's connections to that Russian effort, and President Trump's efforts to obstruct the Mueller investigation.³ In under two years, his team wound up criminally indicting thirty-four individuals and three companies.⁴ Eight individuals pleaded guilty or were convicted at trial, including five people close to Trump himself.⁵

Throughout this ordeal, pundits speculated as to whether Mueller had gathered sufficient evidence for a grand jury to indict Donald J. Trump. There was also widespread puzzlement over whether, even if he had, Mueller would feel constrained by the Department of Justice's (DOJ) internal analysis and guidance that, for purposes of its own prosecutors, indictment and prosecution

1. See Oliver Roeder & Dhruvil Mehta, *How Cable News Covered Mueller in 2018*, FIFTYTHREE (Dec. 19, 2018), <https://perma.cc/JZ77-YFU9> (reporting CNN, Fox News, and MSNBC devoted on average 3% of their news coverage to the investigation of Special Counsel Robert Mueller in 2018).

2. Mark Landler & Eric Lichtblau, *Jeff Sessions Recuses Himself from Russia Inquiry*, N.Y. TIMES (Mar. 2, 2017), <https://perma.cc/738N-QTWE>.

3. Off. of the Deputy Att'y Gen., Order No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (2017), <https://perma.cc/GB2V-VLEV>.

4. Emily Cochrane & Alicia Parlapiano, *Over 100 Charges, 34 People and 3 Companies: The Investigations Surrounding Trump, Explained*, N.Y. TIMES (Feb. 23, 2018), <https://perma.cc/L2VA-AAZN>.

5. Ryan Teague Beckwith, *Here Are All of the Indictments, Guilty Pleas and Convictions from Robert Mueller's Investigation*, TIME (Nov. 15, 2019), <https://perma.cc/246G-H4KU>. President Trump later pardoned a number of those individuals, including Paul Manafort. *Trump Pardons Two Convicted By Russia Investigation*, BBC (Dec. 23, 2020), <https://perma.cc/YXM3-UMTK>.

of a sitting president would be unconstitutional.⁶ To be clear: As a matter of internal DOJ policy, federal prosecutors are told not to indict sitting presidents. This is not a law embodied in the Constitution or a statute. It is an internal personnel policy. And under the governing regulatory framework for a special counsel, Mueller was bound by DOJ policy.⁷ So even if Mueller were to find indictable evidence that he believed would convince a jury beyond a reasonable doubt that Donald J. Trump committed one or more federal crimes either before taking office or while in office, federal prosecutors were barred from bringing such a case.

Keep in mind that because this policy is not a law, an incumbent attorney general is free to change it at any point in time. Just like Presidents Nixon and Reagan directed prosecutors to fixate on bringing narcotics cases as part of the declared “war on drugs,” a future AG could decide that weeding out government corruption is paramount, and that as part of that presidents will no longer be treated as above the law as a practical matter within the ranks of DOJ. If they want to avoid indictment, they should not commit crimes.

But as it stands, the decades-old memos directing federal prosecutors to stand down on prosecutions of sitting presidents remain in place. Some people who had worked with Mueller during his storied career—including as a former director of the Federal Bureau of Investigation (FBI)—believed that his personal commitment to the rule of law would prompt him to find a way to hold the president accountable if the facts warranted it.⁸ Mueller could have asked DOJ to revisit its presidential immunity policy, for example. Or he could have indicted the president under seal if the facts warranted it in order to toll the applicable statute of limitations. The memos do not expressly forbid that route, after all; if the public was unaware of an indictment and the president were prosecuted later, as a private citizen, the policy reasons for not prosecuting sitting presidents set forth in the memos did not hold much weight.

6. See Memorandum from Robert G. Dixon Jr., Assistant Att’y Gen., Off. of Legal Couns., on Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office 28 (Sept. 24, 1973) [hereinafter 1973 OLC Memo] (concluding that the President is not subject to indictment or criminal prosecution while still in office); RANDOLPH D. MOSS, OFFICE OF LEGAL COUNSEL, MEMORANDUM, A SITTING PRESIDENT’S AMENABILITY TO INDICTMENT AND CRIMINAL PROSECUTION, 24 OP. O.L.C. 222, 222 (Oct. 16, 2000) [hereinafter 2000 OLC Memo] (reaffirming the OLC’s 1973 conclusion by finding indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions).

7. See 28 C.F.R. § 600.7 (2019) (“A Special Counsel shall comply with the rules, regulations, procedures, practices, and policies of the Department of Justice”). *But see infra* Part III (concluding that OLC memos are not binding per se).

8. Eli Watkins, *Who is Robert Mueller?*, CNN (Apr. 17, 2019) <https://perma.cc/D5PM-CXPZ>. *But see* Paul Rosenzweig, *There’s No Way Mueller Will Indict Trump*, ATLANTIC (Jan. 30, 2018), <https://perma.cc/M2ZR-KJX7> (arguing Mueller’s rule-of-law ethos binding him to the DOJ policy is what would, and ultimately did, prevent Mueller from indicting President Trump).

Those predictions did not come to pass.⁹ In a redacted 448-page report issued on April 18, 2019, Mueller concluded that the Trump campaign had not criminally conspired with the Russians, despite numerous contacts between the two groups during the campaign.¹⁰ As for obstruction of justice, Mueller referred to the DOJ policy against indicting sitting presidents as a reason why the ten acts of obstruction detailed in the report¹¹ were not actionable through an indictment of Donald J. Trump.¹² Over 1,000 former federal prosecutors subsequently signed a public statement concluding “that the conduct of President Trump described in Special Counsel Robert Mueller’s report would, in the case of any other person not covered by the Office of Legal Counsel (OLC) policy against indicting a sitting President, result in multiple felony charges for obstruction of justice.”¹³

What’s more, pundits, experts, government officials and laypeople across the board—in discussing the internal DOJ policy against indicting sitting presidents—have treated the memos as if they were black letter law. Rarely did the analysis turn to the flexibility that former Attorney General Jeff Sessions, Acting Attorney Matt Whitaker and, later, Attorney General Bill Barr had to lift that policy. Of course, there are good reasons not to indict presidents in office, but that’s a far cry from treating it as if it derived from actual law. It does not.

So, what is it about the OLC policy that gives it such force of law as a matter of constitutional and criminal law?

To be clear, by “force of law” I mean a provision of the Constitution, a statute, a regulation, international law, or common law that creates rules that bind private behavior.¹⁴ A yellow “Children at Play” sign along a neighborhood street might operate as an admonition for drivers to slow down, but only an actual speed

9. See Dan Balz, *Mueller Says He Couldn’t Charge Trump, Tosses the Question to Congress*, WASHINGTON POST (May 29, 2019), <https://perma.cc/622T-NLYJ> (explaining that Congressional action would be the only way to hold President Trump accountable after Mueller’s refusal to break from Department of Justice policy against charging a sitting president).

10. ROBERT S. MUELLER III, U.S. DEP’T OF JUSTICE, *REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION* 173 (2019), <https://perma.cc/P4KA-DA6D> [hereinafter, Mueller Report] (“[t]he investigation established multiple links between Trump Campaign officials and individuals tied to the Russian government”).

11. See Alexandra Hutzler, *Here Are the 10 Events Robert Mueller Investigated for Potential Obstruction of Justice Charges Against Donald Trump*, NEWSWEEK (Apr. 18, 2019), <https://perma.cc/3VRJ-KJNZ>.

12. 2 ROBERT S. MUELLER III, U.S. DEP’T OF JUSTICE, *REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION* 182 (2019), <https://perma.cc/KQ7E-DP6E> (“if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, we are unable to reach that judgment”).

13. DOJ Alumni, *Statement by Former Federal Prosecutors*, MEDIUM (May 6, 2019), <https://perma.cc/Q89G-ETQJ>.

14. See Kimberly L. Wehle, *Defining Lawmaking Power*, 51 WAKE FOREST L. REV. 881, 914 (2016), <https://perma.cc/5K8T-CD3R>.

limit sign operates as an enforceable limit on how fast drivers can go. A memorandum to prosecutors from a supervisor directing them to focus on prosecuting felonies over misdemeanors is an internal policy directive—not a law. The Constitution’s Fourth Amendment requiring that law enforcement obtain a warrant before conducting a search of a home is a law. This distinction seems self-evident, but rarely broken down or understood in this way.

Of course, an incumbent president is not in the posture of a private person. The very fact that the president operates pursuant to the Vesting and Take Care Clauses of Article II of the Constitution complicates the question of whether he can obstruct investigations conducted by actors within Article II’s chain of command. If he is in charge of DOJ under Article II, it is ultimately his decision whether to investigate or prosecute someone, the argument goes, so any prosecutorial decisions are per se legitimate and cannot obstruct justice.¹⁵

The DOJ policy—which was set forth in two memoranda produced by the OLC under Presidents Richard Nixon and Bill Clinton—sprung in part from a reading of Article II that would render a sitting president beyond the reach of the criminal justice system. As a practical matter, the OLC memos have operated to excise the judicial branch from the separation of powers for purposes of holding presidents accountable for potential crimes in office. After all, Article III judges only hear matters brought to them. If DOJ is forbidden from bringing those cases in the first place, the judicial branch and its jury trial process are categorically beyond reach for purposes of confining presidential wrongdoing, leaving Congress as the only branch of government that is conceivably poised to impose consequences on a sitting president who—assuming for the sake of argument—commits crimes in office. Put simply, the Judiciary has no power over matters that prosecutors do not bring into court.

This alteration or shaping of the relationship between the three branches is of monumental importance, as the Constitution itself says nothing about the propriety of indicting a sitting president.¹⁶ Under *Marbury v. Madison*,¹⁷ the courts decide what the law is and whether the other branches have acted outside the scope of the Constitution—and are thus poised to give definition to the scope of the Constitution itself.

Of course, the OLC is not a court. Nor is it a legislative body, which under Article I has lawmaking power.¹⁸ Congress exercised that power post-Watergate to create a statutory apparatus for appointing an independent counsel to investigate presidents outside the ambit of DOJ and the president’s direct

15. See Benjamin Wittes, *How Can the President Obstruct Justice?*, LAWFARE (Dec. 5, 2017), <https://perma.cc/ZEZ4-QZLH> (responding to a piece by Josh Blackman suggesting that a president cannot obstruct justice pursuant to his Article II powers).

16. Adam Liptak, *A Constitutional Puzzle: Can the President Be Indicted?*, N.Y. TIMES (May 29, 2017), <https://perma.cc/K2ML-C7CV>.

17. 5 U.S. 137, 177 (1803).

18. See U.S. CONST. art. I, § 1.

influence.¹⁹ That statute lapsed following the Whitewater investigation of Bill Clinton—but only after the Supreme Court upheld its constitutionality under Article II in *Morrison v. Olson*.²⁰ Although agencies routinely promulgate regulations with the force pursuant to authority delegated from Congress, the OLC memoranda were not produced pursuant to a notice-and-comment process, so they are not regulations entitled to the force of law under administrative law principles, either.²¹

Instead, the OLC is a group of government lawyers whose role derives from a statute authorizing the attorney general “to give his advice and opinion on questions of law when required by the President.”²² The statute does not establish—for purposes of such advice—who the attorney general’s client is in the first place: Is it the president? The Department of Justice? The American people? Or general fidelity to the rule of law and the Constitution? As we have seen with the alleged politicization of DOJ under Attorney General William Barr²³—who appears to publicly operate with primary fidelity to the president personally²⁴—DOJ’s actual client is a question that government lawyers ultimately answer for themselves. Lawyers are advocates—not judges. Thus, the OLC memoranda cannot be held up as independent and free from client bias.²⁵

19. The Watergate crisis furthered the need for controls over high-ranking government officials including the president. The Ethics in Government Act was signed into law by President Carter in 1978. The act gave the attorney general power to recommend the appointment of an independent counsel whenever he or she received specific charges of misconduct, unless the charges were “so unsubstantiated” as to not warrant further investigation. See Jim Mokhiber, *A Brief History of the Independent Counsel Law*, PBS, <https://perma.cc/E3UE-PXHV>.

20. See 487 U.S. 654, 655 (1988).

21. For a regulation to have the force and effect of law, it must be “promulgated in conformity with congressionally-imposed procedural requirements, such as the notice and comment provisions of the Administrative Procedure Act.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979).

22. 28 U.S.C. § 511 (2018).

23. Former DOJ officials called for Attorney General Barr’s resignation after senior DOJ officials intervened to reduce a sentencing recommendation for Roger Stone, who served as a campaign advisor in 2016 to then-candidate Donald Trump. See DOJ Alumni, *DOJ Alumni Statement on the Events Surrounding the Sentencing of Roger Stone*, MEDIUM (Feb. 16, 2019), <https://perma.cc/692Y-939P> (“[DOJ] alumni . . . [s]trongly condem[n] President Trump’s and Attorney General Barr’s interference in the fair administration of justice.”).

24. President Trump congratulated Attorney General Barr after DOJ intervened to reduce Roger Stone’s sentencing recommendation. Trump tweeted, “[c]ongratulations to Attorney General Bill Barr for taking charge of a case that was totally out of control and perhaps should not have been brought. Evidence now clearly shows that the Mueller Scam was improperly brought & tainted. Even Bob Mueller lied to Congress!” Donald Trump (@realDonaldTrump), TWITTER (Feb. 12, 2020, 6:53 AM), <https://perma.cc/KQ8C-2VEN?type=image>.

25. The OLC’s own guidelines dictate that the OLC’s work should “reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office.” Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1455 (2010).

DOJ lawyers do not enjoy life tenure and salary protection like federal judges.²⁶ The security of their jobs depends on the satisfaction of their executive branch superiors, who all answer to the president himself. It is thus unsurprising that, at the same time the OLC offered opinions to presidents Nixon and Clinton that they were immune from criminal indictment and prosecution, the prosecutors investigating those men—Special Prosecutor Leon Jaworski and Independent Counsel Kenneth Starr, respectively—produced legal memoranda that reached precisely the opposite conclusion.²⁷

Part II of this Article walks through the arguments against the constitutionality of indicting a sitting president, but not for purposes of resolving their merits; rather, they serve as a backdrop for the primary project: identifying what the OLC memos *are* as a matter of law. Functionally, the OLC memos have operated as if they are legally binding. The effect has been to heighten the urgency of impeachment and presidential elections as the primary—if not sole—levers of accountability for potential wrongdoing by sitting presidents, despite a lack of textual grounding in the Constitution or Supreme Court precedent for that conclusion.

Part III goes on to suggest two possible frames for categorizing the Nixon- and Clinton-era OLC memoranda as sources of law: they are either prosecutorial declination determinations on the one hand, or non-legislative rules on the other. The piece analyzes both as a matter of Article II and general principles of administrative law, and concludes that neither justifies the massive, dispositive weight afforded these decisions for purposes of the constitutional separation of powers.

Part IV evaluates the proper means of identifying the scope of a president’s criminal accountability in office, including Congress, the federal courts, and federalism principles. It concludes in Part V with a call to Congress for legislation clarifying the OLC’s role in producing definitive readings of executive branch powers. Alternatively, as suggested by now-Justice Kavanaugh’s decision in *In re Aiken County*—in which the U.S. Court of Appeals for the D.C. Circuit affirmed a writ of mandamus forcing an executive branch agency to exercise its statutory mandate²⁸—DOJ should be judicially

26. Tenure and salary protections for federal judges are constitutional provisions that promote judicial independence from political branches and popular opinion. Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 987 (2007). In *U.S. v. Hatter*, Justice Breyer explained: “They ‘promote the public weal,’ in part by helping to induce ‘learned’ men and women ‘to quit the lucrative pursuits’ of the private sector, but more importantly by helping to secure an independence of mind and spirit” 532 U.S. 557, 568 (2001) (quoting *Evans v. Gore*, 253 U.S. 245, 248, 253 (1920)).

27. “[I]t is proper, constitutional, and legal for a federal grand jury to indict a sitting President for serious criminal acts that are not part of, and are contrary to, the President’s official duties.” Memorandum from Ronald D. Rotunda, Univ. Ill. Coll. Law, on Indictability of the President to the Hon. Kenneth W. Starr 55 (May 13, 1998) (on file with the Dep’t of Justice) [hereinafter, Starr Memo].

28. *In re Aiken Cnty.*, 725 F.3d 255, 257 (D.C. Cir. 2013).

required to treat presidents for the most part like regular people for purposes of enforcing the federal criminal laws.

Although there are constitutional and practical shortcomings to this approach, the article concludes with a substantive rebuttal to the OLC memos' arguments that criminal accountability would undermine presidents' ability to do their jobs to the broader detriment of the separation of powers,²⁹ which should be of paramount concern in this debate. It is fidelity to the separation of powers that requires a rethinking of the DOJ policy by an articulated branch of government that is better suited to make dispositive determinations of such extraordinary constitutional weight.

I. THE OLC MEMORANDA AND CRIMINAL INVESTIGATIONS OF PRESIDENTS NIXON, CLINTON, AND TRUMP

The structural Constitution—i.e., the separation of powers as a means of limiting the power of the federal government—has been in vogue of late. Prior to the Trump era, most Americans' working knowledge or awareness of the Constitution's contents and meaning had to do with the Bill of Rights and debates over hot-button provisions like the First and Second Amendments.³⁰ That has changed. The very structure of the original Constitution—with its three, co-equal branches of government, each of which is positioned to check the other two so that no one branch accumulates too much power that could be used in ways that compromise the individual rights of "We the People"—has been debated and analyzed on major news outlets nearly every day since Trump took office.³¹

The reason is simple: human nature. The framers of the Constitution well-understood that it is human nature to amass, entrench, and ultimately abuse power.³² That's why they established a triad at the apex of government, rather than a single monarch. But on a host of issues, from refusing to turn over his tax returns as a presidential candidate³³ to using money appropriated to the military

29. See 2000 OLC Memo, *supra* note 6.

30. See STEVE FARKAS, KNOWING IT BY HEART: AMERICANS CONSIDER THE CONSTITUTION AND ITS MEANING 14 (2002) (finding most Americans had hazy recall of constitutional specifics and admit not knowing the basics of the Constitution, but the vast majority still had absorbed knowledge of foundational constitutional principles).

31. The Annenberg Public Policy Center of the University of Pennsylvania found in a 2019 survey study that Americans' constitutional knowledge increased in 2019. See Annenberg Pub. Pol'y Ctr., *Americans' Civics Knowledge Increases but Still Has a Long Way to Go* (Sept. 12, 2019), <https://perma.cc/H6FJ-NR8C>. The Center reasoned that news consumption related to recent clashes between the three branches of government accounted in part for the growth of civics knowledge. *Id.*

32. Kimberly Wehle, *Why Do We Have Inspectors General? To Call Out Abuse of Power*, THE HILL (Oct. 7, 2019), <https://perma.cc/7FYN-DC2N>.

33. Trump's refusal to turn over his tax returns extended from his presidential candidacy into his presidency even after the House Ways and Means Committee formally requested that the IRS release them. Trump maintained that he would not release his tax returns because they are under audit, although there is no such legal requirement and federal law requires the IRS

in order to build a wall at the Southern border that Congress expressly refused to authorize,³⁴ Trump tested certain boundaries that have largely cabined the power of the presidency since the founding of the Republic, leaving America—and the world—wondering if there remain any meaningful limits on the office of the presidency, whether that occupant be Donald Trump or someone else down-the-line.³⁵

Perhaps ironically, a primary source for this “constitutional crisis” is DOJ itself—the agency within the federal apparatus that is charged with enforcing laws that protect the public from serious harms under the United States Code.³⁶

to hand them over to the House Ways and Means Committee. *See* 28 U.S.C. § 6103 (2018); *see also* David Jackson, *Donald Trump Says He Won’t Give His Tax Returns to Congress*, USA TODAY (Apr. 10, 2019), <https://perma.cc/LFT5-8C8Z>; Philip Hackney, *Why the IRS Is Legally Required to Give Congress Trump’s Tax Returns, but Probably Won’t*, PBS (May 7, 2019), <https://perma.cc/6X5X-3YKN>.

34. Trump declared a national emergency on the US border with Mexico in February 2019. Calling for the diversion of \$3.6 billion from military funding to construct a border wall, the move was an attempt to bypass Congress after it refused to include funding for a border wall in its spending bill. A back and forth between Congress and the President ensued, with Congress twice passing resolutions to block Trump’s national emergency declaration and Trump vetoing both resolutions. *See* Brett Samuels, *Trump Again Vetoes Resolution Blocking National Emergency for Border Wall*, THE HILL (Oct. 15, 2019), <https://perma.cc/77EQ-SAXP>.

35. Trump has questioned the Constitution’s two-term limit on presidential tenure. While speaking to donors during a private fundraiser, Trump quipped, “Maybe we’ll have to give that a shot some day,” in referencing China’s President Xi Jinping proposed abolishment of presidential term limits in China. *See* Kevin Liptak, *Trump On China’s Xi Consolidating Power: ‘Maybe We’ll Give That A Shot Some Day’*, CNN (Mar. 3, 2018), <https://perma.cc/9GDG-LU3Q>; *see also* Kim Wehle, *For Trump, Power Is for Self-Preservation Only*, THE ATLANTIC (Mar. 31, 2020), <https://perma.cc/NWX9-QGNA>.

36. 28 C.F.R. § 0.25 articulates the OLC’s role as follows:

- (a) Preparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet.
- (b) Preparing and making necessary revisions of proposed Executive orders and proclamations, and advising as to their form and legality prior to their transmission to the President; and performing like functions with respect to regulations and other similar matters which require the approval of the President or the Attorney General.
- (c) Rendering opinions to the Attorney General and to the heads of the various organizational units of the Department on questions of law arising in the administration of the Department.
- (d) Approving proposed orders of the Attorney General, and orders which require the approval of the Attorney General, as to form and legality and as to consistency and conformity with existing orders and memoranda.
- (e) Coordinating the work of the Department of Justice with respect to the participation of the United States in the United Nations and related international organizations and advising with respect to the legal aspects of treaties and other international agreements.
- (f) When requested, advising the Attorney General in connection with his review of decisions of the Board of Immigration Appeals and other organizational units of the Department.
- (g) Designating within the Office of Legal Counsel:
 - (1) A liaison officer, and an alternate, as a representative of the Department in all

It is called the Department of *Justice*, after all, with a stated mission “[t]o enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair, impartial administration of justice for all Americans.”³⁷

Within DOJ is an elite group of lawyers known as the OLC, which provides advice to the president when two agencies disagree about statutory interpretation, or when the president wants to review the constitutionality of legislation.³⁸ Two specific OLC opinions—dating from 1973 and 2000—opine that Article II forbids indictment and prosecution of a sitting president.³⁹ As a result, DOJ has flatly refused to take criminal action against any president since, leaving the judicial branch unable to check the presidency for crimes in office.⁴⁰

This Part situates the OLC within DOJ and describes the sources of its authority. It then summarizes the analyses contained in the two presidential immunity memos. Finally, this Part explains in greater detail how the memos have together operated to effectively amend the Constitution to excise a critical

matters concerning the filing of departmental documents with the Office of the Federal Register, and

(2) A certifying officer, and an alternate, to certify copies of documents required to be filed with the Office of the Federal Register (1 C.F.R. § 16.1).

(h) Approving certain blind trusts, as required by section 202(f)(4)(B) of the Ethics in Government Act of 1978, 92 Stat. 1843.

(i) Consulting with the Director of the Office of Government Ethics regarding the development of policies, rules, regulations, procedures and forms relating to ethics and conflicts of interest, as required by section 402 of the Ethics in Government Act of 1978, 92 Stat. 1862.

(j) Taking actions to ensure implementation of Executive Order 12612 (entitled “Federalism”), including determining which Department policies have sufficient federalism implications to warrant preparation of a Federalism Assessment, reviewing Assessments for adequacy, and executing certifications for the Assessments.

(k) Performing such special duties as may be assigned by the Attorney General, the Deputy Attorney General, or the Associate Attorney General from time to time. 28 C.F.R. § 0.25

37. *About DOJ*, U.S. DEP’T OF JUSTICE, <https://perma.cc/829P-VE8A>.

38. *See id.*; *see also* Off. of Legal Couns., *General Legal Activities*, U.S. DEP’T OF JUSTICE, (2017), <https://perma.cc/9CY3-QHNL> (stating the mission of the OLC includes addressing “legal issues about which two or more agencies are in disagreement” and addressing constitutional questions raised by new legislation).

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

40. Robert Mueller explained the inability to charge President Trump following the two-year Russia probe this way: “Under longstanding department policy, a president cannot be charged with a federal crime while he is in office. That is unconstitutional. Even if the charge is kept under seal and hidden from public view, that, too, is prohibited. A special counsel’s office is part of the Department of Justice, and by regulation, it was bound by that department policy. Charging the president with a crime was therefore not an option we could consider.” Robert S. Mueller III, *Statement on the Russia Probe*, N.Y. TIMES (May 29, 2019), <https://perma.cc/CH84-9NF9>.

check on the presidency that is not explicit in the text.⁴¹ Yet somewhat astonishingly, the legal potency of the OLC memos as an impenetrable limit on judicial oversight is largely assumed without deep analysis or debate.⁴² This Part sets the stage for filling that gap in the balance of the paper.

A. What Is the OLC?

At bottom, the Office of Legal Counsel is a quasi-law firm within DOJ that counsels the president on the constitutionality and legality of actions that the president, Congress, and executive branch agencies plan to take. Yet “the myth of a supreme OLC dispensing formal legal opinions persists”; its opinions are given great—even binding—weight within the federal government.⁴³

As noted above, the necessity of the OLC’s existence derives in part from the constitutional ban on advisory opinions by the federal judiciary.⁴⁴ The president cannot simply ask Chief Justice Roberts for an opinion on whether, for example, a presidential decision to ban certain categories of people from entering the United States from foreign countries would be upheld by the Supreme Court.⁴⁵ To be sure, such anticipatory legal advice would save the White House, private litigants, and the American public a good deal of confusion and anticipation while legal challenges to the president’s actions wind their way through the courts. But Article III confines federal courts’ jurisdiction to “cases” and “controversies,” which the Supreme Court has construed to require a concrete, actual injury suffered by the plaintiff that a positive result through the courts would redress.⁴⁶ The animating rationale for the ban on advisory opinions is that courts should not be in the business of abstract lawmaking—particularly as federal judges serve for life and are not electorally accountable.⁴⁷ The OLC

41. Adam Liptak, *A Constitutional Puzzle: Can the President be Indicted?*, N.Y. TIMES (May 29, 2017) <https://perma.cc/CA96-EVDQ>.

42. The Supreme Court heard arguments regarding the indictability of a sitting president in *U.S. v. Nixon*, but did not resolve the issue. See 418 U.S. 683, 687 n. 2 (1974); see also Liptak, *supra* note 41. Some push-back against the potency of the OLC’s memos is forming, with Rep. Adam Schiff calling for the OLC to re-examine whether DOJ can indict a sitting president. Emily Birnbaum, *Adam Schiff: Justice Should ‘Re-Examine’ Whether It Can Indict Sitting President*, THE HILL (Dec. 13, 2018) <https://perma.cc/NY4X-EHEQ>.

43. Daphna Renan, *The Law Presidents Make*, 103 VAND. L. REV. 805, 808 (Sept. 2017).

44. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (affirming that “no justiciable controversy is presented . . . when the parties are asking for an advisory opinion”).

45. The Supreme Court weighed in on the legality of Proclamation No. 9645, which placed entry restrictions on the nationals of eight foreign states, after finding that the state of Hawaii had standing to file suit against President Trump. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2402 (2018) (finding a sufficient national security justification to uphold the proclamation).

46. *Lujan v. Defenders of Wildlife*, 504 U.S. 551, 560-61 (1992).

47. See *Flast*, 392 U.S. at 96; see also Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 713 (1995).

fills this important void as a measured, scholarly voice that the president and agency officials can call on in lieu of federal judges to secure legal advice on actions of constitutional or other, potentially grave, legal dimension.

1. 28 U.S.C. § 510 et seq.

The OLC is headed by an Assistant Attorney General who has a number of deputies and attorney staff.⁴⁸ Its authority derives from statutory and regulatory law. The Judiciary Act of 1789 provided for the appointment in each judicial district of a “Person learned in the law to act as attorney for the United States . . . whose duty it shall be to prosecute in each district all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned”⁴⁹ Prior to the creation of the Department of Justice in 1870, the U.S. Attorneys were independent of the attorney general’s supervision and authority.⁵⁰

Under the Judiciary Act of 1789, now codified at 28 U.S.C. § 511, the attorney general was also tasked with “giv[ing] his advice and opinion on questions of law when required by the President.”⁵¹ Section 510 further provides that “[t]he Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.”⁵² It is pursuant to this delegated authority that the OLC serves as counsel to the president and, “[i]n effect, outside counsel” for executive branch agencies regarding “legal issues of particular complexity and importance or those about which two or more agencies are in disagreement.”⁵³ The OLC also comments on the constitutionality of pending legislation, as well as “executive orders and substantive proclamations proposed to be issued by the President.” And the OLC reviews all orders and regulations proposed by the attorney general.⁵⁴

Agency heads can ask the OLC for opinions on legal issues germane to that department, although each has their own legal staff. Section 512 provides that “[t]he head of an executive department *may require* the opinion of the Attorney General on questions of law arising in the administration of his department.”⁵⁵

48. *About the Office of Legal Counsel*, U.S. DEP’T OF JUSTICE, <https://perma.cc/H7EU-LCL7>.

49. The Judiciary Act of 1789, 1 Stat. 73, § 35 (1789).

50. U.S. ATT’Y’S OFF., DIST. OF MINN., *History*, <https://perma.cc/8CJZ-VUAV>.

51. *Office of Legal Counsel Opinions*, U.S. DEP’T OF JUST., <https://perma.cc/E9ME-AQ8D>.

52. 28 U.S.C. § 510.

53. *Id.*

54. U.S. DEP’T OF JUST., *supra* note 48.

55. 28 U.S.C. § 512; *see generally* U. S. Dep’t of Just., 13 Opinions of the Office of Legal Counsel of the United States Department of Justice Consisting of Selected Memorandum Opinions Advising the President of the United States, the Attorney General, and Other

However, the OLC took the more draconian position in 1987 that *requires* the agencies to submit legal disputes they are unable to resolve to the attorney general “except where there is specific statutory vesting of responsibility for a resolution elsewhere.”⁵⁶

A question still remains regarding the extent to which OLC opinions are in fact binding within the executive branch under § 512. To be sure, the OLC has authority to render legal opinions for the president and agencies, and under 28 U.S.C. § 516, the attorney general has the authority to conduct all litigation in which the United States, an agency, or an officer is a party. According to the OLC’s 1987 memo, “[t]he Attorney General’s authority to conduct litigation on behalf of the United States necessarily includes the exclusive and ultimate authority to determine the position of the United States on the proper interpretation of status before the courts.”⁵⁷ But neither Congress nor the U.S. Supreme Court has translated that position into actual law.

In any event, as Andrew Crespo has observed, neither of the OLC memos on presidential immunity “was requested by the head of an executive department outside of DOJ, so the attorney general’s duty ‘to render opinions’ to such officials simply doesn’t apply. (Indeed, it’s not altogether clear who requested that these two particular memos be written in the first place.)”⁵⁸ Even within the OLC’s statutory mandate, therefore, the non-prosecution memos do not immediately qualify as official opinions under 28 U.S.C. § 516.

Moreover, “OLC’s authority to issue binding opinions does not extend to executive branch officials who are ‘authorized by law’ to ‘conduct litigation on behalf of the United States’ without first getting the attorney general’s blessing for the positions they intend to take.”⁵⁹ Thus, Crespo concludes, independent agencies within the executive branch “are ‘not . . . presumptively bound’ by OLC’s opinions.”⁶⁰ An independent counsel or special prosecutor who is structurally independent of DOJ control would accordingly not be presumptively bound by an OLC opinion because they germinate outside the procedure established by § 512.

2. The Justice Manual

The OLC posts a number of its opinions on DOJ’s website along with a

Executive Officers of the Federal Government in Relation to Their Duties (1989) (preliminary draft), available at <https://perma.cc/28H4-9R8V>.

56. U.S. Dept. of Justice, Office of Legal Counsel, *Application of the Davis-Bacon Act to Urban Development Projects that Receive Partial Federal Funding* (Aug. 6, 1987) at 97, available at <https://perma.cc/ZU2X-NVWV>.

57. *Id.* at 98.

58. See Andrew Crespo, *Is Mueller Bound by OLC’s Memos on Presidential Immunity?*, LAWFARE (Jul. 25, 2017), <https://perma.cc/86YC-NYSZ>.

59. *Id.*

60. *See id.*

document known now as the Justice Manual (JM), which contains DOJ's major federal law enforcement policies; it is thus another potential source of the OLC's perceived authority to issue binding legal opinions for DOJ and executive branch agencies more broadly.⁶¹ Previously called the United States Attorneys' Manual (USAM), the JM "was comprehensively revised and renamed in 2018," and is "prepared under the supervision of the Attorney General and under the direction of the Deputy Attorney General."⁶² The 2018 revision was prompted by difficulties perceived in pinning down the DOJ policy, which was "spread among various sources," including memos, speeches, and articles.⁶³ The USAM was also considered out-of-sync with current DOJ policy and federal law.⁶⁴

Prior to the JM's release, former Deputy Attorney General Rod Rosenstein emphasized the need "to clearly distinguish binding policies from commentary," a task complicated by the fact that certain memos conflicted with each other or the USAM.⁶⁵ DOJ attorneys across the country were asked to find, collect, and review the scattered policy memos and other guidance documents.⁶⁶ Not all the DOJ policy—and thus only a subset of OLC guidance—is contained in the JM, however, and it is unclear whether outdated memos remain guiding policy.⁶⁷

Even in its current form, the JM sheds doubt on whether the OLC memos purporting to immunize presidents from criminal liability are widely binding. Under the express language of § 1.19.000 of the JM, agency guidance documents are not "binding on persons or entities outside the executive branch (including state, local, and tribal governments)."⁶⁸ So according to DOJ, the OLC presidential immunity memos do not bind state prosecutors, for instance.

The JM goes on to define "guidance" as "any agency statement of general applicability and future effect that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation"—*but expressly*

61. See Sindu et al., *The New Justice Manual: DOJ Updates US Attorney's Manual for the First Time in Decades*, NAT. L. REV. (Feb. 18, 2020), <https://perma.cc/ZU44-XA7Z>; see also U. S. DEP'T OF JUST., JUSTICE MANUAL § 1-1.100, <https://perma.cc/MM8P-JYMB> [hereinafter, JM] (2020) (stating that the JM contains "publicly available . . . DOJ . . . [p]olicies and procedures [and] guides investigative, charging and sentencing decisions of DOJ employees across the country.").

62. See JM, *supra* note 61, at § 1-1.200; Sindu, *supra* note 61.

63. Rod Rosenstein, Deputy Attorney General, Keynote Address at the NYU Program on Corporate Compliance & Enforcement, <https://perma.cc/6KMK-6TF9> (Oct. 6, 2017) (describing how the DOJ policy could be modified by successive memos, necessitating historical research and analysis to determine "what [DOJ attorneys] were supposed to do").

64. See Press Release, U.S. Dep't of Just., Department of Justice Announces the Rollout of an Updated United States Attorneys' Manual (Sep. 25, 2018).

65. Rosenstein, *supra* note 63, at 3.

66. See *id.*

67. See Zoe Tillman, *The Justice Department Deleted Language About Press Freedom and Racial Gerrymandering from Its Internal Manual*, BUZZFEED NEWS (Apr. 30, 2018); see also Sollers et al., *DOJ Issues Updated U.S. Attorneys' Manual*, AMERICAN BAR ASSOCIATION PRACTICE POINTS (Feb. 05, 2019).

68. See JM, *supra* note 61, at § 1-19.000.

excludes “documents informing the public of the agency’s enforcement priorities or factors the agency considers in exercising its prosecutorial discretion . . . or legal advice provided by the Department.”⁶⁹ Even within DOJ, therefore, the OLC presidential immunity memos do not qualify as binding guidance. In a footnote, the JM excludes from the definition of “guidance” documents relating to how DOJ will utilize its prosecutorial discretion.⁷⁰

The OLC presidential immunity memos function as a directive to prosecutors not to prosecute sitting presidents. Hence, it is this exception—and not the primary text of § 1.19.000—that covers the OLC, which amounts to discretionary decisions by Nixon’s and Clinton’s DOJ’s not to prosecute a category of potential cases—that is, any arising regarding actions taken by a sitting president of the United States. They establish an enforcement “non”-priority. Yet as a practical matter, OLC memos have been treated by law enforcement officials and the media as legally binding across federal, state, and local governments.⁷¹ As a matter of law, this is pretty bizarre.

3. Courts’ Treatment of OLC Memoranda: “Working Law”

Unambiguously, OLC memos are considered legally nonbinding by courts.⁷² This is unsurprising, as they are not statutes. Nor do their contents come from the Constitution’s text itself. Research suggests that the government has never argued otherwise.⁷³ It is therefore telling that federal courts, who otherwise cite *Marbury* for principles as uncontroversial as judicial review, cite no authority when discussing the effects of OLC memos; to the contrary, there is a strong judicial presumption that the memos have no intrinsic force—or source—of law.⁷⁴

69. *Id.*

70. *Id.*

71. *See id.* (stating that “Department components may not issue guidance documents that create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements”); *see also* Gary J. Edles, *Service on Federal Advisory Committees: A Case Study of OLC’s Little-Known Emoluments Clause Jurisprudence*, 58 ADMIN. L. REV. 1, 4 (2006) (stating that “OLC opinions are generally regarded as binding throughout the executive branch”).

72. *See* *Smith v. Jackson*, 246 U.S. 388, 390-91 (1918) (stating that court opinions control over attorney general opinions “beyond all possible question”); *see also* *Cherichel v. Holder*, 591 F.3d 1002, 1016, n. 17 (8th Cir. 2009) (“[T]he courts are not bound by [OLC opinions.]”).

73. *See, e.g.,* *Trump v. Vance*, 941 F.3d 631, 644, n. 16 (2d. Cir. 2019) (discussing the significance of an OLC memo concerning presidential immunity and noting that “[t]he President appropriately does not argue that we owe any deference to the OLC memoranda”).

74. *See* *City of S.F. v. Trump*, 897 F.3d 1225, 1242 (9th Cir. 2018) (stating without citing authority that a DOJ memo is not per se binding on the executive branch). *But see* *Tenaska Washington Partners II v. United States*, 34 Fed. Cl. 434, 439 (1995) (stating without citing authority that “[OLC memos] are binding on the [DOJ] and other executive branch agencies and represent the official position of those arms of government”); *Cherichel*, 591 F.3d at 1016 n. 17 (“OLC opinions are generally binding on the Executive branch.”).

Although the OLC memos are *not* laws, some courts have treated them as “effective law and policy” within the executive branch, a concept that is also known as “working law.”⁷⁵ Factors that courts consider when determining whether an internal memorandum is “working law” include: (1) whether agency officials feel free to disregard the memo, (2) whether agency superiors instruct their subordinates to follow the memo, (3) whether the memo is applied in the agencies’ dealings with the public, and (4) whether failure to follow the memo will lead to professional repercussions.⁷⁶ Courts have also relied on theories of express adoption and incorporation by reference when deciding whether an OLC memo is effective law and policy.⁷⁷ An OLC memo may have an “opt-in” binding effect,⁷⁸ that is, an agency is not bound by an OLC memo unless it has adopted it as effective law and policy.⁷⁹ Moreover, that adoption must be properly authorized within a given agency.⁸⁰

75. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975) (introducing working law doctrine as a means to discover whether secret agency guidance documents have enough legal animus to constitute “secret law”); see generally *ACLU v. NSA*, 925 F.3d 576, 594-95 (2d Cir. 2019) (identifying factors to determine “whether a document is functionally binding and hence, ‘working law’”); *N.Y. Times Co. v. DOJ*, 756 F.3d 100, 114-20 (2d Cir. 2014) (discussing why and to what extent an OLC memo constituted effective law and policy).

76. See *ACLU*, 925 F.3d at 595.

77. See *id.* (“The doctrine of ‘express adoption’ describes a process by which courts can discern whether a document first drafted as legal or policy advice has become an agency’s ‘effective law and policy.’”); see also *id.* at 597 (“[A]n agency incorporates a document by reference when it transforms a previously advisory document into binding ‘working law.’”).

78. See *N.Y. Times*, 756 F.3d at 116 (reasoning that, *inter alia*, a statement from an executive branch official that “[OLC] advice establishes the legal boundaries within which we can operate” is evidence that an OLC memo assumed binding force within the executive branch) (internal quotation marks omitted); see also *Nat’l Council of La Raza v. DOJ*, 411 F.3d 350, 359-60 (2d Cir. 2005) (finding that presenting an OLC memo as “embodying” the DOJ policy and promulgating it with legal effects on law enforcement officers was evidence that DOJ adopted the memo as working law); *Brennan Ctr. v. DOJ*, 697 F.3d 184, 203-04 (2d Cir. 2012) (explaining how various USAID statements constituted evidence that agency officials treated an OLC memo as binding authority, thereby giving the memo binding authority within USAID).

79. See *City of S.F. v. Trump*, 897 F.3d 1225, 1242 (9th Cir. 2018); see also *Sears, Roebuck & Co.*, 421 U.S. at 153; *Brennan Ctr.*, 697 F.3d at 203 (holding that because two OLC memoranda were merely advisory, they did not constitute working law or OLC’s effective law and policy).

80. See *ACLU*, 925 F.3d at 595-96 (citing *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 9 (D.C. Cir. 2014) (holding that an OLC opinion submitted to the FBI did not constitute working law because “OLC is not authorized to make decisions about the FBI’s investigative policy, so the [OLC memo] cannot be an authoritative statement of the agency’s policy”) (emphasis added)) (holding that John Brennan’s remarks prior to becoming an official director of the CIA lacked the requisite authority to bind the CIA to an OLC memo). It is possible that these limitations are derivative of the limitations on the Attorney General’s power. See, e.g., *Pub. Citizen v. Burke*, 655 F. Supp. 318, 321-22 (D.D.C. 1987) (citing *Smith v. Jackson*, 246 U.S. 388, 390-91 (1918); *Edwards v. Carter*, 580 F.2d 1055, 1103 n. 42 (D.C. Cir. 1978)) (stating that the AG’s opinion is binding as a matter of law on those who request it until (1) withdrawal by the AG or (2) judicial invalidation, unless the matter is within the proper discretion of a department official, which renders the AG’s opinion “merely advisory”).

In general, judges have treated OLC memos as binding in only two categories of cases. The first block of cases involves “secret law”; in these cases, courts have treated OLC memos as having binding effect for purposes of deciding whether they must be released in response to Freedom of Information Act (FOIA) requests. Where an OLC memo is treated as having the force of law within the executive branch, courts have reasoned, public policy strongly indicates that it should be amenable to release under FOIA.⁸¹ If an OLC memo has been afforded the force of law but is nonetheless unavailable to the public, the memo becomes “secret law,” which is frowned upon by the courts.⁸²

The second block of cases examining the legal effect of OLC memos involves judicial review of agencies’ adoption of OLC memos as their own agencies’ policy in non-FOIA cases. Courts have held that, even if an OLC memo binds an agency internally as effective law and policy, it is only binding outside the agency to the extent that it is consistent with federal law.⁸³ In one string of cases, prisoners challenged the Federal Bureau of Prisons’ adoption of an OLC memo’s language seeking to define a federal prisoner relocation statute as its own policy. Rather than grapple with the binding effect of the OLC memo on the BOP per se, courts considered whether the BOP regulation—which adopted the OLC memo—was itself consistent with federal law.⁸⁴ This is consistent with the foundational notion that OLC memos are not laws: the laws must come from somewhere else, whether that be the Constitution, a statute, a regulation, or binding judicial precedent.

The memos instead amount to lawyers’ advice. But unlike traditional lawyers’ advice, which is often treated as confidential and thus protected by the attorney-client privilege, OLC memos are often public and thus operate as if they have the force of law—even though there is virtually no judicial precedent or scholarly analysis of the question of whether OLC opinions should be afforded the force of law, either inside or beyond the executive branch.

The OLC’s most prominent and controversial opinions have included authorization for President George W. Bush’s use of torture to combat the war

81. See, e.g., *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) (“A strong theme of our opinions is that an agency will not be permitted to develop a body of ‘secret law,’ used by it in the discharge of regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as ‘formal,’ ‘binding,’ or ‘final.’”).

82. *Id.*

83. See *Pub. Citizen v. Burke*, 843 F.2d 1473, 1474-75 (D.C. Cir. 1988) (describing an OLC memo seeking to bind an independent agency as DOJ “opin[ion]” before declaring “the agency’s regulations . . . with the gloss placed upon them by the Justice Department” unconstitutional); see also *Am. Historical Ass’n v. Nat’l Archives & Records Admin.*, 516 F. Supp. 2d 90, 111 (D.D.C. 2007) (rejecting an agency regulation that was a verbatim adoption of an OLC memo and relied on “erroneous” constitutional interpretation, and was thus nonbinding).

84. See, e.g., *Fagiolo v. Smith*, 326 F. Supp. 2d 589, 590-91 (M.D. Pa. 2004) (determining that the BOP’s policy was consistent with federal law even after adopting the language of an OLC memo).

on terror in the early 2000s,⁸⁵ as well as the Bush Administration's warrantless wiretapping program. Many of the so-called "torture memos" were written by a former deputy attorney general in the OLC, John Yoo, who concluded that the Geneva Conventions do not apply to "enemy combatants" held at Guantanamo Bay and—most controversially—that executive authority during wartime includes the use of waterboarding and other "enhanced interrogation techniques" under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, as implemented by 18 U.S.C. §§ 2340-2340A.⁸⁶ Although the torture memos were used to justify Bush's policies post-9/11, the political backlash was severe, and eventually both the wiretapping and waterboarding programs were pulled back.

The torture memos also played a more traditional role of providing attorney advice to executive branch officials facing thorny questions of constitutional significance. Although the torture and wiretapping programs went forward with the blessing of the OLC, the ultimate accountability for them belonged to the president. Like any client, President Bush considered his lawyers' advice, weighed the risks, and made decisions on that basis. The OLC memos foreclosing prosecutions of sitting presidents go further. In effect, they erase any criminal and judicial oversight of the presidency—a major gloss on the separation of powers itself, with no express grounding in the Constitution. As such, the memos have not operated as lawyerly guidance. They have operated as binding law.⁸⁷

B. The Memoranda's Constitutional Rationales for Absolute Criminal Immunity for Sitting Presidents

Although DOJ's policy against indicting presidents is often referred to as a single pronouncement, there are actually two memos—one issued under Nixon's Justice Department and the other under Clinton's. Notably, Special Prosecutor Leon Jaworski was—like Robert Mueller—structurally situated *within* DOJ, whereas Independent Counsel Kenneth Starr was appointed by a three-judge panel pursuant to the Ethics in Government Act, a post-Watergate reform designed to prevent a recurrence of the Saturday Night Massacre, in which President Nixon fired a string of DOJ officials in an effort to avert a criminal investigation implicating the Oval Office.⁸⁸ In theory, Starr was more independent than Jaworski and thus not bound by OLC policy in the same way,

85. Memorandum for Alberto R. Gonzales, Counsel for the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340 - 2340A 1 (Aug. 1, 2002), <https://perma.cc/4VNH-KWCU>.

86. *Id.*; see generally *Library*, CIA, <https://perma.cc/2FK7-M6HG>.

87. *Cf. Pub. Citizen*, 843 F.2d at 1478 (stating that "[t]he federal Judiciary does not . . . owe deference to the executive branch's interpretation of the Constitution") (citing *United States v. Nixon*, 418 U.S. 683, 703-05 (1974)).

88. See 28 U.S.C. §§ 591-98.

although both Jaworski and Starr secured independent legal opinions on a president’s immunity from criminal indictment, and in both instances, those opinions reached the opposite conclusion than the OLC did for both Presidents Nixon and Clinton.⁸⁹

It is important to note further that although Article II, section 4 of the Constitution provides that “[t]he President, the Vice President, and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other high crimes and Misdemeanors,” the argument has never been made by presidents’ lawyers at OLC that impeachment is the *exclusive* remedy for wrongdoing (including criminal wrongdoing) by a president. This is significant because it means that the constitutional debate around prosecuting presidents is not about the impeachment language. Rather, it centers around more nuanced separation-of-powers arguments that are not grounded in the text itself.

What follows is a summary of the substantive arguments set forth in the two OLC memos—one from 1973, under President Nixon’s DOJ, and the other from 2000, under President Clinton’s DOJ. The key point to keep in mind here is that the arguments are just that—arguments. They do not derive from constitutional text or established Supreme Court precedent. While I rebut the substance of the arguments at the end of the paper, the point here is to highlight the breathtaking significance these memos have been given in terms of confining the authority of the judicial branch to check abuses of power by the presidency. Yet they amount to little more than lawyers’ policy-based advocacy on behalf of clients in legal jeopardy.

1. The 1973 Memorandum

On March 1, 1974, a federal grand jury in the District of Columbia returned an indictment charging seven named individuals from the Nixon White House or re-election campaign with conspiracy to defraud the United States and to obstruct justice, among other offenses, in connection with the June 1972 break-in of the Democratic National Committee headquarters and subsequent cover up.⁹⁰ President Richard Nixon was not named in the indictment, but on the motion of the Special Prosecutor Leon Jaworski and counsel for the President, the Supreme Court unsealed the following extract from the record of the grand jury proceedings:

On February 25, 1974, in the course of its consideration of the indictment in the instant case, the June 5, 1972, Grand Jury, by a vote of 19-0, determined that

89. See generally Watergate Special Prosecution Force, U.S. Dep’t of Just., Staff Memorandum to Special Prosecutor Leon Jaworski concerning the indictment of President Nixon (Feb. 12, 1974), reprinted in Eric Freedman, *On Protecting Accountability*, 27 HOF. L. REV. 677, 728-49 (1999) (concluding there was no legal barrier to indicting a sitting president) [hereinafter, Jaworski Memo].

90. *United States v. Nixon*, 418 U.S. 683, 687 (1974).

there is probable cause to believe that Richard M. Nixon (among others) was a member of the conspiracy to defraud the United States and to obstruct justice charged in Count I of the instant indictment, and the Grand Jury authorized the Special Prosecutor to identify Richard M. Nixon (among others) as an unindicted co-conspirator in connection with subsequent legal proceedings in this case.⁹¹

In a memorandum dated September 24, 1973,⁹² the OLC issued its first opinion that sitting presidents cannot be indicted as a matter of Article II of the Constitution. The memo is relatively brief. Given its thin analysis, it may have failed the test of time without the help of Clinton's DOJ in 2000. The 1973 memo hurriedly concluded that impeachment was *not* the sole constitutional remedy for wrongdoing in office; the question it considered instead was whether criminal process against a sitting president is constitutional *at all*. The OLC decided "no."

To begin with, the OLC made clear that an impeachable offense does not require violation of a criminal statute:

Certainly, a case can be made that if impeachment is a process by which the faith in and integrity and effectiveness of the office of an attending incumbent can be restored, offenses which tend to bring the office into disrepute or render it dysfunctional should be impeachable whether or not committed in an official capacity.⁹³

This is important, because it carved out a distinct role for impeachment that cannot be served by criminal indictments, suggesting that the latter likewise has its own role to play under the Constitution.

Nonetheless, the OLC in 1973 went on to consider whether a president is amenable to criminal proceedings while in office, and concluded "no." Because "[t]he historical evidence on the precise point is not conclusive," the OLC based its argument "on a system of checks and balances, or of blending the three powers," concluding that "[t]he proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and functions of the Presidency."⁹⁴

The OLC noted that "[t]he Framers of the Constitution made it abundantly clear that the President was intended to be a Chief Executive, responsible, subject to the law, and lacking the prerogatives and privileges of the King of England."⁹⁵ Quoting Justice Holmes in *Myers v. United States*, it underscored that "any legal arguments drawn merely from the Executive power of the President, his duties to appoint officers of the United States . . . and to take care that the laws be carefully executed seem to him 'spider's webs inadequate to control dominant facts.'"⁹⁶ Put another way, presidents are not kings, and do not enjoy complete

91. *United States v. Nixon*, 417 U.S. 960, 960, (1974).

92. *See* 1973 OLC Memo, *supra* note 6.

93. *Id.* at 14.

94. *Id.* at 24.

95. *Id.* at 20 n. 14, 24 (citations omitted).

96. *Id.* at 21 (quoting *Myers v. United States*, 272 U.S. 52, 177 (1926)).

immunity by virtue of Article II.

The memo’s argument against indictment of a president as a matter of checks and balances instead went as follows: *first*, “courts lack jurisdiction in criminal proceedings which have the effect of questioning the proper exercise of the President’s discretion”; *second*, “a President’s status as defendant in a criminal case would be repugnant to his office of Chief Executive, which includes the power to oversee prosecutions”; *third*, the president’s ability to invoke executive privilege and the pardon power “may create the appearance of so serious a conflict of interest as to make it appear improper that the President should be a defendant in a criminal case”; and *finally*, “[a] necessity to defend a criminal trial and to attend court in connection with it . . . would interfere with the President’s unique official duties, most of which cannot be performed by anyone else.”⁹⁷

While these are all normative arguments, not grounded in law, the fourth rationale is the lynchpin of both memos: the notion that “the Presidency would be derailed if the President were tried prior to removal.” Even a public indictment tolling the statute of limitations but staying a trial until a president leaves office, by this reasoning, “would damage the institution of the Presidency virtually to the same extent as an actual conviction.”⁹⁸

The problem with the 1973 memo is that it does little to explain how an indictment or trial would derail the presidency other than to state that conclusion. The Constitution assumes that an “indictment” by articles of impeachment and trial in the Senate, by definition, would *not* derail a presidency. Yet that logical, text-based inconsistency is not even raised, let alone rebutted. The memo summarily argues—as a matter of policy preference on the part of President Nixon’s DOJ in the midst of the Watergate scandal—that “[t]he spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination.”⁹⁹

2. The 2000 Memorandum

When former President Bill Clinton was Arkansas’s attorney general in 1978 (and later, governor), he and his wife Hillary Clinton formed the Whitewater Development Corporation as part of an investment opportunity with two friends, James and Susan McDougal. The plan was to purchase 230 acres of riverfront land and sell it in lots for vacation homes. Jim McDougal was a real estate entrepreneur. He purchased the land for \$203,000 with no money down—it was paid for through a \$180,000 loan on which the Clintons and the McDougals were jointly liable. When the venture failed (frequent heavy storms left the land inaccessible due to flooding), McDougal bought a small savings and loan association, renaming it Madison Guaranty and hiring Hillary Clinton’s law firm

97. *Id.* at 25-28.

98. *Id.* at 29.

99. *Id.* at 30.

as counsel. It was later shut down by federal regulators, costing the Federal Deposit Insurance Corporation tens of millions and later prompting a criminal investigation into the deal by a number of investigators, including Independent Counsel Kenneth W. Starr.

Ultimately, a total of fifteen people were convicted of various criminal charges, including the McDougals and Webster Hubbell, a law partner of Hillary Clinton's who served as an associate attorney general under her husband.¹⁰⁰ Starr did not find sufficient evidence to charge the Clintons with criminal wrongdoing, but did issue a lengthy report to Congress in 1998, prompting Bill Clinton's impeachment by the House of Representatives. He was later acquitted by the U.S. Senate.

On October 16, 2000, Clinton's DOJ issued its own memo entitled "A Sitting President's Amenability to Indictment and Criminal Prosecution." The 2000 memo picks up on the final rationale of Nixon's OLC, concluding broadly that "[t]he indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions."¹⁰¹ It also relies on a brief filed on October 5, 1973 by then-Solicitor General Robert Bork in connection with the grand jury investigation of then-Vice President Spiro Agnew—a reliance that underscored the nature of the memorandum's objective: advocacy on behalf of the man who was in office at that moment and subject to investigation by Ken Starr's team and, later, to impeachment.¹⁰²

In short, both Presidents Nixon and Clinton were under criminal investigation when their respective DOJs issued decisions normatively positing that presidents cannot be indicted.

Since publication of the 1973 memorandum, two intervening Supreme Court's decisions made the advocacy task of Clinton's OLC a bit more complicated. *United States v. Nixon* held that Nixon's executive privilege claims did not shield him from having to respond to a criminal subpoena seeking records of communications between a president and his advisors.¹⁰³ *Clinton v. Jones* held that a sitting president is not immune from having to respond to a civil deposition subpoena while in office.¹⁰⁴ The OLC drew a distinction between the relative disruption of a civil deposition and criminal process, arguing that the latter imposes greater burdens:

- (a) the actual imposition of a criminal sentence of incarceration, which would make it physically impossible for the President to carry out his duties; (b) the public stigma and opprobrium occasioned by the initiation of criminal

100. Dylan Matthews, *Whitewater, Explained for People Who Don't Remember the Clinton Presidency*, VOX (Apr. 13, 2015, 10:30 AM), <https://perma.cc/NBJ4-2CZL>.

101. See 2000 OLC Memo, *supra* note 6, at 222.

102. Walter Dellinger, *Indicting a President is Not Foreclosed: The Complex History*, LAWFARE (June 18, 2018), <https://perma.cc/4MRF-8ZV2> (linking to Oct. 5 brief).

103. *United States v. Nixon*, 418 U.S. 683, 707 (1974).

104. *Clinton v. Jones*, 520 U.S. 681, 705 (1997).

proceedings, which could compromise the President’s ability to fulfill his constitutionally contemplated leadership role with respect to foreign and domestic affairs; and (c) the mental and physical burdens of assisting in the preparation of a defense for the various stages of the criminal proceedings, which might severely hamper the President’s performance of his official duties.¹⁰⁵

Here again, the OLC did not compare these burdens to the parallel burdens of impeachment. It emphasized “the stigma arising both from the initiation of a criminal prosecution and also from the need to respond to such charges through the judicial process,” and argued that they “would seriously interfere with [the president’s] ability to carry out his constitutionally assigned functions.”¹⁰⁶

Bear in mind, however, that both memos were written before the digital age and the 24-hour news cycle, with myriad “news” outlets that do not follow the traditions and ethical boundaries of journalism, leaving presidents having to contend with real-time criticisms and charges pretty much non-stop. The office of the U.S. president has not since ground to a halt. If the OLC’s analysis were revisited today, the possible stigma associated with criminal allegations would not be a factor of equivalent constitutional dimension. On a number of fronts, the OLC’s analysis is subject to pragmatic critique where pragmatism formed the basis for its separation of powers analysis in the first place—one that has operated as a functional gloss on the Constitution itself.

At bottom, as the competing memoranda drafted under Leon Jaworski and Ken Starr demonstrate,¹⁰⁷ the OLC memos are not neutral assessments of the Constitution akin to a decision by a federal court. Indeed, acting on appeal, even court majorities are subject to dissenting opinions in writing—a countervailing source of pressure that is not routine for lawyers, including those at the OLC. They should be viewed with a jaundiced eye—not with the patina of authoritativeness that most people give them.

C. The Net Effect of the OLC Memoranda on the Separation of Powers

The effect of the OLC memoranda, which are couched as internal policy guidance for prosecutors, is to alter the structure of the separation of powers itself—without any amendment to the Constitution or Supreme Court review. Of course, the Constitution does not state that prosecutions of sitting presidents are forbidden. To make that change would require ratification by two-thirds of both houses of Congress and three-quarters of the states. When it interprets and gives definitive meaning to vagueness in the Constitution, the Supreme Court effectively amends the Constitution; but that has not happened here, either.

Under the Trump Administration, the impact of the OLC memos was felt in ways that push against American democracy. This has only partially to do with

105. 2000 OLC Memo, *supra* note 6, at 246.

106. *Id.* at 249.

107. Compare Starr Memo, *supra* note 27, with Jaworski Memo, *supra* note 89.

the occupant of the Oval Office. More significantly, it was the result of a methodical deactivation of the traditional levers of oversight that are embedded in the Constitution, both expressly and impliedly. As I explain below, the mechanisms for holding the office of the presidency accountable to the people have lapsed, producing a “mega-branch” that is susceptible to the very abuses that the Constitution was designed to avoid.

Congress has let this happen, to be sure. Consider the constitutional powers that Congress has to check the presidency: committee oversight, appropriations, substantive legislation, Senate confirmation of presidential appointees, and impeachment. Now consider the context and specifics of the two articles of impeachment against Donald Trump, on which the Senate voted to acquit.¹⁰⁸ The first article was for abuse of power stemming from his administration’s request that Ukrainian President Volodymyr Zelensky announce an investigation of a primary political rival for the presidency, Joe Biden, in exchange for the release of \$391 million in Senate-appropriated aid to Ukraine. Ukraine needed the aid to stave off aggression from Russia, which is a foe of the United States, having infiltrated the 2016 electoral process for its own gain. Under the Impoundment Control Act, Trump was required to notify Congress of any delay in the aid. He did not. By acquitting Trump on this article of impeachment, the Senate sent a message that its appropriations power and its legislative power are fickle. Presidents can violate both without consequences. The absence of consequences, of course, inspires more bad behavior; it is a matter of human nature.

The vitality of the remaining levers of congressional oversight is equally suspect at this juncture in history. The Supreme Court has repeatedly held that the power to legislate implies the power to gather facts through congressional subpoenas.¹⁰⁹ After all, without relevant facts, Congress cannot make valid policy determinations—it becomes hamstrung in its ability to weigh the evidence bearing on an issue with its congressional prerogatives. Congress’ subpoena powers are difficult to enforce, however. Congress has the inherent power to enforce a subpoena to a non-compliant witness by calling its Sergeant-at-Arms to physically confine the witness in an actual jail that exists within the walls of Congress. Needless to say, this option has been obsolete as a practical matter for over a century.

The other means of enforcing a congressional subpoena are through a criminal contempt proceeding or, alternatively, through civil contempt. Both require a court order directing that someone testify in the first instance, which is then enforced through a process holding the witness in contempt for non-compliance with the order.

On the criminal side, contempt must be prosecuted through the Justice Department, which is headed ultimately by the president, so contempt

108. Peter Baker, *Senate Acquits Trump, Ending Historic Trial*, N.Y. TIMES (Feb. 6, 2020), <https://perma.cc/73HR-TZPE>.

109. See, e.g., *McGrain v. Daugherty*, 273 U.S. 135, 170 (1927).

prosecutions of witnesses whom the president would prefer to keep quiet for purposes of executive branch oversight by Congress are unrealistic. On the civil side, contempt enforcement requires Congress to file a lawsuit in federal court, obtain a judgment and order, and then seek to enforce contempt of court if that order is violated in addition to the original congressional subpoena. Contempt of court is enforced through the U.S. Marshals Service, which can put people in federal prison for non-compliance. This happened in the Whitewater investigation under Ken Starr with Susan McDougal, who refused to testify before the grand jury and served a jail sentence as a result. Again, however, the U.S. Marshals Service answers ultimately to the president.

The second article of impeachment against President Trump charged him with obstruction of Congress. Trump barred his administration from producing information in response to Congress’s subpoenas for documents. The defense’s position was that the president is entitled to test Congress’s subpoena power in court. For their part, House Democrats decided not to press subpoenas with motions to compel or, for that matter, issue subpoenas for testimony in the first place. A handful of witnesses agreed to testify voluntarily. For the rest, Congress declined to issue subpoenas and even withdrew a subpoena for an aide to former National Security Advisor John Bolton when the witness, Charles Kupperman, filed an action in federal court seeking a declaratory judgment as to whether he was required to comply.

As a result, acquittal on the second article of impeachment now stands as a stark statement that presidents do not need to comply with congressional requests for information needed to conduct core oversight or—in this instance—for impeachment. The White House had initially taken the position that, absent a full House vote to conduct an impeachment inquiry, any subpoenas were unlawful. In fact, the OLC under Trump issued an opinion to that effect. Once the House conducted a formal vote, however, the White House’s stance did not change; it claimed authority not only to refuse compliance with all requests for information, but also to instruct prior employees not to show up in response to congressional subpoenas in the first place.

President Trump’s arguments for complete immunity from process were rejected by the U.S. Supreme Court in 2020.¹¹⁰ In *United States v. Nixon*, the Court upheld a trial subpoena for President Nixon’s Oval Office tapes after applying a balancing test and ultimately concluded that the public interest in transparency outweighed any presidential privilege.¹¹¹ In *Clinton v. Jones*, the Court held that a civil deposition subpoena in a sexual harassment suit arising from activity prior to Clinton’s taking office was enforceable against a sitting president.¹¹² Of course, if the president does not have complete immunity from process, his former employees do not, either. The arguments in favor of moving

110. *Trump v. Vance*, 140 S. Ct. 2412 (2020).

111. *United States v. Nixon*, 418 U.S. 683, 707 (1974).

112. *Clinton v. Jones*, 520 U.S. 681, 705-06 (1997).

to compel were formidable. Nonetheless, House Democrats apparently determined that litigation to shore up Congress's subpoena power was either too politically risky, too time-consuming, or both. The net result, again, is a weakening of a lever of congressional oversight, possibly for good—not just a strategic call for purposes of the Trump impeachment exclusively.

During the Senate trial, one of Trump's lawyers, Pat Philbin, argued that acquittal on the impeachment charges would not impact the separation of powers because the Senate can continue to rein in the presidency by withholding approval of Cabinet-level nominees and other officers within the executive branch pursuant to the Advice and Consent Clause. Yet this lever of oversight has also gone by the wayside. After the close of the Senate trial, President Trump publicly admitted that he deliberately decided to "use" his personal lawyer Rudy Giuliani to conduct diplomacy on his behalf in Ukraine, despite the testimony of career diplomats that Giuliani did so in ways that undermined longstanding U.S. policy toward Ukraine.¹¹³ Here too, the Senate acquittal stands for the unmistakable proposition that presidents can hand-pick individuals to carry out their individual interests under the guise of U.S. foreign policy without having to go through the Senate nomination and confirmation process.

Past presidents like Franklin Delano Roosevelt and Dwight D. Eisenhower used private emissaries, as well—but not in furtherance of personal political interests that conflict with the interests of the United States and the American populace. The advice and consent process is designed as a check on the presidency, to ensure that the executive branch is populated with experienced, qualified individuals and not abject political loyalists. Future presidents can rely on the Giuliani precedent to bypass that process, to the clear detriment of the separation of powers.

Lastly, it is evident that, because they both resulted in acquittal by a Senate dominated by the same political party as the respective presidents, the Clinton-Trump impeachments together operated to devalue impeachment itself as a serious check on the presidency.¹¹⁴ The Senate supermajority required for removal is nearly impossible to achieve in today's polarized political environment. The prospect of another impeachment does not loom as a serious threat that would otherwise serve as a check on the worst impulses of a person in the seat of the power of the presidency.

Given that Congress has failed to protect its own oversight prerogative in the years since the OLC memos were issued, the impact of those documents on the overall separation of powers has become increasingly serious. If Congress were

113. Marshall Cohen, *Trump Contradicts Past Denials, Admits Sending Giuliani to Ukraine*, CNN (Feb. 14, 2020, 12:15 AM), <https://perma.cc/W4WY-GTHA>.

114. See Nina Totenberg, *From Consensus To Deadlock: Is Impeachment Still A Check On Presidents?*, NPR (Dec. 10, 2019, 5:26 AM ET), <https://perma.cc/88W3-Y4HP> (describing impeachment as a long-standing theoretical deterrent against bad behavior but noting that the lesson from Donald Trump's impeachment may be that party loyalty provides a safety net which cancels out the check impeachment once had on presidential behavior).

functioning as a meaningful check on the White House, the unavailability of the judicial branch as a check on potential criminal activity at the highest echelons of the executive branch would be less troubling. But today, it appears that the OLC memos—no doubt inadvertently, because the authors were acting to protect their then-clients, the sitting presidents of the United States, rather than make rulings as to the scope of the Constitution *per se*, which they were ill-equipped to do—have worked a check-mate on executive branch accountability. As Justice Kavanaugh wrote in an opinion authored as a D.C. Circuit judge: “The remedy for presidential abuses of the pardon power or to decline to prosecute crimes comes in the form of public disapproval, congressional ‘retaliation’ on other matters, or ultimately impeachment in cases of extreme abuse.”¹¹⁵ None of these remedies are workable anymore. The threat of public disapproval is not a meaningful one in modern politics.

Because the OLC memos impose a barrier to Article III oversight of any federal crimes possibly committed by presidents in office, and because the other levers of presidential accountability lack force in today’s political climate, the OLC memos’ functioning *as law* conflicts with broader constitutional values. As James Madison wrote in Federalist No. 47, “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”¹¹⁶ And Montesquieu explained that “[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”¹¹⁷ That is the state of affairs to a meaningful degree under the contemporary separation of federal powers.

It is no answer, moreover, to hold out for possible criminal indictments of a president after leaving office. The general statute of limitations for federal crimes is five years, rendering presidents immune from criminal liability for crimes committed in the first term if they secure a second term in office.¹¹⁸ Furthermore, the public’s appetite for seeing any former president in jail is untested and unlikely. At a minimum, newly-elected presidents would be hard-pressed to prioritize prosecution of former presidents over the myriad agenda items that require congressional and public buy-in, both in terms of effectuating a new president’s platform and securing his or her political future.¹¹⁹

Per the OLC’s own 2010 memo of “Best Practices for OLC Legal Advice

115. *In re Aiken Cnty.*, 725 F.3d 255, 266 (D.C. Cir. 2013).

116. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

117. MONTESQUIEU, THE SPIRIT OF LAWS bk. 11 ch. 6, at 163 (J.V. Prichard ed., Thomas Nugent trans., G. Bell & Sons, Ltd., 1914).

118. 18 U.S.C. § 3282 (2003).

119. Professor Crespo has suggested that the OLC memos on presidential immunity “also function to some degree as *de facto* anticipatory pardons of potential activity committed by a president, especially given the serious practical challenges that arise when a prosecution is delayed for too long.” Crespo, *supra* note 57.

and Written Opinions,” its role includes “help[ing] the President fulfill his or her constitutional duties to preserve, protect, and defend the Constitution, and to ‘take Care that the Laws be faithfully executed.’”¹²⁰ By excising entirely the execution of criminal laws against an elected official who happens to be the president, the OLC may be undermining the Take Care Clause, as well.

II. WHAT IS AN OLC MEMO AS A SOURCE OF LAW?

This Part digs into the central question presented by this Article: What *is* an OLC memo as a source of law? If it is not “law” per se, then it cannot have the force of law—it cannot bind conduct in the way that a statute can, for example. The OLC memos that make the case for presidential immunity from criminal process do not purport to merely recite the text of the Constitution; they derive instead from general impressions of how criminal process would burden the person sitting in the Oval Office at a particular point in time. They are not constitutional law. Nor are they judicial opinions or acts of Congress, which would stem from the vesting clauses of Articles III and I, respectively.

As this Part explains, the two most promising lines of analysis for categorizing the OLC memos on presidential immunity are, first, as an exercise of prosecutorial discretion under Article II or, to use DOJ terminology, as prosecutorial “declination” determinations. The problem with this construct is that prosecutorial declination decisions are traditionally made on a case-by-case basis. To the extent that a policy removes an entire category of law enforcement from the scope of the power of a prosecutor’s office, it may conflict with the executive’s obligation to “Take Care” that the laws are faithfully executed. Arguably, that obligation trickles down to the individual prosecutor regardless of who is in the White House, particularly where a declination determination amounts to a president’s decision to immunize himself from the laws of Congress. That power is not express in the Constitution, although scholars debate where the dividing line lies between the exercise and abdication of executive power to enforce the laws.

The second potential frame for the OLC presidential immunity memos is that they are non-legislative rules establishing agency policy or interpretation of the Constitution. Both are expressly authorized by the Administrative Procedure Act (APA),¹²¹ and agencies create both forms of non-legislative rules with the expectation that employees within a particular agency will heed such guidance. However, the Supreme Court has made clear that, to the extent agency guidance establishes a mandate that strips individual personnel of any discretion, the guidance amounts to a rule with the force of law that cannot be created by a mere

120. Off. of Legal Counsel, *Memorandum for Attorneys of the Office re: Best Practices for OLC Legal Advice and Written Opinions*, U.S. DEP’T OF JUST. 1 (Jul. 16, 2010), <https://perma.cc/CN6B-U7TS>.

121. 5 U.S.C. § 553(b)(3)(A) (1946).

memorandum.¹²² To create rules with the force of law, agencies instead must go through the laborious notice-and-comment or formal rulemaking process to the extent that Congress gives a particular agency the authority to do so. Under the APA rubric, therefore, the OLC memos could not operate to bind individual prosecutors.

A. The OLC Memos as an Exercise of Prosecutorial Discretion Under Article II

The most logical frame for understanding the OLC memos’ position that the president has immunity from criminal process is as an exercise of prosecutorial discretion under Article II or, more specifically, a decision *not* to prosecute—also known as a “declination” decision. However, the president’s power to execute the laws, albeit broad, is not unlimited. Most saliently, the Supreme Court has indicated that a prosecutor’s non-enforcement determination can be overruled if it results in a complete abdication of statutory responsibility, an exception that would appear to fit here.¹²³

1. Article II

Article II of the United States Constitution establishes the executive branch of the United States government, and vests the power of the executive branch in a single person: the President.¹²⁴ This singular concentration of power is unique in the United States Government, reflecting the view that the awesome responsibilities and powers of the executive branch would be better executed through “the proceedings of one man” than through a group of people.¹²⁵ And although the power of the executive branch is vested in the President, it can be exercised by others on his behalf.¹²⁶

The president’s power to exercise wide discretion in executing the laws derives from four provisions of Article II: the Executive Power Clause, the Take Care Clause, the Oath of Office Clause, and the Pardon Clause.¹²⁷ The ten words

122. *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 97 (2015) (citing *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 99 (1995)).

123. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers.”).

124. U.S. CONST. art. II, § 1.

125. THE FEDERALIST No. 70, at 424 (Alexander Hamilton)(Clinton Rossiter ed., 1961). Compare U.S. CONST. art. I (establishing the legislative branch) and U.S. CONST. art. III (establishing the judicial branch) with U.S. CONST. art. II (establishing the executive branch).

126. See generally *Wilcox v. Jackson*, 38 U.S. 498 (1839) (stating that the President speaks and acts through department heads, whose official conduct is presumptively the President’s conduct).

127. See U.S. CONST. art. II, § 3 (“[The President] shall *take Care* that the Laws be

of the Take Care Clause have been judicially interpreted to give the president broad powers, many of which—such as the powers to remove government officials and to take unilateral action to enforce the law—allow the president to act without external approval or supplemental authority.¹²⁸ The Supreme Court has recognized—but never enforced—limitations on the pardon power, leaving many to wonder whether a president could even pardon him- or herself.¹²⁹ The language of the constitutional oath to “preserve, protect and defend the Constitution of the United States” has also been construed to bolster the president’s federal role as a unitary enforcer and protector, uniquely insulated from limitations.¹³⁰

2. Prosecutorial Discretion and Constitutional Limits

Article II further grants the President non-enforcement power, a controversial analogue to his powers of enforcement and punishment, which is

faithfully executed . . .”) (emphasis added); *Id.*, art. II, § 1, cl. 8 (“Before he enter[s] on the Execution of his Office, *he shall take the following Oath or Affirmation:—*”I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”) (emphasis added); *id.*, art. II, § 2, cl. 1 (“[He] . . . shall have *Power to grant Reprieves and Pardons* for Offenses against the United States, except in Cases of Impeachment”) (emphasis added). See also *In re Aiken Cnty.*, 725 F.3d 255, 261-62 (D.C. Cir. 2013) (deriving executive prosecutorial discretion from Article II) (citing *Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (referencing use of Article II to decline to enforce a statute regulating passports of people born in Jerusalem)); *Myers v. United States*, 272 U.S. 52, 106 (1926) (addressing President Wilson’s refusal to comply with a statutory limit on the removal power); *Freytag v. Comm’r*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring) (suggesting that the President has “the power to veto encroaching laws or even to disregard them when they are unconstitutional”) (citation omitted); Memorandum from Walter Dellinger, Assistant Att’y Gen., to Att’y Gen., (Nov. 2, 1994), in 18 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 199 (1994) (describing as “uncontroversial” and “unassailable” the proposition that a President may decline to execute an unconstitutional statute in some circumstances); Statement of James Wilson (Dec. 1, 1787), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446 (Jonathan Elliot ed., 2d ed 1836) (“[T]he President of the United States could shield himself, and refuse to carry into effect an act that violates the Constitution . . .”).

128. See *Myers v. United States*, 272 U.S. 52, 117 (1926) (deriving the removal power from the Take Care Clause); see also *In re Neagle*, 135 U.S. 1, 63-64 (1890) (recognizing the President’s power to take necessary and proper measures to enforce the law). *But see* *Humphrey’s Executor v. United States*, 295 U.S. 602, 627-30 (1935) (introducing limitations on the removal power pursuant to how “Executive” the removed officer is).

129. *Schick v. Reed*, 419 U.S. 256, 256 (1974) (examining the pardon power); see also Donald Trump (@realDonaldTrump), TWITTER (Jun. 4, 2018, 8:35 AM), <https://perma.cc/J3FD-TH2E?type=image> (“As has been stated by numerous legal scholars, I have the absolute right to PARDON myself . . .”).

130. See Michael Strokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1257-58 (2004) (deriving “an overriding principle of constitutional and national self-preservation . . . [t]hat may even, in cases of extraordinary necessity, trump specific constitutional requirements” from Article II).

also known as prosecutorial discretion.¹³¹ The non-enforcement power extends to the attorney general and United States attorneys “because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”¹³² Prosecutorial discretion not to enforce the law has received only limited judicial analysis and limitation.¹³³

Perhaps most prominently, in *Heckler v. Chaney*, the Supreme Court established that, if an agency decides *not* to enforce the laws, courts must presume that such decisions are *not* subject to judicial review.¹³⁴ The case involved a challenge to the Food and Drug Administration’s (FDA) refusal to enforce federal prohibitions on “misbranding” drugs or allowing “unapproved use of an approved drug.” The plaintiffs were incarcerated individuals who had been sentenced to death by lethal injection under the laws of the States of Oklahoma and Texas. The drugs used had not been authorized for that purpose by the FDA. They sought to challenge the FDA’s decision not to enforce the law against Oklahoma. The case was brought under APA, which contains a statutory exception to judicial review of agency actions that are “committed to agency discretion.” The FDA argued that this exception applied to decisions not to enforce the law—non-enforcement decisions are committed entirely to the agency’s discretion, so courts cannot review them.

The Supreme Court, in a decision authored by Chief Justice Rehnquist, sided with the FDA, observing that the Take Care Clause recognizes that the “faithful[]” execution of the law does not require “act[ing] against each technical violation of the statute” that an agency is charged by Congress with administering.¹³⁵ A charging decision involves a balancing of “a number of factors” within an agency’s expertise, the Court reasoned, including “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and . . . whether the agency has enough resources to undertake the action at all.”¹³⁶ The Court compared an agency’s exercise of enforcement discretion with that of a criminal prosecutor, a job

131. See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (stating that “the decision of a prosecutor in the Executive Branch not to indict [is] a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed’”).

132. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996); see also *United States v. Batchelder*, 442 U.S. 114, 124 (1979); *Wayte v. United States*, 470 U.S. 598, 607-08 (1985).

133. See *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (“[T]he courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.”); see also *Batchelder*, 442 U.S. at 124 (noting that “the decision to prosecute is particularly ill-suited to judicial review”).

134. *Heckler*, 470 U.S. at 831.

135. *Id.*

136. *Id.*

description that reflects the essence of executive power.¹³⁷

In a concurring opinion, Justice Brennan outlined a number of contexts in which nonenforcement decisions would not be immune from judicial review, including where “an agency engages in a pattern of nonenforcement of clear statutory language,” or in the case of “nonenforcement in return for a bribe.”¹³⁸ Similar limitations can be presumed in the context of criminal cases, including if a president were to use the Article II power to commit a crime.¹³⁹ In a separate concurrence, Justice Marshall noted “the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action.”¹⁴⁰

The competing *Heckler* opinions suggest that a functionalist approach to the constitutionality of unfettered prosecutorial power—whereby courts weigh heavily the normative, policy effects rather than black letter law—is unavoidable, as the susceptibility of sitting presidents to criminal prosecution is not addressed in the Constitution’s text. Michael Stokes Paulsen has accordingly posited that “[t]he Constitution itself embraces an overriding principle of constitutional and national self-preservation that operates as a meta-rule of construction for the document’s specific provisions and that may even, in cases of extraordinary necessity, trump specific constitutional requirements.”¹⁴¹ The question becomes what factors or interests operate to preserve the Constitution on a meta-basis, and thus which should be enforced above all others.

Proponents of an extreme version of the unitary executive might posit that virtually unlimited presidential power is necessary under certain circumstances, such as “to successfully prosecute [a] war.”¹⁴² Yet the Supreme Court has elsewhere acknowledged that the president’s non-enforcement power has the potential for both individual and institutional abuse, necessitating constitutional limitation.¹⁴³

137. See *id.* at 832-33; *cf. Armstrong*, 517 U.S. at 465 (recognizing that exercises of prosecutorial discretion in criminal cases involve consideration of “[s]uch factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan”) (quoting *Wayte*, 470 U.S. at 607).

138. *Heckler*, 470 U.S. at 839 (Brennan, J., concurring).

139. But see generally Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1537-43 (1981).

140. *Heckler*, 470 U.S. at 851 (Marshall, J., concurring).

141. Paulsen, *supra* note 130, at 1257.

142. See, e.g., John C. Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 566 (2007) (“[T]he President possesses the constitutional authority as Commander-in-Chief to engage in warrantless surveillance of enemy activity, even communications entering or leaving the United States, to successfully prosecute the war.”).

143. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (“There is no doubt that the breadth of discretion that our country’s legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise.”); see also

A sounder approach to constitutional preservation would accordingly focus on accountability for *all* government contexts—including (if not especially) the president. Courts have indicated that both enforcement and non-enforcement determinations may not be immune from judicial review if a prosecutorial decision is “vindictive” or “retaliatory,” and if prosecutors use false promises to induce guilty pleas.¹⁴⁴ The Supreme Court has also held that prosecutors cannot make charging or declination decisions in ways that violate constitutional rights, such as equal protection.¹⁴⁵

Acknowledging that prosecutorial discretion is nonetheless broad, scholars have carved out a category of decision-making that could be categorically improper: prosecutorial nullification.¹⁴⁶ As Roger Fairfax explains, whereas “[a] prosecutor can decline, for any reason or no reason at all, to proceed against an individual even though there is likely sufficient evidence to convict,” prosecutorial nullification includes circumstances where a prosecutor “might determine that the *application* of a law is unwise or unfair.”¹⁴⁷ The OLC memos on presidential immunity nullify all federal criminal laws—regardless of the strength of the facts showing that a crime was committed—based on the job description of the would-be defendant. This is not the exercise of prosecutorial discretion on a case-by-case basis, but a categorical refusal to enforce the law—with no limitations. The OLC memos do not leave space for addressing crimes that work violations of constitutional rights, presidential actions through DOJ that are vindictively motivated, and actions that are retaliatory.

Nor do their analyses acknowledge that, by refusing to enforce any crimes against a sitting president, congressional intent to prohibit and deter certain criminal conduct is undermined. As Cass Sunstein has explained, although

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) (“The Executive, except for recommendation and veto, has no legislative power.”).

144. See *Heckler*, 470 U.S. at 840 (Marshall, J., concurring); see also Blackledge v. Perry, 417 U.S. 21, 28 (1974) (holding that potentially vindictive exercises of prosecutorial discretion are impermissible); *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984) (holding that retaliatory use of prosecutorial discretion is intolerable); *Santobello v. New York*, 404 U.S. 257, 262 (1971) (limiting prosecutorial discretion to induce guilty pleas with false promises); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980) (extending judicial review of prosecutorial discretion to agency non-enforcement decisions motivated by improper or illegal factors and noting that “the decision to enforce—or not to enforce—may itself result in significant burdens on a . . . statutory beneficiary”).

145. See *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (finding selective enforcement unconstitutional on equal protection grounds); *Adams v. Richardson*, 480 F.2d 1159, 1164 (D.C. Cir. 1973) (finding that an agency’s non-enforcement decision constituted an abdication of statutory duty and upholding an injunction to “assure that the agency properly construes its statutory obligations, and that the policies it adopts and implements are consistent with those duties and not a negation of them”); see also *In re Aiken Cnty.*, 725 F.3d 255, 266 (D.C. Cir. 2013).

146. See generally Roger Fairfax, *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1243 (2011) (“A prosecutor . . . [m]ight decline a meritorious prosecution simply because he or she disagrees with the applicable law or its application in the particular case.”).

147. *Id.* at 1254.

execution of the laws “is entrusted to the executive, . . . [t]he ‘take Care’ clause is a duty, not a license; it imposes an obligation on the President to enforce duly enacted laws. If judicial involvement is based on a statutory violation by the executive, review promotes rather than undermines the separation of powers, for it helps to prevent the executive branch from ignoring congressional directives.”¹⁴⁸ A co-equal separation of the powers of the federal government assumes that respect amongst the branches for the coordinate powers of the other two. Legislation reflects popular will, so there is a strong argument that the president cannot wholesale sidestep his obligation to enforce the law, especially if the circumstances suggest that he is doing so for his own political gain or for revenge.

As noted at the outset, this Article’s aim is not to make definitive conclusions regarding the strength of the OLC memos’ analyses. The question it addresses is whether they warrant the extreme deference that DOJ, media commentators, academics and the general population bestow on them as if they had the force of law. Because they operate as a gloss on the federal criminal laws and the Constitution itself, this Article argues that, at a minimum, a rigorous application of the exceptions to unlimited prosecutorial discretion is warranted before—as a matter of constitutional law—they can reasonably be given such binding effect.

B. The OLC Memos as Non-Legislative Rules Under the APA

The second possible legal frame for evaluating the relative “force of law” established by the OLC memos opining on presidential immunity from criminal process is through the APA. The APA recognizes that agencies have the power to issue rules interpreting the law or establishing agency policy—rules that are often referred to as “non-legislative” rules or agency “guidance.” Courts have further held, however, that if agencies issue non-legislative rules that in fact function as rules with the “force of law,” they violate the APA.¹⁴⁹ The question thus becomes whether, applying this standard, the OLC memos operate with the force of law. The short answer appears to be that they *do* function as if they have the force of law. As such, they would violate the APA’s rulemaking provisions if viewed through its interpretive lens. If a court were to weigh in under the APA, it would thus likely find that the memos are *not* legally binding on any agency absent evidence of the contrary intent of Congress.

Section 553 of the APA sets forth the procedures under which an agency that has authority delegated from Congress can create rules with the force of law—known colloquially as “regulations,” which are codified in the Code of Federal Regulations (C.F.R.).¹⁵⁰ In *United States v. Nixon*, the Supreme Court held that,

148. Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 669-70 (1985).

149. *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 97 (2015).

150. 5 U.S.C. § 553.

so long as a regulation remains in effect (in that case, the regulation created and gave power to a special prosecutor) the executive branch is bound by and must follow it, including the president.¹⁵¹ More broadly, *Nixon* stands for the proposition that duly-promulgated regulations have the force of law, that is, they function as acts of Congress even though Congress itself did not enact them. (Of course, Congress can supersede regulations by legislation.)

In addition, the Supreme Court has long made clear that the argument *against* handing off legislative power to an executive branch agency—known as the non-delegation doctrine¹⁵²—has no bite.¹⁵³ For decades, litigants have challenged the legitimacy of agency regulations on the theory that only Congress can make laws. For the most part, those arguments have failed. From the Supreme Court’s standpoint, Congress can hand off the legislative baton to an agency if the legislation includes an “intelligible principle” to guide the agency’s exercise of its power to issue regulations pursuant to the statute. If Congress gives an agency instructions for rulemaking, in other words, the handoff of legislative power does not violate Article I or the Constitution overall.¹⁵⁴ The Supreme Court has held that statutory guidance as broad as a directive to regulate “in the public interest” is sufficiently intelligible to pass constitutional muster.¹⁵⁵

That said, there are limits on agencies’ ability to issue regulations with the force of law. The first is that Congress must have authorized the agency to exercise such power in the statute creating the agency and granting it authority in the first instance. The second is § 553 of the APA itself, which requires that agencies apply the notice-and-comment process or, if statutorily authorized, the formal rulemaking process in order to enact rules that carry the force of law.¹⁵⁶ In this instance, the OLC memos went through neither and there is no indication that Congress explicitly exempted the OLC from the APA for purposes of making rules with the force of law.

To be clear, § 553(c) of the APA sets forth a process for making rules with the force of law that includes “notice,” and “an opportunity to participate in the rule making” by “interested parties,” i.e., the comment process.¹⁵⁷ Oddly enough, the comment process is a uniquely democratic requirement that allows regular people to weigh in on proposed rules with the ultimate force of law, regardless

151. 418 U.S. 683, 696 (1974).

152. Article I of the Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” U.S. CONST. art. 1, § 1. The Supreme Court has interpreted this to mean that Congress may not transfer to another branch “powers which are strictly and exclusively legislative.” See *Gundy v. United States*, 139 S. Ct. 2116, 2119 (2019) (plurality opinion).

153. The Supreme Court has only twice employed the non-delegation doctrine to invalidate laws. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-38 (1935); *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 433 (1935).

154. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

155. *Gundy*, 139 S. Ct. at 2127-28 (2019).

156. 5 U.S.C. § 553.

157. *Id.* § 533(c).

of expertise. The APA goes on to provide that “[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.”¹⁵⁸ The statement of basis and purpose is rarely concise, because the provisions for judicial review of agency rulemakings under § 706 of the APA, as interpreted by the Supreme Court in *Dep’t of Motor Vehicles v. State Farm*, effectively requires that agencies account for important comments in their justifications for a final rule under the “hard look” or “arbitrary and capricious” standard of review.¹⁵⁹ Alternatively, if required by the act enabling the agency to engage in rulemaking, the agency must conduct a fact-finding hearing under §§ 556 and 557 in order to make a rule with the force of law—a laborious process known as formal rulemaking.

Section 553 goes on to provide that its notice-and-comment requirements do not apply “when notice or hearing is required by statute . . . to interpretative rules[or] general statements of policy . . .” *Interpretive rules* generally clarify or interpret the nature of the agency’s statutory authority; they are akin to legal memos by the agency’s lawyers describing their understanding of what a statute requires. And if a statute requires a regulated entity to take a particular action, an agency can clarify that requirement by an interpretive rule.

But an agency cannot use an interpretive rule to create a new requirement that is not grounded in the statute itself. In other words, it cannot make rules with the force of law through the looser process of issuing an interpretive rule. The judicial test for determining if an interpretive rule has the force of law is sometimes called the “new duty” test—if an interpretive rule’s alleged “clarification” of a rule is in fact creating a new obligation on a regulated party that would not exist but for the rule, then it is not binding on the regulated community unless it goes through notice-and-comment.¹⁶⁰

Take, for example, the Animal Welfare Act, which authorizes the Secretary of Agriculture to establish standards “to govern the humane handling, care, treatment, and transportation of animals by dealers.”¹⁶¹ Imagine that the Secretary issues a memorandum stating that, for “dangerous animals,” facilities that house the animals must “include a perimeter fence at least fifteen feet high.” The mandate that dealers build fifteen-foot fences does not arise from the statute, but from the memorandum. Accordingly, a court will likely deem the memorandum invalid and unenforceable under the APA. Dealers cannot, as a matter of law, be bound by the fence requirement unless the agency undergoes notice-and-comment and, for that matter, unless its resulting regulation is upheld (assuming it is challenged) in court.¹⁶²

158. *Id.*

159. 463 U.S. 29, 45 (1983).

160. *See Metro. Sch. Dist. v. Davila*, 969 F.2d 485, 489 (7th Cir. 1992).

161. 7 U.S.C. § 2143(a) (1994).

162. In general, there are two standards that apply to agency rules in litigation: hard look review, which is essentially a deferential review of whether the agency’s rule is consistent with the factual record considered by the agency, and also review under the seminal case,

Alternatively, the OLC memoranda could be exempt from notice-and-comment if they qualify as *policy statements* within § 553’s exceptions.¹⁶³ Agencies issue policy statements in order to advise the public of how they intend to exercise their discretionary authority to enforce the law within their respective statutory mandates.¹⁶⁴ For example, DOJ issued a policy statement in the form of guidance on how it intends to enforce marijuana possession laws, stating in 2013, for example, that “in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department’s enforcement priorities”¹⁶⁵

As with interpretive rules, however, agencies cannot create rules with the force of law—also known as “legislative” rules—under the auspices of identifying policy priorities. Courts use a cousin of the new duty test—the “binding effects test”—to distinguish policy statements from improperly-enacted legislative rules.¹⁶⁶ If an agency states in a policy memorandum that its enforcement personnel “must” take some action given certain facts, then a court will likely conclude that the agency has done more than announce a policy; it is imposing a new rule with binding effects, which it cannot do through a guidance document. Alternatively, an agency might inform the regulated community that it “should” take certain steps to avoid an enforcement action. Courts will have to determine whether that guidance is in fact binding—an analysis that considers “whether a purported policy statement genuinely leaves the agency and its decision makers free to exercise discretion.”¹⁶⁷

Consider now the OLC memoranda regarding presidential immunity from the criminal process. Of course, they were not promulgated pursuant to notice-and-comment rulemaking, so the question is whether they together qualify as a valid non-legislative rule. An interpretive rule cannot be binding if it creates a new duty.¹⁶⁸ On their face, the OLC memos are merely interpreting Article II of

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, which looks to whether rules are consistent with the statutory mandate. *Chevron* is an exercise in statutory construction—not record review. Rules that depart from the language of statutory mandate are struck down. If the statutory language is ambiguous in the first place, agencies get deference; courts applying *Chevron* do not review agency constructions of ambiguous statutes *de novo*, so long as Congress intended the agency to have interpretive authority in the first instance. 467 U.S. 837, 867 (1984). The hypothetical was borrowed from WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES 353-54 (5th ed. 2014).

163. See 5 U.S.C. § 553(b)(3)(A).

164. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n. 3 (1947).

165. See Memorandum from James M. Cole, Deputy Att’y Gen., Dep’t of Just., to all U.S. Att’ys 3 (Aug. 29, 2013), <https://perma.cc/7KSW-D6GH>.

166. See *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987).

167. *Id.* at 1046 (quoting *Texaco, Inc. v. Fed. Power Comm’n*, 412 F.2d 740, 744 (3d. Cir. 1969)).

168. An interpretive rule should “only remind affected parties of existing duties.” *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984). The imposition of new

the Constitution. But it is clear, given the Mueller Report's statements in this regard, that they operate to confine federal prosecutors' discretion to act on an entire category of would-be defendants, i.e., sitting presidents, regardless of whether facts give rise to a chargeable crime. Prosecutors within DOJ are functionally bound by the memos as edict—they lack the discretion to depart. Thus, the memos cannot be fairly categorized as simply explaining the Constitution, which itself—as the memos themselves concede—creates no prosecutorial ban on indicting presidents.¹⁶⁹

Alternatively, it could be argued that the OLC memos merely articulate a policy regarding the exercise of prosecutorial discretion over a certain category of potential criminal wrongdoing. Here again, however, the argument breaks down as a matter of the APA, because there is no discretion to depart from it. To be sure, as explained below, the role of prosecutors in law execution is—as Justice Scalia suggested in his dissent in *Morrison v. Olson*, which upheld the statute creating the Office of the Independent Counsel Kenneth W. Starr—perhaps the most fundamental exercise of Article II enforcement power.¹⁷⁰ An agency exercising enforcement power over a statutory and regulatory regime that does not implicate criminal conduct is exercising a version of enforcement power. But the president's Article II power is not in play to an equivalent degree with regulatory activity by agencies.

There is an additional distinction in the administrative law context that springs from *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*¹⁷¹: The power of regulatory agencies comes from Congress. *Chevron* was, of course, the groundbreaking case that held that agencies get deference in construing statutes that they are charged with administering. In other words, courts do not interpret statutes de novo if the agency has already weighed in through a regulation, for example. The reason stems in large part from Congress's prerogative to hand off the legislative baton to a particular agency in the first place. Without that handoff, there is no deference. But if Congress gave an agency the authority to enact rules with the force of law, courts need to defer to the agency's interpretation of unclear statutory language when it promulgates those rules.

The Supreme Court has recognized that *Chevron* deference may be proper even for non-legislative rules, such as interpretive rules or policy statements, but only if the statutory text and legislative history indicates that Congress intended the agency to get deference through such actions.¹⁷² The OLC memos regarding presidential immunity do not interpret an act of Congress; they interpret the Constitution itself. To adapt the precise framework of APA review to the OLC

duties makes a rule legislative, and thus triggers the notice-and-comment requirement of which interpretive rules are exempt. *See id.*; 5 U.S.C. § 553(b)(3)(A).

169. 2000 OLC Memo, *supra* note 6, at 226.

170. *See Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

171. 467 U.S. 837 (1984).

172. *See Barnhart v. Walton*, 535 U.S. 212, 220 (2002).

memos would require an inquiry into whether the Framers of the Constitution intended attorneys within the executive branch to receive deference in their interpretations of constitutional questions relating to the scope of the president’s power relative to the two other, co-equal branches’ power of oversight. Of course, DOJ did not even exist at the time of the original Constitution’s ratification, so this enterprise is an exercise in fiction-making (which is, for that matter, a legitimate critique of *Chevron*’s progeny, as well, when it comes to divining congressional intent). Put another way, there is no statutory mandate and authority against which to judge the exercise of DOJ’s decision not to prosecute presidents for crimes in office.

In sum, the APA does not support treatment of the OLC memos as having the force of law. If the APA applied to DOJ (which it does not), the memos would likely be struck down in court.

III. PROPER SOURCES OF LAW FOR IDENTIFYING THE SCOPE OF CRIMINAL ACCOUNTABILITY FOR A PRESIDENT IN OFFICE

This Part argues as a matter of basic separation of powers analysis that either Congress or the courts—and not DOJ—are the proper constitutional sources of law for purposes of defining the scope of prosecutorial power over a sitting president. This Part also discusses the role and power of federalism and the individual states’ ability to enforce their own criminal laws notwithstanding a pronouncement of presidential immunity by DOJ.

A. Congress’s Power as a Source of Law

The leading case on the power of Congress vis-à-vis the president is *Youngstown Sheet and Tube Co. v. Sawyer*.¹⁷³ In his famous concurrence, Justice Jackson explained that “the Federal Government[,] as a whole, possesses only delegated powers. The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand.”¹⁷⁴ To lodge all power over investigations and prosecutions of the president in the executive branch itself to the exclusion of the other branches undermines the system of separated powers that the Supreme Court underscored in *Youngstown Sheet and Tube*.

In 1952, the United Steelworkers Union announced that its members were going to go on a nationwide strike for higher wages.¹⁷⁵ This occurred during the Korean War, and the Truman Administration was worried about inflation.

173. *Youngstown* has been called “the most celebrated instance of the issuance of compulsory process against Executive officials.” William H. Harbaugh, *The Steel Seizure Reconsidered*, 87 YALE L.J. 1272, 1282 (1978) (quoting *Nixon v. Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) (holding that *Youngstown* destroyed the notion that the President could not be party to a suit)).

174. 343 U.S. 579, 640 (1952) (Jackson, J., concurring).

175. See *Youngstown Sheet & Tube Co.*, 343 U.S. at 579, 583.

Truman believed that a strike of all the major steel producers could hurt the defense contracting industry because weapon production requires steel.¹⁷⁶ To avoid a strike, Truman issued an executive order to seize control of the steel mills to keep them running.¹⁷⁷ The steel companies sued, arguing that the president lacked the power to take private property without congressional authorization.¹⁷⁸ Congress had not declared war, so there was no special circumstance that might have triggered greater presidential powers.¹⁷⁹

The Supreme Court sided with the steel companies, holding that Truman had acted unconstitutionally.¹⁸⁰ The justices issued seven separate opinions, reflecting four distinct views of the relationship between executive and legislative power. The first theory, posited in the majority opinion by Justice Black, is that the president can only act if there is clear constitutional or statutory authority. The second theory is that the president can do what he wants so long as he or she steers clear of another branch's powers. In a concurring opinion, Justice Douglas agreed that Truman acted unconstitutionally, but not because he exercised legislative power. Rather, by taking this action, the president was spending money that was not authorized under the Spending Clause.¹⁸¹ The third theory, posited by Justice Jackson, agrees that the president has implied powers, but if Congress contradicts them by statute—even by implication—the president loses.¹⁸² The fourth view would hold up executive power above that of Congress, and seemingly put the presidency above the other branches by confining the scope of the judiciary's power to check a president if a case reached the courts.¹⁸³

Although all of these four views from *Youngstown Sheet & Tube* can be found sprinkled in later Supreme Court cases, there is a prevailing theme among them: Congress matters as a co-equal check on presidential power. Under theory one, the president can execute the laws and must take care that the laws are faithfully executed absent congressional limitations. Article II leaves the president with discretion to decide on a case-by-case basis which individuals to investigate and prosecute, but he cannot refuse to enforce categories of laws against categories of people altogether without statutory authority.

Under theory two, the president can excise himself from criminal indictment

176. *See id.*

177. *See id.*

178. *See id.* at 579.

179. *See id.* at 587.

180. *See id.* at 579, 589.

181. *See id.* at 631-632 (Douglas, J., concurring).

182. *See id.* at 579, 640 (Jackson, J., concurring).

183. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 4.1 (5th ed. 2015). Chief Justice Roberts embraced this theme of presidential power in his majority opinion in *Trump v. Hawaii* by ignoring Trump's public statements regarding the "travel ban," which limited individuals' entry into the United States if they were from certain countries with a large percentage of Muslims. 138 S. Ct. 2392, 2401, 2403 (2018). So long as at least one of the stated rationales for the president's action on immigration was legitimate, Roberts indicated, it is likely constitutional. *Id.* at 2423.

and prosecution unless it interferes with a coordinate power of Congress—here, the power to pass criminal statutes.

Under theory three, non-enforcement of criminal laws against a president is an implied power that the president can exercise unless Congress says no, which would require the Congress to again pass a law like the Ethics in Government Act—a post-Watergate reform that gave rise to the Starr probe—which was upheld as a matter of the separation of powers by the Supreme Court in *Morrison v. Olson*. Although that law lapsed, only under theory four of *Youngstown* would the president have implied power to refuse to investigate or prosecute himself.

In *Morrison*, the Supreme Court upheld the statute’s controversial limitations on the president’s power to appoint and remove the independent counsel despite the Appointments Clause, the Take Care Clause, and the Vesting Clause of Article II. The Court’s rationale was, first, that the position of the independent counsel was that of an “inferior” (versus principal) officer under Article II because the attorney general was positioned between her and the president.¹⁸⁴ Thus, the statutory limitations on the president’s power to appoint (it was done by a three-judge panel) and remove (in the hands of the attorney general and only for cause) did not impede the president’s powers under the Appointments Clause.

Second, the majority held that the independent counsel’s limited jurisdiction—she worked for a finite period on a finite set of questions, unlike a regular U.S. attorney—was “sufficient to establish that [she] is an ‘inferior’ officer” meaning that the implementation of the statute did not interfere with the “core . . . functions” of the president.¹⁸⁵ Notably, the Court did not define what the “core functions” of a president are, and the term is undefined in the Constitution.

In a brilliant dissent, Justice Scalia lamented that the majority had failed to reconcile the core functions argument with the type of power the independent counsel wielded: prosecutorial power, which is at the heart of what it means to execute the laws.¹⁸⁶ In Scalia’s view, the statute was per se unconstitutional precisely because it touched on prosecutorial powers at the apex of Article II prerogatives. Although some have suggested that Scalia’s opinion had the better of the argument, the majority of the Court sided with Congress. *Morrison* thus stands as a stark statement that Congress *can* constitutionally establish by statute a structure for cabinining and directing the execution of prosecutorial power against a sitting president whose conflicts of interest with DOJ could otherwise make him above the law. Congress should act again.

184. See *Morrison v. Olson*, 487 U.S. 654, 695 (1988).

185. See *id.* at 669, 672, 693.

186. See *id.* at 705 (Scalia, J., dissenting) (noting that the Vesting Clause of Article II “does not mean *some* of the executive power, but *all* of the executive power”) (emphasis in original).

B. Courts' Power as a Source of Law

Youngstown Sheet & Tube was a judicial opinion resolving a question regarding the appropriate separation of powers between the other two branches. The action was brought by private parties whose property rights under the Due Process Clause of the Fifth Amendment were at stake, so there was no question of standing to sue. Nor did the political question doctrine operate to halt the exercise of the federal courts' jurisdiction in the same way that it did according to the Supreme Court majority in *Rucho v. Common Cause*—the political gerrymandering case in 2019, for example.¹⁸⁷ In short, the federal courts' role under *Marbury v. Madison* is to say what the law is and enforce Constitution, including the Bill of Rights, and judicial rulings bind the other two branches. Certainly, then, federal courts are better situated than prosecutors (who answer to the president) to perform the role of determining the scope of incumbent presidents' accountability to criminal laws.

It is nonetheless difficult to conceive of how a justiciable dispute might come before the federal courts on the question of indicting a sitting president, absent an action from DOJ. Were DOJ to issue an indictment of the president, the question of its constitutionality would arise by the president challenging the indictment under Article II.

Yet DOJ's categorical non-enforcement posture itself renders the question virtually immune from judicial review if Congress does not act. No federal prosecutor will bring that case. If Congress were to act by passing a statute governing investigations of presidents, the White House occupant could again bring an action to challenge the constitutionality of that law. But as *Heckler* indicates, it is exceedingly tough to successfully bring a lawsuit asking a court to order the executive to do its job—here, to enforce the criminal laws against the boss of that branch, the president.

It is conceivable that a private person who is prosecuted for similar conduct could raise the question of presidential immunity from criminal indictment as a defense in a criminal action or perhaps even bring an affirmative civil claim against the government on equal protection grounds—the argument being that the OLC policy means that the person holding the office of the president is uniquely given favors that regular people in the criminal justice system do not. Even if the plaintiff in such an action were a member of a protected class for purposes of equal protection, however, any showing of an intent on the part of DOJ to discriminate on the basis of protected status would run into the obvious defense: the president has *sui generis* Article II powers that account for his special position. That status—and not discrimination—accounts for his immunity from prosecution. Moreover, it would be difficult to identify a would-be plaintiff in the first instance whose factual case is sufficiently similar to a president's so as to make out a *prima facie* equal protection violation. To the

187. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

extent that presidential wrongdoing involved actions taken in the capacity as president, no other person on the planet wields similar powers, so again, he is *sui generis* for purposes of such an equal protection claim.

Practicalities aside, as discussed in Part V, *Marbury* does indicate that courts may use coercive powers to force coordinate branch officials to do their jobs in the name of the Constitution. Federal judges enjoy life tenure and salary protection, after all, which certainly renders them more neutral and thus better suited than prosecutors within the president’s chain-of-command for making determinations of the immense gravity that presidential immunity entails. A court could apply the political question doctrine to eschew the issue and send it back to Congress to work out with the president; that, perhaps, is the best resolution in the long run. But it does not point to the propriety of prosecutors-as-constitutional-arbiters, i.e., to treating OLC memos as if they were federal court decisions backed up by the constitutional authority to say what the law is. That solution instead points to Congress passing a law to govern DOJ practice. That law, again, would wind up in the courts (unless the Supreme Court were to refuse to exercise jurisdiction, which would be unfortunate for the rule of law and the separation of powers).¹⁸⁸ Unlike prosecutors, Congress is democratically accountable to the electorate, while federal courts, per *Marbury*, are particularly well-postured to rule on questions of constitutional import (cases like *Rucho* notwithstanding).

In short, it barely warrants deep exposition and analysis to conclude that Congress is better suited to make constitutional policy governing the executive than prosecutors who answer to the president. And it is beyond peradventure that federal courts are better positioned to evaluate the constitutionality of congressional policy than are prosecutors, too. Yet the question of whether the OLC memos should be given deference—as if they carry the force of law, even though they are not legislation, regulations, or judicial decisions—is rarely even raised. The answer (that is, “yes”) has been merely presumed. Given the weightiness of that assumption for a functioning separation of powers, the time has come to challenge it.

C. Federalism and States’ Power as Sources of Law

Notably, OLC memos do not bind state prosecutors.¹⁸⁹ To the contrary, a United States attorney’s authority is limited to “his/her district” and “federal criminal matters.”¹⁹⁰ Even in the context of federal prosecutions, courts have held

188. See Comm. on Judiciary v. McGahn, No. 19-5331, 2020 WL 1125837 (D.C. Cir. Feb. 28, 2020) (finding that Congress lacks standing to move to compel compliance with subpoenas), *reh’g granted*; U.S. House of Representatives v. Mnuchin, No. 19-5176, No. 19-5331, 2020 WL 1228477 (D.C. Cir. March 13, 2020).

189. Walter Dellinger, *Indicting a President is Not Foreclosed*, LAWFARE (June 18, 2018, 7:00 AM), <https://perma.cc/ZH38-G48H>.

190. JM, *supra* note 61, at § 9-2.001.

that DOJ memoranda do not create rights on behalf of criminal defendants; nor can they be used to defend against an allegedly improper prosecution.¹⁹¹ OLC memos create no judicially cognizable standards, even as applied to federal prosecutors violating the DOJ policy.¹⁹² Accordingly, a president would be hard-pressed to use the memos to claim immunity against an indictment brought under state law.

But assuming for the sake of argument that a state attorney general were to gather facts sufficient to indict a president, there is no precedent for testing whether states would be in violation of Article II if an indictment moved forward.¹⁹³ When the Mueller Report became public in March 2019, there remained numerous additional federal and state investigations pending that implicated Donald Trump, his campaign, his family, and his holdings.¹⁹⁴ It is impossible to know whether the current lack of criminal action against Trump from state and local prosecutors is a result of insufficient evidence or political

191. See *United States v. Toombs*, 748 Fed. App'x 921, 922 (11th Cir. 2018), (quoting *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983)) (holding that DOJ memo does not create a cause of action “because, rather than establishing binding norms, the memorandum leaves prosecutors ‘free to consider the individual facts in the various cases that arise’”); see also *Ryder*, 716 F.2d at 1377 (explaining that the central inquiry to differentiate between a general policy statement and a rule is whether the agency action establishes a ‘binding norm’); *United States v. Wasserman*, 504 F.2d 1012, 1016 (5th Cir. 1974) (“find[ing] no basis for prohibiting prosecutions which violate internal Department of Justice policy memoranda” and therefore rejecting contention that the government prosecuted the defendants “in contravention of a Department of Justice policy memorandum”) (emphasis added); *United States v. Strong*, 844 F.3d 133, 136 (2d Cir. 2016) (holding that a DOJ memorandum does not confer any rights or impose constitutional standards for courts because it is “merely an internal guideline for exercise of prosecutorial discretion”) (citing *United States v. Ng*, 699 F.2d 63, 71 (2d Cir. 1983)).

192. See *Toombs*, 748 Fed. App'x 921.

193. Liz Zhuo, *Why Mueller Said He Couldn't Indict Trump, Explained*, VOX (July 24, 2019, 1:31 PM EDT), <https://perma.cc/V5BB-XXX4>.

194. For example, New York State's Department of Financial Services reportedly issued a subpoena to Aon, the Trump Organization's insurance broker after former Trump lawyer Michael Cohen testified in early 2019 that the company had inflated its assets to insurers. William K. Rashbaum & Ben Protess, *Trump Organization's Insurance Policies Under Scrutiny in New York*, N.Y. TIMES (Mar. 5, 2019), <https://perma.cc/4J9H-98GU>. New York's attorney general has reportedly looked into a number of matters relating to the Trump Organization, including a failed attempt to purchase the Buffalo Bills football team, William K. Rashbaum & Danny Hakim, *New York Attorney General Opens Investigation of Trump Projects*, N.Y. TIMES (Mar. 11, 2019), <https://perma.cc/C9BB-ZBML>, as well as what state prosecutors called a “shocking pattern of illegality” relating to the Donald J. Trump Foundation and its officers, Alan Feuer, *Trump Ordered to Pay \$2 Million to Charities for Misuse of Foundation*, N.Y. TIMES (Nov. 7, 2019), <https://perma.cc/6H9K-7QU7>. New York State and New York City officials have also reportedly been examining Trump's taxes, William K. Rashbaum & Ben Protess, *8 Years of Trump Tax Returns Are Subpoenaed by Manhattan D.A.*, N.Y. TIMES (Sept. 16, 2019), <https://perma.cc/DGT8-67DM>, while New Jersey's attorney general's office worked with the FBI to examine allegations that Trump's golf properties hired workers with fraudulent papers, Abigail Abrams, *Here Are the Other Investigations President Trump Still Faces*, TIME (Mar. 24, 2019, 5:48 PM), <https://perma.cc/6KNY-HV8Z>.

wariness.¹⁹⁵

At a minimum, the states’ exemption from the binding effects of OLC guidance underscores that the memos do not carry the force of law; they amount to legal advocacy on behalf of a client within the executive branch or, in theory, on behalf of the broader American populace. The memos do not have the legitimacy that results from full-throated advocacy, either, because—unlike in litigation—there is no lawyer on the other side positioned to exhaust competing arguments before a judge. For the OLC’s presidential immunity memoranda, the opposing counsel were the ethics lawyers who wrote competing memos for Jaworski and Starr. But even without a neutral decision-maker to break the analytical debate amongst the four memoranda, the OLC memos effectively became the law of the land for purposes of defining the president’s susceptibility to criminal and thus judicial accountability under the U.S. Constitution.

Unbounded by the OLC memos, state prosecutors and the states’ criminal laws are postured to play a pivotal role in teeing up a critical question of presidential accountability under the Constitution. The political implications for any state that would dare to indict a sitting president are surely incalculable.¹⁹⁶ Perhaps a federalism route to resolution of the constitutional question of whether presidents are immune from criminal liability is impractical.

IV. SHELVING THE OLC MEMOS AS A SOURCE OF LAW

Building on the foundations laid out in Part IV, this Part argues that Congress and, barring that, the courts should take the reins to resolve the open constitutional questions regarding the president’s immunity from criminal process. Congress did this once already, post-Watergate, with the passage of the Ethics in Government Act, which the Supreme Court upheld as constitutional in *Morrison v. Olson*. Thus, there is Supreme Court precedent shoring up Congress’s ability to legislate in this arena—setting aside whether the current Court would see the *Morrison* analysis differently today.

As an alternative to a judicial resolution, this Part picks up on now-Justice Kavanaugh’s seizure of a writ of mandamus as a means for forcing executive action in a case called *In re Aiken County*; indeed, the same mechanism for

195. See Garrett Epps, *The Only Way to Find Out If the President Can Be Indicted*, ATLANTIC (May 23, 2018), <https://perma.cc/Z9SY-LJYU> (“Presidential indictment and prosecution is, in a sense, the Schrödinger’s Cat of Article II. We just don’t know, and we won’t know, whether it’s allowed until we open the box—that is, until evidence leads some prosecutor to decide that a sitting president, in the interests of justice and national survival, must face indictment while in office.”); see also Alberto Gonzales, *Presidential Powers, Immunities, and Pardons*, 96 WASH. UNIV. L. REV. 905, 921-24 (2019) (noting the lack of judicial precedent establishing whether a state prosecutor could indict a sitting president and discussing the federalism concerns therein).

196. For example, the President can withhold federal funding from states that do not bend to political agendas. See Annie Correal *Trump Can Withhold Millions From ‘Sanctuary’ States, Court Rules*, N.Y. TIMES (Feb. 26, 2020), <https://perma.cc/HN3A-CGMM>.

addressing nonfeasance was at the heart of *Marbury v. Madison* itself. Given the widespread, sobering concern for the vitality of the separation of powers today, it may be necessary to invoke less popular levers of oversight—such as the use of mandamus—in order to protect the structure of government itself.

Of course, the solutions proposed here—which concededly amount to a usurpation of the OLC’s perceived power to create law under Article II—would have implications for the scope of presidential power, many of which were outlined in the OLC memos on presidential immunity in the first place. This Part concludes with a rebuttal of these concerns, which appear relatively quaint given the modern-day stresses on the existing constitutional structures for holding executive power accountable to the populace.

A. Legislative Solutions

The OLC memos were the subject of much agitation and stress throughout the Mueller investigation. Trump skeptics feared that the president would evade the criminal accountability that would befall regular people who are similarly situated. Others worried that Mueller would ignore the DOJ policy if the facts gave rise to actionable misconduct. In his report, Mueller cited the OLC memoranda as reason why he did not indict the president for obstruction of justice, and further indicated that it was for Congress to take steps, if any, based on the facts he uncovered. Congress did nothing about the Mueller report.

In the wake of the Watergate scandal, Congress passed a menu of reform legislation, covering everything from money in politics, ethics and transparency, to privacy protections, control over the federal budget, and oversight of the intelligence community.¹⁹⁷ One statutory reform was the Ethics in Government Act of 1978, which created the U.S. Office of Independent Counsel and tasked it with investigating high-level government officials, including the president.¹⁹⁸

The statute expired on June 30, 1999 and was replaced with DOJ regulations.¹⁹⁹ As a result, it was internal DOJ regulations—and not a statute enacted by Congress—that governed the appointment of Robert Mueller and the resulting investigation.²⁰⁰ Those regulations were not promulgated by notice and comment but, instead, by the attorney general unilaterally and according to statutory authority. 28 U.S.C. § 533 provides that “[t]he Attorney General may appoint officials . . . to detect and prosecute crimes against the United States” and “to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be

197. See generally Sam Berger & Alex Tausanovitch, *Lessons from Watergate: Preparing for Post Trump Reforms*, CTR. FOR AM. PROGRESS (July 30, 2018, 9:00 AM), <https://perma.cc/6UZR-GTUM>.

198. See George Packer, *The President is Winning His War on American Institutions*, THE ATLANTIC (Apr. 2020), <https://perma.cc/2HTZ-VZQ2>.

199. *A Brief History of the Independent Counsel Law*, *supra* note 19.

200. 28 C.F.R. § 600.1 (2020).

directed by the Attorney General.”²⁰¹ Hence, the special counsel regulations—including the provisions confining the attorney general’s ability to fire Robert Mueller except for cause—were subject to revision at the whim of the attorney general.

Under then-Deputy Attorney General Rod Rosenstein, who appointed Mueller when Jeff Sessions recused himself, an amendment to relieve the president of investigative scrutiny was unlikely. But once Attorney General William Barr—a Trump loyalist—was confirmed,²⁰² the regulations appeared insufficient to ensure that a criminal investigation begun by a special counsel into President Trump would continue. An attorney general is free under the regulations to simply decline to appoint a special counsel in the first instance. This scenario leaves all the spadework of fact finding to a fractured Congress operating without the benefit of a team of prosecutors, the FBI, and a grand jury with subpoena power to back up its investigative efforts.

Following Trump’s first impeachment and trial in the Senate, the problems with having members of Congress function as would-be prosecutors were laid bare: the factual record, by definition, was insufficiently developed, and the American public was ultimately left in the dark on critical details that a prosecutorial team would have uncovered.

For these reasons, it is incumbent on Congress to consider new reforms to avert a future constitutional meltdown in the face of another norm-defying president.²⁰³ To be sure, there is little appetite for a revised independent counsel law, perhaps across the political spectrum; the Ethics and Government Act was allowed to lapse due to a general consensus that the Whitewater investigation was a failed exercise.²⁰⁴ The question of how new legislation should be framed to address the problems with the special counsel regulations and the OLC memos is beyond the scope of this Article. But there are constitutional lessons to be learned from the prior law.

Specifically, the prior independent counsel law took both appointment and

201. 28 U.S.C. § 515(a) further provides: “The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrate judges, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.”

202. See David Rohde, *William Barr, Trump’s Sword and Shield*, NEW YORKER (Jan. 13, 2020), <https://perma.cc/UEW6-E2S7> (describing how Barr presented a sanitized summary of the Mueller Report to the public in an effort to clear President Trump of wrongdoing).

203. See Max Boot, *Trump Isn’t Just Violating Norms — He’s Also Breaking the Law*, WASH. POST (Apr. 25, 2019, 7:37 PM), <https://perma.cc/YVR4-TQ6W>.

204. See *The Constitutional Validity of the Ethics in Government Act*: Morrison v. Olson, 16 HOFSTRA L. REV. 65 (1987); see Jim Mokhiber, *A Brief History of the Independent Counsel Law*, PBS (May 1998), <https://perma.cc/ZGF2-DTGY>.

removal of the independent counsel out of the exclusive hands of the president.²⁰⁵ In *Morrison v. Olson*, the Supreme Court held that the statute nonetheless did not violate Article II's Appointments Clause on the theory that, due to the durational and subject matter limits on the scope of the independent counsel's authority, the statute did not interfere with the "core functions" of the president.²⁰⁶ Thus, *Morrison* took a major swipe at the notion of unbridled presidential power over the federal criminal justice system; Congress should bear this precedent in mind if and when it considers additional reforms that are badly needed to reinvigorate presidential accountability to the people.

Litigation would certainly arise if Congress were to attempt to legislatively codify, at a minimum, some version of the current DOJ regulations. A president's argument in that instance would be inherently self-serving, sounding something like: "My attorney general can confine my power to control a special prosecutor by issuing regulations, but Congress cannot." The obvious flaw with such an argument is that it lays bare the separation of powers problem that led to the Ethics in Government Act to begin with: The attorney general serves at the pleasure of the president so internal regulations that can be ignored or repealed by order of the president to evade an investigation into potential presidential wrongdoing are akin to no regulations at all.

The counterargument is that Congress—not DOJ—is a coequal branch of government with oversight authority vis-à-vis the executive branch, and nothing in the Constitution excises criminal legislation from that scope. Moreover, Congress created DOJ by statute and gave the attorney general her powers in the first place—much like it created the lower federal courts and defined their subject matter jurisdiction. The power to create DOJ and pass substantive criminal statutes implies the power to craft the scope of DOJ's authority as well as the mechanics of the administration of the statutory scheme.

All told, *Morrison* stands for the proposition that an effort by Congress to erect a statutory process for investigation and possible prosecution of the president that avoids the inherent conflict-of-interests with DOJ should pass constitutional muster to a significant degree. Congress must try its hand again at a solution to this recurring separation of powers problem.

B. Judicial Solutions

The paper has already mentioned the threshold barriers to getting the question of indicting a president before a court, including Article III standing and the political question doctrine. Assuming for the sake of argument that a plaintiff managed to survive a motion to dismiss, there is authority from the D.C. Circuit for a mandamus remedy to an agency's failure to execute the laws (*Heckler*

205. *See id.* (describing the authority of the attorney general to appoint and remove the independent counsel under the Ethics in Government Act).

206. *See Morrison v. Olson*, 487 U.S. 654, 672 (1988).

notwithstanding). Hence, if Congress does not take up its legislative prerogative to address this constitutional blind spot on behalf of the American people, there is some precedent for a federal court doing it instead.

In *In re Aiken County*,²⁰⁷ two States, entities and residents sought a writ of mandamus requiring the Nuclear Regulatory Commission (NRC) to implement the Nuclear Waste Policy Act²⁰⁸ with respect to nuclear waste storage at Yucca Mountain in Nevada. The law provides that the NRC “shall consider” license applications to store nuclear waste and “shall issue a final decision approving or disapproving” the application within three years of submission, with certain extensions allowed. The Department of Energy (DOE) filed an application in June 2008. Although Congress appropriated approximately \$11.3 million to fund the NRC’s licensing duties (which dissenting Judge Merrick Garland explained is not enough to execute its statutory obligations),²⁰⁹ the NRC did not process the application. In an opinion authored by then-Judge Kavanaugh, the court explained that “the Commission has simply shut down its review and consideration of [DOE’s] license application”; the case thus “rais[ed] significant questions about the scope of the Executive’s authority to disregard federal statutes.”²¹⁰

In Kavanaugh’s words, “[m]andamus is an extraordinary remedy that takes account of equitable considerations,” and “may be granted ‘to correct transparent violations of a clear duty to act.’”²¹¹ Moving on to “settled, bedrock principles of constitutional law,” he continued: “Under Article II of the Constitution and relevant Supreme Court precedents, the President must follow statutory *mandates* so long as there is appropriated money available and the President has no constitutional objection to the statute.” If the objection is constitutional, “the President may decline to follow the law unless and until a final Court order dictates otherwise. But the President may not decline to follow a statutory mandate . . . simply because of policy objections.”²¹²

This standard is significant. If the OLC Article II immunity memos constitute constitutional *objections* to enforcing the criminal laws against presidents—which they seem to be—then *In re Aiken County* indicates that a federal court must resolve that constitutional objection. If, on the other hand, they are mere *policies* governing the job descriptions and limitations of DOJ officials and employees, then the President cannot simply rely on the memos as grounds

207. 725 F.3d 255 (D.C. Cir. 2013).

208. 42 U.S.C. § 10134(d).

209. *In re Aiken Cnty.*, 725 F.3d at 269 (Garland, J., dissenting).

210. *Id.* at 257, 258.

211. *Id.* at 258 (quoting *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (citing *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2260 n. 10 (2013)) (noting that if the federal Election Assistance Commission did not act on a state’s statutorily permitted request, “Arizona would be free to seek a writ of mandamus to ‘compel agency action unlawfully withheld or unreasonably delayed’” (quoting 5 U.S.C. § 706(1))).

212. *In re Aiken Cnty.*, 725 F.3d at 386.

for refusing categorically to enforce the criminal laws. In the latter instance, the President's failure to enforce the laws would—or should—be a justiciable question that a court must resolve.²¹³ Either way, the question whether the Constitution would tolerate indicting a president cannot begin and end with DOJ alone.

To be sure, the court noted that under the Vesting, Oath of Office, and Take Care Clauses “the President possesses significant independent authority to assess the constitutionality of a statute.”²¹⁴ The OLC, acting on behalf of a president, arguably determined that the federal criminal statutes are unconstitutional as applied to a sitting president. As Kavanaugh noted, “Congress speaks through the laws it enacts.”²¹⁵ But the President is not bound by Congress's assessment of the constitutionality of statutes, and vice versa. “Rather, in a justiciable case, the Supreme Court has the final word on whether a statutory mandate or prohibition on the Executive is constitutional.”²¹⁶

Framed this way, i.e., as an assessment of the constitutionality of the federal criminal laws as applied to a sitting president, it becomes evident that—absent a decision by the Supreme Court on the immunity question—the OLC memos cannot be *legally* binding on individual U.S. attorneys or prosecutors. (Of course, any proposed indictment would be vetted by the attorney general, so as a practical matter it would likely be “killed” within DOJ bureaucracy based on the OLC memos as a matter of policy anyway.) But, as in *In re Aiken County*, the OLC memos are not framed so as to challenge the federal criminal laws as unconstitutional.

Kavanaugh turned next to the key question raised by the Article II immunity memos: “[I]t is also true that, under Article II, the President possesses a significant degree of prosecutorial discretion not to take enforcement actions against violators of a federal law.”²¹⁷ Thus, “Congress may not *mandate* that the President prosecute a certain kind of offense or offender.”²¹⁸ Yet importantly, Kavanaugh tied the prosecutorial declination power to individual liberties—not

213. *But see id.* at 265 n. 10 (noting that, although “the President may disregard a statutory mandate or prohibition on the Executive only on constitutional grounds, not on policy grounds . . . the President may exercise the prosecutorial discretion and pardon powers on any ground—whether based on the Constitution, policy, or other considerations”). A policy of insulating oneself from prosecution is of a different nature, however, because of its separation of policy implications—as Judge Kavanaugh indicates in *In re Aiken County* in assessing a different factual scenario.

214. *Id.* at 261 (citing U.S. CONST. art. II, § 1, cl. 1 (Executive Power Clause); citing U.S. CONST. art. II, § 1, cl. 8 (Oath of Office Clause); citing U.S. CONST. art. II, § 3 (Take Care Clause)).

215. *In re Aiken Cnty.*, 725 F.3d at 387.

216. *Id.* at 261 (citing, *inter alia*, *Youngstown Sheet & Tube Co.*, 343 U.S. 579, 639 (1952) (Jackson, J., concurring)); *see also* *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

217. *In re Aiken Cnty.*, 725 F.3d at 262.

218. *Id.* at 263 (noting that the president's “absolute authority to issue a pardon at any time after an unlawful act has occurred” subsumes the lesser power to decline to prosecute) (emphasis in original).

raw Article II power. He wrote:

One of the greatest *unilateral* powers a President possesses under the Constitution, at least in the domestic sphere, is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior—more precisely, the power either not to seek charges against violators of a federal law or to pardon violators of federal law. The Framers saw the separation of the power to prosecute from the power to legislate as essential to preserving individual liberty.²¹⁹

That the prosecutorial declination power “operate[s] as an independent protection for individual citizens against the enforcement of oppressive laws that Congress may have passed” distinguishes routine declination decisions from a wholesale ban on prosecuting sitting presidents, who are not in a vulnerable position in relation to an overbearing government. Quite the opposite is true: Presidents have an extraordinary amount of power that must be bridled in order to secure individual liberties. This is precisely why, as *In re Aiken County* indicates, judicial review is a necessary prerequisite to a criminal non-enforcement policy, within the Justice Department, for presidents.

Kavanaugh goes on to note that “[t]he remedy for presidential abuses of the power to pardon or to decline to prosecute comes in the form of public disapproval, congressional ‘retaliation’ on other matters, or ultimately impeachment in cases of extreme abuse.” But as noted previously, those levers of oversight have not properly functioned in our modern political climate, for various reasons. This sad fact makes judicial review of crimes committed by presidents in office vital to preserving the separation of powers which, after all, is itself about protecting individual liberty.²²⁰ Indeed, as for the actual remedy of mandamus, Kavanaugh noted that “Congress has taken no further action on this matter” and that, for this reason, “[w]e therefore have no good choice but to grant the petition for a writ of mandamus against the Commission”; importantly, he added, “[t]his case has serious implications for our constitutional structure.”²²¹

Kavanaugh ultimately distinguished *In re Aiken County* on its facts, as “[p]rosecutorial discretion does not include the power to disregard other statutory obligations that apply to the executive branch, such as statutory requirements to issue rules, or to pay benefits, or to implement or administer statutory projects or programs.”²²² But of course, when it comes to a blanket non-enforcement policy such as that contained in the OLC memos immunizing presidents from criminal

219. *Id.* at 264 (citations omitted).

220. *See id.* at 264 (citing THE FEDERALIST No. 47, at 269 (James Madison) (Clinton Rossiter ed., 1999) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”)); *see also* Montesquieu, *supra* note 117, at 163 (“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”).

221. *In re Aiken Cnty.*, 725 F.3d at 266-67.

222. *Id.* at 266 (citing *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007)).

prosecution, that is a fine line to draw.²²³ In both cases, there are serious implications for our constitutional structure—arguably more serious ones when it comes to the reality we face today: potentially unbridled presidential power.²²⁴

C. A Final Rebuttal to the OLC Memos' Arguments for Presidential Immunity

But what about the merits of the OLC memos? Is it not of deep constitutional concern that prosecutors might indict and try a sitting president?

Before we go further, keep in mind that the premise of this Article is that the OLC Article II immunity memos are not traditional or even proper exercises of prosecution declination authority. Nor are they proper non-legislative rules, as they operate as binding on all federal prosecutors with respect to an entire category of potential crimes, rather than on a case-by-case basis.

Even if technically within the scope of Article II power, the president's ability to immunize himself from criminal liability has broad constitutional implications that are not within the OLC's authority to resolve.²²⁵ Excising the judicial branch from executive branch oversight thus works a trauma on the balance of separated powers, leaving the populace without a robust means of holding presidents accountable for potential crimes committed in office. At any given moment, elections can be up to four years away. And as discussed previously, Congress cannot develop a factual record for impeachment with the precision, care, and depth that a prosecutor can, as it operates without full-time prosecutors, FBI agents, and grand juries. As we saw with the Trump administration's refusal to respond to requests for information from Congress in connection with the House impeachment inquiry, Congress lacks equivalent power to command documents and witnesses for investigative purposes because it cannot utilize the penalty of contempt of court to prompt compliance. Undoubtedly, then, the criminal justice system could conceivably play a role in presidential accountability.

But what about the objections raised in the OLC memos? Are they still

223. See *Heckler v. Chaney*, 470 U.S. 821, 833 n. 4 (1985) (stating that a nonenforcement policy can be reviewed where it causes a complete abdication of statutory authority); see also *Montana Air Chapter No. 29 v. Fed. Lab. Relations Auth.*, 898 F.2d 753, 756 (9th Cir. 1990) (allowing judicial review of nonenforcement decisions causing abdication of statutory authority or pursuant to improper determination of jurisdiction); *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (allowing judicial intervention into agency inaction given that the inaction invalidated part of the Civil Rights Act).

224. See, e.g., Donald Trump, *supra* note 129 (“As has been stated by numerous legal scholars, I have the absolute right to PARDON myself.”); see also *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (describing “the potential for both individual and institutional abuse” of prosecutorial discretion).

225. See Christopher Man et al., *Applying the Presidential Pardon Power in the Context of an Investigation of the Executive Branch*, 33 CRIM. JUST. 12, 13 (2018) (“[T]he Supreme Court . . . has noted the breadth of the president’s [pardon] power without ever invalidating the president’s use of that power as having gone too far.”).

salient today? Recall that the 2000 memorandum underscored the “public stigma and opprobrium occasioned by the initiation of criminal proceedings, which would compromise the President’s ability to fulfill his constitutionally contemplated leadership role with respect to foreign and domestic affairs,” as well as “the mental and physical burdens of assisting in the preparation of a defense of the various stages of the criminal proceedings, which might severely hamper the President’s performance of his official duties.”²²⁶ These are the key constitutional barriers to indicting a sitting president according to the OLC (we will assume that incarceration while in office is something that prosecutors and a presiding judge would, quite rationally, choose to avoid).

Now let’s go back to the opening hypothetical. Recall that a sitting president has accepted \$100 million in untraceable gold bullion from terrorists in exchange for political influence. Congress does not act, because those within the president’s political party fear they will lose their jobs in the next election.

Imagine next that the House of Representatives, controlled by the competing political party, issues one article of impeachment for bribery. But its investigation is stymied by the White House’s refusal to “allow” anyone who ever worked in the administration to testify. Subpoenas for information from private banks that engaged with the president before and during his term of office—and thus might have data pertinent to the bribe’s asset trail—are challenged in court by the president via taxpayer-funded lawyers in the White House Counsel’s Office. Those cases drag on and are ultimately dismissed on justiciability grounds. The House stumbles to the finish line with a bribery charge, but the Senate acquits, with senators from the president’s party pointing out that the record developed in the House was full of holes and patently insufficient to justify something as volatile as undoing a presidential election.

The result? A criminal in the White House who is allowed to continue blatantly using his massive powers over the criminal justice system and the military to support terrorism in contravention of U.S. national security interests. Innocent people will likely die as a consequence,²²⁷ yet there appears to be nothing the American people can do other than wait for another election to toss out the president and his enablers in Congress.

Hearing this scenario, some might say “that would never happen,” or that “Congress would kick into gear at that point.” But those points are missing the point. The salient question under the Constitution is whether, in that instance, the OLC’s reasons for blanket presidential immunity from criminal indictment or prosecution outweigh the danger to the American public of keeping such a person in office.

226. See 2000 OLC Memo, *supra* note 6, at 246.

227. Cf. Jack Holmes, *Trump Says He Takes No Responsibility ‘At All’ for Slow Coronavirus Response*, ESQUIRE (Mar. 13, 2020), <https://perma.cc/8RL9-PV2G> (detailing President Trump’s stance on his decision to shutter the White House pandemic response team months before a global viral pandemic, intensifying the spread of the virus in the U.S.).

Some might also say that Congress has the tools to impeach, and that if it does not impeach, then it is the fault of Congress—not the President or the OLC memos.²²⁸ But ours is a system of separated powers. Each branch gets its papers graded by two other branches, so to speak.²²⁹ The question becomes whether the OLC’s justifications for knocking out the judicial branch are sufficiently important to leave only two legs of the three-legged stool of government standing when it comes to a functioning system of presidential oversight.

Here again are the OLC’s concerns: public stigma and the mental and physical burdens of dealing with a criminal investigation.²³⁰ Neither holds water here. It is just hard to seriously see stigma as a serious consideration that would justify blocking judicial oversight of the presidency in 2020, particularly with the rise of hostile social media since the 2010 memo was written.²³¹ During quainter times, a negative newspaper article was taken seriously by politicians; not so today.

Similarly, it is difficult to digest the idea that the burdens on a president of defending against a criminal investigation would be any greater than those attending to an impeachment process—which the framers clearly envisioned a presidency tolerating—or any greater than the demands of civil litigation, which the Supreme Court shrugged off in *Clinton v. Jones*.²³² If a president were to choose to flagrantly violate the criminal laws, moreover, those demands would be “asked for”—not thrust upon him.

Of course, skeptics could counter that investigations and prosecutions of presidents cannot become de rigueur, else they be used for political purposes and not criminal law enforcement and the pursuit of justice.²³³ But at the federal level,

228. See Jane Chong, *There’s Never Going to Be a Clear Standard for Impeachable Offenses*, ATLANTIC (Nov. 14, 2019), <https://perma.cc/Z3AV-XP2Q> (noting “[a]nd that means it’s Congress’s job to set boundaries around presidential power”).

229. See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1941 (noting that “[the Constitution] strikes many different balances and expresses its purposes at many different levels of generality”).

230. See 2000 OLC Memo, *supra* note 6, at 246.

231. Compare Alison Mitchell, *Impeachment: The Overview—Clinton Impeached; He Faces a Senate Trial, 2d in History; Vows to Do Job Till Term’s ‘Last Hour’*, N.Y. TIMES (Dec. 20, 1998), <https://perma.cc/AB3X-YYZ7>, with Zack Budryk, *Valerie Jarrett: Obama would be impeached ‘in a nanosecond’ for behaving like Trump*, THE HILL (May 30, 2019), <https://perma.cc/6EDG-2CTN> (quoting a former White House advisor, “I think that the standards have slipped dramatically . . . [n]ot just the words . . . but [the] policy reversals”).

232. 520 U.S. 6821, 705 (1997).

233. See Donald Trump (@realDonaldTrump), TWITTER (Jan. 6, 2020, 6:32 AM), <https://perma.cc/HE7R-65A6?type=image> (“The Impeachment Hoax, just a continuation of the Witch Hunt which started even before I won the Election, must end quickly.”); American Action Network, *Charade - Joe Cunningham - SC-01*, YOUTUBE (Nov. 18, 2019), <https://perma.cc/KG3U-NGDM> (advertising the 2019 impeachment of President Trump as politically motivated and destructive to Congress); Frank Miele, *A Politically Motivated Impeachment is No Laughing Matter*, REAL CLEAR POLITICS (Sep. 30, 2019), <https://perma.cc/J4HL-44C8> (referencing claims that Congress “could impeach the president for laughing the wrong way”).

it would be the Justice Department itself that would have to bring such a case.²³⁴ Given that its chain of command leads directly to the president, one could hardly expect that such a step would conceivably occur without facts so overwhelming that they virtually demand that DOJ act.²³⁵

CONCLUSION

The “policy” against indicting a sitting president must be revised. And it should be revised by a coordinate branch of government—either Congress or the courts.²³⁶ The president’s lawyers cannot, by default, be awarded the constitutional authority to add a gloss²³⁷ on the Constitution to effectively render impeachment the only means of holding a president responsible for crimes in office.²³⁸ This is particularly so where, as here, that reading defies a plain reading of the text itself,²³⁹ which does not treat impeachment as the sole option short of an election.

Lawyers have roles in government but making definitive interpretations of the Constitution is not one of them. Somewhat remarkably, the OLC has nonetheless been afforded an elite status not only within the government bar, but

234. JM, *supra* note 61, at § 9-2.001 (stating a U.S. attorney’s authority to prosecute federal criminal matters). *But see* Gonzales, *supra* note 195 (noting the open question of whether a state prosecutor could indict a sitting president); Epps, *supra* note 195 (“We won’t kno[w] whether it’s allowed . . . until evidence leads some prosecutor to decide that a sitting president, in the interests of justice and national survival, must face indictment while in office.”).

235. *See, e.g.*, Mueller Report, *supra* note 10 (declining to indict President Trump despite finding at least ten instances of potential obstruction of justice).

236. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J. concurring) (“The Executive . . . has no legislative power.”); *Cherichel v. Holder*, 591 F.3d 1002, 1017 n. 17 (8th Cir. 2009) (noting that “the courts are not bound by [OLC opinions]”).

237. *Public Citizen v. Burke*, 843 F.2d 1473, 1474-75 (D.C. Cir. 1988) (rejecting an OLC memo as an unconstitutional “gloss” on otherwise constitutional agency policies); *see also* *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 67 (1997) (“As a state employee subject to Article XXVIII, Yniguez had a viable claim at the outset of the litigation in late 1988. We need not consider whether her case lost vitality in January 1989 when the Attorney General released Opinion No. 189-009”); *Marston’s Inc. v. Roman Catholic Church of Phoenix*, 132 Ariz. 90, 94 (1982) (“Attorney General opinions are advisory only and are not binding on the court . . . This does not mean, however, that citizens may not rely in good faith on Attorney General opinions until the courts have spoken.”); *Trump v. Vance*, 941 F.3d 631, 644, n. 16 (2d. Cir. 2019) (noting that “[t]he President appropriately does not argue that we owe any deference to . . . OLC memoranda”).

238. *See* *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (warning of “individual and institutional abuse” of prosecutorial discretion and noting that “there are undoubtedly constitutional limits upon its exercise”); *Blackledge v. Perry*, 417 U.S. 21, 28 (1974) (holding that potentially vindictive exercises of prosecutorial discretion warrant judicial intervention).

239. *See* *Youngstown*, 343 U.S. at 655 (Jackson, J. concurring) (stating “[t]he Executive . . . has no legislative power”); *Adams v. Richardson*, 480 F.2d 1159, 1164 (D.C. Cir. 1973) (using an injunction to force a non-compliant agency to (1) “properly constru[e] its statutory obligations” and (2) adopt and implement policies that are “consistent with those duties and not a negation of them”).

in the public domain with respect to its views on urgent separation of powers matters that affect “We the People.”²⁴⁰ The impact of the memos—which were from attorney to client, not from courts or the legislature—has been to cordon off the Article III branch of government as a means of enforcing presidential accountability for criminal wrongdoing.²⁴¹ This simply cannot be correct as a matter of constitutional law.²⁴² Indeed, it defies common sense.

Congress should step in to bring a statutory structure to DOJ’s role in criminal law enforcement with respect to sitting presidents. Alternatively, in the proper case, federal courts should utilize the rarely-employed mandamus power to prompt DOJ to enforce the laws across-the-board. The constitutional stakes are that high.

240. See, e.g., *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (refusing to allow “‘secret law,’ used by [an agency] in the discharge of regulatory duties and in its dealings with the public, but hidden behind a veil”) (emphasis added).

241. See *Vidal v. Nielsen*, 279 F. Supp. 3d 401, 408 (E.D.N.Y. 2018) (setting aside agency action “clearly within the . . . agency’s authority . . . simply because the agency . . . failed to adequately explain its decision”); see also *Fairfax*, *supra* note 146, at 1243 (concluding that where “[a] prosecutor . . . decline[s] a meritorious prosecution simply because he or she disagrees with the applicable law or its application,” impermissible prosecutorial nullification has occurred). Compare *Oversight of The Report on the Investigation into Russian Interference in the 2016 Presidential Election: Hearing before the H. Comm. on the Judiciary*, 116th Cong. 456 (2019) (statement of Former Special Counsel Robert S. Mueller, III) (“[W]hen it came to the president’s culpability . . . we needed to go forward only after taking into account the OLC opinion that indicated that . . . a sitting president cannot be indicted.”) with *Mueller Report*, *supra* note 10 (finding at least ten instances of potential obstruction of justice by the President).

242. See *Heckler v. Chaney*, 470 U.S. 821, 855 n.4 (1985) (stating that a “consciou[s] and expres[s]” non-enforcement policy is judicially reviewable if it leads to an abdication of the agency’s statutory responsibility); *Regents of Univ. Cal. v. U.S. Homeland Secretary*, 908 F.3d 476, 507 (9th Cir. 2018) (clarifying that a “general statement of policy” is judicially reviewable where the agency believes it has no authority to deviate from it).