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Who Executes the Executioner? Impeachment, Indictment and Other Alternatives to Assassination

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On reflection, the District Attorney realized he probably shouldn't have done it. It wasn't that the case wasn't a strong one, it was just that he was unprepared for the attention that overwhelmed him, his office, and the entire state. It was mid-February 2009 and three weeks after Inauguration Day, the District Attorney for Waukesha County, Wisconsin, had indicted a sitting President. The elections had been enormously exciting, what with all the fervor and foment over the first serious proposal to annex Canada since the Articles of Confederation, the economic challenge to the United States being mounted by the dissolution of all political boundaries of the former members of the European Economic Community and the formation of United Europe, and the real prospect of armed conflict over territory on the Moon. During the campaign, the new President, a former member of Congress and Governor of Wisconsin, had managed to keep to political issues and fended off questions about his very public and messy divorce while serving as Governor. His ex-wife had kept a low profile to shield the children, but the negotiations over restructuring of his child support broke down shortly after the election, and she said she was "unwilling to play lawyer games anymore." She pressed charges with the D.A. under the Wisconsin Criminal Child Support Act of 2001 (the "Deadbeat Dad" law), which made it a crime to fail to pay child support. The Act carried a fine and a potential jail sentence of up to five years. The state judge announced that "the case should not be tried in the media" and set trial for May.

How can a sitting President be subject to criminal charges in Wisconsin? New York, maybe; Washington, D.C., surely, but not Wisconsin. And not in a domestic dispute. On the other hand, how can the President avoid charges simply because he is President? What kind of democracy would have its chief law enforcement officer above the law? What claim does the President have

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to avoid prosecution? That the matter under consideration is a state charge? That the actions of which the President stands accused occurred prior to his election? That the indictment is not related to the President's activities in office, nor does it relate in any way to the means by which he obtained office? That it does not relate to his conduct in any other public office, state or federal?

The President is prepared to offer a defense on the merits, but conviction could bring incarceration that would extend beyond his term as President. And the alternatives — impeachment or assassination — seem wholly disproportionate. This does not seem to be a matter about which Congress should busy itself in impeachment hearings and a trial. And assassination? — well, as Benjamin Franklin pointed out, when "recourse[is] had to assassination," the President is "not only deprived of his life but of the opportunity of vindicating his character."

In this article I intend to address whether the Constitution protects a sitting President from indictment. The text of the Constitution is not as clear on this question as it might be, but it is clear enough. So far as I can determine, no court has ever addressed the question of the President's amenability to criminal charges, although the courts have considered the related question of whether federal judges can be subjected to criminal charges. Those courts have answered that judges and other officials are subject to criminal prosecution while in office. Congress has implicitly approved this conclusion in its passage of the Ethics in Government Act with its provision for an Independent Counsel. Unfortunately, Congress and the courts are wrong: the President — and, I suspect, federal judges and other public officials — is not subject to criminal prosecution until first having been impeached by the House of Representatives and convicted by the Senate. Impeachment is the first remedy for the criminal acts of a sitting President.

I

Just two brief clauses of the Constitution concern us here. Article II, Section 4, states that "[t]he President, 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." Article I, Section 3, Clause 7, is modestly longer:

> Judgment in Cases of Impeachment shall not extend further

than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

Together these clauses provide that the President and Vice President, along with other officers, may be impeached for treason, bribery, or other crimes; that conviction will result only in removal from office and disqualification to hold further office; and that such officers remain liable to indictment according to law. Does this mean that indictment must follow impeachment, or because an officer "shall nevertheless be liable and subject to Indictment," may a state proceed with indictment, allowing conviction to serve as the basis for impeachment by the House and Senate?

Let me begin with some observations on the text of each of these clauses. First, the officers who are subject to impeachment proceedings are the President, Vice President, and "all civil Officers of the United States."

The phrase "civil officers" may throw us just a bit, because we often speak of civil and criminal law; at first blush, this phrase seems to exempt officers charged with criminal law enforcement. But the phrase does not mean that. The President is, of course, the Chief Law Enforcement Officer of the United States, having been charged with "tak[ing] Care that the Laws be faithfully executed." It would be strange that Article II would include the lord high executioner while exempting the assistants. Furthermore, the classification of *laws* as "criminal" and "civil" is an inexact science; the task of classifying *people* who enforce such laws would be near impossible. The phrase "civil officers" refers to civilian officers of the United States, as contrasted with military officers, whose discipline and punishment were entrusted to such rules established by Congress. The phrase "civil officers" thus includes all civilian officers of the United States such as cabinet members, ambassadors, and judges. Notice who is not included on this list: members of Congress. As I will discuss later, their discipline is provided for elsewhere in the Constitution,

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and they are immune from arrest (subject to certain exceptions) while in attendance at or traveling to or from a session of Congress.

The remainder of this clause in Article II lists the matters for which the President, Vice President and other officers may be impeached and prescribes a penalty if convicted. The grounds for impeachment — treason, bribery, high crimes and misdemeanors — are all crimes. General negligence, personal indiscretions, and general stupidity (where would the blood end?) that do not rise to the level of a crime are not proper grounds for impeachment. Of the crimes listed, only treason is defined in the Constitution, and it bears directly, of course, on the President's qualifications even if the treasonous act was committed prior to the President's election. Bribery, although not defined in the Constitution, had an established meaning in English common law; it applied only to public officials, and not to private activities. Notice that there is no germaneness requirement. The Constitution does not specify that the bribery be in connection with the officer's present office; presumably a President could be impeached for bribery in connection with a prior office, federal or state. Finally, the remaining grounds for impeachment are not a listing of crimes, but categories of criminal actions, "high Crimes and Misdemeanors." What are "high Crimes and Misdemeanors"? Some of the Drafters thought that impeachment should be limited to political crimes, or crimes that were related to political office, treason and bribery being two particularly notorious examples. If the Framers intended to limit the offenses for which an officer of the United States could be impeached, they were unsuccessful in the effort. Any shared sense the Framers had of appropriate and inappropriate grounds for impeachment was not codified in the Constitution, leaving to future Congresses the power to decide for themselves when the commission of criminal acts so violated the public trust that the offense was impeachable.

One intriguing thing about the Constitution including this class of crimes is that the class really is an open-ended category. Any number of acts cognizable as crimes today were not prohibited by the states in 1789; but the Constitution did not incorporate existing crimes and misdemeanors, but such crimes as would — in Congress' judgment — constitute *high* crimes or misdemeanors. As James Madison remarked during the debates, the President might be impeached "for any act which might be called a misdemeanor." We cannot supply a complete

list of the grounds upon which a President can be impeached without referring to something else, some other body of law. Who provides that body of law? The short answer is both Congress and the states. One of the controversial questions raised during the drafting and ratification of the Constitution was what authority Congress would possess to define and punish crime. Some people argued that Congress was limited to the crimes the Constitution expressly says they can punish, counterfeiting, piracy on the high seas, and treason. Others argued that Congress must necessarily possess the power to define crimes on federal property, such as the District of Columbia, military installations, and U.S. territories. Still others believed that Congress could punish such matters as were "necessary and proper" to the carrying out of Congress' enumerated powers; that if, for example, Congress could create post roads and offices for the delivery of mail, it could also punish theft of the mail.

Whatever the scope of Congress' power to define and punish crime, the principal organs for suppressing domestic violence were the states. At the time of the abandonment of the Articles of Confederation and the adoption of the Constitution, the states had an existing corpus of criminal laws. Law enforcement was primarily of local concern; the power of the United States lay in insuring domestic tranquillity when crime proved beyond the resources of the states. Thus, at the time the Drafters wrote the phrase "other high crimes and misdemeanors" into Article II, there would have been few high crimes and misdemeanors (except for treason, which was mentioned specially) defined in *federal* law; it would have largely been *state* law. Even after the first congresses began defining certain kinds of federal criminal laws, those laws did not preempt state criminal laws, and they would have constituted a very small part of the total criminal law in the United States. In sum, from the perspective of the Drafters, the President and other federal officers could be impeached, and if convicted, removed from office for violation of state and federal criminal laws, and the power to expand or contract the canon of impeachable claims lay principally with the states.

With that background, we are now prepared to consider the ambiguous passage in Article I, Section 3. That section qualifies Article II, Section 4. Whereas Article II imposed mandatory removal from office for conviction following impeachment, Article I, Section 3, makes clear that removal and disqualification from further office is the only

punishment Congress may impose through impeachment. Limiting Congress' power to punish to removal from office represented an important break with English tradition. Impeachment in England was a substitute for a criminal proceeding, and conviction could be punished by imprisonment or death. In the United States, however, the only penalty upon impeachment is removal from office and disqualification for future office.

Article I, then, continues that while removal is the exclusive punishment *Congress* may impose, it is not the exclusive punishment that offending persons are subject to: "[T]he Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment." The double jeopardy clause does not bar a second proceeding. Now who is going to indict, try, judge, and punish the President or other officer of the United States? The Constitution does not make us strain to figure it out — it shall be done "according to Law," that is, according to the ordinary procedures applicable to any other person. No special procedures are required, nor even permitted.

Somewhat enigmatically, Article I refers to a person who is subject to indictment, trial, judgment, and punishment as the "Party convicted." Here lies the ambiguity. Does the phrase "party convicted" simply confirm the dual sovereignty doctrine — that conviction under federal law does not bar conviction under state law for the same acts — or does the phrase indicate an order of the proceedings? Does it mean, as Alexander Hamilton explained in Federalist No. 69, that "The President of the United States would be liable to be impeached, tried, and upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would *afterwards* be liable to prosecution and punishment in the ordinary course of law" (emphasis added)? That is, does the clause indicate that criminal proceedings must follow the impeachment proceedings, that only a "party convicted" — a former official — may be subjected to the criminal jurisdiction of a state or the United States?

And what if a federal official is impeached but acquitted? May a "party acquitted" be tried subsequently in a criminal proceeding in state or federal court? Stated another way, the Constitution makes convicted parties liable to subsequent prosecution: [D]oes acquittal in an impeachment proceeding foreclose a second proceeding? If the answer is that the acquitted may not be tried, then state criminal proceedings must follow impeachment.

Otherwise, a state might convict, only to have Congress impeach and acquit.

I think the better reading of the Constitution's text requires impeachment before state trial. The Constitution conspicuously uses the term "party convicted," when it might simply have been silent. Or it might have said "*officials* shall nevertheless be liable and subject to Indictment," or it might have referred to a "party *impeached*" [whether convicted or acquitted]. If the Constitution had remained silent or if it had said "officials" or "party impeached" instead of "party convicted," it would have implied that whether the House impeached or not, and whether the Senate convicted or not would not bar a state indictment and proceeding. Because the Constitution states "party convicted" it must be taken seriously and dictates an order to the proceedings.

II

Unfortunately, the few courts that have considered this question have not adopted this analysis. Let me turn to their view. This question has never been addressed by the Supreme Court, but three Federal Courts of Appeals have considered the question in connection with the prosecutions of federal judges: the Seventh Circuit in the matter of Seventh Circuit Judge Otto Kerner, Jr.; the Ninth Circuit in the matter of Nevada District Judge Harry Claiborne; and the Eleventh Circuit in the matter of Florida District Judge Alcee Hastings. The Seventh Circuit first held, and the succeeding courts agreed, that Article I, Section 3, "does not mean that a judge may not be indicted and tried without impeachment first." They also concluded that "[t]he Constitution does not forbid the trial of a federal judge for criminal offenses committed either before or after the assumption of judicial office."

From our vantage point, one of the problems with the cases from the Seventh, Ninth, and Eleventh Circuits is that the issue arose in the context of criminal prosecution of the judiciary's own. But Article I, Section 3, must be judged under its toughest case, not necessarily by the first case. Whatever may be said of the prosecutability of federal judges applies with equal force to the President and vice versa. The case ought to be judged according to the most difficult circumstance, prosecution of the President. This would be consistent with the Drafters' concerns. By text and history, the impeachment clauses are about removal of the President, first and foremost, and then about removal of everyone

else. The Drafters debated extensively the impeachment of the President and, after agreeing on the grounds and procedure, then decided to add the Vice President and other federal officers to the provision.

There are a number of important distinctions between impeachment of the President and impeachment of a federal judge. The President is the only person who is also a branch of government. That puts him at the top of an organizational chart in a position that no other person in our government can claim. Even the Chief Justice of the Supreme Court is a member of a collegial body and has no power to issue judgments on his own authority. While it would be demoralizing and inconvenient for a court to have a member removed, or for the executive branch to lose, say, the Secretary of the Interior or a commissioner of the International Trade Commission, the organization remains in place. Removal of the President, however, would be removal of a constitutional branch of government and, as a practical matter, far more crippling to the nation than removal of any judge or justice would be to the federal judiciary. Federal judges are fungible in ways that a President is not.

There is another important distinction between the President and the federal judiciary that counsels caution in applying the courts' conclusion to the President: tenure in office. This is a critical difference. Criminal conviction of the President and a jail sentence effectively remove the President from office. By contrast, since a federal judge has tenure "during good Behavior," criminal conviction does not necessarily remove him from office; if his sentence is less than life, and if Congress fails to impeach him, the federal judge may resume office after serving his sentence.

That said, the courts of appeals offered three lines of analysis: text, history, and policy. First, they pointed out that Article I, Section 3, ensures that criminal charges are not barred by double jeopardy. Second, they said the First Congress believed that the Constitution does not require prior impeachment. Third, they argued that, as a general principle, officials are not above the law. Let me address each of these in turn.

The courts' first point concerning double jeopardy is, as we have seen, a fair and important point, one clearly indicated by the text. But ultimately it is beside the point. It not only does not address the question at hand, it does not even inform it. Whether impeachment follows criminal conviction or criminal conviction follows impeachment, Article I, Section 3, at least makes it plain that

trial of the one charge does not bar trial and conviction of the other. The double jeopardy argument does not address whether the Constitution specifies an order as to which of these two separate proceedings shall be conducted first.

If there is an inference to be drawn from the double jeopardy argument, it surely points toward requiring impeachment to precede criminal indictment. Impeachment cannot preempt indictment, but indictment may moot impeachment. Consider the consequences of prosecuting my fictitious President. If he is convicted under Wisconsin's statute and given a five year jail term, the President is effectively removed from office. The fact that he is still subject to impeachment is nearly irrelevant, because Congress can only make formal what Wisconsin has brought about indirectly. On the other hand, if Congress impeached and convicted the President, resulting in his removal from office, the lack of double jeopardy defense would have real meaning, because the President would still be subject to indictment, trial, judgment, conviction, and punishment under the laws of Wisconsin.

Impeachment cannot preempt indictment, but indictment may moot impeachment.

The second point, concerning original understanding and the First Congress is more interesting, but simply begs the question. The main evidence for the claim that the Drafters did not mandate that impeachment precedes indictment is the Bribery Act of 1790, which provided for the removal of judges upon their conviction of bribery. In the Bribery Act, Congress used the possibility of state prosecution to its purposes, permitting criminal conviction to trigger removal, thereby sparing Congress the trouble. The courts reasoned that if impeachment had to precede an action in bribery, then removal following impeachment would moot removal on conviction of bribery; in other words, the statute only made sense if impeachment was not a condition precedent to criminal prosecution.

The weight to be given the First Congress' understanding of the Constitution is a controversial question subject to opposing inferences. On the one hand, the First Congress is of the same generation — and included many of the same people — who drafted the Constitution. We should, the argument runs, defer to their understanding of the document they drafted. On the other

hand, this was a group of legislators cast into a particular role dealing with a document that no one had construed authoritatively and which was subject to various interpretations by the many people who had a hand in drafting and ratifying it. As the disgraceful history of the Sedition Act of 1798 demonstrates, the first congresses were not above disingenuous constitutional arguments to justify political expediency. While the views of the First Congress may inform our understanding of the Constitution, neither the First Congress' temporal proximity to the Drafters, nor its efforts at interpretation are themselves a guarantee of Congress' correctness.

The First Congress — or any Congress — would have good reason to prefer having a President tried first according to law. In the first place, impeachment may involve interpretation of state laws, and a state has a good deal more experience interpreting its own laws. If the President stands accused of something other than treason or bribery — some high crime or a misdemeanor — Congress would be happy to have the state's view of its own laws. It saves Congress the trouble of understanding the law and further spares it the determination that the crime is within the category of a "high crime" or "misdemeanor." Second, the House of Representatives would be equally delighted to have the state make the case and collect the evidence. It makes the Representatives' job a whole lot easier. Third, the Constitution does not provide what standard of proof shall be used in cases of impeachment. The standards most familiar to us, preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt, are used in different circumstances. Proof beyond a reasonable doubt is the standard applied in criminal cases, but no standard of proof is specified in the Constitution. We do not know whether, assuming the matter was even justiciable, the courts would consider an impeachment proceeding a criminal proceeding subject to the "beyond a reasonable doubt" standard. The dilemma is partially solved if the state convicts the President on proof beyond a reasonable doubt. For Congress, the conviction could be accepted as conclusive proof of commission of "high crimes and

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misdemeanors," and Congress could then piggyback on the state conviction. All in all, I cannot say that the mere existence of the Bribery Act of 1790 is persuasive to me on the question of sequencing.

That brings us to the courts' third point, the general principle that the President is not above the law. The point cannot be denied, of course, but it is a red herring. No one contends that Presidents are above the law, and the courts are simply mistaken if they believe that that is what would result if criminal convictions were stayed until after impeachment and conviction. These clauses do not give the President immunity from prosecution; rather, they specify an order in which things are to occur. The President may not be indicted and tried so long as he is President. Once he has been impeached by the House of Representatives and convicted by the Senate, he "shall" be removed, and once removed from office, he is no longer President. And as non-President, he may be indicted and tried for his crimes just like everyone else. The real argument is over the sequence, not whether the President may commit crimes with impunity, only to hide behind Article I, Section 3. An analogous argument could be fashioned from the Fourth Amendment. The Fourth Amendment provides a process for the government to obtain the right to enter a dwelling and search and seize its contents. We do not look at the Fourth Amendment and complain that the people to which it applies (us) are above the law, that we have immunity from search and seizure. That Amendment describes the condition (we are secure against "unreasonable searches and seizures") and a process (the issuing of warrants upon "probable cause") for doing so, and in the absence of that process, our persons, houses, papers and effects are secure.

But, we must ask, what if the House fails to impeach or the Senate fails to convict? What then? Does the President go free? Doesn't that make him above the law? Yes, the President goes free until he leaves office; no, he is not above the law. A Congress that fails to impeach, like a prosecutor who declines to prosecute, has spoken to the matter on behalf of the nation. Congress will have to bear full responsibility for the embarrassment or inadequacies of a President it refuses to remove. Our remedy is not self-help through a local D.A. (any more than it is assassination), but to throw the bums out and then find some bums who will impeach an indictable President.

III

There is a certain parity or proportionality in the contrast between the protection afforded members of Congress and that afforded the President which helps confirm this analysis. Senators and representatives are not subject to impeachment, but under Article I, Section 6, (the speech and debate clause) are "privileged from Arrest" during their attendance at sessions of Congress and while "going to and returning" from those sessions, except for cases of "Treason, Felony and Breach of the Peace." Nevertheless, under Article I, Section 4, "[e]ach House may . . . punish its Members for disorderly Behavior" and by two-thirds vote, "may expel a Member." Note that there is no ambiguity in these clauses — senators and representatives may be charged with crimes and prosecuted before Congress takes disciplinary action. They are not, however, without some protection. One of the concerns of the Drafters was that members of Congress might be arrested in order to prevent them from voting on important matters. The result was the speech and debate clause, which is a form of safe conduct pass. Otherwise, members of Congress are subject to criminal prosecution. This means that they may be charged in their own districts (or even in other districts) when Congress is not in session, and the charges are less likely to be politically-tainted.

By contrast, the President, members of the federal judiciary, and other officers are always "in session" and subject to politically motivated charges in an effort to deter them from their duties. Because Presidents represent the whole, they may be judged only by the whole, as represented in Congress. No single jurisdiction has the power to speak for the rest of the country and deprive the United States of its President. Madison, convinced that impeachment was "indispensable," argued that there must be "some provision . . . for defending the Community against the incapacity, negligence or perfidy of the chief Magistrate."

Our remedy is . . . to throw the bums out and then find some bums who will impeach an indictable President.

My argument finds further support in an unlikely place: the Twelfth Amendment. In the original constitutional scheme, the person with the greatest number of electoral

votes was elected President; the second-place finisher became Vice President. With the quick rise of political parties, this scheme virtually assured us of having a President and Vice President of different political persuasions. (The Twelfth Amendment changed the Constitution to require electors to make "distinct lists of all persons voted for as President, and of all persons voted for as Vice-President"). Permitting a President to be subject to state indictment where the penalty would be imprisonment would have been tantamount to permitting state removal of the President. Given the likely disparity in the political views of the President and Vice President, states would have had a much greater incentive to indict and convict a sitting President in order to secure the Vice President as President. Such a system would subvert the election process, offering temptations for politically motivated prosecutions too great to be resisted.

So far I have said very little about prosecutions under federal law. I have a couple of thoughts about the separation of powers implications. First, there was less chance earlier in our history that a President would be prosecuted under federal law because the President as the Executor-in-Chief, would have had the opportunity of appointing loyal officials to serve as Attorney General, or as U.S. Attorneys. Second, the President could — as President Nixon did during the "Saturday Night Massacre" — order the removal of officials the President regarded as overstepping their bounds or acting too zealously. Today, of course, the prosecution of federal officials, including the President, can be put in the hands of an independent counsel who is not appointed by the President, has unspecified tenure, and cannot be removed by the President. This odd arrangement simply transfers power from Congress and the executive branch to a third party and makes it easier to indict federal officials. Congress might, of course, use the investigative services of someone like an independent counsel as a means of gathering information and then advising it on the grounds (or lack thereof) for impeachment. To the extent Congress has authorized the independent counsel to indict, it has abdicated its responsibility to the national "Community" (as Madison put it) to check the President. Third, we may have special concerns with respect to the federal judiciary. Clashes between U.S. Attorneys and federal judges are not unknown. A zealous federal prosecutor might seek the effective removal of a federal judge from his district by charging

him with a crime. Requiring impeachment first gives a judge embroiled in a local dispute the protection of a national forum to answer the charges, where the distinctively local issues are less likely to hold sway.

Finally, but not least, if indictment may precede impeachment, then a single house of Congress could effectively remove a President outside of the impeachment mechanism. In a dispute between the President and Congress — say, the President has refused to turn over executive documents to a House oversight committee — a single house could declare the President in contempt of Congress. Contempt of Congress is a criminal offense, and may be prosecuted by a U.S. Attorney or by an independent counsel. If convicted, the President could draw jail time. Effectively, the President has been removed from office by the action of a single house.

IV

Does anything I have said suggest that the President is immune from civil suit? I don't think so. Civil suits can, of course, involve allegations of fact as serious as any criminal suit — suits for assault or fraud, for example. Civil suits can be just as time consuming as criminal cases. They may distract the President and, in an extreme case, prevent the President from fulfilling his responsibilities. These things should concern us, but they are not reasons supplied by the Constitution itself for staying prosecution of civil matters. By contrast, the impeachment clauses give us ample cause for giving Congress the exclusive right of first conviction.