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# Evaluating a Proposed Presidential Reform: Tolling Statutes of Limitations

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## ABSTRACT

Prior to his ascendancy as the Chairman of the Judiciary, Representative Jerry Nadler (D–NY) floated legislation that would toll all criminal statutes of limitations for the duration of time one serves as president. This article evaluates such an idea insofar as it could potentially constitute a bill of attainder, be applied retroactively, or violate a president's constitutional rights. Ultimately, the article concludes that the bill would pass judicial scrutiny, whether it could be used in the way Nadler envisioned —namely going after the Oval Office's current occupant—is a matter of timing, not constitutional law.



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## INTRODUCTION

Legislators and pundits have offered proposals for handling President Trump's alleged wrongdoing. Some focus on the question of whether the Constitution permits the president to be indicted,[1] while others have homed in on the question of self-pardons.[2] But on December 4, 2018, then-incoming U.S. House of Representatives Judiciary Chairman Jerry Nadler (D-NY) stated on MSNBC: "We ought to, and I'm considering introducing legislation to this effect: toll the statute of limitations on any President while he [or she] is president so that he can't be above the law."[3]

Nadler, along with Representatives Eric Swalwell (D-CA) and Ted Deutch (D-FL), has since introduced the No President is Above the Law Act (Act).[4] Senator Richard Blumenthal (D-CT) has also introduced an identical bill in the U.S. Senate.[5] The upshot of such bills would be to sidestep the debates about whether a president may be indicted or pardon himself in a constructive fashion. If passed it remains uncertain whether the bill would have its desired effect—preserving the ability to bring formal charges against the president for any potential wrongdoing committed prior to his election or during his tenure in the Oval Office. With regard to President Trump, the retroactive application of such a bill is not guaranteed. The legislation could also be challenged as an unconstitutional bill of attainder, improperly focused on a single individual. Finally, one could argue that further delays in prosecuting presidents violate his or her right to a speedy trial and or due process rights. This Article explores these potential challenges.

## I. A PRIMER ON STATUTES OF LIMITATIONS

Statutes of limitations are essentially countdown clocks that pressure the government (or private parties) to bring charges (or civil actions) against a party, barring the filing of such actions after the window has expired. The

1. *See, e.g.*, Laurence H. Tribe, *Yes, the Constitution Allows Indictment of the President*, LAWFARE (Dec. 20, 2018, 11:55 AM), https://www.lawfareblog.com/yes-constitution-allows-indictment-president [https://perma.cc/E8RN-SDX3].
2. *See, e.g.*, Garrett Epps, *Can Trump Pardon Himself?*, ATLANTIC (Dec. 17, 2018), https://www.theatlantic.com/ideas/archive/2018/12/can-trump-pardon-himself/578074 [https://perma.cc/5CP7-Q94K].
3. *The Last Word with Lawrence O'Donnell* (MSNBC television broadcast Dec. 4, 2018).
4. H.R. 2678, 116th Cong. (1st SESS. 2019).
5. S. 1756, 116th Cong. (1st SESS. 2019).

countdown is tolled, or paused, by the filing of a civil action or criminal indictment or information. If the filing party needs to withdraw the action for any reason, the clock is not reset, but resumes counting down from the point at which it stopped.

Statutes of limitations serve important democratic principles. As the U.S. Supreme Court wrote decades ago:

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.[6]

The commencement of court actions is not the only mechanism to stop such countdowns; other circumstances trigger a pause too. For example, the government may ask a court to toll or suspend the statute of limitations in order to obtain foreign evidence under 18 U.S.C. § 3292. Tolling also applies to fugitives of the law under § 3290. There is precedent, in other words, for suspending statutes of limitations for delineated periods because of the circumstances of the putative defendant.

To do so for someone serving as president arguably reinforces, rather than undermines, certain democratic aims. To be sure, such a law would exacerbate concerns of staleness (for example, lapses in memory or loss of evidence). But the U.S. Supreme Court has permitted civil lawsuits concerning a president's unofficial conduct to proceed.[7] And, as alluded to above, while the Department of Justice has concluded in internal legal memoranda issued by its Office of Legal Council that a president is not prosecutable,[8] others argue that the question remains

6. Toussie v. United States, 397 U.S. 112, 114–15 (1970).
7. *See* Clinton v. Jones, 520 U.S. 681, 705–06 (1997).
8. *See* Memorandum from Robert G. Dixon, Jr., Assistant Attorney Gen., Office of Legal Counsel, *Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution While in Office* (Sept. 24, 1973), https://fas.-org/irp/agency/doj/olc/092473.pdf [https://perma.cc/G4A5-6LAH]; Memorandum from Randolph D. Moss, Assistant Attorney Gen., Office of Legal Counsel, *A Sitting President's Amenability to Indictment and Criminal Prosecution* (Oct. 16, 2000), https://www.justice.gov/file/19351/download [https://perma.cc/EF2C-AY6G].

open.[9] Still others advocate that presidents are subject to criminal prosecution.[10] Therefore, tolling statutes of limitation is a viable middle ground; it simultaneously shields presidents from civil or criminal distractions, affirming that "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government,"[11] without eroding accountability once presidents leave the office.

## II. BILL OF ATTAINDER?

Two separate constitutional clauses discuss bills of attainder. Article I, § 9 reads: "No bill of attainder or ex post facto Law shall be passed," while § 10 imposes the same restriction on states. As described by the Supreme Court in 1867, "[a] bill of attainder is a legislative act which inflicts punishment without a judicial trial."[12] Though rooted in 14th century England "to escheat the estates of dead rebels who were beyond the reach of earthly justice. They gradually became convenient methods of dealing with living political enemies of the Crown and of Parliament who might be difficult to convict in a court of law."[13] Upon being proposed at the Constitutional Convention, there was little debate regarding the clause;[14] the Supreme Court[15] and scholars[16] instead agree that the clause was an exercise in the separation of powers.

In Chief Justice Warren Burger's words, there are three requirements for an act to be deemed a bill of attainder: specification of the affected persons, punishment, and lack of a judicial trial."[17]

9. *See* Walter Dellinger, *Indicting a President is Not Foreclosed: The Complex History*, LAWFARE (June 18, 2018, 7:00 AM), https://www.lawfareblog.com/indicting-president-not-foreclosed-complex-history [https://perma.cc/WS3N-W4BA].
10. *See* Tribe, *supra* note 1.
11. *Jones*, 520 U.S. at 720 (Breyer, J., concurring) (quoting Nixon v. Fitzgerald, 457 U.S. 731, 751 (1982)).
12. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867).
13. Charles H. Wilson, Jr., *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 CAL. L. REV. 212, 214 (1966) (footnote omitted).
14. *See id.* at 216.
15. *See* United States v. Brown, 381 U.S. 437, 441–42 (1965).
16. *See* Wilson, *supra* note 13, at 214; Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L. REV. 330, 330–31 (1962).
17. Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 847 (1984).

### A. Specification

The first prong, specification, denotes that "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 are bills of attainder prohibited by the Constitution."[18] The U.S. Supreme Court has only invalidated five laws under the Bill of Attainder Clause, and each law "singled out suspected political subversives for unfavorable treatment."[19] For example, the Supreme Court used the clause to justified striking down laws singling out communists[20] or Confederate sympathizers.[21]

The Act is obviously inspired by President Trump's actions. It was initially floated in response to Trump's actions and in the context of whether he can be indicted while sitting at 1600 Pennsylvania Avenue, and the Act itself was formally introduced within a month of the Mueller Report's publication. What's more, Nadler specifically stated that he was considering the measure because "if [President Trump] can't be impeached for improper conduct, if there are crimes he should be . . . prosecuted."[22] He followed this statement by asserting that President Ford's pardoning of Richard Nixon was wrong.[23] Drawing a line from Nadler's interview to the Act to the current president requires no considerable artistic talent.

But such legislation would not necessarily single out Trump in such a way as to violate the Bill of Attainder Clause. Rather, the bill targets all future holders of that prestigious office rather than just its current, forty-fifth occupant.[24] Trump may be this law's inspiration, just as Nixon was for post–Watergate reforms,[25] but proponents of such legislation could reasonably present it as an institutional safeguard to the presidency more broadly, rather than a narrow response to President Trump's tenure.

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18. United States v. Lovett, 328 U.S. 303, 315 (1946).
19. Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 WIS. L. REV. 1203, 1229 (2010).
20. *See Brown*, 381 U.S. at 440.
21. *See* Cummings v. Missouri, 71 (4 Wall.) U.S. 277, 332 (1867); Pierce v. Carskadon, 83 U.S. 234, 239 (1873).
22. *See supra*, note 3.
23. *See supra*, note 3.
24. *See* H.R. 2678, *supra*, note 4 at 2(c) ("In the case of *any person* serving as President of the United States . . . ") (emphasis added); S. 1756, *supra*, note 5 at 2(c) ("In the case of *any person* serving as President of the United States . . . ") (emphasis added).
25. *See* Mark Stencel, *The Reforms*, WASH. POST (June 13, 1997), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/legacy.htm [https://perma.cc/7SUR-5UPR].

Compare that with laws passed inspired by President Nixon. Following his resignation and pardon, U.S. Congress passed the Presidential Recordings and Materials Preservation Act (PRMPA), which charged the Administrator of General Services with the following:

> [T]o take custody of the Presidential papers and tape recordings of appellant, former President Richard M. Nixon, and promulgate regulations that (1) provide for the orderly processing and screening by Executive Branch archivists of such materials for the purpose of returning to appellant those that are personal and private in nature, and (2) determine the terms and conditions upon which public access may eventually be had to those materials that are retained.[26]

Importantly, the PRMPA singled out Nixon: indeed, the National Archives states that it "applies *only* to the Nixon Presidential Materials . . . relevant to the understanding of Abuse of Governmental Power and Watergate."[27]

When Nixon challenged the law in *Nixon v. Administrator of General Services*[28] as a bill of attainder, the majority conceded that those affected by the law "constituted a legitimate class of one": Nixon.[29] (Nevertheless, a 7–2 majority upheld the law and parried Nixon's Bill of Attainder argument by concluding that the law did not in fact inflict punishment on Nixon.) Unlike the PRMPA, though, the Act does not single out President Trump. Thus, while the number of individuals affected would begin at only one, it is poised to grow at only one every four or eight years. Therefore, it would not be singularly focused in the way the PRMPA was.

### B. Punishment

Even if it were to meet the specification standards, extending the statute of limitations does not constitute a punishment in the lay understanding of the term—no one is being arrested strictly because of this proposal and no liability is being assessed. But whether a law constitutes a punishment in the sense of a bill of attainder is broader than the lay understanding. For that reason, as the U.S. Court of Appeals for the D.C. Circuit observed, "the

26. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 429 (1977).
27. NAT'L ARCHIVES, *Presidential Recordings and Materials Preservation Act (PRMPA) of 1974*, NAT'L ARCHIVES: PRESIDENTIAL LIBR. (emphasis added), https://www.archives.gov/presidential-libraries/laws/1974-act.html [https://perma.cc/J5QP-WNCB].
28. 433 U.S. 425 (1977).
29. *Id.* at 472.

Supreme Court has instructed that a court should pursue a three-part inquiry":

> (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish."[30]

As the Supreme Court has implied,[31] and multiple circuit courts have stated outright, "each of these criteria [is] an independent—though not necessarily decisive—indicator of punitiveness."[32]

As to the first test, the D.C. Circuit observed in 1998 that:

> In the earliest cases construing the provision, the only punishment prohibited by the bill of attainder clause was a sentence of death. However, the Court long ago extended the protections of the clause to include "bills of pains and penalties." Bills of pains and penalties "historically consisted of a wide array of punishments: commonly included were imprisonment, banishment, and the punitive confiscation of property by a sovereign." In the Court's . . . jurisprudence, the definition of punishment "has expanded to include legislative bars to participation by individuals or groups in specific employments or professions."[33]

(Citations omitted). Indeed, as the Supreme Court said in *Nixon*:

> Forbidden legislative punishment is not involved merely because the Act imposes burdensome consequences. Rather, we must inquire further whether Congress, by lodging appellant's materials in the custody of the General Services Administration pending their screening by Government archivists and the promulgation of

30. Foretich v. United States, 351 F.3d 1198, 1218 (D.C. Cir. 2003) (citing Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 852 (1984)).
31. Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 852 (1984).
32. Kaspersky Lab, Inc. v. U. S. Dep't Homeland Sec., 909 F.3d 446, 455 (D.C. Cir. 2018) (internal quotations omitted); *see also* SeaRiver Mar. Fin. Holdings, Inc. v. Mineta, 309 F.3d 662, 672–77 (9th Cir. 2002); Consol. Edison Co. of N.Y. v. Pataki, 292 F.3d 338, 349–55 (2d Cir. 2002).
33. BellSouth Corp v. Fed. Commc'ns Comm'n., 162 F.3d 678, 685 (D.C. Cir. 1998) (first citing Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 473 (1977); then quoting *id.* at 474; then quoting *id.*; and then quoting *Selective Serv. Sys.*, 468 U.S. at 852).

> further regulations, "inflict[ed] punishment" within the constitutional proscription against bills of attainder.[34]

The aforementioned punishments are all specific deprivations of liberty (death or jail) or property (real or liquid), or the ability to protect against such deprivations (via marketplace access). Bills to toll statutes of limitations need not include expansion of the underlying offense, meaning that consequences cannot be expanded beyond those statutorily prescribed to that particular offense. Thus, while the idea may "impose[] burdensome consequences,"[35] it is unlikely to be a punishment with respect to bill of attainder jurisprudence in this historical sense.

The D.C. Circuit has opined, "that the second factor—the so-called 'functional test'—'invariably appears to be 'the most important of the three.'"[36] This test asks whether the law, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes. Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers."[37]

Again, *Nixon* is instructive. In that case, the U.S. Supreme Court found it persuasive that previous presidents had faced similar requests by officials to review presidential materials for historical preservation and analysis. In many such instances, presidents had granted these requests, though they were under no legal obligation to do so.[38] But because this was a norm rather than a law, "Congress could legitimately conclude that the situation was unstable, and ripe for change."[39]

A reasonable Congress could decide that in light of the longstanding Justice Department policy not to indict a sitting president, it would be a legitimate public policy to ensure that presidents in general cannot run out the clock on criminal prosecutions by virtue of holding the office.

Trump's strongest argument that the Act would constitute a bill of attainder would rest on the third prong—the intent to punish standard. Trump could look to Nadler's interview alone and assert that the law was

34. *Nixon*, 433 U.S. at 472–73 (alteration in original) (first quoting United States v. Lovett, 328 U.S. 303, 315 (1946); then citing United States v. Brown, 381 U.S. 437, 456–60 (1965); and then citing Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1867)).
35. *Nixon*, 433 U.S. at 472.
36. Foretich v. United States, 351 F.3d 1198, 1218 (D.C. Cir. 2003) (internal citation omitted) (quoting *BellSouth*, 162 F.3d at 684).
37. *Nixon*, 433 U.S. at 475–76 (citations omitted).
38. *Id.* at 452 n.15.
39. *Id.*

directed at him and intended to lengthen the window that he personally could be prosecuted and, thus, punished.

Precedent dictates that "a formal legislative announcement of moral blameworthiness or punishment" is not the requisite intent to consider legislation "an unlawful bill of attainder."[40] Instead, courts must look to the entirety of the congressional record to see what, if anything, evinces "congressional sentiments expressive of . . . nonpunitive intentions."[41] Absent such expressions, courts may well conclude that "the legislature, in seeking to pander to an inflamed popular constituency, [sought] to assume the mantle of judge—or, worse still, lynch mob."[42] While lawmakers may indeed try to pad the congressional record with statements of nobler purpose, courts may well view such efforts as pretextual. On balance, were this law to pass, Trump might well have the better argument with respect to this subfactor.

### C. Lack of Trial

But the main reason that the Act would likely survive judicial scrutiny as a bill of attainder is that it does not impose any punishment without a trial. Lack of a trial can be reframed as an assumption of guilt. In 1960, the U.S. Supreme Court stated that "[t]he distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt."[43] As the U.S. Court of Appeals for the Second Circuit described, satisfying this requirement means the act "defines past conduct as wrongdoing and then imposes punishment on that past conduct. Such a bill attributes guilt to the party or parties singled out in the legislation."[44]

The Act does not do this. The bill, as originally described by Representative Nadler on television, was floated as a way of enabling the prosecution of some of the crimes Trump is alleged to have possibly committed. But the Act in no way assumes the president's guilt or changes either the substantive offenses or the substantive standards of evaluating

40. *Id.* at 480.
41. *Id.*
42. *Id.* (citation omitted).
43. De Veau v. Braisted, 363 U.S. 144, 160 (1960) (citing United States v. Lovett, 328 U.S. 303 (1946)).
44. Consol. Edison Co. of N.Y. v. Pataki, 292 F.3d 338, 349 (2d Cir. 2002) (first citing *Nixon*, 433 U.S. at 472–73; then citing Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325 (1867); then citing *Nixon*, 433 U.S. at 468; then citing *De Veau*, 363 U.S. at 160; and then citing *Cummings*, 71 U.S. at 323).

those offenses. Instead it merely preserves the ability for the facts to come out as they would in any normal criminal trial.

Particularly in light of "the heavy presumption of legitimacy that is ordinarily accorded legislative decisions,"[45] the likelihood that such a law would be struck down as a bill of attainder is quite low.

## III. RETROACTIVE APPLICATION?

The bigger problem is that such a law it cannot be retroactively applied. In *Landgraf v. USI Film Products*,[46] the U.S. Supreme Court held that the Civil Rights Act (CRA) of 1991 did not apply to a Title VII suit pending on appeal at the time the CRA was enacted.[47] Two separate inquiries come out of *Landgraf*. First, as the Ninth Circuit summarized, "*Landgraf* created a scheme whereby courts must scrutinize each provision of a given statute to ascertain whether it is 'substantive' or 'procedural,' and implied that if a provision is substantive, a presumption against retroactive application attaches; if it is procedural, a presumption in favor of retroactive application attaches."[48]

Second, in Third Circuit's words:

> In *Landgraf v. USI Film Products*, the Supreme Court set forth a two-part test for determining whether a particular statute applies retroactively. At the first stage, a court must determine if Congress has expressly prescribed the statute's intended reach. If Congress has done so, the inquiry ends, and the court enforces the statute as it is written. If the statute is ambiguous or contains no express command, a court must examine whether the statute would have an adverse effect if it were held to be retroactive; that is to say, "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[49]

It is not eminently clear how the two inquiries—substantive versus procedural and explicit congressional intent—interact with one another. But the U.S. Court of Appeals for the Ninth Circuit did not even look to Congress's intent when evaluating the applicability of an augmented statute

45. *Id.* at 355.
46. 511 U.S. 244 (1994).
47. *Id.* at 247.
48. Chenault v. U.S. Postal Serv., 37 F.3d 535, 538 (9th Cir. 1994).
49. Lieberman v. Cambridge Partners, 432 F.3d 482, 488–89 (3d Cir. 2005) (citations omitted).

of limitations. Rather, it determined that "a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would . . . 'alter the substantive rights' of a party and 'increase a party's liability.'"[50] The U.S. Court of Appeals for the Fifth Circuit has come to a similar conclusion,[51] as have the Third,[52] Seventh,[53] and Eighth Circuits.[54] And in dicta, the Supreme Court has endorsed the Ninth Circuit's reasoning.[55] Therefore, regardless of specific congressional language aiming to apply the law retroactively, precedent dictates that new tolling statutes, such as the Act, would almost certainly not permit the prosecution of any crimes President Trump is alleged to have committed if their statute of limitations has already run. (So, too, does the Act's text, as currently written.)[56] What such a statute could do, however, is halt the expiring clocks for crimes whose statute of limitations has not yet expired.

## IV. AN INSUFFICIENTLY SPEEDY TRIAL AND/OR DUE PROCESS?

A final set of concerns relates to due process stemming from unreasonable delay in trial. The relevant doctrine emanates from the D.C. Circuit's 1965 case *Ross v. United States*,[57] in which the court "reverse[d] a criminal conviction on the basis of prejudicial prearrest delay,"[58] holding that a reversal was required because the criminal defendant's due process right was violated.[59] Shortly following *Ross*, the U.S. Supreme Court, in dicta, agreed with its reasoning[60]—twice.[61] And ten years after *Ross*, the D.C. Circuit had more clearly articulated its holding: "Generally speaking, the *Ross*

50. *Chenault*, 37 F.3d at 539 (citations omitted).
51. *See* FDIC v. Belli, 981 F.2d 838, 843 (5th Cir. 1993).
52. *See Lieberman*, 432 F.3d at 489–90.
53. *See* Foss v. Bear, Stearns and Co., Inc., 394 F.3d 540, 542 (7th Cir. 2005).
54. *See In re* ADC Telecomms., Inc. Sec. Litig., 409 F.3d 974, 977–78 (8th Cir. 2005).
55. *See* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 950 (1997).
56. Section 2 of the Act reads: "The amendments [to the statute of limitations] shall apply to any offense committed before the date of the enactment of this section, if the statute of limitations applicable to that offense had not run as of such date." *See* H.R. 2678, *supra*, note 4 at 2(c); S. 1756, *supra*, note 5 at § 2(b).
57. 349 F.2d 210 (D.C. Cir. 1965).
58. Janis Merle Caplan, *Better Never Than Late: Pre-Arrest Delay as a Violation of Due Process*, 1978 DUKE L.J. 1041, 1041 (1978).
59. *See Ross*, 349 F.2d at 216.
60. *See* United States v. Marion, 404 U.S. 307, 324 (1971).
61. *See* United States v. Lovasco, 431 U.S. 783, 795 (1977).

line establishes the rule that, under certain circumstances, an unreasonable delay preceding arrest may so prejudice the interests of an accused as to raise due process difficulties and require dismissal of charges pursuant to this court's supervisory power over criminal cases arising in this circuit."[62]

And just what are those circumstances? Per the Court's *United States v. Marion*,[63] "the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay . . . caused substantial prejudice to [the defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."[64] As the court held the next time it heard a case regarding a preindictment delay, "statutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide 'the primary guarantee against bringing overly stale criminal charges. . . . [T]he Due Process Clause has a limited role to play in protecting against oppressive delay."[65]

Because a tolling statute regarding the president would simply modify statutes of limitations, which are themselves safeguards for due process rights, the Fifth Amendment is unlikely to be implicated. However, the president could argue that the proposed bill in fact implicates the "limited role" of the Due Process Clause because it engenders "actual prejudice to the conduct of the defense"—including that it was done to unconstitutionally "harass" him, particularly in light of his recent allegations that Democrats investigating his actions are partaking in "Presidential harassment."[66] It is possible to see this inquiry merging with the retroactivity analysis in a Trump argument that Congress has altered the statutes of limitations in a specific effort to delay his trial, and thus enable it to happen, in a fashion that makes such a proposal unconstitutional as applied to him. Future occupants of the Oval Office would be far less successful in this line of argument, given that this context is specific to the current occupant.

62. United States v. Jones, 524 F.2d 834, 837 (D.C. Cir. 1975).
63. 404 U.S. 307 (1971).
64. *Marion*, 404 U.S. at 324 (citation omitted).
65. *Lovasco*, 431 U.S. at 789 (internal citations omitted).
66. Brandon Conradis, *Trump Accuses Dems of 'Presidential Harassment' as Investigations Ramp Up*, HILL (Mar. 3, 2019, 7:11 PM), https://thehill.com/homenews/administration/432407-trump-accuses-dems-of-presidential-harassment-as-investigations-ramp [https://perma.cc/Y5H7-4AFV].

## Conclusion

The Act may make policy sense, particular among the sea of reforms under review surrounding the presidency. If it were passed, President Trump would have substantial arguments to make that it constituted a bill of attainder. Yet given the impossibility of applying such legislation retroactively, whether the law would address his alleged wrongdoing may well depend entirely on timing.