

**When the Nation Cannot Wait:
A Call for the Justice Department to Revise its Policy Against Indicting Sitting Presidents**

Sarah Pavlini

Abstract: This note argues that the Justice Department (DOJ) should reconsider the soundness of its categorical policy against indicting sitting presidents. This policy, entitled “A Sitting President’s Amenability to Indictment and Criminal Prosecution,” has long been based on the following principles: that (1) indicting a sitting president would unconstitutionally undermine the ability of the executive branch to perform its constitutionally assigned functions; (2) immunity from criminal immunity while in office does not make presidents “above the law” because they are only immune from criminal liability for the length of their term and can therefore be indicted and prosecuted once their term ends; and (3) when there is a need for the president’s immediate prosecution and punishment, Congress will remove the president from office via impeachment proceedings, thereby making him or her available for criminal proceedings pursuant to a clear constitutional provision authorizing that action. However, the nation cannot always afford to wait for a president to leave office in order for him or her to face the consequences of his or her criminal conduct. Impeachment, the Constitution’s explicit tool for effecting a president’s immediate removal from office, has shown itself to be a far less reliable safeguard against serious presidential criminal activity than is ideal. DOJ policy regarding the indictment of sitting presidents should better reflect this reality.

I. The Need for an Adjustment in DOJ Policy

i. New Concerns About Presidential Criminal Activity

The numerous indictments that came out of the Russia Investigation¹ and the various other controversies plaguing the Trump Administration have brought one question back into the

¹ See Amy Sherman, *All of the People Facing Charges from Mueller’s Investigation into Russian Meddling*, POLITIFACT (Mar. 25, 2019), <https://www.politifact.com/truth-o-meter/article/2019/mar/25/who-has-already-been-indicted-russia-investigation/>. In May 2017, the Justice Department appointed Robert Mueller, Former Director of the Federal Bureau of Investigation (FBI), as special counsel to lead an investigation into the ties between President Trump’s campaign and Russian officials. Rebecca R. Ruiz & Mark Landler, *Robert Mueller, Former F.B.I. Director, is Named Special Counsel for Russia Investigation*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/us/politics/robert-mueller-special-counsel-russia-investigation.html>. Within this broader inquiry into President Trump’s campaign was a narrower one focused on determining whether the President himself was “working on behalf of Russia against American interests.” Adam Goldman et al., *F.B.I. Opened Inquiry into Whether Trump Was Secretly Working on Behalf of Russia*, N.Y. TIMES (Jan. 11, 2019), <https://www.nytimes.com/2019/01/11/us/politics/fbi-trump-russia-inquiry.html>.

constitutional dialogue: does the Constitution permit the indictment of a sitting president?²

Without a ruling from the Supreme Court,³ the prevailing view among legal experts is that it does not.⁴ The most that can be said is that the Department of Justice (DOJ), the body that would ultimately be responsible for bringing federal criminal charges against a president, takes the view that the Constitution immunizes presidents from criminal liability as long as he or she holds office.⁵ The DOJ's official policy expressing this stance, entitled "A Sitting President's Amenability to Indictment and Criminal Prosecution," reads: "The indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions."⁶ Special Counsel Robert Mueller was likely bound by this policy while conducting his investigation into whether or not there was collusion between Russia and the Trump campaign,⁷ and this policy would likely

² The Russia Investigation has prompted a slew of commentary by renowned constitutional law scholars and lawyers exploring this question. *See, e.g.*, Phillip Bobbit, *Can the President Be Indicted? A Response to Laurence Tribe*, LAWFARE (Dec. 17, 2018), <https://www.lawfareblog.com/can-president-be-indicted-response-laurence-tribe>; Walter Dellinger, Opinion, *Yes, You Can Indict the President*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/opinion/indict-president-trial.html>; Pete Kasperowicz, *Ken Starr: DOJ Should Be Able to Indict a Sitting President*, WASH. EXAMINER (Mar. 8, 2019), <https://www.washingtonexaminer.com/news/ken-starr-doj-should-be-able-to-indict-a-sitting-president>; Laurence H. Tribe, Opinion, *Constitution Rules Out Immunity for Sitting Presidents*, BOS. GLOBE (Dec. 12, 2017), <https://www.bostonglobe.com/opinion/2018/12/10/constitution-rules-out-sitting-president-immunity-from-criminal-prosecution/6Byq7Qw6TeJIPVUhlgABPM/story.html>.

³ *See* Salvador Rizzo, *Can the President Be Indicted or Subpoenaed?*, WASH. POST (May 22, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/05/22/can-the-president-be-indicted-or-subpoenaed/?noredirect=on&utm_term=.964dcc6462cd.

⁴ *See* Adam Liptak, *A Constitutional Puzzle: Can the President Be Indicted?*, N.Y. TIMES (Sept. 19, 2018), <https://www.nytimes.com/2017/05/29/us/politics/a-constitutional-puzzle-can-the-president-be-indicted.html>.

⁵ Brianne Biggiani, Note, *Designs for Immunity: A Comparison of the Criminal Prosecution of United States Presidents & Italian Prime Ministers*, 14 CARDOZO J. INT'L COMP. L. 209, 209 (2006). *See also* Randolph D. Moss, *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 OPINIONS OFF. LEGAL COUNS. 222 (2000), https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf.

⁶ Moss, *supra* note 5, at 222.

⁷ According to the federal regulation authorizing the appointment of special counsel, "[a] Special counsel shall comply with the rules, regulations, procedures, practices, and policies of the Department of Justice" and "the Attorney General may remove a Special Counsel for . . . good cause, including violation of Departmental policies." 28 C.F.R. § 600.7 (2018). However, it is possible under this regulation for a special prosecutor to deviate from Justice Department policy under extraordinary circumstances and with the Attorney General's approval. *Id.*; *see also* Michael S. Schmidt et al., *Mueller Won't Indict Trump if He Finds Wrongdoing, Giuliani Says*, N.Y. TIMES, May 16, 2018, <https://www.nytimes.com/2018/05/16/us/politics/mueller-trump-indictment.html>.

similarly bind the United States Attorney's Offices, as branches of the DOJ, in pursuing other criminal charges against President Trump.⁸

Many scholars, in criticizing the DOJ's policy, worry that it makes the President "above the law."⁹ The DOJ, through the Office of Legal Counsel (OLC), refutes this concern by making it clear that a president is only immune from criminal prosecution while still holding office, and that its policy does not preclude prosecutors from bringing charges against a president who has been removed from office or whose term has expired.¹⁰ While many scholars and commentators have focused on the idea that a sitting president might be above the law if he or she is immune from criminal prosecution, that should not be the only concern fueling this constitutional debate. The investigation into the Trump Campaign and Russia's involvement in the 2016 presidential election illuminated an additional factor that should animate concerns about presidential criminal activity: the possibility that the nation might be exposed to tangible risks due to that criminal activity *combined with* the fact that the criminal actor continues to hold office. In other words, it is possible that certain criminal activity poses enough of a risk to the nation that the nation could not afford to continue under the leadership of a president who, through his or her criminal conduct, exposes the nation to that risk in the first place.

This new concern about presidential criminal activity should make the DOJ revisit the soundness of its categorical policy against indicting sitting presidents. While the country could likely afford to wait for a president to become available for prosecution for some crimes (for

⁸Jan Wolfe, *Can a Sitting U.S. President Face Criminal Charges?*, REUTERS, Feb. 26, 2019, <https://www.reuters.com/article/us-usa-trump-russia-indictment-explainer/can-a-sitting-us-president-face-criminal-charges-idUSKCN1QF1D3>.

⁹ See, e.g., Alberto R. Gonzales, Commentary, *Presidential Powers, Immunities, and Pardons*, 96 WASH. U. L. REV. 905, 907 (2019); Laurence H. Tribe, *Yes, the Constitution Allows Indictment of the President*, LAWFARE (Dec. 20, 2018), <https://www.lawfareblog.com/yes-constitution-allows-indictment-president>; Dellinger, *supra* note 2.

¹⁰ A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 255 (2000) [hereinafter OLC Memo].

example, if the president were to shoplift), the argument that the nation can continue under the leadership of a president whose criminal conduct potentially exposes the American people to continuing danger (for example, through the threat of interference by a hostile foreign nation) seems problematic. At a certain point, there arises a compelling interest in a president's "immediate prosecution and punishment."¹¹ In such a case, criminal prosecution of a president is not merely a means of holding a president accountable to the law, but rather is a means of removing from office a president who is unfit to govern *because of* the threat he or she poses to the nation while holding office. The idea behind indictment and prosecution in this case is that they might be necessary to neutralize an active threat that a president's criminal activity creates.

ii. The DOJ Policy Should Reflect New Realities About Presidential Crime

Of course, the Constitution already contemplates a means of removing a president from office: impeachment and conviction for "Treason, Bribery, or other high Crimes or Misdemeanors."¹² However, it is not clear that Congress could ever be relied upon to remove a president from office even in those cases where he or she harms the nation by continuing to hold office. Despite the egregiousness of some of the alleged criminal activity by President Trump, and despite the severe threat that his dangerous conduct poses to American constitutional democracy, those who are constitutionally empowered to remove the president from office or otherwise take action that would address the criminal activity have in several notable instances declined to do so. For instance, while the Republican Party controlled both houses of Congress in the first two years of the Trump Administration, House Republicans blocked several subpoenas

¹¹ OLC Memo, *supra* note 10, at 255 (emphasis in original). In this memo, OLC argues that the relevant question in determining whether presidents deserve immunity from criminal prosecution while in office is "the nature and strength of any governmental interests in *immediate* prosecution and punishment." *Id.* I cite to this source here for the general idea that the true interest in prosecuting a sitting president – whether that interest belongs to the government or to the American people – is one of immediate accountability.

¹² U.S. CONST. art. II § 4.

that might have helped the House Committee on Oversight better understand the administration’s susceptibility to foreign influence.¹³ Additionally, several top Democrats in Congress (most notably, Nancy Pelosi, the House Minority Leader during the first two years of the Trump Administration and current Speaker of the House), cautioned for months against initiating impeachment proceedings against President Trump for his alleged obstruction of justice, fearing political backlash in the 2020 presidential election.¹⁴ The House of Representatives did eventually impeach President Trump on two charges (abuse of power and obstruction of Congress) arising out of more recent allegations that President Trump solicited the help of the Ukrainian President to damage a political opponent, former Vice President Joseph R. Biden Jr., and that he conditioned Ukraine’s receipt of foreign aid on its providing him with that assistance—¹⁵ conduct which very well could expose the President to criminal liability for bribery (among other things).¹⁶ However, the Senate ultimately voted to acquit President Trump

¹³ See Press Release, House Comm. on Oversight and Reform, GOP Blocks 13 More Subpoena Motions for a Total of 19 Subpoenas Rejected by Oversight Committee (Feb. 6, 2018), <https://oversight.house.gov/news/press-releases/gop-blocks-13-more-subpoena-motions-for-a-total-of-19-subpoenas-rejected-by>.

¹⁴ See Heather Caygle et al., *Dems Run from Impeachment Post-Mueller*, POLITICO (Apr. 18, 2019), <https://www.politico.com/story/2019/04/18/democrats-impeachment-mueller-trump-1282488>; Nicholas Fandos, *Nancy Pelosi Announces Formal Impeachment Inquiry of Trump*, N.Y. TIMES (Sept. 24, 2019), <https://www.nytimes.com/2019/09/24/us/politics/democrats-impeachment-trump.html>. Additionally, members of President Trump’s cabinet have apparently declined to remove President Trump through invocation of the Twenty-Fifth Amendment. See Avery Anapol, *McCabe Says DOJ Talked 25th Amendment, Rosenstein Offer to Wear Wire Around Trump Was Serious: Report*, THE HILL (Feb. 14, 2019), <https://thehill.com/homenews/administration/429960-mccabe-said-justice-dept-discussed-25th-amendment-confirms-rosenstein>; Adam Goldman & Michael S. Schmidt, *Rod Rosenstein Suggested Secretly Recording Trump and Discussed 25th Amendment*, N.Y. TIMES (Sept. 21, 2018), <https://www.nytimes.com/2018/09/21/us/politics/rod-rosenstein-wear-wire-25th-amendment.html>; Opinion, *I am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html>. If a president’s removal via the Twenty-Fifth Amendment were to be permanent, that would presumably expose the president to indictment and criminal prosecution. However, the decision not to invoke the Twenty-Fifth Amendment with regard to President Trump appears to have been motivated by concerns about his competence rather than by concerns about his alleged criminal conduct. See Opinion, *I am Part of the Resistance Inside the Trump Administration*, *supra*.

¹⁵ See Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Justice*, N.Y. TIMES (Dec. 18, 2019), <https://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html>; see *infra* Part III, Section ii.

¹⁶ President Trump may have run afoul of the federal bribery statute. See 18 U.S.C. § 201(b)(2) (making it a crime for a public official to corruptly demand, seek, receive, accept, or agree to receive or accept anything of value in return for being influenced in the performance of any official act); see also Ian Millhiser, *The 4 Possible Crimes in*

on both charges, with the vote predictably falling along party lines (save one Republican vote to convict the President by Senator Mitt Romney).¹⁷ Overall, it is important to note that the relevant constitutional actors have, for the most part, not acted or have hesitated to act to remove President Trump when it has not been to their individual political advantage to do so.

Public officials who are politically accountable to the people need to be able to exercise discretion in deciding whether or not to take action as drastic as investigating the president or removing him or her from office. However, that same ability to exercise discretion makes it possible that Congress will *not* exercise its power to remove or investigate a sitting president even in those cases where it would be dangerous for a president to continue to govern because of his or her criminal conduct. The inquiries into the dealings of the Trump Administration compel us to confront this as a realistic possibility, if not now, at some point in the future. In this way, the Russia Investigation, the Ukraine scandal, and Congress's response to those events together raise the question of: *at what point does certain presidential criminal activity pose an active risk to the American people?* If the nation cannot rely on Congress to impeach and convict a president whose crimes pose a present danger, it is not acceptable to delay prosecution until a president no longer holds office. This is not to say that President Trump's potentially criminal activity necessarily amounts to conduct that places this nation in the kind of danger it cannot afford to withstand so long as he remains in office, although an unusually strong case can be made that this is indeed the case. It does, however, bring attention to the fact that a president's criminal activity *could* pose such a danger. The DOJ, keeping in mind the reality that the American people cannot always afford to wait until a president is out of office for him or her to be subject

the Trump-Ukraine Whistleblower Scandal, Explained, VOX (Sept. 27, 2019), <https://www.vox.com/policy-and-politics/2019/9/27/20885557/criminal-laws-trump-barr-giuliani-ukraine>.

¹⁷ Nicholas Fandos, *Trump Acquitted of Two Impeachment Charges in Near Party-Line Vote*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/us/politics/trump-acquitted-impeachment.html>.

to criminal proceedings, should reassess at what point indictment of a sitting president would be constitutional, and to amend its policy accordingly.

From here, this note will proceed by explaining how the DOJ arrived at its conclusion that it would be unconstitutional to indict a sitting president. Next, it will explore how, under the current DOJ policy, the nation could be forced to endure the leadership of a president whose criminal activity tangibly threatens the national welfare. Lastly, it will advocate for a shift in DOJ policy that takes into account that the nation cannot always afford to wait for a president's term to expire in order for him or her to face the consequences of his or her criminal conduct and will introduce some possibilities for crafting that updated policy.

II. The DOJ's Argument for Presidential Immunity from Criminal Liability

The United States government has addressed the question of a sitting president's indictability several times, both through internal memoranda and court briefs.¹⁸ Two memos—one written in 1973 and the other in 2000—formally set forth the DOJ's policy against pursuing criminal charges against a sitting president.¹⁹ The 1973 OLC memo publicized the DOJ's policy for the first time, while the 2000 memo explicitly revisited and reaffirmed that policy.²⁰ In fact, the DOJ attached the 2000 OLC memo to its webpage broadcasting its policy to the public,²¹ which suggests that it continues to rely on that memo's reasoning to justify its stance.

The DOJ's ultimate conclusion that it would be unconstitutional to indict a sitting president is based on the OLC's concern that subjecting a sitting president to the criminal process would

¹⁸ Walter Dellinger, *Indicting a President is Not Foreclosed: The Complex History*, LAWFARE (June 18, 2018), <https://www.lawfareblog.com/indicting-president-not-foreclosed-complex-history>.

¹⁹ Gonzales, *supra* note 9, at 914.

²⁰ Biggiani, *supra* note 5, at 225; OLC Memo, *supra* note 10, at 222 (“We believe that the conclusion reached by the Department in 1973 still represents the best interpretation of the Constitution.”).

²¹ Because the DOJ has posted the 2000 OLC memo on its web page broadcasting its stance on a sitting president's amenability to indictment and prosecution, *see* Moss, *supra* note 5, and because the 2000 OLC memo both reconsiders and affirms the 1973 memo, OLC Memo, *supra* note 10, at 222; Biggiani, *supra* note 5, at 225–26, I rely on the 2000 memo for explanation of the DOJ's policy.

“impermissibl[y] undermine the capacity of the executive branch to perform its constitutionally assigned functions.”²² In other words, the DOJ is concerned that the president cannot both run the country and defend himself or herself from allegations of criminal wrongdoing. The DOJ arrives at this conclusion by relying on a test²³ balancing “the constitutional interests underlying a claim of presidential immunity against the governmental interests in rejecting that immunity.”²⁴

The DOJ identifies several burdens that indictment and prosecution impose on a sitting president to support a claim of presidential immunity. First, it argues that the “imposition of a criminal sentence of incarceration . . . would make it physically impossible to carry out his duties.”²⁵ Second, “the public stigma and opprobrium occasioned by the initiation of criminal proceedings . . . could compromise the President’s ability to fulfill his constitutionally contemplated leadership role with respect to foreign and domestic affairs.”²⁶ Third, “the mental and physical burdens of assisting in the preparation of a defense for the various stages of the criminal proceedings . . . might severely hamper the President’s performance of his official duties.”²⁷ The DOJ finds that each of these burdens is particularly heavy in light of the unique role of the president and the availability of the impeachment process to accuse a president of wrongdoing and to remove him or her from office.²⁸

In examining whether countervailing government interests override a claim of presidential immunity, the DOJ makes it clear that the precise government interest at issue is not

²² OLC Memo, *supra* note 10, at 222 (“In 1973, the Department concluded that the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions . . . We believe that the conclusion reached by the Department in 1973 still represents the best interpretation of the Constitution.”).

²³ Biggiani, *supra* note 5, at 227.

²⁴ OLC Memo, *supra* note 10, at 244.

²⁵ *Id.* at 246.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 245–54.

simply holding a president accountable for his or her criminal conduct.²⁹ Because a president is subject to indictment and prosecution once out of office, the true government interest at issue in this inquiry is *immediate* prosecution and punishment.³⁰ With this understanding, the DOJ identifies several important government interests: retribution and specific deterrence through incarceration; avoiding the bar of a statute of limitations; avoiding the weakening of the prosecution’s case due to the passage of time; and upholding the rule of law.³¹ The DOJ finds that none of these government interests override those interests underlying an immunity claim because incarceration can be deferred; a court can toll the statute of limitations so that it has not run by the time the president leaves office; and a president “suspected of the most serious criminal wrongdoing might well face impeachment and removal from office” before the expiration of his or her term.³² Therefore, “the immunity from indictment and criminal prosecution for a sitting President would generally result in the delay, but not the forbearance, of any criminal trial.”³³

The DOJ emphasizes that the Constitution provides an explicit tool for dealing with presidential misconduct: the impeachment process.³⁴ A president whose criminal behavior “[falls] into the category of ‘high Crimes and Misdemeanors’... is always subject to removal from office upon impeachment by the House and conviction by the Senate, and is thereafter subject to criminal prosecution.”³⁵ The DOJ cites impeachment as a preferable mechanism for dealing with sufficiently egregious criminal conduct by the president because (1) the Framers understood that the public interest in removing a president who poses a threat to the nation’s

²⁹ *Id.* at 255.

³⁰ *Id.*

³¹ *Id.* at 255–56.

³² *Id.* at 256–57.

³³ *Id.* at 257.

³⁴ *Id.*

³⁵ *Id.* (quoting U.S. CONST. art. II, § 4).

welfare outweighs the burden that impeachment would impose on the president; and (2) impeachment and conviction is a process facilitated by elected, accountable officials, unlike unelected prosecutors.³⁶ The DOJ concludes, “[w]here the President is concerned, only the House of Representatives has the authority to bring charges of criminal misconduct through the constitutionally sanctioned process of impeachment.”³⁷ The DOJ’s “view remains that a sitting President is constitutionally immune from indictment and criminal prosecution.”³⁸

III. When Presidential Criminal Activity Gives Rise to an Interest in Immediate Indictment

i. Presidential Crime Might Expose the Nation to Active Risks

Though the DOJ finds that insufficient interest in *immediate* prosecution and punishment exists to justify placing the burden of criminal proceedings on a sitting president, it recognizes that a president’s continued ability to hold office after engaging in criminal conduct could pose a large enough threat to the nation’s welfare to justify burdening a president and the executive branch with impeachment proceedings.³⁹ The 2000 OLC memo contends that the nation’s interest in immediately removing a president posing an immense threat to the nation overrides any burden that the impeachment process places on the president.⁴⁰ This indicates the DOJ’s acknowledgement that the nation cannot properly function under the leadership of a president whose criminal conduct poses a threat to its welfare. However, the OLC memo does not acknowledge the possibility that the House of Representatives might fail to impeach or that the Senate might refuse to convict a president, including in those cases where there is a compelling interest in his or her timely removal from office.

³⁶ *Id.* at 257–58.

³⁷ *Id.* at 259–260.

³⁸ *Id.*

³⁹ *Id.* at 258.

⁴⁰ *Id.*

Impeachment is a power, rather than a duty,⁴¹ and it is a political, rather than a legal, process.⁴² Therefore, members of Congress maintain the discretion over whether they will move to impeach or convict. The Constitution does not mandate that a president *must* be removed from office if he or she commits treason, bribery, or a high crime or misdemeanor; rather, the Constitution says that a president shall be removed from office “on Impeachment for, and Conviction of” those things.⁴³ This leaves the sole power of impeachment to the House of Representatives⁴⁴ and the sole power of conviction to the Senate.⁴⁵ Therefore, holding a sitting president accountable for committing an impeachable offense depends entirely on whether the House and the Senate decide to take action – “Congress...bears the heavy burden of exercising judgment” when it comes to making those decisions.⁴⁶ The DOJ appears to assume that, because Congress is “structurally designed to consider and reflect the interests of the entire nation,” it will seek to remove the president where it would be against the nation’s interest for the president to enjoy criminal immunity and render him or her subject to criminal prosecution.⁴⁷

The congressional response to the allegations against President Trump— specifically, those allegations related to his campaign’s potential ties to Russian interference and his possible obstruction of the investigation into those potential ties, as well as those allegations arising out of his contact with the President of Ukraine — raises questions about whether this assumption is sound. The nature of President Trump’s allegedly criminal conduct raises concerns that his activity might pose an active and continuing threat to the welfare of the nation. Several inquiries

⁴¹ Brianne J. Gorod, Opinion, *Discretion and the Impeachment Power*, Constitutional Accountability Center (June 12, 2018) (quoting LAURENCE TRIBE & JOSHUA MATZ, *TO END A PRESIDENCY: THE POWER OF IMPEACHMENT* (2018)).

⁴² Albert Broderick, *The Politics of Impeachment*, 60 A.B.A. J. 554, 554 (1974).

⁴³ U.S. CONST. art. 2, § 4.

⁴⁴ U.S. CONST. art. 1 § 2 c. 5.

⁴⁵ U.S. CONST. art. 1 § 3 cl. 6.

⁴⁶ Gorod, *supra* note 41 (quoting TRIBE & MATZ, *supra* note 41).

⁴⁷ OLC Memo, *supra* note 10, at 258.

into potentially criminal conduct by the President and his organizations do not necessarily share an intimate connection to the welfare of the nation (for instance, investigations into potential tax, campaign finance, and immigration violations).⁴⁸ Arguably, the commission of these crimes does not pose any tangible threat to the nation's welfare. However, the investigation into the Trump campaign's potential ties to the Russian government and the inquiry into the President's alleged bribery of a foreign leader quite arguably do pose this kind of threat, as they involve matters of national security and election interference.

The Russia Investigation began not as a criminal investigation into President Trump, but as a counterintelligence investigation seeking to uncover whether or not the President "was knowingly working for Russia or had unwittingly fallen under Moscow's influence."⁴⁹ However, "criminal and counterintelligence elements were coupled together into one investigation" when President Trump fired former FBI Director James Comey, allegedly with the intent to impede or end the Russia Investigation, which would constitute "both a possible crime and a national security concern."⁵⁰ James A. Baker, who served as FBI General Counsel until late 2017, privately testified before congressional investigators that if President Trump had intended to obstruct the Russia Investigation, "[n]ot only would it be an issue of obstructing an investigation, but the obstruction itself would hurt our ability to figure out what the Russians had done, and that is what would be the threat to national security."⁵¹ Additionally, while President Trump's

⁴⁸ See Garrett M. Graff, *Trump's World Still Faces 16 Known Criminal Probes*, WIRED (Apr. 30, 2019), <https://www.wired.com/story/trumps-world-faces-16-known-criminal-probes/>.

⁴⁹ Goldman et al., *supra* note 1. A timeline of the Russia investigation shows that the counterintelligence investigation into Russia's interference in the 2016 Presidential election dates back to July 2016, that the Federal Bureau of Investigation had concerns about contacts between Trump campaign and administration members and Russians within days of President Trump taking the oath of office, and that Robert Mueller was appointed to investigate possible collusion between the Trump campaign and the Russian government in May 2016, only five months into President Trump's term. See Eugene Kiely, *Timeline of Russia Investigation*, FACTCHECK.ORG, <https://www.factcheck.org/2017/06/timeline-russia-investigation/> (last updated Apr. 22, 2019).

⁵⁰ Goldman et al., *supra* note 1.

⁵¹ *Id.*

dealings with President Zelensky of Ukraine potentially expose him to criminal liability for offenses such as bribery, the concern about his conduct here is less about immediate punishment for punishment's sake and more about how President Trump's abuse of power has threatened and continues to threaten core democratic principles.⁵² These considerations relating to both the Russia and Ukraine scandals imply a greater potential threat to the nation's welfare than do other crimes allegedly committed by the President.

Obstruction of justice and bribery are not the only alleged crimes by President Trump raising serious concerns about the national welfare; there have been several other investigations into President Trump and his organizations, many of which raise concerns about the President's exposure to foreign influence.⁵³ For example, federal prosecutors in the Eastern District of New York are investigating whether "officials helped foreigners illegally funnel donations to Trump's inaugural committee using so-called straw donors to disguise their donations."⁵⁴ Concerns about President Trump's exposure to foreign influence, particularly Russian influence, are particularly alarming in light of "the reality—based on the sworn testimony and more recent public statements of the heads of our intelligence community— that Russia interfered in the 2016 presidential election, and that they intend to interfere in future American elections."⁵⁵

ii. Congressional Reluctance and Inaction

Despite the serious concerns about potential ties between the Trump Administration and foreign powers and the resulting national security implications, several members of Congress

⁵² See Kyle Cheney, *'Imminent Threat': Democrats Make Final Case to Remove Trump*, POLITICO (Jan. 24, 2020), <https://www.politico.com/news/2020/01/24/trump-impeachment-trial-democrats-arguments-103466>.

⁵³ See Graff, *supra* note 48. There have additionally been non-criminal investigations into the Trump Organization that raise concerns about the possibility of improper foreign influence: attorneys general in Maryland and the District of Columbia have brought suit against the Trump Organization and hotel for possible violations of the emoluments clause, "which is meant to prohibit the president from accepting payments from foreign powers while in office." *Id.*

⁵⁴ *Id.*

⁵⁵ Gonzales, *supra* note 9, at 938.

were initially reluctant to bring impeachment proceedings against the President.⁵⁶ For instance, Speaker of the House Nancy Pelosi and other top Democrats deferred any serious consideration of impeaching President Trump based on his campaign’s contacts with Russian officials until the Mueller investigation was complete.⁵⁷ Even after Mueller submitted his report documenting “substantial evidence that [the President] attempted to derail the Russian probe,” many Democrats remained reluctant to pursue the President’s forcible ejection from office.⁵⁸ These individuals cited political concerns as the basis for their hesitation, despite believing the President’s activity made him impeachable: House Majority Leader Steny Hoyer expressed his belief that initiating impeachment proceedings would not be “worthwhile” and that “the American people will make a judgment” in the 2020 election; Representative Raúl Grijalva of Arizona stated that the President has “enough protection around him from the top lawyer in the country [Attorney General William Barr] to keep him in office”; and Representative Steve Cohen of Tennessee said that he thought that “Speaker Pelosi doesn’t think it’s worth going forward politically when there will not be a conviction . . . For a lot of people in swing districts and all, it’s probably easier for them to take that position.”⁵⁹ Representative Brad Sherman of California continued, “[t]he legal case is there. The political case is still to be made.”⁶⁰ Given that impeachment and subsequent removal is an “awesome” step to take,⁶¹ a degree of reluctance to take that step was to be expected.

Though the Russia Investigation never triggered any impeachment proceedings, Speaker Pelosi did eventually announce that the House of Representatives would begin a formal

⁵⁶ See generally Caygle et al., *supra* note 14.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 293 (1999).

impeachment inquiry into President Trump in September 2019 in response to reports that President Trump “pressured the president of Ukraine to open a corruption investigation of former Vice President Joseph R. Biden Jr., a leading contender for the Democratic presidential nomination, and his son,” and used foreign aid money as leverage.⁶² These facts, now widely accepted as beyond dispute,⁶³ might, like the evidence that President Trump may have obstructed justice during the Russia Investigation, tend to expose President Trump to criminal liability.⁶⁴ However, despite clear evidence of wrongdoing and the obviousness of the connection between that wrongdoing and a larger, graver threat to American democracy, Republican Senators allowed President Trump to remain in office.⁶⁵

Removal from office is not the only action that Congress has declined to take concerning President Trump’s contact with foreign entities. While in control of both houses of Congress during the first two years of the Trump Administration, the Republican Party prevented a large amount of oversight activity intended to address some of the concerns about the Trump Administration’s susceptibility to foreign influence and the potential that members of the Trump Administration might continue to expose the country to national security risks. For example, while the Republican Party controlled the House of Representatives, Republican members of the House Committee on Oversight and Reform blocked various subpoenas for critical documents from the White House and from several executive agencies and subpoenas seeking information related to the Russia Investigation.⁶⁶ Among these blocked subpoenas were those that sought documents from the Department of Homeland Security regarding Russian government-backed

⁶² Fandos, *supra* note 14.

⁶³ Kenneth P. Vogel, *Beyond the Partisan Fight, a Wealth of Evidence About Trump and Ukraine*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/us/politics/trump-ukraine-evidence.html>.

⁶⁴ See *supra* note 16 and accompanying text.

⁶⁵ Fandos, *supra* note 17.

⁶⁶ Press Release, House Comm. on Oversight and Reform, *supra* note 13.

efforts to hack, monitor, and interfere with twenty-one state election systems,⁶⁷ and those that sought documents from the DOJ pertaining to former National Security Advisor Michael Flynn’s foreign contacts.⁶⁸ Additionally, Republican Senators – including Senate Majority Leader Mitch McConnell and Senator Lindsay Graham – led efforts to stop legislation that would have protected Mueller from being fired by the President before concluding his investigation and led efforts to create legislation that would have prevented the public release of the Mueller report.⁶⁹ And perhaps most infuriatingly, despite the fact that President Trump’s former National Security Advisor, John Bolton, has outlined in his forthcoming book that the President explicitly said that he would withhold aid to Ukraine until the country aided his push for information on former Vice President Biden, and despite Bolton’s indication that he would testify in the impeachment trial if subpoenaed, the Republican-led Senate rejected motions to hear from any witnesses in the trial at all.⁷⁰

These examples demonstrate how the Congressional members’ willingness and ability to initiate impeachment proceedings and otherwise inquire into potential presidential criminal activity depends entirely upon political incentives associated with pursuing those activities. This complies with constitutional design in two ways: first, the ability to impeach a president,⁷¹ and

⁶⁷ *Id.*; Letter from Rep. Elijah E. Cummings et al., to Rep. Trey Gowdy, Chairman, Comm. on Oversight and Reform (Jan. 29, 2018), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2018-01-29.OGR%20Dems%20to%20Gowdy%20re%20DHS%20Doc%20Production%20for%20Attacks%20on%20State%20....pdf>.

⁶⁸ Press Release, House Comm. on Oversight and Reform, *supra* note 13.

⁶⁹ Jordain Carney, *Graham Blocks Resolution Calling for Mueller Report to be Made Public*, THE HILL (Mar. 14 2019), <https://thehill.com/homenews/senate/434124-graham-blocks-resolution-calling-for-mueller-report-to-be-made-public>; Jordain Carney, *McConnell Blocks Resolution Calling for Mueller Report to be Released Publicly*, THE HILL (Mar. 25, 2019), <https://thehill.com/homenews/senate/435703-mcconnell-blocks-resolution-calling-for-mueller-report-to-be-released>.

⁷⁰ Kyle Cheney et al., *Republicans Defeat Democratic Bids to Hear Witnesses in Trump Trial*, POLITICO (Jan. 31, 2020), <https://www.politico.com/news/2020/01/31/murkowski-to-vote-against-calling-witnesses-in-impeachment-trial-109997>.

⁷¹ U.S. CONST. art. II, § 4; *see also id.* art. I § 2 cl. 5, § 3, cl. 6–7.

the ability to investigate the executive branch,⁷² are tools the Constitution grants to Congress to check the power of the president, and second, the system of checks and balances is designed to be self-executing assuming that each branch of government would want to increase its power relative to the other branches of government.⁷³ The system of checks and balances is premised on the assumption that the competition for power would cause each branch of government to constrain the others, therefore keeping the other branches from accumulating enough power to abuse the public trust.⁷⁴ In this process, “[a]ctions that seek to redistribute power—actions that would result in power being concentrated in one office or branch—would be blocked,” while “[a]ctions that advance the public interest would (presumably) not be blocked.”⁷⁵ However, this design fails where the interests of the Congress align with the interests of the president in remaining in office (and in avoiding criminal charges, for a time), even where the president’s tenure in office does not advance the public interest. The result is a disconnect between what is politically advantageous (and possible) for lawmakers and what would serve the public good. Under a framework where indicting a sitting president is not a viable option, a gap results between the point at which the nation can no longer afford to exist under a criminal president and the point at which the House and the Senate will act to remove a president from office whose criminal activity seriously threatens the public good. The fact that Congress might not act in cases where prompt action would be necessary to neutralize a threat strengthens the nation’s interest in immediate indictment and prosecution.

⁷² See U.S. CONST. art. I § 1 (stating that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States”); *Watkins v. United States*, 354 U.S. 178, 187 (1957) (stating that the power to investigate is inherent in the legislative process).

⁷³ *Buckley v. Valeo*, 424 U.S. 1, 122 (1976); Eric A. Posner, *Presidential Leadership and the Separation of Powers*, 36 (Univ. Chi. Law Sch. Pub. Law and Legal Theory Working Paper No. 545, 2015).

⁷⁴ Posner, *supra* note 74, at 36.

⁷⁵ *Id.*

IV. A Standard for Indictment

It would be absurd for the Constitution—which exists to “insure domestic Tranquility, provide for the common defence, [and] promote the general Welfare”⁷⁶—to immunize from criminal liability a sitting president whose criminal activity poses an active threat to the nation. The DOJ should amend its policy in order to correct for this absurdity. This section is meant to begin a discussion on how new policy should look.

The DOJ need not make indictment and prosecution of a sitting president wholly available in order to address the divide between a president’s criminal activity threatening the national welfare and Congress’s willingness to remove a president from office. After all, the impact that indicting (and prosecuting) a sitting president would have remains significant. In addition to the DOJ’s concerns about burdening the executive branch in violation of the separation of powers, prosecutors could abuse the ability to prosecute a sitting president to achieve political ends. Additionally, Yale Law Professor Akhil Reed Amar has argued against indictment, stating that only a body with a national mandate should ever “undo a national election,” and that “[e]ven a federal prosecution would follow only from an indictment from a grand jury sitting in one locality.”⁷⁷ Therefore, the DOJ should craft a legal standard that creates only a narrow and limited ability to indict sitting presidents, a standard that only permits prosecutors to pursue criminal charges against a sitting president when his or her criminal activity poses an active and serious threat to the national welfare as long as that president continues to hold office.

Changing its policy to include such a standard would not be an enormous disruption to the DOJ, since the standard could fit within its existing framework for understanding the constitutionality of indicting a sitting president. As discussed in Part II of this note, the OLC in

⁷⁶ U.S. CONST. pmbl.

⁷⁷ Liptak, *supra* note 4.

its 2000 memo balanced “the constitutional interests underlying a claim of presidential immunity against the governmental interests in rejecting that immunity” and identified no interest in a president’s immediate prosecution and punishment that outweighed the constitutional interest in presidential immunity.⁷⁸ The DOJ can recognize that in certain cases, a president’s criminal activity poses a threat to the nation that vests in the people an interest in the president’s immediate prosecution and punishment which is strong enough to override the constitutional reasons for a president’s immunity from criminal liability. It would be this type of case where the DOJ could initiate criminal proceedings against a sitting president.

Questions remain about what exactly this standard would look like. Would the standard simply state that the point at which a president’s criminal activity poses the kind of threat to the nation that gives the nation an interest in that president’s immediate prosecution and punishment is the point at which indictment becomes constitutional? Would the DOJ be required to employ its balancing test on a case-by-case basis to determine if a president’s criminal activity meets this standard? Or would certain crimes *per se* satisfy the standard? Would only serious threats to national security satisfy the standard, or are there other kinds of threats to the national welfare that could justify immediate prosecution? How imminent must the threat to the national welfare be in order to justify indictment? These are questions that participants in this constitutional debate should ask, that the DOJ should consider, and that the Supreme Court might one day have to grapple with. For the moment, the important point is that a discussion about the constitutionality of indicting sitting presidents is incomplete if it does not take into account the possibility that a president’s criminal conduct might expose the nation to harm that warrants the president’s immediate removal from office.

⁷⁸ OLC Memo, *supra* note 10, at 244, 260.

V. Conclusion

There is no dispute that the question of whether or not to indict a sitting president is a thorny one. The concerns about imposing an unsustainable burden on the president's ability to execute Article II duties are valid, as are concerns that the political parties would weaponize the criminal prosecution of presidents to achieve partisan ends. However, when the president's tenure threatens the welfare of the nation *because of* his or her criminal activity, impeachment is not always sure to come. It is absurd for the DOJ to premise its stance on the indictment on the assumption that impeachment and removal from office would necessarily result in these cases.

The concern that criminal immunity makes a sitting president above the law, while an important component of this constitutional debate, should not be the only consideration. The DOJ's policy, "A Sitting President's Amenability to Indictment and Criminal Prosecution," should reflect the reality – which the Trump Administration makes apparent – that presidential criminal conduct might be egregious enough that the president can no longer lead the nation and that Congress may not impeach the president if its interests align with the president's interests. Under a policy that acknowledges this reality, the idea behind removal or incapacitation of a president through indictment and prosecution would not be to circumvent the constitutional requirements of impeachment; rather, the idea would be to provide a means of neutralizing a serious threat to the national welfare when Congress will not. While a sitting president will inevitably leave office and become subject to indictment and prosecution at some point, it is while a president is at the height of power that the consequences of his or her criminal activity pose the greatest threat to the nation. A president's subjection to the rule of law matters most while he or she holds office.

The DOJ has the power to change its policy in order to protect the nation from a president whose criminal conduct continues to cause it harm and from a Congress that refuses to address that harm. The DOJ might never need to indict a sitting president, and the opportunity for the Supreme Court to evaluate the constitutionality of such a policy might never arise—but if it does, it will next be up to the Court to craft a constitutional rule that reflects these very real and present dangers.