

# VICE PRESIDENTIAL IMMUNITY IN THE AGE OF IMPEACHMENT:<sup>1</sup> A FRESH LOOK AT THE AGNEW PRECEDENT

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## INTRODUCTION

In late 2017, former Trump Administration National Security Advisor Michael Flynn pleaded guilty to charges stemming from Special Counsel Robert Mueller’s investigation into whether members of the Trump campaign colluded with the Russian government in order to influence the 2016 U.S. presidential election.<sup>2</sup> This has led some in the mainstream media to suggest that Flynn may, in turn, implicate individuals at the highest levels of the administration, including Vice President Mike Pence.<sup>3</sup> Some observers have even speculated that Pence himself might be indicted. Notably, Harvard constitutional law professor Laurence Tribe recently tweeted, “Don’t forget Flynn may well have highly incriminating evidence against VPOTUS Mike Pence . . . And we know a sitting VP can be indicted and convicted. Recall Agnew.”<sup>4</sup>

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1. Regards to Historian David Kyvig for the term “Age of Impeachment.” See generally DAVID E. KYVIG, *THE AGE OF IMPEACHMENT: AMERICAN CONSTITUTIONAL CULTURE SINCE 1960*, 132 – 137 (2008). This extremely thorough, well-researched and well-written book expertly documents the rise of impeachment in American constitutional and political culture during the last half century.

2. Cristina Maza, *If Trump and Pence are Taken Down by Russia Investigation, Here’s Who the Next President Is*, NEWSWEEK (December 1, 2017), <http://www.newsweek.com/trump-pence-paul-ryan-president-russia-investigation-mike-flynn-728803> [perma.cc/9YQ3-WXPU].

3. *Id.*

4. Maureen Groppe, *What does Flynn’s Guilty Plea Mean for Vice President Pence?*, USA TODAY (December 10, 2017), citing Laurence Tribe (@tribelaw), TWITTER (Dec. 1, 2017, 10:12AM), <https://www.usatoday.com/story/news/politics/2017/12/10/what-does-flynn-indictment-mean-vice->

Professor Tribe's reference is to Vice President Spiro T. Agnew, whose well known 1973 conviction for tax evasion coincided with his resignation of the Vice Presidency.<sup>5</sup>

What is less well known is that Agnew's conviction and resignation came on the heels of a heated debate over whether a sitting Vice President is constitutionally immune from indictment and criminal prosecution.<sup>6</sup> It had long been accepted that incumbent Presidents have absolute constitutional immunity<sup>7</sup> but in 1973 the Justice Department took the position that sitting Vice Presidents are not immune.<sup>8</sup> The Justice Department maintains that position to this day,<sup>9</sup> but there remains no judicial resolution to the question of Vice Presidential immunity.<sup>10</sup>

With current events suggesting at least the possibility of another Vice Presidential prosecution, the issue is one warranting further review. In undertaking that review, this article argues that Vice Presidents *are* constitutionally immune from indictment and criminal prosecution while in office. In Part I of this article, I provide the historical background for this issue with a brief discussion of the influential Agnew case. In Part II, I closely examine the constitutional arguments presented in that case—both for and against Vice Presidential immunity. Finally, in Part III, I challenge the Agnew precedent and argue that the Constitution does provide for absolute Vice Presidential immunity, citing constitutional considerations overlooked in 1973.

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president-pence/935678001/ [https://perma.cc/BJ4G-QKFL]. Contrary to Professor Tribe's assertion, Vice President Agnew was not actually indicted or convicted while in office. As part of a plea bargain, Agnew resigned the Vice Presidency immediately before appearing in federal court to offer a plea of *nolo contendere* to a single charge of tax evasion. KYVIG, *supra* note 1, at 136–137.

5. See generally RICHARD M. COHEN & JULES WITCOVER, *A HEARTBEAT AWAY: THE INVESTIGATION AND RESIGNATION OF VICE PRESIDENT SPIRO T. AGNEW* 342–350 (1974).

6. KYVIG, *supra* note 1, at 132–137.

7. Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS J. OP. 11, n. 1 (1997), citing 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1563 (BOSTON, HILLARD, GARY & CO. 1833)

There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions which are confided to it. Among these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office . . . .

8. James D. Myers, *Bringing the Vice President Into the Fold: Executive Immunity and the Vice Presidency*, 50 B.C. L. REV. 897, 924–25 (2009).

9. *Id.* at 926., citing Memorandum from Randolph D. Moss, Assistant Att'y Gen., Off. of Legal Couns., on A Sitting President's Amenability to Indictment and Criminal Prosecution 1 (Oct. 16, 2000), <https://www.justice.gov/olc/opinion/sitting-president%E2%80%99s-amenability-indictment-and-criminal-prosecution> [https://perma.cc/69XW-8VU4].

10. *Id.*

## II. BACKGROUND: THE AGNEW PRECEDENT

Spiro T. Agnew served as Vice President of the United States from 1969 to 1973.<sup>11</sup> Shortly after his re-election in 1972, Agnew came under suspicion of having accepted bribes while serving as governor of Maryland and as Vice President.<sup>12</sup> When the Justice Department referred Agnew's case to a federal grand jury for investigation, Agnew—through counsel—moved the District Court to enjoin the grand jury from considering the case on the grounds that as Vice President, he had absolute constitutional immunity from indictment and criminal prosecution and that his case could only be handled through an impeachment inquiry.<sup>13</sup> In fact, Agnew even went so far as to ask the Speaker of the House of Representatives to undertake impeachment proceedings.<sup>14</sup>

In support of his position that his case could only be resolved through impeachment, Agnew cited the 1826 case of Vice President John C. Calhoun.<sup>15</sup> While serving as Vice President, Calhoun was accused of profiteering from army contracts while previously serving as Secretary of War.<sup>16</sup> Rather than being referred to a grand jury for investigation, his case was instead sent to the House of Representatives for an impeachment inquiry.<sup>17</sup> After a six-week House investigation, Calhoun was exonerated.<sup>18</sup> This “Calhoun precedent” was reaffirmed in the 1873 case of Vice President Schuyler Colfax, who was also accused of accepting bribes prior to his Vice Presidency.<sup>19</sup> Like Calhoun, Colfax's case was referred to the House, not the Justice Department.<sup>20</sup> After a House

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11. JULES WITCOVER, *THE AMERICAN VICE PRESIDENCY: FROM IRRELEVANCE TO POWER*, 391–406 (2014).

12. *A HEARTBEAT AWAY*, *supra* note 5, at 3–16. Though the U.S. Attorney's investigation of Agnew focused on kickbacks he allegedly accepted for steering government contracts to certain contractors, Agnew ultimately pleaded *nolo contendere* to just a single charge of tax evasion as part of a plea bargain.

13. Memorandum in Support of Motion, *In re* Proceedings of the Grand Jury Impaneled Dec. 5, 1972, No. 73-965 (D. Md. Oct. 5, 1973) [hereinafter Agnew Memo], *available at* 27 HOFSTRA L. REV. 728, 750-53 (1999).

14. SPIRO T. AGNEW, *GO QUIETLY . . . OR ELSE*, 163–172 (1980). While seeking one's own impeachment may at first seem like a bizarre step, Agnew's action was obviously one of self-preservation. He calculated that even if he were to be impeached by the Democratically-controlled House, he was unlikely to be removed by the Senate, where the Democrats' numbers were short of the two-thirds supermajority required for removal. JULES WITCOVER, *VERY STRANGE BEDFELLOWS: THE SHORT AND UNHAPPY MARRIAGE OF RICHARD NIXON AND SPIRO AGNEW*, 316 (2007).

15. AGNEW, *supra* note 14, at 163–172.

16. *THE AMERICAN VICE PRESIDENCY*, *supra* note 11, at 70.

17. *Id.*

18. *Id.*

19. *Id.* at 172–173.

20. *Id.*

impeachment inquiry, articles of impeachment were sent to the House floor, where they were voted down.<sup>21</sup>

Opposing Agnew's motion on behalf of the Justice Department, Solicitor General Robert Bork argued that an incumbent Vice President is *not* constitutionally immune from grand jury investigation, subsequent indictment, or even criminal prosecution while in office.<sup>22</sup> In so arguing, Bork cited, *inter alia*, the 1804 case of Vice President Aaron Burr.<sup>23</sup> Despite having been indicted for murder, Burr's case was never subjected to a House impeachment inquiry and he actually served out the remainder of his entire term as Vice President.<sup>24</sup> Bork reasoned that if Burr could perform his constitutional duties while under indictment, Agnew could too.

Ultimately, Vice President Agnew pleaded *nolo contendere* to a single charge of tax evasion and resigned the Vice Presidency before the District Court judge could rule on the motion at the center of the debate.<sup>25</sup> However, Agnew's request that the Speaker of the House initiate an impeachment inquiry was denied<sup>26</sup> and, as recently as 2000, the Justice Department reaffirmed its position that sitting Vice Presidents are not constitutionally immune from indictment and criminal prosecution.<sup>27</sup> This is the Agnew precedent.

## II. THE DEBATE OVER VICE PRESIDENTIAL IMMUNITY IN THE AGNEW CASE

In order to understand the Agnew precedent, especially as part of a modern reconsideration of it, one must first understand the arguments presented in the Agnew case, both for and against absolute Vice Presidential immunity. First, Vice President Agnew cited provisions in the constitutional text, which he averred directly supported his conclusion that

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21. *Id.* Colfax's status as a "lame-duck" at the time of the impeachment inquiry was considered crucial to the failure of the articles of impeachment.

22. 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* (D. Md. Oct. 5, 1973) [hereinafter Bork Memo] (*available at* Memorandum: Watergate Special Prosecution Force, 27 HOFSTRA L. REV. 728, 795-96 (1999)).

23. *Id.* at 765.

24. THE AMERICAN VICE PRESIDENCY, *supra* note 11, at 39-40.

25. KYVIG, *supra* note 1, at 136-137.

26. *Id.* at 135.

27. Myers, *supra* note 8, at 926, citing Memorandum from Randolph D. Moss, Assistant Att'y Gen., Off. Of Legal Couns., on A Sitting President's Amenability to Indictment and Criminal Prosecution (Oct. 16, 2000), <https://www.justice.gov/olc/opinion/sitting-president%E2%80%99s-amenability-indictment-and-criminal-prosecution> [<https://perma.cc/69XW-8VU4>].

sitting Vice Presidents are entitled to absolute constitutional immunity. Second, Agnew also argued that the Vice Presidency is so significant in the overall constitutional scheme that its occupant should be afforded absolute constitutional immunity from indictment and criminal prosecution in the same manner that the President is. Writing for the Justice Department, General Bork rebutted both of these lines of reasoning. This section reviews each side of the debate, in turn.

#### A. *Textual Bases for Vice Presidential Immunity*

The two provisions from the constitutional text cited by Vice President Agnew as directly supporting his conclusion that Vice Presidents have absolute constitutional immunity are: Article I, Section 3, Clause 7 and Article II, Section 4.

##### 1. Article I, Section 3, Clause 7

Article I, Section 3, Clause 7 provides that, “in Cases of Impeachment . . . the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to law.”<sup>28</sup> In citing this provision, Agnew emphasized the word “*convicted*” and argued that the usage of the past participle indicated that the Framers did not intend to permit criminal proceedings against a constitutional officer until *after* impeachment by the House and conviction by the Senate.<sup>29</sup>

Bork disputed this contention on the grounds that the clause only applies to the President. His position was rooted in the fact that the Framers’ debates regarding impeachment were exclusively related to the President.<sup>30</sup> Therefore, he claimed, the clause did not apply to Vice Presidents and other constitutional officers. As for the Constitution’s specific reference to impeachment for the Vice President and other “civil officers,” Bork asserted that this serves only to head off pleas of double jeopardy for officers who are criminally tried after their impeachment.<sup>31</sup> Furthermore, Bork pointed out, the Constitution *does* address constitutional immunity for officers other than the President in Article 1, Section 6. According to that clause,

Senators and Representatives are “privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to

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28. U.S. CONST. art. I, § 3, cl. 7.

29. See Agnew Memo, *supra* note 13, at 754.

30. See Bork Memo, *supra* note 22, at 780.

31. *Id.* at 781.

and returning from the same.”<sup>32</sup> Therefore, Bork reasoned, “no immunity exists where none is mentioned.”<sup>33</sup> In other words, if the Framers had intended to provide immunity to the Vice President, they would have expressly done so as they did in Article 1, Section 6.

## 2. Article II, Section 4

Article II, Section 4, the “Impeachment Clause,” sets forth that “The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of . . . high Crimes and Misdemeanors.”<sup>34</sup> To be given its fair meaning, Agnew argued, this clause must be read as being both an authorization and a prohibition.<sup>35</sup> Accordingly, Agnew concluded that because the Constitution “sanctions removal by an impeachment proceeding, *and not otherwise*,” a Vice President’s election cannot be “set at naught by criminal proceeding or other means of effective removal.”<sup>36</sup>

While Bork conceded Agnew’s point that impeachment is the only means for *actual* removal from office, he took issue with Agnew’s claim that criminal indictment and prosecution amounted to effective or “practical removal.”<sup>37</sup> Bork found this claim to be “without foundation in history or logic.”<sup>38</sup> Historically, Bork noted, Vice President Aaron Burr was indicted for murder, yet successfully exercised his constitutional responsibilities until the end of his term.<sup>39</sup> Logically, Bork claimed, the “criminal indictment, trial, and even conviction of a Vice President would not, *ipso facto*, cause his removal” from office because such a Vice President could always retain his seat.<sup>40</sup> Such a scenario was not out of the realm of possibility, Bork reasoned, because first, Congress would have the prerogative to choose not to impeach him and second, because the President would have the power to pardon him.<sup>41</sup>

In addition to these arguments over specific textual provisions of the Constitution, the litigants in the Agnew case also engaged in a debate over whether the significance of the office of the Vice Presidency in the

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32. U.S. CONST. art. I, § 6.

33. See Bork Memo, *supra* note 22, at 779.

34. U.S. CONST. art. II, § 4.

35. See Agnew Memo, *supra* note 13, at 755.

36. *Id.* (emphasis added).

37. See Agnew Memo at 785.

38. *Id.*

39. *Id.* at 786. Bork made no mention of the Calhoun or Colfax cases.

40. *Id.*

41. *Id.* at 787.

constitutional scheme warranted absolute constitutional immunity for its occupant.

*B. Significance of the Vice Presidency in the Constitutional Scheme*

In arguing for absolute Vice Presidential immunity based on the Vice Presidency's overall significance in the constitutional scheme, Agnew emphasized three broad themes: the office's core constitutional functions, the democratically-elected nature of the office, and the office's status as heir apparent to the Presidency.

1. The Core Constitutional Functions of the Vice President

Agnew argued that the Vice President's core constitutional functions<sup>42</sup> of standing ever-ready to serve as President,<sup>43</sup> presiding over the Senate (and breaking ties therein),<sup>44</sup> and monitoring the ability of the President to discharge the powers and duties of his office,<sup>45</sup> rendered the office so important to the country that the Vice President needed absolute constitutional immunity. Of particular importance, according to Agnew, was the Vice President's function under the Twenty-Fifth Amendment of determining whether the President needs to be removed from office due to his inability to discharge the duties and responsibilities of that office. Such a "heavy duty," Agnew averred, is "far too important to the Nation to permit [the Vice President's] disablement by criminal prosecution."<sup>46</sup>

In response, Bork downplayed the significance of these functions on the grounds that they either rarely occurred or would not actually be impaired by the criminal process.<sup>47</sup> Moreover, Bork took particular issue with Agnew's assertions about the significance of the Vice Presidency under the Twenty-Fifth Amendment. The Vice Presidential duty to declare Presidential disability, Bork countered, is not really as "heavy" as Agnew claimed because, first, it is actually shared with the rest of the Cabinet and, second, "it is not [even] an active, continuous executive function" but merely "a single act" that could easily be performed by a Vice President who was under indictment.<sup>48</sup> Furthermore, Bork insisted,

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42. See Agnew Memo, *supra* note 13, at 751-52.

43. U.S. CONST. amend. XXV, § 1.

44. U.S. CONST. art. I, § 3.

45. U.S. CONST. amend. XXV, § 3.

46. See Agnew Memo, *supra* note 13, at 765.

47. *Id.* at 793.

48. See Bork Memo, *supra* note 22, at 793.

the asserted importance of the function was belied by the fact that such power has never once been exercised in American history.<sup>49</sup>

## 2. The Vice President as a Democratically Elected Official

Agnew also emphasized the democratic notion that the Vice President's "title traces to the vote of representatives of all citizens of the Republic."<sup>50</sup> Accordingly, he reasoned, the People should not be deprived of a duly elected Vice President's services by the mere whims of a prosecutor and 12 grand jurors, but only "by [a] vote of equal dignity"<sup>51</sup> to the vote of the People. Therefore, he concluded, "a Vice President may be removed from his office or effectively prevented from performing its duties *only* through impeachment voted by the House, and judgment of conviction voted by the Senate."<sup>52</sup> Though Bork avowedly sought not to "deprecate in any way the high office of the Vice Presidency or its importance in the Constitutional scheme,"<sup>53</sup> he pointedly rejected Agnew's argument about the democratically-elected nature of the Vice Presidency as an effort to "magnify the constitutional position" of an officer who was not really directly elected by the People, but was actually just "an understudy chosen by the presidential candidate."<sup>54</sup>

## 3. The Vice President as an Heir Apparent to the President

Finally, and most vigorously, Agnew argued that the Vice President is "second only to the President in personifying the national will and dignity."<sup>55</sup> Noting the long accepted position that Presidents have absolute constitutional immunity, Agnew drew parallels between the Presidency and the Vice Presidency by citing the Twelfth Amendment.<sup>56</sup> Emphasizing that the Twelfth Amendment provides for the "simultaneous and separate election of President and Vice President," while also requiring that the Vice President meet the same constitutional eligibility requirements as the President—Agnew reasoned that the Vice President should be as protected by absolute constitutional immunity from indictment and criminal prosecution as the President is.<sup>57</sup> Rebutting this

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49. *Id.*

50. *See* Agnew Memo, *supra* note 13, at 751.

51. *Id.* at 752.

52. *Id.* (emphasis added).

53. Bork Memo, *supra* note 22, at 796.

54. *See* Bork Memo at 788.

55. *See* Agnew Memo, *supra* note 13, at 751.

56. *See* Agnew Memo at 758.

57. *Id.*

argument, Bork countered that the true thrust of the Twelfth Amendment had little to do with the Vice Presidency whatsoever and really sought only to revise the presidential election process.<sup>58</sup>

Additionally, Bork argued that a constitutional officer should only have absolute immunity if “subjecting him to the criminal process would substantially impair the functioning of a branch of government.”<sup>59</sup> In support of this position, Bork again referenced the example of the Presidency. Noting that the President is of “singular importance” to the Nation because the “whole executive power” is vested in him,<sup>60</sup> Bork reasoned that the functions of the President are “inconsistent with his subjection to the criminal process” precisely because he is so “indispensable to the operation of government.”<sup>61</sup>

By contrast, Bork argued that there is absolutely “no comparison between the importance of the Presidency and the Vice Presidency.”<sup>62</sup> Again refuting the significance of the Vice President’s core constitutional functions emphasized by Agnew, Bork argued that the Vice Presidency is “clearly less crucial to the operations of the executive branch.”<sup>63</sup> Bork further asserted that, unlike the Presidency, the Vice Presidency is in no way “indispensable to the orderly operation of government.”<sup>64</sup> Therefore, Bork concluded, “Congress and the judiciary possess concurrent jurisdiction over allegations made concerning a Vice President.”<sup>65</sup>

While the arguments detailed above are thoughtful and well-reasoned, the cases presented on both sides of the debate have their flaws. Indeed, the entire constitutional basis underlying the Agnew precedent itself remains, as one historian has put it, “far from unassailable.”<sup>66</sup> In light of this, and with recent developments suggesting the possibility of yet another Vice Presidential prosecution,<sup>67</sup> the question of Vice Presidential immunity has once again become a “grave and unresolved”<sup>68</sup> constitutional matter warranting further review. The following section

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58. Bork Memo, *supra* note 22, at 788.

59. *Id.* at 789.

60. *Id.* at 791-92.

61. *Id.* at 794.

62. *Id.* at 792.

63. *Id.*

64. *Id.*

65. *Id.* at 776.

66. KYVIG, *supra* note 1, at 136.

67. *See supra* notes 2-4.

68. Bork Memo, *supra* note 22, at 755.

takes a fresh look at the Agnew precedent and the rationale underlying it and offers new arguments to the debate over Vice Presidential immunity.

### III. A FRESH LOOK AT THE AGNEW PRECEDENT

#### A *Critique of the Bork Memorandum*

The Bork memorandum presented on behalf of the Justice Department in support of its case against vice presidential immunity relied on a blend of textualism and broader constitutional theory. It did so with mixed effectiveness.

Consider Bork's argument that "no immunity exists where none is mentioned."<sup>69</sup> Bork argued that because Article 1, Section 6 expressly provides constitutional immunity only to Senators and Representatives, Vice Presidents therefore have none. Not only does this *expressio unis* rationale run afoul of Bork's own separate argument that Presidents have (extratextual) constitutional immunity,<sup>70</sup> but such a strict, bare textualist reading of the Constitution can result in absurdity when applied elsewhere in the document. For example, it would actually permit a Vice President to preside at his own impeachment trial!<sup>71</sup> Surely the Constitution does not really permit this,<sup>72</sup> so Bork's bare textualist argument—while credible and reasonable—ultimately falls under a shadow of doubt and needs to be taken with the proverbial grain of salt.<sup>73</sup>

Similarly flawed is Bork's argument that because the Framers' Constitutional Convention debates regarding impeachment were exclusively related to the President, Article I, Section 3, Clause 7's use of

69. *Id.* at 779.

70. See Bork Memo, *supra* note 22, at 780.

71. Joel K. Goldstein, *Can the Vice President Preside at His Own Impeachment Trial? A Critique of Bare Textualism*, 44 ST. LOUIS. L. J. 849, 853 (2000) citing Michael S. Paulsen, *Someone Should Have Told Spiro Agnew*, 14 CONST. COMMENTARY 245 (1997).

72. Goldstein, *supra* note 71, at 865-66.

Fundamental structural principles preclude a Vice President from presiding over his own impeachment trial . . . such a practice would offend ideas intrinsic to the notion of the rule of law, one of the fundamental concepts of our Constitution . . . The Constitution imposes few checks on the Vice President (perhaps because it gives him little power); one such check is the prospect of impeachment. It would be anomalous if the Constitution allowed him to preside over his own trial.

73. Agnew makes similar argumentative errors when asserting that the bare text's use of the past participle "*convicted*" in art. I, § 3, cl. 7 shows that the Framers did not intend to permit criminal proceedings against a constitutional officer until *after* impeachment. This is also the case when Agnew argues that art. II, § 4, in permitting the impeachment of a Vice President, prohibits other action against him. See Part II.

the past participle “*convicted*” must apply only to the President.<sup>74</sup> In fact, that the Vice Presidency received such little attention at the Constitutional Convention,<sup>75</sup> actually makes it *less likely* that the Framers intentionally excluded it from the purview of that clause.

As for Bork’s arguments regarding Article II, Section 4, they too are flawed. While Bork is correct that indictment and prosecution would not, *ipso facto*, cause a Vice President’s removal from office, he gave too short shrift to Agnew’s reasonable claim that indictment and prosecution amounts to “effective removal.”

First, Bork cited the 1804 case of Aaron Burr in support of his position that a Vice President under indictment can nevertheless perform his constitutional duties. In so doing, Bork not only blatantly ignored the more recent and then-prevailing precedents of Vice Presidents Calhoun and Colfax, but he also failed to recognize the significant expansion of the importance of the office of the Vice Presidency between 1804 and 1973.<sup>76</sup>

Second, and more importantly, Bork ignored the fact that indictment and prosecution of a sitting Vice President would delegitimize him in the eyes of the Nation. While such delegitimization may matter little to an indicted Vice President with few day-to-day constitutional duties, it would matter tremendously to the Nation should the Presidency suddenly devolve upon that very same Vice President. This would be particularly problematic in the case of a Vice President who retained his office after a criminal conviction. Bork expressly—and wrongly—assumed that a convicted Vice President would be promptly removed through impeachment.<sup>77</sup> This is not, however, necessarily true. As Bork himself noted, Congress may very well choose not to impeach a Vice President even if he was convicted in a criminal court.<sup>78</sup> Furthermore, history has since shown that something like this is possible. Since the Agnew case, two federal judges—Harry Claiborne and Walter Nixon—actually refused to resign their offices while they underwent impeachment proceedings, even *after* their convictions in federal court.<sup>79</sup>

A Vice President continuing to serve while indicted or—worse yet—convicted, would be disastrous for the country. Vice President Agnew argued that the country would have been in “sore straits” had Vice

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74. See Bork Memo, *supra* note 22, at 780.

75. Goldstein, *supra* note 71, at 867.

76. See generally Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811, 812 (2005).

77. See Bork Memo, *supra* note 22, at 793.

78. See Bork Memo, *supra* note 22, at 787.

79. KYVIG, *supra* note 1, at 281.

President Lyndon B. Johnson been under indictment on the day President Kennedy was assassinated.<sup>80</sup> This is a reasonable observation, but even more importantly, this author would posit that this country would have been in even sorer straights had Agnew been convicted and still in office on the day President Nixon resigned. This is *all the more reason* to require absolute Vice Presidential immunity.

Finally, with regard to General Bork's arguments regarding the constitutional significance of the Vice Presidency, this author concedes that they are generally accurate. This is especially apparent when reading the Bork memo alongside the one filed in support of Agnew's position, which seems almost tortured in its efforts to aggrandize the office. Where Bork (and, for that matter, Agnew too) missed the point though, was that he only focused on what the Constitution tells us about the significance of the Vice Presidency in and of itself. Bork patently overlooked what the Constitution tells us about the Vice Presidency in the context of the entire presidential administration.

*B. A New Argument: The Vice Presidency as a Constitutional Check on the Legislative Impeachment Power*

The Constitution makes clear that the Vice Presidency is part of a democratically elected political partnership with the President. As part of that partnership, the Vice Presidency serves the important constitutional function of preventing the legislature from "reversing an election"<sup>81</sup> through the impeachment and removal of just one official. Put differently, the Vice Presidency serves to preserve the *administration* elected by the People even if the President is removed. This constitutional principle is evidenced, not by the writings of the original Framers or by their discussions at the Constitutional Convention of 1787 but, as indicated below, through the amendments made to the Constitution throughout the course of American history.

Prior to the ratification of the Twelfth Amendment in 1804, the runner-up in the presidential election became Vice President.<sup>82</sup> Accordingly, in early American history, the Vice President was actually a political rival of the President.<sup>83</sup> With the advent of political parties though, electors began "strategically" casting their ballots to ensure that their preferred candidates would win both the Presidency and the Vice

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80. Agnew Memo, *supra* note 13, at 767.

81. VERY STRANGE BEDFELLOWS, *supra* note 14, at 297–298.

82. Albert, *supra* note 76, at 840.

83. *Id.* at 830.

Presidency.<sup>84</sup> When this awkwardly resulted in a tie for the Presidency in the election of 1800, Congress and the States quickly rectified the problem by ratifying the Twelfth Amendment—creating separate ballots for President and Vice President, and thereby constitutionalizing the party practice of creating a political team within the executive branch.<sup>85</sup>

While obviously serving to repair the defective constitutional mechanism that led to the election of 1800 debacle,<sup>86</sup> this design also served to prevent a change in party control of the executive branch in the event of a presidential vacancy. In other words, the Vice Presidency, as part of a democratically elected political team, now serves to uphold the democratic will of the people if the President is removed or is otherwise unable to serve. This principle, first seen in the Twelfth Amendment, was underscored by later amendments to the Constitution, which further established the Vice Presidency as part of a political partnership and a stabilizing check on the legislature.

First, it was underscored in section 3 of the Twentieth Amendment,<sup>87</sup> ratified in 1933. This clause sets forth that the Vice President-elect shall become President-elect if the President-elect dies before Inauguration Day. In addressing the matter, the Framers of the amendment had the opportunity of arranging another option (for example, a special election) but instead, they chose to fall back on the democratic will of the People by simply elevating the member of the team that had already been chosen.

Second, it was further underscored in section 1 of the Twenty-Second Amendment,<sup>88</sup> ratified in 1951, though one has to look closely. This clause is widely known as the constitutional provision that limits a President to two terms, but it is relevant to the matter at hand because it also provides that “no person who has held the office of President, or acted as President for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.”<sup>89</sup> This provision clearly contemplates the possibility of vice presidential succession to the presidency,<sup>90</sup> again underscoring the

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84. *Id.* at 839.

85. *Id.* at 840–842.

86. *Id.* at 837–838.

87. U.S. CONST. amend. XX, § 3.

88. U.S. CONST. amend. XXII, § 1.

89. *Id.*

90. The original Framers evidently did not intend for the Vice President to *become* President upon death, resignation or removal, but only to *act* as President. Goldstein, *supra* note 71, at 868. This approach was quickly discarded. In 1841, in the wake of the first death of an incumbent President, Vice President John Tyler unabashedly took the oath of office and assumed the Presidency for himself, arguing that “the office” of the Presidency, not merely the “powers and duties” of the Presidency had devolved upon him. By 1951, this “Tyler Precedent” had been followed by 6 other

principle that when voters go to the ballot box, they vote not just for a President, but for an administration.

Finally, the principle of the Vice President being part of a democratically elected political partnership is most clearly seen in the Twenty-Fifth Amendment,<sup>91</sup> ratified in 1967. Section 1 of this amendment provides that “[i]n the case of the removal of the President from office, or of his death or resignation, the Vice President shall become President.” In absolutely unambiguous terms the Twenty-Fifth Amendment reaffirms the democratic principles, which first emanated from the Twelfth Amendment, that the President and the Vice President together represent an entire administration—a political partnership—elected by the People, which is to be preserved for the duration of the elected term. This is further evidenced by section 2 of the Twenty-Fifth Amendment, which sets forth that in the event of a Vice Presidential vacancy, the President shall nominate a replacement subject to confirmation by a majority of both Houses of Congress. In so doing, the amendment preserves the elected administration by averting the possibility of a shift of party control of the executive branch in the event that the President dies or otherwise leaves office during a period of a Vice Presidential vacancy. Again, the Framers of the Twenty-Fifth Amendment could have handled these matters through the establishment of protocols for a special election or some other framework, but they chose not to.

Read together, the Twelfth, Twentieth, Twenty-Second, and Twenty-Fifth Amendments reveal that the Vice Presidency not only upholds the democratic will of the people, but also serves the “democratic principle that a transfer of executive authority should proceed in a predetermined orderly fashion.”<sup>92</sup> Furthermore, they show that the Vice Presidency “promotes stability in the affairs of the state insofar as it defuses the possibility that the Presidency will swing from one political party to another as a successor moves into the office.”<sup>93</sup> This is squarely in line with the rest of the constitutional framework, which was designed to ensure a reliable, balanced, and stable government.

Altogether then, the democratic principles in the Constitution show that the Vice Presidency effectively serves as a constitutional check on the

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Vice Presidents: Millard Fillmore, Andrew Johnson, Chester Arthur, Theodore Roosevelt, Calvin Coolidge, and Harry Truman. Albert, *supra* note 76, at 849.

91. U.S. CONST. amend. XXV.

92. Albert, *supra* note 76, at 862.

93. *Id.* (“This had been possible prior to the Twenty-Fifth Amendment. When the Vice Presidency was vacant, a presidential death or incapacity would thrust the Speaker of the House into the Presidency, and there was of course no assurance that the Speaker and the President shared the same party allegiance.”).

legislative impeachment power by stabilizing the executive branch and preserving the elected administration in the event the President is removed. This is relevant to the matter at hand because it strongly suggests that the indictment and prosecution of a sitting Vice President actually would, in the words of General Bork, “substantially impair the functioning of a branch of government.”<sup>94</sup> This is especially critical today because American constitutional culture is currently in the midst of what one historian has called the “Age of Impeachment.”<sup>95</sup>

For most of U.S. history, impeachment was rarely employed, much less even mentioned.<sup>96</sup> In modern times though, impeachment has become “commonplace [] in American thought, language and culture” as a “weapon in political arsenals.”<sup>97</sup> It has evolved from being the rarely used nuclear weapon of American politics to a conventional weapon in political combat to the point where it is now just considered a normal challenge of national political life.<sup>98</sup>

This has become glaringly true during the current controversial presidency of Republican Donald Trump, whose political opponents, calling for the normalization of impeachment,<sup>99</sup> have already introduced articles of impeachment against him.<sup>100</sup> If Trump were to be removed, the presidency would then devolve upon Vice President Mike Pence. To opponents of the administration though, Republican Pence is not a better alternative<sup>101</sup> and this has led to calls for the dual impeachment of Trump and Pence.<sup>102</sup> With Democrats likely to recapture the House of Representatives in the 2018 midterm elections,<sup>103</sup> thus placing a Democrat

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94. Bork Memo, *supra* note 22, at 789.

95. See generally KYVIG, *supra* note 1.

96. *Id.* at 9.

97. *Id.*

98. *Id.* at 1-7.

99. Ezra Klein, *The Case for Normalizing Impeachment*, VOX (Dec. 6, 2017), <https://www.vox.com/2017/11/30/16517022/impeachment-donald-trump> [https://perma.cc/66H7-9KCL].

100. Kyle Cheney, *Trump Impeachment Vote Fails Overwhelmingly*, POLITICO (Dec. 6, 2017), <https://www.politico.com/story/2017/12/06/trump-impeachment-vote-fail-282888> [https://perma.cc/66XL-CHHE].

101. Jim Geraghty, *The Tired ‘but Pence Might Be Worse’ Argument*, NATIONAL REVIEW (Oct. 16, 2017), <http://www.nationalreview.com/morning-jolt/452697/mike-pence-donald-trump-impeachment-argument> [https://perma.cc/7VVP-6TF3].

102. Joe Concha, *Maxine Waters: Pence Should Be Impeached After Trump*, THE HILL (Aug. 4, 2017), <http://thehill.com/media/345358-maxine-waters-pence-should-be-impeached-after-trump> [https://perma.cc/H6F6-BX5T].

103. Nate Silver, *Fundamentals Favor Democrats in 2018*, FIVE THIRTY EIGHT (Nov. 8, 2017), <https://fivethirtyeight.com/features/the-fundamentals-favor-democrats-in-2018/> [https://perma.cc/Q2E4-JM9C].

next-in-line of succession to the presidency,<sup>104</sup> such calls can only be expected to increase.

While the idea of such “wholesale overthrow of an administration”<sup>105</sup> may initially seem far-fetched,<sup>106</sup> it is less difficult to imagine a scenario in which, unable to acquire the bipartisan votes almost certainly required for dual impeachment, the administration’s political opponents instead attempt to force the Vice President from office through an indictment.<sup>107</sup> In fact, the Agnew case shows how a Vice President can be delegitimized and forced from the line of succession through prosecution. Furthermore, this scenario is even more realistic given the recent emergence of the “criminalization of political differences” whereby “overly malleable laws” are used to prosecute the “questionable, but not necessarily criminal, activities of political rivals.”<sup>108</sup>

As discussed above, the democratic principles found within the Constitution—namely the amendments establishing the Vice President as part of a democratically elected political team—do not tolerate the forced or “de facto removal”<sup>109</sup> of the Vice President from office. As part of an elected administration, the Vice Presidency serves as a check on the legislative impeachment power by preventing a change in party control of

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104. The Speaker of the House of Representatives is next in the line of succession behind the Vice President. 3 U.S.C. § 19 (“Presidential Succession Act of 1947”).

105. KYVIG, *supra* note 1, at 400.

106. Dual impeachment for the purposes of installing an opposition party Speaker has been suggested at other times in recent American history. See Matthew Yglesias, *The Impeachment Option*, THE ATLANTIC (July 7, 2007), <https://www.theatlantic.com/politics/archive/2007/07/the-impeachment-option/43076/> [<https://perma.cc/7QKW-RPK8>]. See also VERY STRANGE BEDFELLOWS, *supra* note 14, at 297.

107. One might argue that the author’s concern is misplaced given that a Congress that could remove a President could likely also remove his Vice President. This argument, however, overlooks the fact that the 67-vote threshold required for removal in the Senate would almost certainly be a bipartisan action. This author finds the likelihood of bipartisan action to overthrow an entire administration to be extremely low. One might also argue that such a coup cannot happen because once the Vice Presidency is vacated, the President appoints, under the Twenty-Fifth Amendment, a successor subject to confirmation by a majority of both Houses of Congress. This point overlooks, however, that there is no guarantee that an appointee would actually be given a confirmation hearing. This would be especially true if the President were then under consideration for an impeachment proceeding. Such politicization of the confirmation process was most recently seen in the case of Judge Merrick Garland. When President Obama appointed him to the Supreme Court, Senate Republicans refused to hold confirmation hearings until after the next election. See Michael D. Ramsey, *Why the Senate Doesn’t Have to Act on Merrick Garland’s Nomination*, THE ATLANTIC (May 15, 2016), <https://www.theatlantic.com/politics/archive/2016/05/senate-obama-merrick-garland-supreme-court-nominee/482733/> [<https://perma.cc/GCD5-QQ8E>].

108. Alan M. Dershowitz, *When Politics is Criminalized*, THE NEW YORK TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/opinion/politics-investigations-trump-russia.html> [<https://perma.cc/3J7U-Q2G5>].

109. Amar & Kalt, *supra* note 7, at 17.

the executive branch in the event of a President's removal. This is why the Constitution requires absolute Vice Presidential immunity.

#### CONCLUSION

The historical record shows that the constitutional basis underlying the Agnew precedent was weak. Largely, the precedent was just a product of the exact moment in history in which it arose. With the then-brewing Watergate scandal progressively making it more and more likely that President Nixon would face his own impeachment, the Justice Department was eager to do whatever was necessary to remove the embattled Agnew from the line of succession so that a more palatable heir apparent could be confirmed before Nixon's own problems reached fever pitch.<sup>110</sup> In essence, the Justice Department was trying to avert a crisis, hence, the argument presented by Bork. With the increased criminalization of politics in the "Age of Impeachment," today's officials are not likely to be so reasonable and as such, absolute Vice Presidential immunity is needed in the modern era. Even more importantly, though, absolute Vice Presidential immunity is needed because the Constitution requires it.

While the Vice Presidency *is* significantly different from the Presidency insofar as the constitutional functions its occupant performs, the office is nevertheless equally "indispensable to the orderly operation of government" and "crucial to the operations of the executive branch"<sup>111</sup> because of the democratic constitutional check it represents. In making dual impeachment so constitutionally difficult, the Vice Presidency serves as a check on the legislative impeachment power. Given this important structural function, the Constitution requires that Vice Presidents have absolute constitutional immunity. A Vice President should not be able to be removed, or effectively removed, at the whims of a potentially politically motivated prosecutor,<sup>112</sup> but only through the arduous two-thirds supermajority U.S. Senate vote required by the Constitution.<sup>113</sup>

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110. KYVIG, *supra* note 1, at 137-138.

111. See Bork Memo, *supra* note 22, at 792.

112. Vice Presidential immunity would also serve the useful function of deterring politically-motivated prosecutors from pursuing Vice Presidents on questionable charges in the first place.

113. U.S. CONST. art. I, § 3, cl. 6.