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Rett R. Ludwikowski

The Catholic University of America, Columbus School of Law

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Recommended Citation

Rett R. Ludwikowski, *Politicization and Judicialization of the U.S. Chief Executive's Political and Criminal Responsibility: A Threat to Constitutional Integrity or a Natural Result of the Constitution's Flexibility?*, 50 AM. J. COMP. L. SUPP. 405 (2002).

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RETT R. LUDWIKOWSKI

Politicization and Judicialization of the U.S. Chief Executive's Political and Criminal Responsibility: A Threat to Constitutional Integrity or a Natural Result of the Constitution's Flexibility?

This article attempts to analyze to what extent the scope of executive privilege, constitutionally committed to the executive branch, is determined by judicial process or by purely political factors. It opens with a brief report on the process of formation of the Presidential model of government and the system of checks and balances in the United States. Focusing on the checks imposed on the Executive, this article distinguishes those restraints that are clearly constitutionalized, or stemming from judicial determination of their constitutionality, and those which are the result of judicial interpretation of the beneficial aspects of public policy or political decisions of the Congress. It then concludes with the observation that the flexibility built into the Constitution by ambiguous language or simply by the gaps left by the Framers, does not always result in a healthy process of the parliamentary implementation of the Constitution. In contrast, such ambiguities actually may lead to awkward political meddling with the constitutional concept of presidential government, affecting the integrity of the Constitution.

THE ORIGINS OF THE PRESIDENTIAL SYSTEM

*Distribution of the Powers of Government*¹

The failure of the American Confederation was quite obvious in February 1787, when Congress recommended that the May Convention in Philadelphia would consider revising the Articles of Confederation. The new Constitution was to "be adequate to the exigencies of

RETT R. LUDWIKOWSKI is Professor of Law and Director of the Comparative and International Law Institute of the Columbus School of Law, The Catholic University of America.

1. Some of the comments in this subchapter have been taken from the author's book, *Constitution-Making in the Region of Former Soviet Dominance* 198-206 (1996) and the article "Mixed Constitutions—Product of an East-Central European Constitutional Melting Pot," 16 *B.U. Int'l L. J.* 7-11 (1998).

government and the preservation of the Union."² Finding some patterns that could be duplicated or developed in the new system was, however, a formidable challenge for the delegates to the Convention. The constitutional framers realized from the initial meetings that they would have to take a "new-way" approach to government making, and their reliance on existing theory or practice might be only limited. In *The Federalist* No. 9, Alexander Hamilton wrote about the new tasks,

"The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal progress towards perfection in modern times. They are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided."³

In fact, the idea that governmental checks and balances are essential to free institutions and that power must be divided among several branches to avoid an arbitrary government was not entirely new. The origins of the division of powers doctrine can be traced to the Aristotelian or Polybian concept of mixed political systems. Such a system which was characterized by the blending of elements of a monarchy, an aristocracy and a democracy, and distributing governmental functions among several organs was to contribute to the social and political stability of the government's structures. The roots of the modern division of powers, however, are not derived directly from the Aristotelian concept. For the authors of the modern version of this doctrine, Locke and Montesquieu, the real rationale for the distribution of power was not so much the improvement of the government's stability through distribution of its functions; the evil they feared most was an absolute arbitrary authority.⁴ Thus, the concept of a government whose power is limited through its diffusion among several organs is a fundamental component of the modern doctrine of division of powers. Wherever this principle is constitutionally recognized, we may find some reception of the Lockean or Montesquieuan doctrine.

Thus, the new approach of the framers of the American Constitution did not stem from the total lack of doctrinal antecedents, but

2. Quoted after T.M. Cooley, *The General Principles of the Constitutional Law in the United States of America* (1891), at 15.

3. A. Hamilton, *Federalist* No. 9, ed. Clinton Rossiter (1961), 72-73.

4. John Lock wrote, "Absolute arbitrary power, or governing without settled standing laws, can neither of them consist with the ends of society and government." J. Locke, *Two Treatises of Civil Government* 186 (W.S. Carpenter ed., 1970).

from the awareness that an Aristotelian, Lockean or Montesquean model of government fits the needs of the rising American Union only to a limited extent. For example, John Locke listed three powers in the British Commonwealth: legislative, executive, and federative. Locke, however, suggested that supreme power lay in the legislative branch, and he did not recognize the judiciary as a separate power. Montesquieu, "the oracle always consulted and cited on this subject," enumerated the judiciary among "powers,"⁵ but he believed that in fact it is no "power" at all. He wrote that "of all three powers of which we have spoken, the judicial is, in a sense, null."⁶

In addition to this, it was obvious that despite Montesquieu's reference to the English system, the powers in the English model were not distributed in the way described by him. They were neither equal nor well separated. The seventeenth-century struggle between the Crown and the Parliament culminated in the adoption of the Bill of Rights (1688) and the Act of Settlement (1700), which confirmed the supremacy of the legislature.⁷ The cabinet members were sitting in the Parliament, and they simultaneously carried on executive and legislative functions; the House of Lords was carrying some judicial functions. If the division of powers was to mean that none of the powers could accumulate all basic functions—legislative, executive, and judicial—the application of this doctrine to the English system was, at least, questionable. As Wade and Bradley wrote: "in many continental constitutions separation of powers has meant an unhampered Executive; in England it means little more than an independent Judiciary."⁸

In revolutionary France, the idea that functions of the government should be diffused was also implemented in a rather different way than the Framers of the American system envisioned a separation of powers system. The principle of the division of powers in France was associated to a large degree with the idea of the separation of powers in that the organs of government and their functions were actually separated. The emphasis was put on different roles within the divisions and not on a collaborative effort between powers.⁹

5. James Madison, *Federalist* No.47, op.cit. at 301.

6. Cappelletti, "Repudiating Montesquieu? The Expansion and Legitimacy of Constitutional Justice," *Cath. U. L. Rev.* 35 (1985): 11, 12-14. See also Montesquieu, *The Spirit of the Laws* (1989) at 160.

7. For more details on the process of the formation of parliamentary supremacy, see E.C.S. Wade & A.W. Bradley, *Constitutional Law* (8th ed. 1970), at 38-61.

8. *Id.* at 25.

9. Arthur T. von Mehren and James R. Gordlay wrote, "The leaders of the French Revolution saw the principle (of separation of powers) in more abstract and conceptual terms. . . / Each power was entirely independent of the others; collaboration between powers was forbidden, and theoretically, unnecessary because each had been delegated the fragment of the national sovereignty necessary to discharge its functions." *The Civil Law System* (1977), 217, n.3.

Thus, it was clear that the system of checks and balances, which was on minds of some of the fifty-five delegates who attended the Constitutional Convention in Philadelphia, was different in several ways than European models or concepts. Although the American model did not require, in strict sense, the equality of powers, it emphasized their "equilibrium," a "sharing" of functions, and a "hampering" of one power by another. A different team of people ran each organ, but their functions were to some extent blended and often overlapping. As enumerated by John Adams, the checks and balances were to be as follows:

"First, the States are balanced against the general government. Second, the House of Representatives is balanced against the Senate, and the Senate against the House. Third, the executive authority is in some degree balanced against the legislature. Fourth, the judiciary is balanced against the legislature, the executive and the State governments. Fifth, the Senate is balanced against the president in all appointments to office, and in all treaties. Sixth, the people hold in their own hands the balance against their own representatives by periodical elections. Seventh, the legislatures of the several States are balanced against Senate by sexennial elections. Eighth, the electors are balanced against the people in the choice of President and Vice President. And this, it is added, is a complication and refinement of balances which is an invention of our own, and peculiar to this country."¹⁰

The Position of the President

The development of the concept of the presidential power was even more difficult. In the center of attention of political philosophers in the seventeenth and eighteenth centuries were the relationships between monarchs and representative bodies. The role and functions of the executive in republican systems were not a subject of any extensive dispute.¹¹ In European Monarchies the Ministers worked on behalf of the Kings who were recognized as the source of the sovereign power.¹² The evolution of a cabinet government and

10. Colley, *supra* n. 2, at 187.

11. "The Framers floundered in dealing with these questions because neither theory nor practice was of much help," wrote J. M. Burns, *Presidential Government* (1965), at 5.

12. In France and England, where the American Framers looked most for some features which they could borrow, the position of a prime minister was fully formed in the seventeenth century. The prime ministerships of Richelieu or Mazarini in France were well established. Similar position of prime minister emerged in England in time of George I, who was often absent from the debates of his cabinet and relied heavily on his administrators selected to preside the meetings. Wade & Bradley, *supra* n. 7, at 44-45.

dual executives, with Monarchs being the heads of states and Prime Ministers working as heads of governments, was not, however, especially helpful for post-colonial leaders trying to develop their system in opposition to European monarchic traditions.

The domestic experience seemed to be more applicable to the “new” needs of the Union of several American States. In some of the North American colonies (New Hampshire, Pennsylvania, South Carolina) the officers who moderated the meetings of the king’s councils were elected and called “presidents” and, since the first meetings of the Continental Congress in the fall of 1774, its presiding officers were holding the same title. This practice resulted in the tendency of calling the elected chiefs of republican political entities “presidents”.

The question that remained to be answered was the scope of the presidential power. The first and more elaborate conception of this office came from Alexander Hamilton. He presented his views to the delegates of the Convention on June 18, 1787.¹³ His concept of presidential authority was there described as follows:

“The supreme Executive authority of the United States (was) to be vested in a Governour to be elected to serve during good behavior—the election to be made by Electors chosen by the people in the Election Districts aforesaid—the authorities & functions of the Executive to be as follows: to have a negative on all laws about to be passed, and the execution of all laws passed./ . . ./

All laws of the particular States contrary to the Constitution or laws of the United States to be utterly void; and the better to prevent such laws being passed, the Governour or president of each state shall be appointed by the General Government and shall have a negative upon the laws about to be passed in the State of which he is governour or President.”¹⁴

Hamilton’s political concepts were not enthusiastically accepted by the delegates of the Philadelphia Convention who believed that his federal government would eliminate the States and that the president, being elected for life, would accumulate almost autocratic power, which would in turn create a monarchy. The provisions of the Constitution on the President’s scope of power, which were approved by the delegates in response to the Hamiltonian vision, provided for the chief executive elected only for a limited term and chosen by electors. The President’s veto was still powerful but more limited than in the Hamilton’s concept. Foreign policy powers of the President were wide and his control over other executive officers was extensive.

13. Burns, *supra* n. 11, at 6.

14. S.J. Konefsky, *John Marshall and Alexander Hamilton* (1964), at 37-38. For more details on The Hamilton Plan, see M. Ferrand, *Records of the Federal Convention of 1787*, Vol. 3, 1966, (Appendix F), at 617-30.

The real scope of prerogatives of the Chief Executive Officer was to be shaped by the first "vital" Presidents.¹⁵ In fact, Hamilton himself played an important role in this process, with respect to at least one feature of the emerging system. The Constitution as crafted in Philadelphia did not mention the President's Cabinet or have any provisions allocating special powers to one of the Cabinet members. With Jefferson serving as the first Secretary of State in President Washington's cabinet, however, the chances that this position might be converted into an equivalent of European prime ministership were quite substantial. Yet Hamilton, as Secretary of Treasury, at least pretended to play this role himself. Competing with Jefferson, he worked efficiently against any tendency to incorporate institution of premiership into the American system.

The lack of a dual executive remained one of the most important features distinguishing the American "presidential" system from other, namely "parliamentary," model of divided government. The other main difference was impossibility of the legislature and executive to terminate each other's political lives. In result, aside from periodic elections, the impeachment process became the main instrument of enforcement of political responsibility of the President, Vice-President and civil officers of the United States.

Development of Impeachment—Philadelphia Convention and the Ratification of the Constitution

Article II Section IV of the Constitution is short. It states "The President, Vice-President and all civil officers of the United States shall be removed from office in impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors."

Although, almost each single word of this provision was subject to extensive judicial and doctrinal interpretation, the information about the conceptual origins of the American impeachment is not overwhelmingly abundant. The delegates to the Philadelphia Convention did not want to influence "the People" and decided to keep their discussions, to some extent, in secret.¹⁶ In this manner, most of the information on the formation of the institutions fundamental to the American system stemmed from constitutional disputes during the ratification period, especially those collected in the brilliant series of articles, written by Alexander Hamilton, James Madison and John Jay, known as "The Federalist Papers." In fact, Madison, recognized often as the main source of information about constitutional debates,

15. Burns, *supra* n. 11, 8-31.

16. M. J. Gerhardt, *Federal Impeachment Process. A Constitutional and Historical Analysis* 3-4 (2000).

had numerous objections about using the 'original intent' approach¹⁷ to constitutional interpretation. He published his notes on constitutional debates many years after the conclusion of the ratification process.¹⁸ Having said this, it is possible, however, to identify some concerns the delegates to the Convention and early defenders of the Constitution of the United States had in their minds.

First, the prevailing opinion was that the institution of American impeachment should depart from the English model¹⁹. In England, the House of Commons could impeach any person before the House of Lords with exception of the Monarch, and impeachable conduct was any high crime or misdemeanor.²⁰ The practice has shown that these acts had usually a political flavor but could be punished by death, imprisonment or a heavy fine.²¹ As Wade and Bradley wrote:

"Before the full development of ministerial responsibility impeachment was a useful weapon enabling the Commons to call to account Ministers appointed by and responsible to the Crown/. . . / By the Act of Settlement 1700 a pardon from the Crown cannot be pleaded in bar of an impeachment, but it is nevertheless open to the Crown to pardon one who has been successfully impeached."²²

In contrast to this practice, the American Framers believed that only the public officers could be subject to impeachment, and that they might be removed from the office,²³ and that eventually the courts should impose criminal penalties.

Second, the Framers could not agree to what extent the judicial structures should participate in impeachment processes. Edmund Randolph suggested in his Virginia Plan that the impeachment should be left in the hands of judiciary.²⁴ Gouverneur Morris, however, argued "the Supreme Court were too few in number and might be warped or corrupted."²⁵ Hamilton agreed with him that the Congress would be the best institution to decide in the cases dealing with "the abuse or violation of some public trust."²⁶ This concept was, however, opposed by Charles Pinkney, who believed that the Senate

17. "Original intent" approach refers to the position of so called "originalists," the commentators relying on the interpretation process mostly on studying original constitutional history. See, W.A. Kaplin, *The Concepts and Methods of Constitutional Law* (1992), at 23.

18. Gerhardt, *supra* n. 16, at 4.

19. E. Field Van Tassel & P. Finkelman, *Impeachable Offenses* (1999), at 82.

20. Wade and Bradley, *supra* n. 7, at 314.

21. R. Berger, *Impeachment: The Constitutional Problems* (1973), at 67-73

22. Wade and Bradley, *supra* n. 7, 314-15.

23. For early debates on this issue see, T.M. Ferrand, *Records of the Federal Convention of 1787*, 1966, Vol. 2, at 64,65.

24. Gerhardt, *supra* n. 16, at 5.

25. Ferrand, *supra* n. 23, at 551; see also Tassel at Finkelman, *supra* n. 19, at 17.

26. *Id.* 19.

would gain too much leverage over the President.²⁷ As a result of these agonizing disputes, on the proposal of the Committee of Eleven, presented on September 4, the House was given the right to impeach, and the power to try was reserved for the Senate.²⁸

Third, the question of who might be impeached inspired some attention. Gouverneur Morris argued that the executive magistrates should be impeachable including chief executive officer "who is not the King but the prime-Minister."²⁹ Morris was, however, concerned that the President might be left excessively dependent on the legislature. The Framers finally reached the consensus that the Presidents and Vice-Presidents should be subject to impeachment but they paid very little attention to the issue of whether other officials may be subject to impeachment. The reference to "Civil officers of the U.S. who might also be removed from office on impeachment and conviction"³⁰ was thereby left without further explanation.

Fourth, the problem of votes required for successful impeachment was vividly discussed but did not inspire a major controversy. Hugh Williamson proposed on June 6 that all effective acts of the Senate would require two thirds majority, and on September 8, Morris moved that "no person shall be convicted without the concurrence of two thirds of the members present: and every member shall be on oath."³¹ The problem of a required majority was resolved without a major dissent.

Fifth, the issue, which caused a vivid dispute, was the scope of impeachable acts. In early debates, the delegates essentially agreed that common crimes, such as treason or murder should trigger the process of impeachment.³² In his comments on the debates, from July 20, Madison also noted references to "malpractice and neglect of duty."³³ Madison himself argued:

"He [the chief Magistrate] might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers. . . . In the case of the Executive Magistracy which was to be administered by a single man, loss of

27. Ferrand, *supra* n. 25.

28. Madison favored the concept of giving the Supreme Court the final voice in the proceeding but this idea was objected by Gouverneur Morris. Madison believed that the President will be too dependent on the excessively powerful Senate if this chamber will be granted the right to try him. In the final vote on impeachment only Virginia and Pennsylvania dissented, see, Ferrand, *supra* n. 23, at 552-53; see also Gerhardt, *supra* n. 16, at 7. Hamilton in *The Federalist Papers* presented also main arguments against granting the Senate power to impeach. 65-66, *supra* n. 3, at 396-407.

29. Ferrand, *supra* n. 25, at 69.

30. Ferrand, *supra* n. 25, at 552.

31. *Id.*

32. See Gerhardt, *supra* n. 16, at 8.

33. Ferrand, *supra* n. 23, at 64.

capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.”³⁴

On August 20th, the Convention moved to refer the issue of the scope of impeachment to the Committee of Five and suggested for discussion the liability of the Officers for “neglect of duty, malversation, or corruption.”³⁵ On September 8, it was moved and passed that the words “or other crimes and misdemeanors against the State” will be inserted after the word “bribery.”³⁶ In the discussion George Mason proposed to add “maladministration” to the list of the impeachable offenses, but he withdrew his motion.³⁷ Finally, the phrase “the State” was replaced by “United States,” but even this phrase was removed by the Committee of Style.³⁸ The definition of remaining impeachable offenses, such as “treason, bribery, or other high crimes and misdemeanors” became one of the most challenging tasks for the next generations of Americans.

IMPEACHABLE MAGISTRATES—SUBJECTIVE SCOPE OF IMPEACHMENT

When the Framers of the Constitution agreed that, “The Executive is also to be impeachable,”³⁹ they did not define precisely what “the Executive” means. Gouverneur Morris spoke about the Executive as the chief “Guardian of the people” and about “great officers of State; a minister of finance, of war, of foreign affairs, etc.” who “will be amenable by impeachment to the Justice.”⁴⁰ The delegates to the Convention also agreed that the Judiciary would be impeachable.⁴¹ It was not clear, however, whether other branches of the government, namely members of the legislature, should be subject to impeachment. The explanation of the scope of the term “all civil officers of the United States” was left to the practice.

Since the Constitution was adopted, the House formally impeached 16 people: 2 presidents, one senator, one secretary of war, and 12 judges. The proceedings in the Senate resulted in 7 officials being convicted and removed from office, 6 were acquittals, 2 dismissals and 1 proceeding being suspended had never been completed.⁴² In fact, the number of impeachment cases in the United States is not

34. *Id.* at 65-66.

35. *Id.* at 337.

36. *Id.* at 545.

37. *Id.* at 550.

38. *Id.* at 551 and 600.

39. Morris’ statement of July 19, see Ferrand, *id.* at 53.

40. *Id.* at 53-54.

41. *Id.* at 66.

42. Gerhardt, at 23, for full list see footnotes 3-7; Van Tassel & Finkelman, *supra* n. 19, at 1.

abundant enough to explain all the problems or questions that were left unclear or unanswered.

With regard to the impeachment of the Senators, the Convention members and particularly James Wilson, expressed reservations as to their impeachability.⁴³ In response to the inquiries of the members of the Pennsylvania Ratifying Convention, Wilson explained that the exchange of one third of the Senators every second year sufficiently guarantees their political responsibility.⁴⁴ During the discussion of the impeachment in Pennsylvania, John Smilie also raised that the opportunities for Senators to impeach their colleagues would be weak and that subjecting them to impeachment would work against the basic concept of equal treatment.⁴⁵ On the other hand, Hamilton, in his letter published in *Federalist* No. 66, stated that the Convention "might also have had in view the punishment of a few leading individuals in the Senate."⁴⁶ The history of the United States has provided only limited clarification about the problem of the extension of impeachment to the members of the legislature. The single case of Senator Blount was dismissed by the Senate vote 14 to 11 for lack of jurisdiction.

William Blount, a frontier man, politician, and businessman, was appointed by George Washington, in 1790, as governor of the territory of the U.S. south of Ohio river. In the late nineties, he founded the city of Knoxville in Tennessee and began representing this State in the U.S. Senate. At the same time, he began conspiring to arrange a military expedition that would seize New Orleans in Louisiana and the Floridas (then the Spanish territory) and then turn them over to Great Britain. On July 3, 1797, President John Adams revealed before the U.S. Congress Blount's handwritten letter as evidence of his intention to gain financial benefits from his efforts on behalf of Great Britain.⁴⁷ The House voted to impeach Blount, and without any formal process completed in this chamber, the Senate voted 25-1 to summarily expel Blount on a charge of "high misdemeanor entirely inconsistent with his public trust and duty."⁴⁸ Apparently, this decision would not block Blount from seeking a re-appointment,⁴⁹ but he decided to run for the State Senate instead. In the meantime, the House prepared the articles of impeachment and the federal Senate began Blount's trial in December 1798. The major issues were listed:

43. Ferrand, *id.*, at 68; check more comments on this by Gerhardt, *supra* n. 16, at 18 f. 43.

44. Gerhardt, *id.* at 18.

45. *Id.*

46. *The Federalist Papers*, at 406.

47. Van Tessel & Finkelman, *supra* n. 19, at 87.

48. *Id.*

49. In accordance with Art. I, Section 3 of the U.S. Constitution, the Senators were chosen by the Legislatures of the State; the direct senatorial elections were introduced by Amendment XVII, ratified in April 8, 1913.

whether an individual, no longer in office, can be impeached and whether a senator is an officer of the United States. Blount himself claimed that the "civil officers" are only those appointed by the President.⁵⁰ The Senate voted on January 10, 1798, to dismiss the resolution that a senator is a "civil officer," and four days later it dismissed the case for lack of jurisdiction.⁵¹ This trial created precedent that seems to limit the scope of impeachable subjects to the members of the executive and judicial branches; whether the Blount's case resolved the problem sufficiently still remains a matter of debate.⁵²

The impeachment against persons "no longer in office" has been discussed in two judicial impeachments: the 1873 case of Federal Judge Mark H. Delahay and 1926 case of Illinois District Judge George W. English. The articles of impeachment against Delahay charged him for improper personal habits exhibited while on the bench. Delahay, however, resigned and no further action was taken by the Senate.⁵³ Similarly, in the case of Judge English, charged for abuse of power, favoritism and tyrannical and oppressive behavior, the substantial majority of the House (306-62) voted for the impeachment but the Senate decided to dismiss charges (70-9) after English's resignation.⁵⁴

The 1876 trial of Secretary of War William W. Belknap was more complicated and provoked significant concern that a defendant may escape the punishment through resignation. On March 2, 1876, Belknap, warned by the friend about the possibility of impeachment, submitted his resignation from the Cabinet of President Ulysses S. Grant. Although several Senators were concerned that the chamber would not have jurisdiction over the person not in office, the majority (37-29) voted in favor of Belknap being guilty of bribery charges. Still, the Senate did not reach the required two-third majority and Belknap was acquitted.⁵⁵ The overlapping reservations as to Belknap's guilt and procedural impropriety of the impeachment did not allow for a decided resolution of the issue of the scope of Senate's jurisdiction over the persons no longer in office.

50. *Annals of Congress*, 1 (1798 [1798-1799]), 2270-2272; see also Gerhardt, *supra* n. 16, at 48. For summary of the argument of Delaware Federalist James Bayard, speaking against Blount's defenses, see Buckner F. Melton Jr. in, *The First Impeachment: The Constitution's Framers and the Case of Senator William Blount* (1998) at 209-15. Melton's book is most exhaustive examination of the Blount's case.

51. When the trial was still pending, Blount, who was elected and who later presided in the state Senate in Tennessee, was himself involved in the impeachment of a state judge. Van Tassel & Finkelman, *supra* n. 19, at 87.

52. See Gerhardt, *supra* n. 16. See also conclusions of St. George Tucker, *Blackstone's Commentaries* (ed.), App., 803, at 335; see also comments of R. Berger who seemed to be less convinced that the issue of impeachability of Senators was finally decided; *Impeachment: The Constitutional Problems* (1973), at 214-23.

53. Van. Tassel & Finkelman, *supra* n. 19, at 119-23.

54. *Id.* at 144-52.

55. *Id.* at 191-98.

The case of President Richard Nixon provoked an even larger controversy. In March 1974, Nixon was confirmed by a federal grand jury as an "un-indicted co-conspirator" in the Watergate investigation triggering the decision of the Supreme Court to order Nixon to turn over the tapes as evidence of the White House cover-up. The attempts to "censure" the president rather than to impeach him failed and the Judiciary Committee of the House recommended to the full chamber the impeachment on the charges of "obstruction of justice, abuse of powers, contempt of Congress (refusal to obey the subpoena of the House)"; two other charges of "income tax evasion and Cambodia bombing" were dismissed.⁵⁶ Losing support of his own party in the Congress, Nixon resigned on August 9, 1974. In addition, prior to the eruption of the Watergate scandal, it was revealed that Vice-President Spiro T. Agnew was under investigation on the charges of bribery, extortion, tax fraud and conspiracy. Agnew resigned and in accordance with Amendment XXV Section II of the U.S. Constitution, Nixon nominated Gerald R. Ford as his successor. After Nixon's resignation, Ford as the new President, on September 8, 1974, pardoned Nixon for all federal crimes. The full House had never decided on the impeachment articles prepared by the Judiciary Committee. The precedent that officials "not in office" are not impeached had not been broken, and the question whether they are "impeachable" remained unanswered.

IMPEACHABLE OFFENSES

Treason is a constitutionalized crime in the United States and bribery is relatively well defined by the judiciary. Article III Section III of the Constitution reads: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

In *Allen v. State*,⁵⁷ the Court defined bribery as "the offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of an official in the discharge of his or her public or legal duties." The federal statute states that "any direct or indirect action to give, promise or offer anything of value to a public official or witness, or an official's or witness' solicitation of something of value is prohibited as a bribe or illegal gratuity."⁵⁸

The meaning of "high crimes and misdemeanors" is more controversial. As the courts declined to define this term for the purposes of

56. Id. at 259.

57. 63 Okl.Cr 16, 72 P.2d 516, 519; see also, *State v. London*, 194 Wash. 458, 78 P.2d 548, 554.

58. 18 U.S.C.A. # 201.

the impeachment process, its interpretation was left to the cases of impeachment and *opinio iuris*. As “crimes and misdemeanors” are well defined by criminal law, the essential problem was to determine what the word “high” means. As Jon Roland wrote: “It does not mean ‘more serious.’ It refers to those punishable offenses that only apply to high persons, that is, to public officials, those who, because of their official status, are under special obligations that ordinary persons are not under, and which could not be meaningfully applied or justly punished if committed by ordinary persons.”⁵⁹ This comment, however, does not sufficiently clarify the meaning of “high,” as the terms “high persons” or even “public officials” are not precisely determined.

It also does not answer the questions, whether the common crimes such as perjury or murder, should be included into the group of “high offenses,” or whether “impeachable acts” include only “serious abuses of power.”⁶⁰ The first issue deals with “criminality” as *condition sine qua non* of impeachable acts, whereas the second issue tackles the problem of “political flavor” of the impeachable offenses. In fact, both questions hardly can be unequivocally answered on the basis of examination of impeachment cases. For example, Richard Nixon’s lawyers claimed that the term “crimes and misdemeanors” encompasses only “indictable crimes” and not general “misbehavior.”⁶¹ On the other hand, it was claimed that the judges hold their positions “during good behavior”⁶² and that they may be removed for official misconduct which might not be criminal in its nature. In 1913, Chief Justice Taft, in his address to the American Bar Association stated, “By liberal interpretation of the term ‘high misdemeanors’ which the Senate has given there is now no difficulty in securing removal of a judge for any reason that shows him unfit.”⁶³ This position was strongly upheld by Gerald Ford in his speech supporting impeachment of Supreme Court Justice William O. Douglas in 1970. Ford referred specifically to the case of U.S. Judge Halsted L. Ritter who was impeached in 1936 for misconduct but not clearly for criminal activity.⁶⁴ In response to Ford, Representative Paul N. McCloskey emphasized that because of special constitutional commitments of the judges, their misbehavior amounts to “the highest crime.”⁶⁵

59. J. Roland, “Meaning of High Crimes and Misdemeanors,” Website of Constitution Society, http://www.constitution.org/cmt/high_crimes.htm.

60. For more comments on this issue see, Van Tassel & Finkelman, *supra* n. 19, at 7.

61. “An Analysis of the Constitutional Standard for Presidential Impeachment,” quoted after Van Tassel, *id.* at 6.

62. The U.S. Constitution, Art. III Sec. I.

63. Quoted by Merrill Otis, “A Proposed Tribunal: Is It Constitutional?,” 7 *Kan. City L. Rev.* 3, 22 (1938); quoted also by R. Berger, *Impeachment: The Constitutional Problems* (enlarged edition 1974), at 61 n. 16.

64. Ford’s speech was published by Van Tassel, at 56-60.

65. McCloskey quoted in his speech Memorandum of Dykema, Wheat, Spencer, Goodnow & Trigg, submitted in Ritter’s case, *id.* at 60-61.

The problem of "impeachable offences" of the highest elected public officials surfaced with particular strength during President Bill Clinton's 1998—impeachment proceeding. Clinton was charged for obstruction of justice by "providing false and misleading testimony under oath in a civil deposition before the grand jury; withholding evidence and causing evidence to be withheld and concealed; and tampering with prospective witnesses in a civil lawsuit and before a federal grand jury."⁶⁶ The minority counsel for the committee, Democrat Abbe Lowell, claimed that impeachment requires especially high standards because "it nullifies the Popular Will." He maintained that purely private behavior does not justify impeachment that can be started only for political offenses.⁶⁷ The House of Representatives rejected this assertion and decided to include within the articles of impeachment two acts: obstruction of justice and perjury. The prevailing tone of the discussion in the chamber did not indicate any tendency to apply different standards to judges and other public officials. Clinton's acquittal by the Senate proved again that there is no unequivocal definition of impeachable offenses. The issue of "criminality" of the impeachable acts has not been clearly answered, especially with regards to non-judicial officials whose terms are limited and who do not serve exclusively "during good behavior."

CRIMINAL AND CIVIL LIABILITY OF THE PUBLIC OFFICIALS

The scope of the executive power is not precisely determined by the U.S. Constitution, and the Constitution does not refer to the President's immunity from the judicial process.⁶⁸ Nevertheless, the problem was addressed several times by the American courts. Most of these cases stemmed from efforts to interpret the separation of powers principle under the Constitution.⁶⁹ In several others cases the

66. See report of David P. Schippers, the majority counsel on the House Judiciary Committee, on October 5, 1998; published in Van Tassel, *op.cit.* at 274-87.

67. *Id.* at 288-302.

68. See, G.R. Stone, L.M. Seidman, C.R. Sunstein, & M.V. Tushnet, *Constitutional Law* (1991), at 397.

69. Several major cases involved four American Presidents; Abraham Lincoln [Prize Cases, 67 U.S. (2 Black) 635 (1863), *Ex parte Milligan*, 4 Wall.2 121 (1866)]; Franklin Roosevelt [Panama Refining *Co.v.Ryan*, 293 U.S. 388 (1935), *A.L.A. Schechter Poultry Corp.v. United States* 295 U.S. 495 (1935), *Carter v. Carter Coal Co.* 298 U.S. 238 (1936), *NLRB v. Jones & Laughlin Steel Corp.* 310 U.S. 1 (1937)]; Harry Truman *Youngstown Sheet and Tube Co v. Sawyer*, 343 U.S. 579 (1952), *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)]; Richard Nixon, [New York Times *v. United States*, 403 U.S. 713 (1971), *United States v. Nixon* 418 U.S. 683 (1974), *Train v. City of New York*, 420 U.S. 35 (1975), *Nixon v. Administrator, General Services Administration*, 443 U.S. 425 (1977)]. As Norman C. Thomas and Joseph A. Pika wrote, "The fact that courts have struck down actions of the president as unconstitutional in only eleven major cases in more than 200 years indicates their reluctance to do so, especially in times of foreign and military crisis." *The Politics of the Presidency* (4th ed. 1997) at 317; for more extensive analysis of case law see,

courts' holdings resembled common law decisions;⁷⁰ the judges intervened to protect the public interest in an on-going criminal prosecution or to define the rights of public officers in private suits for damages. Most of these cases are of great importance for the determination of the public officials' scope of immunity. The courts had to answer several fundamental questions, such as: Are the impeachment decisions subject to judicial review or presidential veto? Can the courts issue injunctions against the President? Can a person be indicted before the conclusion of impeachment? Can the President be judicially punished before his removal from office? To what extent would the acquittal by the Senate in its impeachment proceeding be binding for the criminal courts? Does presidential immunity extend to civil suits? Is presidential immunity different than immunity of other public officers?

The first question has its answer in the Constitution itself: which states clearly that "the House shall have the sole power of impeachment"⁷¹ and "The Senate shall have the sole power to try all impeachments."⁷² The only judicial input into the impeachment process is the presidency of the Senate's trials by the Chief Justice of the Supreme Court in the cases against the Presidents; the courts have never claimed the justiciability of these suits. The same declaration of the Constitution that Congress is "the sole power" in impeachment proceedings responds negatively to all concerns that the presidents would be able to veto the Congressional impeachment decisions and become judges in their own cases or cases of their subordinates.

The problem of injunctions against the President was resolved by the judiciary. The Supreme Court stated in *United States v. Nixon*,⁷³ that "the Special Prosecutor [has] explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties."⁷⁴ The Court declared that "the legitimate needs of the judicial process may outweigh Presidential privilege" and ordered the President to give the tapes of his discussion with indicted John Mitchell, Nixon's former campaign manager and Attorney General. It confirmed that executive officials are not immune from suits for injunctive relief.⁷⁵

G.R. Stone, L.M. Seidman, C.R. Sunstein, M.V. Tushnet, *Constitutional Law*, op.cit., at 359-471.

70. See comments of S.L. Carter on *Nixon v. Fitzgerald* in "The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision," 131 *U.Pa.L.Rev.* 1341 (1983).

71. Art. I Section II/5.

72. Art. I Sec III/6.

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

74. 38 Fed Reg. 30738, as amended by 38 Fed. Reg. 32805.

75. These suits are well known and commented upon; *Marbury v. Madison* (5 U./S. (1 Cranch) 137 (1803); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952);

As far as criminal liability of public officials is concerned, the Constitution states that "the party convicted (in impeachment process) shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law."⁷⁶ The question if whether the criminal trial can start before removal of the officer has not been answered by the courts with sufficient clarity.⁷⁷

The prosecutors have never gone so far as to claim the right to indict the acting President.⁷⁸ The courts showed inclination to confirm absolute, although temporary, immunity of the Chief Executive from criminal liability.⁷⁹ As the Supreme Court, following the argument of Justice J. Story, held in *Nixon v. Fitzgerald*: "The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office. . . ."⁸⁰ The history did not subject this question to practical testing.⁸¹ Neither one of three impeached U.S. Presidents was indicted by the courts. Andrew Johnson was not impeached for common offenses. The charges against him included violating the Tenure of Office Act and the Army

for more comments see, C. F. Abernathy, *Law in the United States: Cases and Materials* (1995), at 232. The American courts, followed the intention of the Framers of the Constitution and distinguished the position of the Executive in the United States from immunities of the British Crown. As Wade and Bradley wrote, "The remedies of injunction and specific performance are not available (in England), as the Crown, i.e. Ministers, cannot be committed for contempt of court, the method of enforcing these remedies against ordinary personal dependents." *Constitutional Law*, op.cit at 189.

76. Art. I, Sec III/7.

77. With regard to this issue neither the Framers' intent is clear or the structural analysis of the Constitution gives clear-cut answer to this problem. See Griffin, "Presidential Immunity from Criminal Process: Amateur Hour at the Department of Justice," 5 *Wid. L. Symp. J.* at 63-64 (2000).

78. For more comments see, Miller, "Presidential Sanctuaries After the Clinton Sex Scandals," 22 *Harv.J.L. &Pub.Pol'y* (1999) 678 and ff.

79. Summarizing arguments in favor and against pre-impeachment criminal prosecution, Miller wrote, "Opponents of presidential immunity from pre-impeachment prosecution argue essentially that the president is not above the law and must, like any citizen, be accountable to society's standards of minimum conduct. . . . Advocates of immunity argue that a prosecutor should not be empowered to disable an entire branch of government. . . ." *id.*, at 679. See also Turley, "From Pillar to Post": The Prosecution of American Presidents," 100 *W. Va L.Rev.* 493 (1997). For comments on the immunity of the President from both state and federal prosecution see, King, "Indicting the President: Can a Sitting President be Criminally Indicted?" 30 *Sw I.L. Rev.* 417 (2001) 424-425.

80. In fact, Justice Story wrote that the president should be deemed immune "in civil cases at least," but the reference to arrest or imprisonment suggested that most likely he would be inclined to extend the liability beyond "the court contempt" cases. See, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); see also 3 J. Story, *Commentaries on the Constitution of the United States*. (1st ed. 1833) at 418-19.

81. The level of uncertainty and confusion is well summarized in the opinion expressed by J.S. Bybee, "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." "Who Executes the Executioner? Impeachment, Indictment and Other Alternatives to Assassination," 2 *Nexus J.Op.*, 54.

Appropriations Act, and undignified behavior in sense of "utterances, declarations, threats, and harangues" against Congress. His conviction failed to pass in the Senate missing just one vote.⁸² Richard Nixon was pardoned by his successor Gerald Ford. In the case of President Clinton, Independent Counsel Robert Ray, who replaced Kenneth Star, agreed to close the investigation without filing any criminal charges against Clinton for perjury or obstruction of justice. In his deal with Ray, Clinton accepted a five-year suspension of his license to practice law in Arkansas and the obligation to pay a \$25,000 fine.⁸³

With regard to other public officers, history gives a different answer. On July 11, 1804, third Vice-President of the United States Aaron Burr challenged Alexander Hamilton to a duel and killed him. In 1804 Burr failed to win re-nomination but still had been Vice President when he was under indictment in New York and New Jersey for murder.⁸⁴ Burr, however, was not impeached.

The case of Vice-President Spiro T. Agnew also confirms the possibility of pre-impeachment criminal suits against high public officials. In 1973 Agnew was officially charged for accepting bribes and for tax evasion.⁸⁵ On October 10, he was fined \$10,000 and sentenced to three years' probation; he resigned from his office shortly before the announcement of the ruling.⁸⁶

The situation of District Judge Harry E. Claiborne was even more complicated. In 1986, he began serving his two-year sentence for tax violations. Claiborne did not resign and planned to return to office after the completion of the punishment. The House impeached

82. Johnson escaped the conviction by one vote short of the required two-third majority in his 1868 Senate's trial. See Van Tassel, *op.cit.* at 221-52.

83. N. Hentoff, "Clinton's Deal: Justice Denied," *Voice Store*, February 14-20, 2001; Guest editorial: Bill Clinton's last deal," *Naples Daily News*, January 21, 2001; "Starr Shines on Clinton's Exit Deal," *NewsMax.com* January 23, 2001.

84. It is interesting to note that Burr, being himself under indictment, presided over the Senate impeachment proceeding of Justice Samuel Chase; see Van Tassel, *op.cit.* at 13.

85. Constitutional scholar Robert G. Dixon argued that the situation of Vice President is different than the sitting President and that Vice President may be subject to indictment and prosecution; see, Robert G. Dixon, Jr. "Memorandum from Department of Justice Re: Amenability of the President, Vice President and other Civil Officers to federal Criminal Prosecution while in Office" (Sept. 24 1973). Similar to this, Solicitor General Robert H. Bork argued also that with exception of the President, all civil officers of the United States, including Vice President are amenable to the federal criminal process; see "Memorandum for the United States Concerning the Vice President's Claim of Constitutional immunity," in Re: Proceedings of the Grand jury Impaneled, Dec 5 1972; Application of Spiro T. Agnew, Vice President of the United States 9 No. 73-965) (Oct.5, 1973).

86. *Opinio iuris* split with regard to criminal liability of a sitting Vice-President and some commentators required that they will be granted the same type of absolute immunity as the President. See Long, "How to Sue the President: A Proposal for Legislation Establishing the Extent of Presidential Immunity," 30 *Val U.L. Rev.* 283 (1995).

him and the Senate, in 1986, voted for conviction but rejected (46 to 17 votes) the charges that Claiborne committed "high crimes and misdemeanors."⁸⁷ Another District Judge Alcee L. Hastings was tried in the court for conspiring to solicit a bribe and was acquitted; he was, however, impeached successfully in 1989 for lying and fabricating evidence in his criminal trial.⁸⁸ The acquittal did not block the Judge's impeachment process.

IMMUNITY FROM DAMAGES PREDICATED ON OFFICIAL ACTS

The scope of the presidential immunity from liability for damages was also determined judicially. In *Nixon v. Fitzgerald*, the Supreme Court summarized its position in several immunity cases, such as *Spalding v. Vilas*,⁸⁹ *Pierson v. Ray*⁹⁰ or *Scheuer v. Rhodes*.⁹¹ The Court held that "petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts."⁹² The Court refused to specify which actions of the President's many functions would be purely "official"; the Court stated only that his immunity extends to "acts within the 'outer perimeter' of his official responsibility" and decided that the President's action that resulted in dismissal of the defendant (a management analyst with the Department of the Air Force) from his office, laid well within the perimeter of his authority. The Court concluded that the Chief Executive is not "above the law" because the nation has non-judicial means of control over his misconduct, such as impeachment, scrutiny of the press, and the ultimate judgment of history. As Stephen L. Carter observed, "the constitutional analysis in *Nixon v. Fitzgerald* leads almost ineluctably to the proposition that the judicial power of the United States does not include the authority to punish the President of the United States."⁹³

The Supreme Court showed, however, limited tendency to extend the Presidential privileges on other public figures in the United States. The absolute immunity of legislators, working in their official character, was granted by the Speech or Debate Clause of the Constitution⁹⁴ and recognized in *Eastland v. United States Servicemen's*

87. *Id.* at 169.

88. *Id.* at 172-180.

89. 161 U.S. 483 (1896).

90. 386 U.S. 547 (1967).

91. 416 U.S. 232 (1974).

92. *Nixon v. Fitzgerald*, *op. cit.* at 749.

93. S.L. Carter, "The Political Aspects of Judicial Power." *op.cit.* at 1343. Carter argued that the Supreme Court did not pronounce a constitutional rule but issued a common law decision. He speculated that in this situation the Congress can limit the President's authority and "legislate to punish him directly" (at 1349). Most likely, this action would violate the constitutional concept of checks and balances.

94. Art. I, Sec 6/1 of the U.S. Constitution.

Fund,⁹⁵ and the scope of immunity of prosecutors and judges has been addressed in *Butz v. Economou*.⁹⁶ The Supreme Court ruled on the immunity of congressional aids in *Gravel v. United States*⁹⁷ deciding that the protection of the congressional employees is derivative from the protection of legislators themselves.

As far as executive officers are concerned, the Court in *Scheuer v. Rhodes*⁹⁸ distinguished "the high officials" and "those with less complex discretionary responsibilities." The distinction is at least ambiguous. The Appointment Clause of Article II of the U.S. Constitution⁹⁹ divides all "officers of the U.S." in two categories of "principal" and "inferior" officers. In *Buckley v. Valeo*¹⁰⁰ the Supreme Court stated, "[P]rincipal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary."¹⁰¹ In *Morrison v. Olson*,¹⁰² the Court again referred to the distinctions between two classes of officers but noted that "[the] line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn."¹⁰³

Despite this ambiguity with regard to shared control of appointments, the Court confirmed that the removal power, except for impeachment cases, is reserved solely for the Executive Branch.¹⁰⁴ The President's discretion, the Court added, is not "illimitable"; the officers may be removed "for good cause," meaning a way that would not threaten their independence.

95. 421 U.S. 491, (1975).

96. 438 U.S. 478 (1978).

97. 412 U.S. 306 (1973).

98. 416 U.S. 232 (1974).

99. Art. II, Sec 2 cl.2.

100. 424 U.S. 1 (1976).

101. It has been often noted that vesting appointment power into the heads of departments still leaves the effective control over this process in the hands of the Presidents. On the other hand, the courts have independent authority to make appointments upon the congressional authorization; the courts, however, cannot remove officers they appointed. C.F. Abernathy, *Law in the United States. Cases and Materials* (1995) at, 256-57.

102. 487 U.S. 654 (1988).

103. The Court quoted the comment of Justice J. Story, "In the practical course of the government there does not seem to have been any exact line drawn, who are and who are not to be deemed *inferior* officers, in the sense of the constitution, whose appointment does not necessarily require the concurrence of the Senate", *Commentaries on the Constitution* (3rd ed. 1858), at 397-98.

104. Section V/A of *Morrison v. Olson* on "Presidential Authority, Id. In fact, the Congress can vest the power to remove executive officers in higher official, other than the President. For example, the authority to remove assistant U.S. attorney is vested in the Attorney General. The President who disagrees with the Attorney General would have to fire him first. C.N. May & A. Ides, *Constitutional; Law, National Power and Federalism* (1998), at 255.

In *Spalding v. Vilas*¹⁰⁵ the Court extended absolute immunity from civil suits for damages on the heads of Executive Departments making decisions in the scope of their discretion. In accordance with the Court's reasoning, the public interest requires that the high executive officers be free from restraints other than their inner convictions, which could affect their official conduct.¹⁰⁶ In *Butz*, however, the Court disqualified the concept of "a blanket recognition of absolute immunity" of all high federal officials; it rejected the assertion of absolute immunity of the Secretary of Agriculture, but upheld a claim of "absolute immunity for administrative officials engaged in functions analogous to those of judges and prosecutors."¹⁰⁷

In *Harlow v. Fitzgerald*, the Supreme Court again addressed the issue of immunity.¹⁰⁸ The Court restated that most presidential aides are entitled only to a qualified immunity. The Court was reluctant to give the presidential aids more immunity than was granted to the Members of Cabinet and rejected the suggestion that it should use the reasoning from *Gravel v. United States* and to make the immunity of the Presidential aids derivative from the Immunity of the Presidents in the same way as the immunity of congressional aids is derivative from the Congressmen's immunity.¹⁰⁹ The *Harlow* Court decided that the immunity should be recognized by the courts according to the standard that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."¹¹⁰ Chief Justice Berger, elaborating on the standards of qualified immunity in the 1974 case of *Scheuer v. Rhodes*, proposed a

105. 161 U.S. 483 (1896). For further analysis of Spalding's decision see, Williams, "Temporary Immunity: Distinguishing Case Law Opinions on Executive Immunity and Privilege as the Supreme Court Tackles an Oxymoron," 21 *Nova L. Rev.* 977-78 (1997).

106. *Spalding v. Vilas*, op.cit. at 498.

107. Court's interpretation of the ruling in *Butz*, presented in *Nixon v. Fitzgerald*, op.cit. at 747.

108. 457 U.S. 800 (1982).

109. Some commentators claimed that the Presidential aides' have to some extent an absolute immunity, which is derivative from the constitutional immunity afforded to the President. This position, however, does not take us far enough to break a 'vicious circle' of immunity doctrine. In fact, linking the aides' immunity with the president's privilege means only making ambiguity of the position of other executive officers derivative from the ambiguity of the powers of the Chief Executive. In contrast to the immunity of legislators, the President's immunity is not covered directly by any constitutional clauses. It still leaves for the courts the task of determining the immunity of the President and his subordinates from constitutional traditions (not directly from constitutional principles) or from the common law standards. For more comments see, Schechter, "Symposium: Separation of Powers and the Executive Branch: The Reagan Era in Retrospect: Immunity of Presidential Aides from Criminal Prosecution," 57 *Geo. Wash. L. Rev.* 779 (1989).

110. For further references to these standards, see *Procunier v. Navarette*, 434 U.S. 555, (1978); and *Wood v. Strickland*, 420 U.S. 322, 95 S. Ct., at 1001.

three-fold test under which the courts would have to check whether the official worked 1) in the scope of authority, 2) within the range of discretion linked to the holder of such office, and 3) in conviction that the action is lawful.¹¹¹ In *Nixon v. Fitzgerald* and *Harlow v. Fitzgerald* the Court confirmed that a "good faith" qualified immunity,¹¹² is contingent on whether the official knew or should have known that the action is one in which the "the law forbade the conduct."¹¹³

RESPONSIBILITY FOR THE SUBORDINATES

All above case law does not directly address the scope of responsibility of the higher executive officers for criminal acts or omissions committed by the subordinates. The courts focused on their immunity rather than on their responsibility, assuming correctly that, in fact, both issues are interrelated and it is quite obvious that the officers' accountability lies beyond the area covered by limited or absolute immunity. It is also unquestionable that, even in the area of responsibility, the President (in accordance with Art. II Sec. 2, #1) has right to pardon any offenses (except in cases of impeachment) committed by his subordinates. It remains a question, however, what other common law principles, besides the doctrine of immunity and the President's clemency power, may determine the limits of responsibility of superiors for the inferior officers' acts?

The response to this question tackles two issues. The first one goes beyond the scope of this article and involves the review of the customary international law doctrine of command responsibility. This doctrine allows delegating authority to subordinate military leaders but also determines the limits of reasonable control and responsibility of superiors for results of the actions.¹¹⁴ It extends to all commanders, including the U.S. President as Commander in Chief.

This article focuses on the second issue related to the limits of political responsibility for the acts committed by executive subordinates of the U.S. President. With regard to this problem, the courts usually emphasized the President's power to control subordinates and reluctantly addressed the scope of his accountability for all administrative actions. The commentators usually focused on a two-fold aspect of the executive responsibility. On the one hand, it is clear that political leaders should not escape responsibility for acts

111. *Scheuer v. Rhodes*, op.cit. at 250; see also Williams, "Temporary Immunity: . . ." op.cit at 983.

112. *Nixon v Fitzgerald*, op.cit. at 746.

113. *Harlow v. Fitzgerald*, id.

114. See Smidt, "Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations," 164 *Mil. L. Rev.* 155.; see also Bantekas, "The Contemporary Law of Superior Responsibility," 93 *A.J.I.L.* 573 (2000).

committed by "faceless bureaucrats;"¹¹⁵ on the other hand, it is equally obvious that the rise of the administrative state complicated the concept of responsibility vested in any single executive person. The final authority doctrine combined with the President's supervisory powers seems to shed some light on the problem.

The prevailing opinion is that Article II of the Constitution places the "[t]otality of executive power with the President"¹¹⁶ and basically derives his responsibility for the subordinates' acts from his unique right of appointment and exclusive right of removal of the executive officers. The President, however, cannot participate in all actions taken even by his closest subordinates, such as members of the Cabinet. As Harold H. Bruff correctly observed, "[h]is (President's) responsibility, then is generalized. . . the President's relationship with the agencies is basically one of oversight. . ." ¹¹⁷ In fact, it determines that the President's accountability for the totality of administrative decisions is of a political nature only, one which can be enforced solely through impeachment and through periodical elections. The commentators observed that the scope of the President's accountability varies and depends on the level of aggressiveness of the Presidential control over subordinate agencies. The increase of the President's regulatory power contributes to the wider responsibility for subordinates decision.¹¹⁸ To conclude, the chain of responsibility in the presidential system is quite different than that in a parliamentary government. As Alexander Hamilton observed in comparing the British system of collective administrative responsibility with the American concept of individual responsibility:

" . . in a republic where every magistrate ought to be personally responsible for his behavior in office, the reason which in the British Constitution dictates the propriety of a council not only ceases to apply, but turns against the institution. In the monarchy of Great Britain, it furnishes a substitute for the prohibited responsibility of the Chief Magistrate, which serves in some degree as a hostage to the national justice for his good behavior. In the American republic, it would serve to destroy, or would greatly diminish, the intended and necessary responsibility of the Chief Magistrate himself."¹¹⁹

115. See, Rivkin Jr. "The Unitary Executive and Presidential Control of Executive Branch Rulemaking," 7 *Admin L.J. U.* 309 (1993).

116. *Id.*

117. A Symposium on Administrative Law; "The Uneasy Constitutional Status of the Administrative Agencies", April 4, 1986: Part II: Presidential Oversight of Regulatory Decisionmaking: Principal Paper: On the Constitutional Status of the Administrative Agencies," 36 *Am.U.L.Rev.* 509 (1986).

118. *Id.* at 510.

119. The Federalists, No. 70, *op.cit.* at 429.

IMMUNITY FROM PRIVATE CIVIL SUITS

The question of whether the presidential privilege extends to private civil suits not related to official functions of the executives was raised by the courts during the Clinton Affair.¹²⁰ Before Clinton, three other Presidents had civil litigation pending at the time when their presidency was inaugurated. Theodore Roosevelt's suit started in New York in 1895, and was pending during his vice-presidency and when he later became president in September 1901, after assassination of William McKinley. The suit ended on August 5 1904 when the New York Court of Appeals affirmed the dismissal.¹²¹ The suit against President Harry Truman¹²² was dismissed by the Supreme Court of Missouri in 1946, a year after he took presidency. The suit against John F. Kennedy for injuries caused by a car leased and used during his campaign was also pending when he became president, and was subsequently settled.¹²³

The 1997 Paula Jones case against President Clinton was the first one in which the courts discussed whether the president's temporary immunity¹²⁴ extends to all civil lawsuits. In fact, Clinton's attorneys were not asking for immunity but for deferral of the suit until the end of the President's term.¹²⁵ The district courts did not confirm the President's immunity from the suits arising from acts prior to his presidency, but stated that the president while in office should focus on public matters rather than on his defense from the civil challenges. The court of appeals rejected this argument and Clinton asked the Supreme Court for certiorari. The Supreme Court granted certiorari and stated that such litigation would not be an encroachment of judicial power into functioning of the executive and would not "place unacceptable burdens on the President that will hamper the performance of his official duties." Justice Stevens, delivering the opinion of the Court wrote, "That assertion (of President's immunity) finds little support either in history, as evidenced by the paucity of

120. For more arguments that sitting presidents should not be subject to civil litigation, see Alexander, "Comment: In the Aftermath of Clinton v. Jones: An Argument in Favor of Legislation Permitting a Sitting President to Defer Litigation," 28 *Sw. U.L. Rev.* 71 (1998); see also Kasten, "Clinton v. Jones' Impact on the American Presidency," 51 *Ark. L. Rev.* 551 (1998); Williams, "Temporary Immunity: Distinguishing Case Law Opinions on Executive Immunity and Privilege as the Supreme Court tackles an Oxymoron," 21 *Nova L. Rev.* 969 (1997).

121. Kasten, "Summons at 1600: Clinton v. Jones' Impact on the American Presidency," 51 *Ark. L. Rev.* 561 (1998).

122. The plaintiff claimed that Truman as a judge improperly committed the plaintiff to a mental institution.

123. *Id.*

124. G.T. Williams argued that Clinton v. Jones suit was actually about the extension of the President's privilege rather than on the recognition of the President's right to temporary immunity, *id.* at 73; see also Kumar Katyal, "Executive Privilege and the Clinton Presidency: The Public and Private Lives of Presidents," 8 *Wm. & Mary Bill of Rts.J.* 677 (2000).

125. Clinton v. Jones (95-1853), 520 U.S. 681 (1997).

suits against sitting Presidents for their private actions, or in the relatively narrow compass of the issues raised in this particular case."¹²⁶ The decision provoked a prolific public debate in which it was often claimed that the message sent by the Court in the *Nixon v. Fitzgerald* and *Clinton v. Jones* cases was not unequivocal enough and that the scope of the President's civil liability should find its resolution in the legislative action of Congress.¹²⁷

CENSORSHIP OF THE PRESIDENT

Throughout U.S. history Congress frequently condemned its own members.¹²⁸ The question, however, whether the Chief Executive of the United States can be reprimanded by Congress remains unanswered. It surfaced first time in 1800, during the presidency of John Adams, after he intervened in a deportation case; the House of Representatives attempted to censure him but failed.¹²⁹ The problem was revisited by Congress during the second term of President Andrew Jackson. Re-elected in 1832, Jackson was convinced that the Bank of the United States worked against him. He vetoed the re-charter of the Bank, fired the Secretary of Treasury, William J. Duane, and in his place appointed Roger Brooke Taney. President Jackson ordered Taney to transfer public deposits to several local banks thus involving himself in a battle with the Senate that ultimately concluded with a resolution condemning the President's conduct. The censure did not have a practical impact on Jackson's presidency, as the Senate did not vote to remove him from office.¹³⁰ The President protested, however, claiming that the censorship was an act that violated his executive privileges. He further contended that the procedure originated in the Senate, not in the House of Representatives, and that he was prosecuted without the concurrence of the other chamber,¹³¹ in violation of the Constitution. In a show of acquies-

126. In the ruling the Court referred also to other suits, such as: *Youngstown Sheet & Tube Co. v. Sawyer*, and *United States v. Nixon*, 418 U.S. 683.

127. Alexander, "Comment: In the Aftermath of *Clinton v. Jones*: An Argument in Favor of Legislation Permitting a Sitting President to Defer Litigation," 28 *Sw. U.L. Rev.* 1998) 72. For earlier comments on the legislative regulation of the Presidential immunity see, Long, "How to Sue the President: A Proposal for Legislation Establishing the Extent of Presidential Immunity," 30 *Val U.L. Rev.* 283 (1995).

128. In the recent times such actions has been taken in 1979 against Rep. Charles Diggs; in 1980, against Rep. Charles Wilson; in 1990, Sen. David Durenberger; in 1990, against Barney Frank; in 1991, against Sens. Alan Cranston, Dennis DeConcini, John Glenn, John McCain; in 1991 against Sen. Alfonso D'Amato; in 1997 against House Speaker Newt Gingrich. See, D. Phinney, "Congress Considers Options" ABC News.com, Dec. 17, 2000, <http://abcnews.go.com/sections/us/DailyNews/censure091698.html>.

129. *Id.*

130. See comments by Van Tassel, *op.cit.* at 205.

131. Jackson's protest published by Van Tassel, *op.cit.* at 212.

cence, on January 16, 1837, the Senate decided to expunge the resolution from its record.

The "experiment" with President Jackson did not prevent the House of Representatives from reprimanding President John Tyler in 1842 for vetoing a tariff bill and for use of inappropriate language within the President's veto message.¹³² The House Committee suggested condemnation of the President for numerous vetoes that blocked the "whole action of the Legislative authority of this Union."¹³³ In 1846 both chambers of the Congress condemned President James K. Polk for provoking Mexican-American conflict.¹³⁴ In 1862, the Senate debated, without any conclusions, the possibility of reprimanding former President James Buchanan for failing to prevent the Civil War.¹³⁵ In 1864, the Senate passed a resolution condemning President Abraham Lincoln and Secretary of War Edwin Stanton for signing the agreement allowing Francis P. Blair, at that time also a member of the House, to hold commissions in the Army. The Senate passed the resolution and referred it to a special committee for further investigation; the committee, however, ended the case.¹³⁶ Another attempt to censor Richard Nixon for "negligence and mal-administration," suggested on August 2, 1974 by Representatives Paul Findley of Illinois and Delbert L. Latta of Ohio, failed.¹³⁷ During the Clinton investigation, numerous resolutions suggesting censure rather than impeachment were submitted to the 105th Congress during its 2nd Session. For example, on December 17, 1998 Representatives Houghton and King introduced the resolution condemning and censuring President Clinton; it died, however, in committee.¹³⁸ The same fate fell upon Representative McHale's resolution of December 17, 1998,¹³⁹ and one submitted on February 12, 1999 by Senator Dianne Feinstein.¹⁴⁰ As Congressman Robert C. Scott concluded in his remarks to the Committee on the Judiciary Consideration of the Censure of the President Clinton, "because co-equal branches of government should refrain from censuring one an-

132. Id. at 203.

133. House Journal, 27th Congress, 2nd Sess. 1343-1352.

134. Id.

135. See, D. Phinney, "Congress Considers Options," *op.cit.*

136. "Alternatives to Impeachment: What May Congress Do?," Committee on Federal Legislation, Dec 10, 1998. <http://www.abcny.org/impch98.htm>. The Report of the Committee presents also the list of other case of congressional censure of other civil officers of the United States.

137. Id. at 200.

138. H.J. Res 139: Expressing the sense of Congress with respect to the censure of William Jefferson Clinton — introduced by Reps. Houghton and King on Dec. 17, 1998, <http://thomas.loc.gov/cgi-bin/query/z?c105:H.J.RES.139>.

139. <http://thomas.loc.gov/cgi-bin/query/z?c105:H.J.RES.140>.

140. <http://www.conservativenews.org/InDepth/archive/199902/IND19990212c.html>.

other, and because this might provoke future impeachment inquiries with flimsy allegations, I cannot support this Resolution."¹⁴¹

It seems that the Framers of the U.S. Constitution intended to design impeachment as the only instrument that could be used by Congress against oppressive Presidents. In *Youngstown Sheet and Tube Co v. Sawyer*¹⁴² the Supreme Court confirmed that the presidential power has its source either in the Constitution or through acts of Congress. Through legislation, Congress may direct the President's activity; the laws passed by Congress are however, subject to the presidential veto, but the resolutions are not.¹⁴³

It is open for discussion whether "resolutions," in which the legislative body merely expresses opinions, are authorized by the Speech or Debate Clause. Criticism of the sitting president must be, distinguished from adopting resolutions with a clear condemnation of the Chief Executive. Resolutions are acts with specific goals to be achieved. These goals in the cases of "censorship" are at the very least ambiguous. It seems that the Framers intended to prevent Congress from intruding into President's constitutional functions;¹⁴⁴ the separation of powers' doctrine speaks against the interference of one branch of government in the operation of another branch without a clear constitutional authorization.¹⁴⁵ Censuring the sitting President would open a Pandora box of questions. What would be a legitimate scope of censure? Can Congress, for example, reprimand the president for using his veto powers? Can the President be condemned for firing a member of his cabinet? Is the congressional resolution of censure different from a bill of attainder, prohibited by Art I Sec 9/3 of the Constitution?¹⁴⁶ Can the chief of one branch of the government be exposed for embarrassment without a formal trial?¹⁴⁷

141. http://www.house.gov/scott/12_12_98.htm.

142. 343 U.S. 579 (1952).

143. See more comments, in Richetti, "Congressional Power vis a vis the President and Presidential Papers," 32 *Dug. L. Rev.* 774-75 (1994).

144. As Madison wrote in No. 47 *Federalist* (op.cit. at 303), quoting from Montesquieu, "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." "Some of these reasons-wrote Madison about the US Constitution—are more fully explained in other passages; but briefly stated as they are here they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author."

145. See comments of Kerby Anderson, the president of Probe Ministries International, on September 25, 1998, "Censure?" <http://www.probe.org/docs/c-censure.html>.

146. Bills of attainder are "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial" *Black's Law Dictionary* (1990), at 165, see also *United States v. Brown*, 381 U.S. 437, 448-49 (1965).

147. So called "censure plus" agreements suggest that the President will offer a public apology for his conduct and the Congress will refrain from further penalizing him. See "Alternatives to Impeachment: What May Congress Do?" Committee on Federal Legislation, op. cit. Those who criticized the "censure plus" agreements argued

Is the embarrassment a form of penalty? Is the Congress' alleged right to censure derivative of the right to impeach? Would a "censure", as distinguished from impeachment, be subject to judicial review?¹⁴⁸

Although the courts throughout history showed inclination to protect the President against usurpation by Congress of his constitutional powers, they have never addressed the problem of whether allowing a single house or even both chambers, holding the President in contempt of Congress has any foundations in the Constitution or if in doing so would in fact circumvent its provisions. The opinions of commentators and constitutional experts split on the legality of the president's censorship. As the Committee on Federal Legislation reported:

"Some advocates of impeachment have argued that any lesser sanction than impeachment and removal from office is unconstitutional or extra-constitutional and that the impeachment power is Congress' sole means to address Presidential misconduct. Other authorities have concluded that the Constitution is sufficiently flexible to permit congressional responses short of impeachment and that such lesser remedies may best serve the interests of the Nation by providing an official public condemnation of the President—perhaps tied to some tangible penalty—while avoiding the drastic step of removing from office a duly elected President."¹⁴⁹

The Committee concluded that it tried to "embrace multiple views on this question [consequences of the censure on the separation of powers], but is in agreement that there may be no single "correct" answer outside a specific factual context."¹⁵⁰ This statement basically confirms that with regard to censure, Congress' position can be determined if not by law, by practical political considerations.¹⁵¹

that, the Senate does not have any right to force the President to accept a self-incriminating agreement; "a plea bargain is an admission of guilt with respect to the charges of impeachment," see, Marc Perkel, "Censure is a Bad Idea," <http://www.perkel.com/politics/clinton/censure.htm>.

148. Committee on Federal Legislation, in the report issued during the Clinton's investigation (December 10, 1998) concluded that "Either House of Congress, or both, may pass a resolution condemning or disapproving presidential conduct" and that such a resolution would not be subject to judicial review "because the Constitution leaves the manner of executing the impeachment power exclusively to Congress." In fact, the Committee seemed to disregard the fact that the impeachment but not the censure is a clearly constitutionalized procedure. See, "Alternatives to Impeachment: What May Congress Do?," Committee on Federal Legislation, *op.cit.* For some arguments against the Congress' power to censure the President, see, Marc Perkel, "Censure is a Bad Idea," *id.*

149. *Id.*

150. *Id.*

151. See more comments, in Richetti, "Congressional Power vis a vis the President and Presidential Papers," 32 *Dug. L. Rev.* 774-75 (1994).

CONCLUSIONS: POLITICIZATION OF THE AMERICAN CONSTITUTION.
 SHOULD THE JUDICIARY GIVE THE CONGRESS CARTE
 BLANCHE TO LEGISLATE ON THE SCOPE OF THE
 EXECUTIVE BRANCH'S PRIVILEGE?

William F. Fox Jr., in referring to the Constitution wrote, "Additional flexibility was written into the document by the deliberate use of ambiguous language, which could then be subject to interpretation as conditions dictated."¹⁵² On the one hand, this "deliberate ambiguity" was recognized as one of the most glorified features of the Constitution, contributing significantly to its longevity.¹⁵³ On the other hand, it was observed that a distinction between flexibility and uncertainty of the law is not entirely clear-cut. Without any attempt to debunk the sacrosanct characteristics of the U.S. Constitution, one may note that ambiguity or lack of decisiveness of the Framers contributed to the many major constitutional problems of their successors. The interpretative problems related to the scope of the political and criminal responsibility of the Chief Executive are the best examples of this legacy.¹⁵⁴ In fact, some of the constitutional problems would go almost unnoticed until crises, such as the Nixon scandal or the Clinton affair, proved that they became more serious than ever expected.

The material collected in this article supports the assertion that the ambiguities of the Constitution resulted in excessive politicization of some processes fundamental for the rule of law. In 1798, during Senator Blount's trial, Representative James A. Bayard already observed that, "Impeachment is a proceeding purely of a political nature. It is not so much designed to punish an offender, as to secure the State."¹⁵⁵ On the other hand, the Records of the Federal Convention do not confirm that it was the intention of the Framers to make

152. "Amending the Constitution to Accomplish Social Goals," IX/3 *Social Thought*, 3.

153. As Cass R. Sunstein wrote, "Insofar as it deals with presidential power, however, the American Constitution has proved to be a highly malleable document. With very few exceptions the constitutional provisions relating to the President have not been changed at all since they were ratified in 1787. But in the late twentieth century, these provisions do not mean what they meant in 1787. The Constitution is a legal document, and it is enforced judicially; but its meaning was hardly fixed when it was ratified. In particular the contemporary President has far broader powers than the original Constitution contemplated. It is remarkable but true that large scale changes in the authority of the President have been brought about without changes in the constitutional text, but nevertheless without significant illegality." "An Eighteenth Century Presidency in a Twenty-First Century World," 48 *Ark. L. Rev.* (1995) at 1.

154. The Constitution in Art. I, Sec. 6 grants some immunity to the Senators and Representatives "in all Cases, except Treason, Felony and Breach of the Peace." It is an open question, whether the Framers wished to extend the same immunity to the Presidents and civil officers of the United States. See, Amar & Katyal, "Executive Privileges and Immunities: The Nixon and Clinton Cases," 108 *Harv. L. Rev.* 702 (1995).

155. Quoted in R. Berger, *Impeachment. The Constitutional Problems* (1974), at 88.

impeachment a political tool of Congress against the President. Simply, the Framers were at a loss trying to define terms such as "high crimes and misdemeanors." In result, as Gerald Ford claimed in 1970, "[a]n impeachable offense is whatever a majority of the House of Representative considers it to be at any given moment in history."¹⁵⁶ Although Ford has been often criticized for his cynical tone in this statement, he pointedly demonstrated that, throughout history, Congress was "flexible" enough to impeach presidents for acts which did not have a purely criminal character. As Ford observed, "...one of the charges brought against President Andrew Johnson was that he delivered "intemperate, inflammatory, and scandalous harangues."¹⁵⁷

To name only the most obvious problems identified in this text, the term "high crimes and misdemeanors" was left for Congress to define, as the courts recognized that this is a political task by nature. Congress also tackled the term "civil officers of the United States" without resolving all of the involved controversies. The question of federal criminal prosecution of the sitting president also remains unanswered,¹⁵⁸ and the scope of criminal immunity of Vice Presidents was subject to some scrutiny through history but the *opinio iuris* divided in attempt to address whether they should be treated differently than sitting presidents. The problem of legality of the congressional censorship of the President has never been judicially resolved and was left for political experiments conducted by Congress.

Constitutional ambiguities entangled all branches of government into challenges, which doubtfully can be handled without impacting the constitutional foundations of the American government. Although Alexis de Tocqueville claimed that "[t]here is hardly a political question in the United States that does not sooner or later turn into a judicial one,"¹⁵⁹ the courts showed a significant restraint in picking up the issues related to the executive privilege. It was quite prudent for non-elective judges to realize that their activism should not extend beyond the regular process of "optimization" of the constitution.

156. Ford's speech supporting the impeachment of Supreme Court Justice William O Douglas: is published in E.F. Van Tassel, *Impeachable Offenses*, op.cit, at 59.

157. *Id.*

158. King, "Indicting the President: Can a Sitting President be Criminally Indicted?," 30 *Sw I.L. Rev.* 417 (2001), King argues that "While state prosecution of a sitting President is precluded (on the basis of analysis of *McCulloch v. Maryland* (17 U.S. 316 (1819)) the federal prosecution question remains unanswered" (at 425). For other arguments supporting the position that the sitting President should not be subject to criminal prosecution, see Griffin, "Presidential Immunity from Criminal Process: Amateur Hour at the Department of Justice," 5 *Wid l. Symp. J.* 49 (2000).

159. *Democracy in America* (ed. J.P. Mayer, 1969) at 270.

In this situation it has been suggested many times that Congress should find legislative remedies to the political problems which cannot be resolved by the courts.¹⁶⁰ As S.L. Carter wrote:

"A hypothesis that the Constitution grants broader authority to Congress than to the courts to create remedies against the President would not be an unreasonable one. For example, one might argue that because the constitutional system places so many express checks on presidential power directly in the legislative branch, that branch also ought to have special authority (if anyone has it) to create new ones."¹⁶¹

This author is of an entirely different opinion. Judicial implementation of the Constitution by interpretation of the constitutional principles should be clearly distinguished from the judicially given "carte blanche" to legislative actions, which would write into the Constitution its allegedly necessary components. Judicialization of the political process, except for extremes going beyond the regular concept of judicial restraint, is a relatively healthy phenomenon supplementing the idea of "ruling" with the concept of "law". Politicization of the "rule of law" is, however, a dangerous tendency leading to the replacement of stable components of the legal system with those that stem from purely political concerns. Politicization means mixing constitutional politics with ordinary politics, manipulation of constitutional mechanisms for temporary political goals. This results in the instability that the fathers of the concept of divided government feared most.

As discussed above, the scope of presidential immunity may be derived from constitutional principle or may be explained as the common law standard.¹⁶² In both instances, however, the courts are called upon to determine what is the meaning of the law. The Constitution itself grants the courts power to decide "all cases, in law and

160. See, Alexander, "Comment: In the Aftermath of Clinton v. Jones: An Argument in Favor of Legislation Permitting a Sitting President to Defer Litigation," 28 *Sw.U.L. Rev.* 71 (1998) See also Long, "How to Sue the President: A Proposal for Legislation Establishing the Extent of Presidential Immunity," 30 *Val U.L. Rev.* 283 (1995).

161. Carter, "The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision," 131 *U.Pa.L.Rev.* 1349 (1983).

162. Elaborating on this difference H.W. Chase and C.R. Ducat wrote: "Cases 'arising under this Constitution' are cases in which the validity of an act of Congress or a treaty or of a legislative act or constitutional provision of a State, or of any official act whatsoever which purports to stem directly from the Constitution, is challenged with reference to it." Chase and Ducat emphasize that the origin of judicial review is much older than the Constitution. "It traces back to the common law, certain principles of which were earlier deemed to be 'fundamental' and to comprise 'higher law' which even Parliament could not alter. Chase and Ducat quote Chief Justice Coke who in 1610 wrote in *Bonham's case* [8 Reps.107, 118 (1610)], 'And it appears that when an act of Parliament is against common right and reason. . .the common law will control it and adjudge such act to be void.' Edward S. Corwin's *The Constitution and What it Means Today* (1978) at 221.

equity, arising under this Constitution, the laws of the United States, and treaties. . . ,”¹⁶³ and as Hamilton claimed in *The Federalist*, No. 78, “The interpretation of the law is the proper and peculiar province of the courts.”¹⁶⁴

The U.S. Constitution is not merely a seven-article charter with twenty-seven amendments; the body of constitutional law was expanded through the subsequent impressive activity of the courts. In cases not clearly resolved by the Constitution, the judges, bound by the principle of *stare decisis*, are in a unique position to provide the necessary stability for the interpretation of the substance of constitutional law. In contrast, allowing Congress to legislate on the scope of the executive privilege would subject the Chief Executive to constant political scrutiny of the legislators, who through legislative measures, would be able to affect the other branches’ “political life”. It would circumvent the fundamental principle of the presidential system that guarantees that – with exception of clear constitutional limitations, namely impeachment, resignation or death—the terms of the legislative and executive branches cannot be affected by their mutual actions. As S.L. Carter wrote expressing to some extent similar concerns, “legislating is by definition an innovative activity, and any congressional statute dealing with the executive branch is likely to circumscribe presidential authority in some manner. If the Congress can limit the President’s authority why can’t it legislate to punish him directly?”¹⁶⁵

Legislation on presidential privilege results in unnecessary meddling with the Constitution. It affects the concept of the presidential system itself. If Congress can determine through legislation the scope of the president’s executive privilege, it may limit it to the extent that it would endanger the very grain of the presidential system itself. The position of the President would not be much different from the position of the prime minister in parliamentary or parliamentary-cabinet systems in which the survival of the government is contingent upon on-going support of the parliament. The result might gradually strip the President of some of his most significant constitutional prerogatives, proving the remedy much worse than the disease itself.

In conclusion, the excessive flexibility of the Constitution resulted in awkward attempts of Congress and more restrained efforts of the courts to identify the scope of the constitutional prerogatives of

163. The U.S. Constitution, Art. III Sec. II/1.

164. Op.cit. at 467.

165. Carter, “The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision,” op.cit. 1349. In fact, Carter seems to reach himself the conclusion that the Congress should take more active legislative role in determining the liability of the President. He writes “It would be all too easy to leave every issue arising under the Constitution to judicial resolution, but *Nixon v. Fitzgerald* is a subtle reminder that the courts cannot govern along—and that the system’s political actors should not want them too,” op.cit. at 1400.

the Chief Executive. The lack of success contributed to almost "spontaneous" extension of the presidential privilege¹⁶⁶ and in final result, to uncertainty of how far this process may go. The popularity of the concept of the "living" Constitution dramatically overshadowed the growing confusion about the actual substance of the "sacrosanct" theory of constitutional checks and balances. The final possibility of amending the Constitution, being a truly challenging undertaking, rarely is taken into consideration. Such possibility should not be, however, disqualified without extensive debate. The need to revisit the constitutional amendment option becomes more visible in critical historical moments, such as presidential impeachments or embarrassing litigations. Until recently, an existing situation did not result in a real imbalance of powers in the United States. It stems, however, more from the political culture of American society than from the constitutional system of restraints itself. Still trusting that the political or legal cultures of the people in the twenty first century will permanently improve the implementation of the country's eighteenth century Constitution is overoptimistic and only contributes to further confusion about the most fundamental constitutional institutions.

166. See Sunstein, "An Eighteenth Century Presidency. . ." *op.cit.* at 12; see also, Devins, "Congress: Does it Abdicate its powers: Abdication by Another Name: An Ode to Lou Fisher," 19 *St. Louis U. Pub. L. Rev.* 65.