

Sec. 3—Legislative, Diplomatic, and Law Enforcement Duties of the President

Rare has been the opportunity for the Court to elucidate its opinion in *Mississippi v. Johnson*, and, in the Watergate tapes case,⁸⁰⁰ it held the President amenable to subpoena to produce evidence for use in a criminal case without dealing, except obliquely, with its prior opinion. The President's counsel had argued the President was immune to judicial process, claiming "that the independence of the Executive Branch within its own sphere . . . insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications."⁸⁰¹ However, the Court held, "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."⁸⁰² The primary constitutional duty of the courts "to do justice in criminal prosecutions" was a critical counterbalance to the claim of presidential immunity, and to accept the President's argument would disturb the separation-of-powers function of achieving "a workable government" as well as "gravely impair the role of the courts under Art. III."⁸⁰³

Present throughout the Watergate crisis, and unresolved by it, was the question of the amenability of the President to criminal prosecution prior to conviction upon impeachment.⁸⁰⁴ It was ar-

Wall.) 50 (1867). Before and since, however, the device to obtain review of the President's actions has been to bring suit against the subordinate officer charged with carrying out the President's wishes. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Congress has not provided process against the President. In *Franklin v. Massachusetts*, 505 U.S. 788 (1992), resolving a long-running dispute, the Court held that the President is not subject to the Administrative Procedure Act and his actions, therefore, are not reviewable in suits under the Act. Inasmuch as some agency action, the acts of the Secretary of Commerce in this case, is preliminary to presidential action, the agency action is not "final" for purposes of APA review. Constitutional claims would still be brought, however. See also, following *Franklin*, *Dalton v. Specter*, 511 U.S. 462 (1994).

⁸⁰⁰ *United States v. Nixon*, 418 U.S. 683 (1974).

⁸⁰¹ 418 U.S. at 706.

⁸⁰² *Id.*

⁸⁰³ 418 U.S. at 706–07. The issue was considered more fully by the lower courts. *In re Grand Jury Subpoena to Richard M. Nixon*, 360 F. Supp. 1, 6–10 (D.D.C. 1973) (Judge Sirica), *aff'd sub nom.*, *Nixon v. Sirica*, 487 F.2d 700, 708–712 (D.C. Cir. 1973) (en banc) (refusing to find President immune from process). Present throughout was the conflicting assessment of the result of the subpoena of President Jefferson in the *Burr* trial. *United States v. Burr*, 25 Fed. Cas. 187 (No. 14,694) (C.C.D.Va. 1807). For the history, see Freund, *Foreword: On Presidential Privilege, The Supreme Court, 1973 Term*, 88 HARV. L. REV. 13, 23–30 (1974).

⁸⁰⁴ The Impeachment Clause, Article I, § 3, cl. 7, provides that the party convicted upon impeachment shall nonetheless be liable to criminal proceedings. Morris in the Convention, 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 500 (rev. ed. 1937), and Hamilton in *THE FEDERALIST*, Nos. 65, 69 (J. Cooke ed. 1961), 442, 463, asserted that criminal trial would follow a successful impeachment.