DESIGNS FOR IMMUNITY: A COMPARISON OF THE CRIMINAL PROSECUTION OF UNITED STATES PRESIDENTS & ITALIAN PRIME MINISTERS

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Since 1973, the United States has espoused a policy affording immunity from criminal prosecution to sitting U.S. presidents while in office.[1] The main reason behind this policy, according to the Department of Justice ("DOJ"), is the concern that the executive powers granted to the president via the Constitution would be impermissibly undermined if the President were subjected to criminal indictment, prosecution, or incarceration during his term in office.[2] Incarceration of a president during his term would make it physically impossible for the president to fulfill his official, constitutionally assigned duties.[3] Further, even if a prosecution did not result in incarceration, the DOJ posits that the public stigma and shame that attaches to an individual after implication with criminal proceedings would inhibit a president's success in foreign and domestic affairs.[4] The result would be harm to the United States at large.[5] Finally, the DOJ recognizes the mental and physical burdens that accompany preparation for a criminal trial. If a sitting president were indicted, he would have to bare this burden in his personal capacity, preventing him from fulfilling his constitutionally proscribed duties with the vigor and devotion that the prestigious position deserves.[6]

The DOJ has not yet had the opportunity to apply its policy on criminal prosecution before impeachment. This is due to the fortunate fact that no president has been criminally indicted while in

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1 Memorandum for the Attorney General, A Sitting President's Amenability to Indictment and Criminal Prosecution (Oct. 16, 2000) (on file with the Department of Justice), *available at* http://www.usdoj.gov/olc/sitting_president.htm [hereinafter "DOJ Memo"].

2 *Id*.

3 *Id*. at 17.

4 *Id.* at 18.

5 *Id*.

6 *Id*. at 19-20.

office since the DOJ policy was announced in 1973.[7] However, the DOJ publicly reaffirmed its position in a memorandum from the Attorney General in the year 2000.[8]

The U.S. policy granting the president temporary amnesty from criminal prosecution while in office is at odds with the policy of Italy affecting its prime minister.[9] In June of 2003, legislation known as the Schifani Law, or *Lodo Schifani* in Italian vernacular, was pushed swiftly through Italian Parliament.[10] The result was legislation providing a grant of immunity from criminal prosecution for the sitting Prime Minister, as well as four other lead government officials, until their term in office expires.[11] However, on January 13, 2004, the Supreme Italian Constitutional Court found the Schifani Law unconstitutional because it violated the principal of equal treatment for all citizens of Italy.[12] At first blush, this law seems markedly similar to the policy actively enforced by the U.S. DOJ. However, this Note will show that the effects of the Schifani Law could have been devastating to the young republic,[13] espe-

7 The DOJ came close to having the opportunity to apply its policy to President Richard Nixon and the Watergate scandal. However, Nixon's resignation took this case out of the potential of criminal indictment before impeachment. Further, the DOJ's policy was announced in response to questions over how they would treat President Nixon in response to Watergate. *See* discussion *infra* Section IV, A.

8 DOJ Memo, *supra* note 1, at 1.

9 While Italy does have a President, his functions are limited and his role is not analogous to that of a U.S. president. The Italian president is considered head of state, while the prime minister is considered the head of government. For these reasons, this paper will compare the U.S. President with the Italian Prime Minister. The Italian Constitution clearly lists the Prime Minster as the Country's Executive Power. *See* Ital. Cost. title III, §1, art. 92. However, the Schifani Law (discussed *infra* Sections III-VII) was written to protect the Prime Minister as well as four other high-ranking Italian officials, including the Italian President.

10 *See infra* p. 13 for text of the Schifani Law.

11 *Id.*

12 *See* Corte Costitutzionale della Repubblica Italiana, *Decisioni*, http://www.giurcost.org/decisioni (for text of the decision of the Italian Constitutional Court invalidating the Schifani Law. The text of this decision is in Italian.) *See also* Ital. Cost. arts. 3, 24, *available at* http://www.mclibrary.edu.mn/intlaws/constitutions/italy.htm.

13 Italy can appropriately be referred to as a "young republic." The monarchy was not replaced by a republic system until after World War II. In 1943, at the close of the war, anti-fascist beliefs ran wildly through Italian culture. While this was surprising given the very recent embrace of fascism in Italy under Mussolini, the anti-fascist sentiments led to popular unity throughout the country. The opportunity was seized and by 1946 Italy had established a Republic and began drafting a Constitution.

Some argue that Italy has been a Republic for much less time than since 1946. This is because the government continued to be controlled by one group, the Christian Democrats, until the early nineties. When this party, and other larger groups, collapsed between 1992 and 1993, some claim this was the first time the Republic of Italy come to life. *See*

cially given the standing of Italian Prime Minister Silvio Berlusconi.

This Note will compare the U.S. prosecutorial policy of providing temporary immunity from criminal proceedings for sitting presidents with the fluctuating parallel practice in Italy. It begins with a brief history of the Republic of Italy and of Prime Minister Silvio Berlusconi, in order to explain the roots of corruption that have plagued the Italian government for centuries and have facilitated Berlusconi's political success. The Note will then discuss the U.S. DOJ immunity policy, addressing arguments of opponents of the policy and the constitutional issues surrounding this prosecutorial discretion. This Note will suggest that while there may be no explicit constitutional guarantee that a sitting president is immune from criminal prosecution until his term in office is complete or he is impeached, the practical advantages gained by enforcing such a policy outweigh any negative repercussions. It will also argue that because the DOJ has adamantly stated its decision to forego criminal prosecution of incumbent presidents, the policy has the force of law.[14]

However, this Note will conclude that such a policy would be harmful if put to work in Italy because of corruption and the current vulnerability of Italian Prime Minister Silvio Berlusconi. This Note will argue that, theoretically, immunity could benefit the Italian system and that the Italian Prime Minister should enjoy the same benefits of immunity as does the U.S. President. However, given the very real corruption present in the current Italian administration, immunity through the Schifani Law or through the American policy would likely result in further abuse of the system. This paper thus concludes that the negatives of instituting such a policy

infra Section II; *see also* MARTIN CLARK, MODERN ITALY 1871-1995 (Denys Hay ed., Addison Wesley Longman Limited 1996) (1984).

[14] The policy at least has the "force of law" until challenged. Who might have standing to sue on this issue, however, is questionable. And, since sitting presidents rarely (relative to U.S. history) are found to be implicated in criminal allegations while they are in office, the chance to challenge the policy may not arise. Further, the Constitution gives us Art. I, § 3, cl. 8 which allows for impeachment. So, there may not be a conceivable situation where the DOJ chooses not to prosecute a president criminally, but at the same time the president is allowed to stay in office. This is analogous to the case of Richard Nixon, who resigned before a criminal prosecution was discussed. In Nixon's case, however, a criminal prosecution against him was not brought based on the same reasons asserted by the DOJ today against such a proceeding.

in Italy would be devastating to the country's success and argues against implementation of the American exemplar in Italy.

Section I of this paper begins with a brief biographical sketch of the current Prime Minister Silvio Berlusconi and explores the history of corruption in the Republic of Italy. Attention is paid to the events that led to Berlusconi's entrance into politics. This history is essential to understanding the distinctions between applying temporary criminal immunity for an official in Italy as compared to the United States. Section II turns to legislative action passed by Berlusconi and his political party *Forza Italia*. This legislation was arguably designed for Berlusconi's personal benefit. This includes, but is not limited to, the passage of the Schifani Law. Section III provides an in depth look at the DOJ's policy of immunity from criminal prosecution for a sitting United States president. It explores relevant U.S. case law on the issue, including the Nixon trials and *Clinton v. Jones*. It also discusses opposition to the DOJ's current policy. Section IV compares the Italian and American schemas, arguing that the benefits enjoyed under the United States policy are not within reach for the Italian Government. Finally, Section V presents the conclusion that immunity from criminal prosecution for a sitting prime minister in Italy should not be implemented, through either policy or law. While affording immunity through a policy might avoid the constitutional problems encountered by the Schifani Law, it will not eradicate the near certain result of abuse of such a policy, rendering the benefits of such a rule slim.

I. Berlusconi & the Corrupt Republic

Silvio Berlusconi, born September 29, 1936, is a native Italian from the city of Milan.[15] Though he came from modest beginnings, Berlusconi was famous throughout Italy long before he became its prime minister. His fame stems mainly from his success in the Italian media[16] and his status as one of the richest men in Italy.[17]

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[15] *See* Governo Italiano, Presidenza del Consiglio dei Ministri, *Curriculum Vitae*, http://www.governo.it/Presidente/Biografia/biografiaen.html (last visited Mar. 15, 2006).

[16] Before Berlusconi, the Italian state held a firm monopoly over nation-wide broadcasting through its company, *Radiotelevisione Italiana* ("RAI"). Berlusconi challenged this monopoly by building his own media empire. Currently, a virtual "duopoly" of Italian television providers exists: the state run RAI and Berlusconi's conglomerate *Mediaset*. This exemplifies the control Berlusconi exerts over Italy, outside of his premiership. *See generally* Section I.

Berlusconi used his wealth to invest in a variety of other industries in Italy, increasing his control over everyday Italian life.[18] One writer aptly described Berlusconi's effect over Italy as *Berlusconism,* stating, "people live in houses built by Berlusconi, watch TV controlled by Berlusconi, shop at supermarkets owned by Berlusconi, relax on tennis courts and in restaurants built by Berlusconi, and adore a soccer team bought by Berlusconi."[19] It is inarguable that Berlusconi's control over the Republic of Italy is widespread.

Berlusconi was not a seasoned politician for long before his election to the post of prime minister.[20] However, he was able to move into politics by using his business savvy.[21] At that time, Italian government was unstable, without firm leadership and without any strong political parties. This was the result of its short and tu-

In 1974, Berlusconi founded his first media company, *Telemilano*. Berlusconi then formed a holding company, *Finivest,* in 1975. Berlusconi gained control of Italy's three largest televisions stations, *Italia Uno, Retequattro*, and *Canale 5*. These channels currently operate with a combined audience share of forty-five percent. This estimate was taken in 2002. Given Berlusconi's vast ownership of other commercial companies, such as print media and advertising, it is estimated that his control of commercial television goes much beyond that. *See* Andy Niklaus & Peter Schwarz, *Hundreds of Thousands Demonstrate in Rome Against Berlusconi Government*, WSWS, March 7, 2002, http://www.wsws.org/articles/2002/mar2002/ital-m07.shtml.

Berluconi's next step was to form the conglomerate, *Mediaset*, now the parent company of all Berlusconi's television media enterprises. It is estimated that Berlusconi now controls 90% of Italy's commercial television. *See* Brendan Bailey, *Cross Media Rules OK?*, LAW AND BILLS DIGEST GROUP, 3 June 1997, *available at* http://www.aph.gov.au/library/pubs/cib/1996-97/97cib30.htm.

Berlusconi now owns news magazine, *Panorama*, Italy's largest publishing house, *Mandadori*, the Italian football club, *AC Milan*, and the leading Italian newspaper, *Il Giornale*. *See* Francesca Caferri, *Silvio Berlusconi, Self-Styled Man of the People*, CNN Italia (2001), *available at* http://www.cnn.com/SPECIALS/2001/italy/stories/berlusconi (last visited Nov. 15, 2004). He became involved in banking and insurance through ownership of the company *Mediolanum*. Berlusconi's company, *Mediaset,* owns and operates *Publitalia 80*, one of the largest advertising agencies in Europe. *See Mediaset* official website, http://www.gruppomediaset.it/indexinvest.jsp?page=/InvestorRelations/comoverview/FAQs.jsp&lang=EN&menu= (last visited Mar. 15, 2006).

17 *See Profile; Silvio Berlusconi*, BBC NEWS WORLD EDITION, Jan 13, 2004, http://news.bbc.co.uk/1/hi/world/europe/3034600.stm (Mar. 15, 2006). Berlusconi's success can be demonstrated by his reported income from recent years. In 1999, Berlusconi declared an income of 16.2 billion lira, roughly $7.4 million American dollars. *See* Caferri, *supra* note 16. Also in 1999, his personal wealth was estimated by Forbes magazine at approximately $12.8 million, making him one the richest men in Italy. *Id.*

18 *See supra* text accompanying note 19.

19 Ed Vulliamy, *Manchester Guardian Weekly* (April 3, 1994); *see also* Caroline Frost, *Silvio Berlusconi- The Italian Tycoon*, BBC FOUR DOCUMENTARIES, Oct. 16, 2003, http://www.bbc.co.uk/bbcfour/documentaries/profile/silvio_berlusconi.shtml.

20 *See infra* Section II.

21 *See supra* text accompanying Section I of this paper.

multuous history as a Republic.[22] Comprehension of this history is essential to understanding Berlusconi's place in and effect on Italian government.

Immediately after World War II, Italy was left in a state of political unrest.[23] On June 2, 1946, Italian King Victor Emmanuel III abdicated the throne. By this act and by popular referendum, Italy became a democratic republic now called *La Repubblica Italiana*.[24] Immediately after the King's resignation, a new political party, *La Democrazia Christiana* ("The DC"), took control of Italian Parliament and continued to hold a majority thereafter for close to fifty years.[25] The DC had the backing of the United States, the Catholic Church, and the political elite.[26] Perhaps more notoriously, they were also supported by the Italian Mafia and by secret political societies working in Italy.[27] The DC routinely provided their affiliates with political positions, turning the new democratic republic into a virtual DC-monarchy. This network of bribes and mutual favors is now commonly referred to as *Tangentopoli*.[28]

Eventually the DC began to lose favor as political outsiders formed new political factions and in 1983, Bettino Craxi was elected as Italy's first socialist prime minister.[29] But, the corruption did not end when Craxi came to power. In fact, Craxi became one of the main figures implicated in the *Tangentopoli* scandal.[30]

In 1992, a group of Milanese prosecutors and magistrates initiated a campaign that has come to be known as *Mani Pulite*, or

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[22] Italy was only a Republic for fifty years before Berlusconi took office.

[23] *See generally* ALEXANDER STILLE, EXCELLENT CADAVERS: THE MAFIA AND THE DEATH OF THE FIRST ITALIAN REPUBLIC, 385-87, 420-21 (Vintage Books, 1996) (1995).

[24] *La Repubblica Italiana* translates to the Republic of Italy, and will herein be referred to as such. *See* U.S. Department of State Website, http://www.state.gov/r/pa/ei/bgn/4033.htm (last visited Nov. 15, 2004).

[25] *La Democrazia Christiana* translates in to "the Christian Democrats." (translated by the author)

[26] STILLE, *supra* note 23, at 10.

[27] *Id.* at 73, 368-69, 385-86.

[28] Tangentopoli has many translations. Some of the more popular translations include "kick back city" and "bribes-ville." Peter Schwartz, *A Portrait of Italy's Berlusconi Government: "All for One, and One for Himself,"* WSWS, International Committee of the Fourth International (ICFI), *available at* http://www.wsws.org/articles/2002/apr2002/ber1-a15.shtml (last visited Nov. 15, 2004).

[29] STILLE, *supra* note 23, at 416.

[30] Craxi serves as a clear example of the nepotism that plagued Italian government. Craxi controlled much of the government positions of Milan. He made his brother-in-law Paolo Pillitteri the mayor of Milan. He also had made his 28 year old son, Bobo Craxi, local party chairman. STILLE at 350.

"Operation Clean Hands."[31] The translation of this phrase aptly describes the goal of the campaign: to "clean the hands" of the Italian government by ridding it of all corrupt businessmen and government officials who had previously been in control. The anti-corruption operation was in response to years of nepotism and dishonesty that had plagued Italian Government, particularly following the Cold War.[32] The investigation and its effect on the Italian people has been compared by many to the early stages of the French Revolution.[33]

The corruption that the *Mani Pulite* campaign sought to dissipate was a system of bribery that literally ran the Italian government. Italy was notorious for its *quid pro quo* client/patron system of politics, where politicians would gain votes by guaranteeing pensions and jobs for their electorate.[34] The campaign was a success, but perhaps an even greater success than had been expected. The depth of the corruption and the numerous high-ranking politicians involved sent shock waves through the country, resulting in the dissolution of the major Italian party systems. Most notably, *Mani Pulite* led to the collapse of the DC and Socialist parties.[35]

Prime Minister Bettino Craxi fell victim to *Mani Pulite.* As corruption and bribery were increasingly uncovered, pressure was

[31] Operation Clean Hands officially began on February 17, 1992 with the arrest of Mario Chiesa, a Socialist administrator, in Milan. Chiesa was arrested on numerous charges of bribery. The leading magistrate behind Clean Hands was Antonio Di Pietro. Di Pietro became a national hero for his anti-corruption work. T-shirts baring his name were sold across Italy. It was common to see anti-corruption graffiti on the walls of Italian cities, with phrases like "Forza Di Pietro!" ("Go Di Pietro!") and "Grazie, Di Pietro!" ("Thank you, Di Pietro!"). Di Pietro worked with Clean Hands until December 6, 1994. He resigned immediately after having commencing criminal proceedings against Prime Minister Silvio Berlusconi on charges of bribery. *Id.* at 385-87, 420-21.

[32] It should be noted that the corruption in Italy was quite embedded in the culture and history of the country by the time the *Mani Pulite* Campaign began in 1992. It has been argued that nepotism and bribery were so common throughout the state that every business and public official was at least aware of its presence. The modern system mirrored any traditional "mafia" schema, with lower ranking officials regularly taking public blame for any uncovered corruption while the masterminds remained undisclosed and the corrupt machine continued to operate below the surface. It became routine for any public prosecutor or judge who attempted to challenge the system to be taken off the case. Evidence and witnesses would disappear. And, those who did make it to trial as defendants were almost always let off. *See id*.

[33] *Id*. at 386.

[34] *Id.*

[35] Paul Lewis, *A World Fed Up with Bribes: Nations Begin Following U.S. Curbs on Corruption*, NY TIMES, Nov. 28, 1996, at D1 (noting corruption scandals, especially those involving Berlusconi).

put on Craxi to resign. Craxi repeatedly denied knowledge of the system of bribes until July of 1992 when he admitted that the practice existed and argued it was so widespread, it could not be considered a crime.[36] In Craxi's own words, "Everyone knows that much of the financing of the parties and of the political system is irregular or illegal . . . and if this material is considered criminal then most of our system would be a criminal system."[37] After Craxi had served four years as prime minister,[38] the magistrates behind the *Mani Pulite* campaign exposed his personal role in the corruption and threatened to prosecute him.[39] Craxi avoided the courts by fleeing to Tunisia where he died in exile.[40]

After the surge in the *Mani Pulite* campaign and the resignation and exile of Craxi, a political void was left in Italy. Silvio Berlusconi, then only a charismatic businessman and media personality, was able to step in and fill this cavity. Berlusconi's entrance into politics did not stop the corruption within Italian government; in fact, it furthered it.[41] Silvio Berlusconi first entered office as Prime minister of Italy in 1994. An alliance of three Italian political parties, *La Lega Nord*, *Aleanza Nazionale*, and fractions of the *Democrazia Christiana*, drove his success.[42] This new party, now known as *Forza Italia*, was created only for his entry

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36 STILLE, *supra* note 23, at 369.

37 *See id.* at 369, (quoting Bettino Craxi before Parliament, *Corrieri*, July 4, 1992).

38 Bettino Craxi was involved in Italian politics since 1976 when he took over control of the Italian Socialist Party. He served as Italy's Premier from 1983 to 1987.

39 *See supra* text accompanying note 36. As discussed *supra*, *Mani Pulite* translates to "clean hands." In order to clean the hands of Italian government, Bettino Craxi was one of the government officials who would have to be expunged.

40 STILLE, *supra* note 23, at 386.

41 Berlusconi also benefited by nepotism influencing his rise in politics. Bettino Craxi was the best man at his wedding, and Berlusconi's daughter married into Craxi's family. STILLE, *supra* note 23, at 386.

42 From 1946, when the Republic of Italy was first formed, to 1992, *La Democrazia Christiana* ("DC") retained near-constant control of the Italian Government. The DC is a center-right political party. This domination lasted for almost four decades and led to questions as to whether the Italian democratic republic was functioning as a republic at all. The first break in the dominion by the DC came in the 1980s, when republican socialist Bettino Craxi led government. Craxi's term as Prime Minister ended in 1987 at which time the DC again took control of the government. The DC lost power a second time in 1992 when Guiliano D'Amato was elected Prime Minister as a member of *Il Partito Socialista Italiano*. However, D'Amato's term was also short lived. *See* http://www.brainy-encyclopedia.com/encyclopedia/h/hi/history_of_italy.html; s*ee also* Columbus Guide, Italy, History and Government, *available at* http://www.worldtravelguide.net/data/ita/ita580.asp (last visited Nov. 16, 2004); s*ee also* Schwartz, *supra* note 28.

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into office.[43] Berlusconi's first term as prime minister was cut short when *Forza Italia* disintegrated as a party. He was re-elected in 2001 and still holds this office. Interestingly, Berlusconi's re-election was not hampered by the numerous criminal trials brought against him on charges of bribery, corruption, and false accounting.[44] Berlusconi was in fact convicted in a number of these cases,

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43 Berlusconi's adversaries argue that *Forza Italia* is a combination of neo-fascists and separatists. *See* Niklaus & Schwarz *supra* note 16; *see generally* http://www.forza-italia.it/silvioberlusconi/06_passione.htm.

44 *Forza Italiana* can be translated as "Go Italy!" and is the same slogan used for the professional Italian soccer team owned by Berlusconi. In 1990, Berlusconi was declared guilty of perjury by the Venice Appellate Court. The charge was false testimony. Berlusconi had lied about his affiliation with *Propaganda 2*, a freemason lodge. While found guilty, Berlusconi never suffered under this judgment. The crime was extinguished before the court proceeded to the punishment phase under an amnesty ruling.

Berlusconi was also brought to trial and accused of bribing a member of the Financial Police. The lower court found him guilty and sentenced him to two years and six months in jail for four named bribes. However, Berlusconi escaped jail time when the Appellate Court found that the statute of limitations had expired for three of the four corruption charges. The Appellate Court also acquitted Berlusconi of the fourth count of the bribery offense.

Berlusconi was also charged with illegally financing a political party for paying 21 billion Lire into an offshore banking account named "All Iberian." The funds were eventually given to Bettino Craxi. The lower court sentenced Berlusconi to two years and four months in jail. Berlusconi escaped jail time once again when the statute of limitations on the crime expired before the appeal was complete. He was acquitted of the charge.

Berlusconi also faced a charge of false accounting 10 billion Lire in his own account. This was known as the Medusa Cinema case. The trial court found Berlusconi guilty and sentenced him to 16 months in jail. Berlusconi was once again acquitted by an Appellate Court who found the charges were not proven.

In the Lodo Mondadori case, Berlusconi was charged with corrupting a judge. Though he was initially found guilty, he was acquitted by the Appellate Court because the statute of limitations once again expired before the appellate proceedings were complete.

As of September 2004, many trials were still pending against the Prime Minister. Berlusconi was once again being charged with false accounting for funneling money into another offshore bank account, known as "All Iberian 2." However, the trial was suspended while the European Court of Justice and the Italian Constitutional Court examined new laws (including the Schifani Law) passed by Berlusconi and his party. One of the laws would significantly reduce the statute of limitations for social crimes of this sort. The statute of limitations for false accounting would be reduced from 15 years from the date of the crime to a maximum of seven years and six months. If the new law was accepted, the charges against Berlusconi would have to be dropped because the time had lapsed.

Berlusconi was also charged with embezzlement, tax fraud, and false accounting in a case involving the Macherio estates. At trial, he was acquitted on the tax and embezzlement charges, and could not be charged for false accounting because the statute of limitations had expired.

In what has become known as the "Lentini Affair," Berlusconi was charged with false accounting for secretly paying 5 million Euro to a Torino football club so they could buy pro-player Luigi Lentini. The statute of limitations on the charge expired while the case was at the trial level. At the time of this paper, the appeal was still running.

but never served jail time because of acquittals on appeal or expired statutes of limitations.[45]

Despite Berlusconi's clear victory in the polls, there was immediate public concern that the glaring conflict of interest surrounding Italy's prime minister would hamper his success.[46] Berlusconi was both Italy's sitting prime minister and its richest, most powerful media magnate. The post of prime minister is the most influential position in Italian government. Many were concerned that Berlusconi's dual role as politician and entrepreneur would conflict, leading to illegitimate use of government powers while Berlusconi was at the helm.[47] In an attempt to quash this worry, Berlusconi "resigned" all of his interest in his major holding company *Finivest* in 1994, before his first election. However, while in form he withdrew his control over Italian media, in substance nothing had changed. Control of *Finivest* remained in his family and Berlusconi's power was still undeniable.[48] Berlusconi again confronted conflict of interest allegations when he was reelected in 2001. Upon his reelection, Berlusconi promised the public he would resolve this conflict within 100 days with formal action.[49] This promise was never fulfilled.[50]

Berlusconi was also implicated in an accounting fraud trial regarding his media group *Finivest*. It was alleged that 750 million Euro in illegal funds were being held by *Finivest* in 64 off shore accounts. The statute of limitations also expired on this crime while it was at trial. However, the limit had recently been shortened by a new law on false accounting approved and passed by Berlusconi's government.

Berlusconi was charged with corrupting a judge in the SME-Ariosto affair. The trial was suspended, however, due to the passage of the Schifani Law which gave Berlusconi immunity while in office as Prime Minister. The SME-Ariosto case is continuing in the European High Court of Justice. This court is currently examining the new Italian laws passed by Berlusconi's government, especially the social laws that he would have fell prey to had they not been altered. *See* Paolo Sylos Labini, Enzo Marzo, & Elio Veltri, *A Dossier on Berlusconi*, CRITICA LIBERALE, July 2, 2003, http://www.criticaliberale.it/berlusca-ing.htm.

45 *See id.*

46 Niklaus & Schwarz, *supra* note 16.

47 *Id.*

48 *See* Italian Embassy, Government Biographies, *Silvio Berlusconi*, Prime Minister, *available at* http://www.italyemb.org/Berlusconi.htm.

49 *See* Jeffrey Israely, *Berlusconi Rules the Waves: The Italian Prime Minister Exerts His Power Over the Nation's State Broadcaster RAI*, TIME EUROPE MAGAZINE, Feb. 18, 2002, http://www.time.com/time/europe/magazine/article/0,13005,901020225-203629,00.html.

50 *Id.* Instead of resolving this conflict, Berlusconi passed the so called "conflict of interest law" which allowed things to remain exactly as they were for the prime minister. *See* Niklaus & Schwarz, *supra* note 16; *see also infra* Section III.

Berlusconi's opponents include many well-known Italian personalities. Directors Roberto Benigni and Nanni Moretti, writers Antonio Tabucchi and Dacia Maraini, and actor

Today, Berlusconi still holds the position of Italian Prime Minister. His government is the longest in the history of the Republic of Italy.[51] But, while Berlusconi's reign has been lengthy, it has not been without corruption, injustice, and public unrest. The conflict of interest that worried skeptics at the beginning of Berlusconi's term has become a legitimate problem.

II. *La Legge*: The Schifani Law & Other Berlusconi-Made Legislation

A. *The Schifani Law*

In June of 2003, the Italian legislature passed the Schifani Law,[52] a decree offering immunity from criminal prosecution while in office to five high ranking Italian government officials: the prime minister, the president of state, the presidents of both parliamentary chambers, and the president of the constitutional court.[53] The translated text of the Schifani Law reads as follows:

> They (the following five named political officers) cannot be subordinates of the penal process for any crime, including any crime regarding facts that came before the officer assumed their position (burden) or function, and until the cessation of their position (burden): The President of the Republic (exceptions exist in the case of impeachment for high treason or attack to the Constitution, voted from the Parliament), the President of the Senate, the President of the Chamber of Deputies, the Prime Minister (save the case where he does not act in exercise of his proper functions, assessed with authorization by parliamentary procedure), and the President of the Constitutional Court.
> *Processes and rules/regulations that are suspended from entrance into the position, by the power of the law*: from the date the new law is in force, the penal processes/criminal trials pending against the five charges to which the law refers are suspended, in every state and phase or degree and for whichever crime they

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and Nobel laureate Dario Fo were all present and active at a massive protest in Rome against the Prime Minister on March 2nd, 2002.

51 This refers only to Italy's history as a democratic republic, from 1946 to present. It does not include Italy's time as a monarchy.

52 Amongst the Italian population, the "Schifani Law" is known as "Lodo Schifani." Translated literally, this phrase means "I praise Schifani." Interestingly, the law is not commonly referred to as "Il Legge Schifani," which would in fact translate to the "Schifani Law." However, in Italian vernacular, legislation is often referred to as "Lodo."

53 The Schifani Law, La Legislazione Italiana (Giuffre), Legge 20 giugno 2003, n.140 - Disposizioni l'attuazione dell'articolo 68 della Costituzione nonché in materia di processi penali nei confronti delle alte cariche dello Stato art. 1.

> have been initiated, and also for crimes that came before the assumption of their position (burden), and until the cessation of the same. To leave, from the date of suspension of the criminal actions and/or processes, the running of terms is suspended as well for the prescription/rule of the crime contested to the high charge.[54]

The colloquial name for the law comes from the senate chairman of *Forza Italia,* Renato Schifani, who authored the legislation. The legislation was passed in record time by the Italian Legislature.[55]

It was immediately apparent throughout Italy that the purpose of the amnesty law was not to benefit the public at large.[56] The law was tailored to protect the sitting Prime Minister Silvio Berlusconi, who was presently the defendant of ongoing criminal trials. Berlusconi's own party leader wrote its terms.[57] The law would also effectually immunize Berlusconi from the impending charges

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[54] The text of the Schifani Law, as written in the Italian language, reads as follows: *Quell'emendamento così discusso*

> Non possono essere sottoposti a processi penali per qualsiasi reato, anche riguardante fatti antecedenti l'assunzione della carica o della funzione e fino alla cessazione della carica, il presidente della Repubblica (eccezion fatta per il caso di impeachment per alto tradimento o attentato alla Costituzione votato dal Parlamento), il presidente del Senato, il presidente della Camera, il presidente del Consiglio (salvo il caso di reato commesso nell'esercizio della propria funzione, accertato con autorizzazione a procedere del Parlamento), il presidente della Corte Costituzionale.
>
> *Processi e prescrizione sospesi da entrata in vigore legge*: dalla data di entrata in vigore della nuova legge sono sospesi i processi penali in corso contro le cinque cariche a cui si riferisce la legge, in ogni stato e fase o grado e per qualsiasi reato siano stati iniziati, anche per fatti antecedenti l'assunzione della carica e fino alla cessazione della medesima. A partire dalla data di sospensione dell'azione penale e/o dei processi è altresì sospeso il decorso dei termini per la prescrizione del reato contestato all'alta carica."
>
> Il Testo del Lodo Schifani, *available at* http://www.repubblica.it/2003/l/sezioni/politica/lodo/testo/testo.html. In the Italian version of the law, the word "carica" is used. Literally, this word means "load," but I have chosen to translate this word to "burden" or "position" to maintain the thrust and intent of the phrase. The drafters of the legislation are attempting to suggest that the five named government officials hold such important positions in office, and carry such a heavy burden for Italy in general, that they are deserving of this temporary asylum from criminal prosecution.

[55] *See* Marianne Arens, *Italy: Court Overturns Berlusconi's Immunity Law*, WSWS, Jan. 23, 2004, http://www.wsws.org/articles/2004/jan2004/ital-j23_prn.shtml.

[56] Giulio Ambrosetti, *Justice & Berlusconi Government*, Jan. 18, 2004, *available at* http://www.usitalia.info/archivio/dettaglio.asp?Art_Id=692&data=01/18/2004.

[57] *Id.*

against him of corruption and bribery of judges.[58] Also, if the law had not been passed, Berlusconi and all of Italy would face an embarrassing coincidence. Berlusconi was set to take his turn as European Union president, a six-month rotating position. At the same time, he would be on trial for bribery in criminal court in his own country.

The Schifani Law was repealed by the Italian Constitutional Court in January of 2004 for violations of Articles 3 and 24 of the Italian Constitution.[59] Namely, the law violated the principal of equal treatment for all citizens under the law because it was clearly designed to benefit only the prime minister and four other high-ranking officials, to the exclusion of the general public.[60]

B. *Beyond Schifani: Other Laws Favoring Berlusconi*

The Schifani law was not the only piece of Italian legislation that was crafted to benefit the country's richest man and prime minister. In 1984, Bettino Craxi, acting as Italy's prime minister (and also a close friend of Berlusconi's),[61] overruled a court order banning Berlusconi from broadcasting. This became known as the *Berlusconi Decree*.[62] The court order was based on the infringement of a law, which only permitted the State to broadcast national television. Berlusconi, however, was the only private individual other than the State attempting to put out a national broadcast. The decree enabled him to become a competitor, the first major step in a media business that has made Berlusconi millions. Interestingly, in the same year Craxi became godfather of Berlusconi's daughter Barbara at her christening, shedding light on the relationship between the two men.[63]

In 1990, the legislature passed another law custom fit for Berlusconi. Italy's broadcasting law, commonly known as *Legge Mammi*, created a Berlusconi-RAI duopoly in the broadcasting

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58 Stefan Vaccara, *Italian Judicial System: With or Without Berlusconi,* Jan. 18, 2004, *available at* http://www.usitalia.info/archivio/sommario.asp?data=01/18/2004#visti.

59 ITAL. COST. art. 3, 24, *available at* http://www.concourt.am/wwconst/constit/italy/itaold-e.htm (last visited March 27, 2006).

60 Maria Rita Latto, *'No' from Constitutional Court to the 'Schifani Law,'* Jan. 18, 2004, *available at* http://www.usitalia.info/archiio/dettaglio.asp?Art_Id=702&data=01/18/2004.

61 Berlusconi also benefited by nepotism influencing his rise in politics. Bettino Craxi was the best man at his wedding, and Berlusconi's daughter married into Craxi's family. STILLE, *supra* note 23, at 386.

62 Schwarz, *supra* note 33.

63 *Id.*

market and took away any limitations on ownership in that market.[64] The Italian Constitutional Court declared this law void in 1994, stating instead that no one company should be permitted to control more than thirty percent of the television or print media market.[65] However, Berlusconi avoided the effect of this law by appointing ownership of the newspaper *Il Giornale* to his brother Paulo Berlusconi.[66]

In 2003, the legislature passed the *Gasparri Law*, a new media law governing the transfer of Italian television to digital transmission.[67] The legislation clearly favored Berlusconi whose third television channel, *Rettequattro*, would no longer have to transfer to satellite before December 31, 2003, as had been demanded by the Italian Constitutional Court. State President Carlo Azeglio Ciampi had refused to sign the law pointing to anti-trust violations and its apparent one-sided benefit to Berlusconi's companies *Finivest* and *Mediaset*.[68] He sent the law back to the legislature for review. However, Ciampi's dissent was in vain. The *Gasparri Law* was passed on April 29, 2004 with all provisions benefiting Berlusconi retained.[69]

In March of 2002, protestors objected to the Italian Legislature's passage of the so-called "conflict of interest law."[70] The law, passed April 30, 2002, would enable Berlusconi to continue as prime minister without limiting his control of the Italian media.[71] Instead of giving up any real power in his three television networks, he would be able to appoint others to serve as titular heads of his networks.[72] This law resulted in leaving Berlusconi in control of Italian government and media simultaneously. This situation

[64] *See supra* text accompanying note 16; *see also* Media Profile, *Berlusconi*, Ketupa.Net (Dec. 2004) http://www.ketupa.net/berlusconi.htm.

[65] *Id.*

[66] *Id.*

[67] Senato Della Repubblica, XIV Legislatura, Disegno Di Legge, n. 447 (July 7, 2003) http://italy.peacelink.org/mediawatch/docs/45-1085_gasparri.pdf.

[68] *See Gasparri Law Finally Adopted*, REPORTERS WITHOUT BORDERS ITALY, April 30, 2004, http://www.rsf.org/print.php3?id_article=8695; *see also President Refuses to Sign Broadcast Media Reform Bill,* REPORTERS WITHOUT BORDERS ITALY, Dec. 16, 2003, http://www.rsf.org/print.php3?id_article=8695; *see also* Arens, *supra* note 55.

[69] *Gasparri Law Finally Adopted, supra* note 74.

[70] Peter Schwarz, *Millions Demonstrate in Rome Against Berlusconi*, WSWS, Mar. 26, 2002, http://www.wsws.org/articles/2002/mar2002/rome-m26.shtml.

[71] Tekla Szymanski, *In Medias Res,* WORLD PRESS REVIEW, June 2003, http://www.tekla-szymanski.com/englpressitaly.html.

[72] *Id.*

left open the dangerous possibility of slanted television coverage and the transmission of propaganda in favor of the prime minister. In fact, during the 2001 election campaign, it was reported that Berlusconi's three networks (the three largest in Italy) reported election coverage at a four to one ratio in favor of Berlusconi.[73]

In early August 2002, Italian Parliament passed a bill that would allow defendants to request that their cases be annulled or moved if the defendant had a "legitimate suspicion" that the judges were biased toward them.[74] While two unknown defendants in cases before Milanese courts were used as examples in arguing for this law, the public of Italy at large was immediately aware that the law would benefit Berlusconi, who also had criminal cases pending before Milanese courts on charges of bribing judges. The bill, popularly known as *Il Decreto Cirami* ("the Cirami decree"), was passed by an astounding vote of 162 to nine.[75] Those opposed to the bill purportedly either walked out during the middle of the vote or remained and wore blindfolds over their eyes as a symbol of their awareness of the corruption.[76]

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[73] *See Berlusconi Victory Raises Fears*, INTERNATIONAL FREEDOM OF EXPRESSION EXCHANGE, May 15, 2001, http://www.ifex.org/fr/layout/set/print/content/view/full/28690/?PHPSESSID=17d9abe361f06e48efed188aa923151; *see also Italy Election Victors Seek TV Purge*, BBC NEWS, May 15, 2001, *at* http://news.bbc.co.uk/2/hi/europe/1332680.stm (quoting Gianfranco Fini, a nominee for deputy prime minister in Berlusconi's government, calling RAI's network coverage of the campaign "scandalous.").

[74] This bill is popularly known as the Cirami Law. The text of the law is as follows:
Il Testo del disegno di legge Cirami

> Art. 45 (Casi di rimessione)- 1. In ogni stato e grado del processo di merito, quando la sicurezza o l'incolumita' pubblica sono pregiudicate da situazioni locali tali da turbare lo svolgimento del processo e non altrimenti eliminabili, ovvero per legittimo sospetto, la Corte di cassazione, su richiesta motivate del procuratore generale presso la Corte di appello o del pubblico ministero presso il giudice che procede o dell'imputato, rimette il processo ad altro giudice, designato a norma dell'articolo 11.

English Translation: *The Text of the Cirami Law*

> Art. 45 (Cases of remission)- 1. In every state and degree of a process/trial of merit, when security or public safety are prejudiced by a local situation which could upset the development of the trial process, and a case is not otherwise dismissable but for that legitimate suspicion, the Court of causation, upon request of the prosecuting attorney general of the Court of Appeals, or the public minister to the judge that is hearing the case, or the culprit/defendant, may remove the trial to another judge, designated by the norms of article 11.

[75] *See* Schwartz, *supra* note 28.

[76] *Italian Senate Passes Disputed Bill*, BBC NEWS, Aug. 2, 2002, http://news/bbc.co/uk/2/hi/Europe/2167204.stm; *see also La maggioranza approva il disegno di legge sul "legittimo sospetto" dopo un forte battaglia parlamentare*, GIORNALE DI BRESCIA, Aug. 2, 2002, http://www.giornaledibrescia.it/giornale/2002/08/02/01,PRIMA/T1.html.

Finally, the *Mani Pulite* campaign has been generally undermined during Berlusconi's term as prime minister.[77] Berlusconi has backed the amendment of laws governing corporate corruption, lessening the penalties.[78] "Cooking the books" (accounting fraud) is now no longer a serous crime in Italy.[79] The statute of limitations for white-collar crimes has been severely decreased.[80] And, the use of cross-border evidence has been seriously restricted.[81] Not only have these changes hindered *Mani Pulite*, they have hindered a major investigation into Berlusconi himself.[82] The above examples reflect how Berlusconi's conflict of interest as media mogul and prime minister has become a material problem within Italian government.

III. The DOJ's Policy for Immunity in the U.S.

Not all of the "Berlusconi-tailored" laws that have recently become effective act only to undermine the success of the country. The scope of the Schifani Law, the amnesty law passed to allow Berlusconi to avoid a current criminal situation, is based on a concept that is familiar to American government. The Schifani Law would result in providing high-ranking government officials immunity from criminal prosecution while serving their term in office. This scenario is markedly similar to the United States DOJ's policy offering a similar protection to any sitting president of the United States.

According to the DOJ, it is their policy that a sitting United States president will not be amenable to indictment and criminal prosecution while in office.[83] This policy only protects the presi-

Protestors also stood outside of Parliament that morning to show their distaste in the decision to pass the bill. They carried signs with slogans like "No all'impunita' dei potenti!" ("Not for the impunity of the powerful ones!") and "Cos'e' un Legittimo Sospetto Berlusconi?" ("What is a legitimate suspicion, Berlusconi?") to show their objection. *Id*.

[77] *See Dear Mr. Berlusconi*, *supra* note 13.

[78] *Id*.

[79] *Id*.

[80] *Id*.

[81] Arens, *supra* note 55.

[82] Among others to benefit from these changes were the heads of Parmalat, the Italian company that went bankrupt in 2003 after the disclosure of corruption in its financials.

[83] If a sitting president were to be indicted, the Department of Justice and the United States Attorney General would be in charge of bringing the indictment. Thus, by issuing this policy (that the DOJ will not prosecute a sitting president), the policy has become a hard and fast rule. This rule will be put into practice until and unless the DOJ effectively

dent while he is serving his term in office and before impeachment.[84] He is not completely insulated from indictment, which can come after the term is complete, after he voluntarily resigns, or after impeachment.[85]

In September of 1973, the DOJ first expressed its opinion on this issue in a comprehensive memorandum from its Office of Legal Counsel.[86] The memorandum analyzed which federal officers would be immune from indictment or criminal prosecution while serving their terms in office, with particular attention paid to the offices of Vice President and President of the United States. The OLC held that all federal officers are subject to criminal prosecution and indictment while in office except for the United States President. The President is uniquely immune from such process. This is still the position of the DOJ today. The DOJ reaffirmed its position that even the Vice President would not enjoy the same immunity from indictment granted to a sitting President in October

changes their policy. Only time will tell if this will occur. However, throughout the history of the United States, no US president has yet been criminally indicted while still in office. And, only one vice president has ever faced that fate. Vice President A. Burr was criminally indicted in New York and New Jersey for murder and treason in 1807. *See* V.B. Reed & J.D. Williams, *The Case of Aaron Burr*, *available at* http://edweb.tusd.k12.az.us/uhs/APUSH/1st%20Sem/Articles%20Semester%201/Burr/case_of_aaron_burr1.htm (last visited Mar. 23, 2005); *see also* DOJ Memo, *supra* note 1.

84 U.S. CONST. art. II, § 4,

> [T]he President, Vice President and all civil Officers of the United States, shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. . . judgment in Cases of Impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any Office of honor, Trust, of Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to the Law.

85 It should be noted that this article and the DOJ's policy against indictment deal only with *criminal prosecution* of sitting presidents. As we have seen in recent years, notably during the Presidency of Bill Clinton, sitting presidents assuredly are subject to civil trials while serving as United States President. However, given the exemplar that the Clinton trials provided the country with, many would argue that that it would be wise for Congress to pass legislation immunizing the President from civil litigation during his term of office. Clinton provided immunity proponents with clear evidence that a civil litigation does distract the Commander in Chief and prevent him from carrying out his Constitutional duties as President. *See* Statement of Representative Howard L. Berman, Before the Committee on the Judiciary, Dec. 10, 1998, *available at* http://www.house.gov/judiciary/report5/berman.pdf [hereinafter Berman Statement].

86 *See* Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office* (Sept. 24, 1973) [hereinafter Dixon Memo].

of that year.[87] In a Memorandum for the Attorney General dated October 16, 2000, the DOJ expressly readopted all findings of the DOJ in 1973.[88]

There is no binding United States case law that speaks directly to the DOJ's policy of granting immunity from criminal prosecution to sitting presidents.[89] However, there is relevant case law discussing executive privileges and immunities regarding legal proceedings in different contexts.[90] These cases do not present us with the specific example of a current president being subjected to a criminal prosecution. Instead they deal with the ability to affect an ongoing criminal prosecution by means of the executive privi-

[87] The DOJ, through a memorandum by then Solicitor General Bork, stated that the President's constitutional protections are different and greater than those of the Vice President. His argument relied on the text and history of the Constitution. Since the Constitution provides no express language granting federal officers immunity while in office, a very compelling argument, based on other Constitutional grounds, would be required to win amnesty for an officer. The Solicitor General found no such argument in favor of the Vice President, while the unique demands of a President combined with separation of powers ideologies clearly allowed immunity for the President *See* Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity (filed Oct. 5, 1973), *In re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew, Vice President of the United States* (D. Md. 1973) (No. 73-965) [hereinafter Bork Memo].

[88] DOJ Memo, *supra* note 1.

[89] The emphasis of this statement is on the phrase "criminal prosecution." The United States Supreme Court has had the occasion to assess presidential immunities from prosecution in non-criminal contexts. *See infra* Section III (A).

[90] *Id. See* United States v. Nixon, 418 U.S. 683 (1974) (The Court was faced with the question of whether a president could fail to comply with a subpoena in a criminal case seeking records of communications between the president and his advisors by virtue of his executive privilege. After balancing the president's interests in confidentiality with the public, government, and Judicial Branch's interests in a fair and functioning adversarial criminal system, the Court held that the executive privilege is not absolute and required Nixon to comply with the subpoena. However, the Court still recognized the validity of a presidential privilege of confidentiality by virtue of the President's enumerated constitutional powers.); *see also* Nixon v. Fitzgerald, 457 U.S. 731 (1982) (Here, the Court decided whether a civil case for official misconduct could proceed or if it would be barred by the sitting President's constitutional immunity. The Court favored a rule of absolute immunity focusing on the negative effects such suits would have on a President's ability to fulfill his official constitutional duties if he was constantly in fear of litigation. The Court balanced the constitutional interest in allowing the President to successfully function in office with the interest of allowing such civil litigations, and found that the constitutional interests prevailed.); *compare* Clinton v. Jones, 520 U.S. 681 (1997) (Here, the Court would not extend executive immunity to a sitting President's unofficial conduct committed before he was the President. The civil proceeding was allowed to continue against the President while he was still in office. The Court expressed their belief that such a civil proceeding would not interfere with the President's ability to fulfill his constitutional duties.).

lege or the applicability of the privilege in civil proceedings.[91] The cases conform, however, with the DOJ's policy of immunity for sitting presidents. The court reaches conclusions by balancing the constitutional interest of preserving a president's ability to fulfill his executive duties while in office against the interests of the government and public in implicating the president in an ongoing prosecution. The DOJ believes that this balance will always fall in a sitting president's favor when he is the would-be-defendant in a criminal prosecution.[92]

A. *U.S. Case Law and Immunity*

The United States Supreme Court has not yet ruled on whether a sitting president is constitutionally entitled to immunity from criminal indictment and prosecution while in office.[93] The DOJ's current policy, however, bases its reasoning on trends and approaches taken in the Supreme Court regarding similar questions of presidential immunity decided after the DOJ first announced its policy in 1973. While not all cases held in favor of presidential immunity, all engaged in the constitutional balancing test that the DOJ uses to justify its own policy. The DOJ maintains that the overall weight of Supreme Court decisions lands in favor of a rule against criminal prosecution of sitting presidents.

In *United States v. Nixon*, 418 U.S. 683 (1974),[94] the Supreme Court held that a president could not assert a claim of executive privilege in response to a criminal subpoena seeking to disclose information between a President and his advisors. Counsel for President Nixon had argued that confidential conversations between the President and his advisors should be privileged, and not reachable by subpoena. While the Court agreed that the President was entitled to some privilege for confidential communications, it did not find that privilege was undermined by mandating compliance with

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91 *Id.*

92 DOJ Memo, *supra* note 1.

93 In a concurring opinion by Justice McKinnon, the D.C. Circuit Court discussed immunity from criminal prosecution for incumbent presidents in dicta. Justice McKinnon suggested that the proposition that a president may only be subject to criminal proceedings after impeachment was supported by the implications of the impeachment clause of the Constitution, the views of the Framers' when the Constitution was drafted, and the need for a sitting president to remain free from distractions and hindrances in order to fulfill his constitutionally assigned duties. Nixon v. Sirica, 487 F.2d 700, 755-58 (D.C. Cir. 1973) (McKinnon, J., concurring in part and dissenting in part).

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

a subpoena.[95] To reach its conclusion, the Court engaged in a balancing test. The Court weighed the President's interest in confidentiality against the government's interest in prosecution and fair administration of criminal justice.[96] In this case, the balance tipped in favor of the government's interest leading to a rule against presidential immunity.

In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982),[97] the Supreme Court held in favor of a rule of absolute immunity for a sitting president, though not in the context of immunity from criminal prosecution before impeachment.[98] The case involved a suit brought against President Nixon for alleged unlawful official conduct committed while in office. Again, the Court engaged in a constitutional balancing test, weighing the interest in allowing the President to adequately perform his constitutional functions with the competing interest of allowing civil actions against his official conduct. Here, the balance tipped in favor of immunity for the President.[99] The Court relied heavily on the President's unique position as head of government and cautioned against diverting his energies from his position to a civil suit.[100] They noted that prosecution would distract and prevent the President from performing his constitutionally assigned duties if choices made in his official capacity could be challenged.

Most recently, in *Clinton v. Jones*, 520 U.S. 681 (1997),[101] the Court decided against a grant of immunity for a president regarding civil suits challenging unofficial conduct that had occurred before his term as president.[102] By this decision, the Court refused

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95 *Id*, at 712.

96 *Id*. at 707-09.

97 Nixon v. Fitzgerald, 457 U.S. 731 (1982).

98 *Id*. at 749.

99 *Id.* at 753-54.

100 *Id*. at 749-50.

101 Clinton v. Jones, 520 U.S. 681 (1997).

102 Opponents to the immunity policy argue that the decision in *Clinton v. Jones* suggests that, if the U.S. Supreme Court had the opportunity, they would reject the policy of immunity for sitting presidents from criminal prosecution. *See* Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193, 2263-64, stating:

> In *Clinton*, the Court held that neither immunity precedents nor separation of powers considerations give the President temporary immunity against civil damages litigation while in office. In so doing, the Court rejected an argument which is relied upon by many who argue that the President should be distinguished from other civil Officers and that presidential impeachment must precede prosecution - - essentially that the President should receive greater

to further extend the immunity granted in *Nixon v. Fitzgerald*. The Court distinguished *Fitzgerald* by maintaining the distinction between official and unofficial acts committed by the President.[103] The Court also disregarded the concern announced in *Fitzgerald* that a president subjected to suit while in office would be distracted and unable to perform his unique constitutional tasks as president. The Court reasoned that the President's physical presence in court would be unnecessary and any testimony needed from the President could be taken at his convenience outside the court.[104] The Court weighed the equitable interest of the party bringing the suit with the constitutional conflicts and practical burdens on the President. The Court decided against immunity from civil litigation based on unofficial conduct committed prior to a President's term.[105]

B. *The Current Policy in the U.S.*

While the DOJ's current position on the issue of immunity from criminal prosecution for a sitting president appears clear, the

> immunity because the Presidency occupies a 'unique position in the constitutional scheme.' The *Clinton* Court refused to find that a President is entitled to immunity from civil suit while in office simply by virtue of the scope and importance of the president's duties, the fact that such duties are the responsibility of only one individual, and the fact that, absent such an immunity, 'burdens will be placed on the President that will hamper the performance of his official duties.

While O'Sullivan's opinion is valid, the state of affairs after Clinton was brought to trial in this civil litigation cannot be ignored. It should be noted that many commentators now argue that the Court's decision in *Clinton v. Jones* was wrong. After the Court held that the President could be tried while in office in a civil litigation based on alleged unofficial conduct committed before his presidency, President Clinton became implicated in a lengthy trial regarding these allegations. The trial was not only long and burdensome, but it arguably did exactly what the Court in *Fitzgerald* predicted any litigation against a sitting president would do – it distracted the United States President in such a way that he was unable to adequately perform his constitutionally assigned duties. The Court in *Clinton v. Jones* had rejected this argument, reasoning instead that the President would not be unconstitutionally distracted from his duties because other means could be made available to accommodate the President's busy schedule, such as out of court testimony trial dates set in accordance with the President's schedule. The President was in fact burdened by the trial to the extent that it hampered his performance in office. He was in fact prevented from performing the duties of the presidency, duties constitutionally assigned to only one individual. It is arguable that, given our nation's recent experience with such a trial, the Supreme Court's opinion may change, especially in regards to a more intensive and involved possibility of a criminal trial.

103 *Clinton*, *supra* note 101 at 692-93.

104 *Id*. at 691-92, 702.

105 *See supra* text accompanying note 102.

question of whether or not an incumbent president really does or should enjoy immunity remains open and thrives in debate amongst legal scholars.[106] Some even argue that the position within the DOJ is split, despite the department's public announcements on the subject.

According to the DOJ's memoranda asserting its policy against criminal prosecution of a sitting president, the Department justifies its decree through the application of a constitutional balancing test.[107] After weighing the interest underlying a grant of presidential immunity against any governmental or public interests in rejecting said immunity, the DOJ concludes that the burden of a criminal litigation would be so intrusive as to make such a prosecution detrimental.[108] The focus of the balance must be on the extent to which a criminal indictment and prosecution would inhibit the Executive branch from realizing its constitutionally assigned Article II powers. But this is not the end of the inquiry. One must then ask whether legitimate governmental concerns would justify such an intrusion, even if the intrusion is great. The DOJ concludes that such a prosecution would be both a violation of the principle of separations of powers and an unconstitutional impingement upon the functioning of the Executive branch.[109]

The DOJ, as well as courts confronted with variations of the immunity issue, have looked to a number of factors in determining

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[106] *See infra*, Section IV, B; *see also* Keith King, *Indicting the President: Can a Sitting President Be Criminally Indicted?*, 30 SW. U. L. REV. 417 (2001) (concluding that the president should not be indicted before impeachment, but exploring the arguments against such a policy).

[107] *See* DOJ Memo, *supra* note 1, at 15.

[108] *Id.*

[109] The "constitutional balancing" that the DOJ speaks of is not just an ideology. The Supreme Court has engaged in this balancing test in cases when determining both separation of powers and immunity issues. The DOJ now relies on the outcome of that test to justify their decision not to subject sitting presidents to criminal prosecution or indictment. *See* Nixon v. Fitzgerald, 457 U.S. 731, 753-54 (1982) (applying a constitutional balancing test in determining whether a president would enjoy an absolute presidential immunity from civil suits related to his official conduct. "[A] court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch."); *see also* Memorandum for the General Counsels of the Federal Government, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: The Constitutional Separation of Powers between the President and Congress*, at 10-13 (May 7, 1996), quoting Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977) ("[T]he proper inquiry focuses on the extent to which [a challenged act] prevents the Executive Branch from accomplishing its constitutionally assigned functions.").

which way this balance will tip. Some key factors include history of presidential indictment, the effect of a criminal sentence on a president's ability to physically do his job, the uniqueness of the president's post, and the potential negative stigma that would riddle the country as a whole if such a criminal indictment were initiated.[110] Attention is also given to the inability of a president without such immunity to serve as a leader in both foreign and international affairs.[111] The reasoning is summarized by the DOJ as follows.

> [N]either the text nor the history of the Constitution ultimately provided dispositive guidance in determining whether a President is amenable to indictment or criminal prosecution while in office. . . . Because of the unique duties and demands of the Presidency. . . a President cannot be called upon to answer the demands of another branch of the government in the same manner as can all other individuals. . . . [T]he ordinary workings of the criminal process would impose burdens upon a sitting President that would directly and substantially impede the executive branch from performing its constitutionally assigned functions, and the accusation or adjudication of the criminal culpability of the nation's chief executive by either a grand jury returning an indictment or a petit jury returning a verdict would have a dramatically destabilizing effect upon the ability of a coordinate branch of government to function. . . . [W]hile civil officers generally may be indicted and criminally prosecuted during their tenure in office, the constitutional structure permits a sitting President to be subject to criminal process only after he leaves office or is removed there from through the impeachment process.[112]

The rationale was restated by Representative Howard L. Berman, speaking in opposition of the impeachment of President Bill Clinton:

> While not above the law, the President – the most powerful man on the planet, the man who has control over our nuclear weapons arsenal, the man whom we vest with the authority to protect and defend the interests of the people of the United States, in-

110 *See* DOJ Memo, *supra* note 1, at 15-17; *see also* King, *supra* note 112, at 419.

111 *See* King, *supra* note 112, at 427-28 ("The President, as the Commander in Chief of the Armed Forces, must protect American citizens and preserve the Constitution. Furthermore, the President is obligated to handle all matters of foreign policy and to ensure that the laws of the United States are faithfully executed."); *see also* Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995).

112 *Id.* at 711, *citing* Dixon Memo, *supra* note 92, and Bork Memo, *supra* note 93.

> deed, protect all of civilization – is a special case! Everybody is equal under the law. But we make special provisions for one person while he's serving as President.[113]

The DOJ and courts confronted with this issue do not discount the practical effects of a rule allowing criminal indictment and prosecution of a sitting president on the ability of the Executive branch's functioning. But, there is also a persuasive argument in favor of a policy of immunity based on the constitutional doctrines of checks and balances[114] and separation of powers.[115] Keith King, author of *Indicting the President: Can a Sitting President be Criminally Indicted*, clearly states this argument.

> The U.S. Constitution specifies Congress, and not any part of the Executive branch, as the court that tries a sitting president. If the President were first federally prosecuted, it would circumvent this power of Congress by giving the independent counsel, part of the Executive branch, the power to prosecute the President.[116]

King also notes a second separation of powers issue arising between the Executive and Judicial branches, based on the chilling effect such a prosecution would have on the functioning of the Executive branch. "If the President were federally prosecuted, the Executive branch would be chilled because the power to prosecute the president would be in the hands of the Judicial branch."[117]

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113 Berman Statement, *supra* note 91.

114 Opponents to the policy of immunity use a "checks and balances" argument to dispute the DOJ's policy against criminal prosecution of a sitting president as well. They argue that the President should not be put above the law, as he would be if his criminal conduct was shielded while he was in office. The other two branches should be able to police executive conduct, even the conduct of the President. The Congress or the Judicial branch should be able to try a sitting President, without the prior requirement of impeachment or resignation. *See* Laura Krugman Ray, *From Perogative to Accountability: The Amendability of the President to Suit,* 80 KY. L.J. 739, 740 (1992) (noting the argument that the need for checks and balances amongst the three branches of the U.S. government prohibit the policy in favor of immunity).

115 Black's Law Dictionary defines separation of powers as, "[t]he division of governmental authority into three branches – legislative, executive, and judicial – each with specified powers and duties on which *neither of the other branches can encroach*." BLACK'S LAW DICTIONARY 637 (2d pocket ed. 2001) (emphasis supplied).

116 King, *supra* note 112, at 426; *see also* U.S. CONST. art. II; *see also* Amar & Kaht, *supra* note 117 (making the same separation of powers argument in favor of immunity for the president).

117 King, *supra* note 112, at 426, *citing* Eric Freedman, *Achieving Political Adulthood,* 2 NEXUS 67, 79 (1997).

After engaging in the balance of constitutional issues and practical effects of criminal prosecution of an incumbent president, the DOJ reaches the conclusion that the balance tips clearly in favor of immunizing a sitting president, leaving him subject only to impeachment for criminal issues or later indictment after his term has ended.[118]

C. *Opposition to the DOJ's Policy*

The DOJ's attitudes toward presidential immunity are in fact just a policy. They are not, and have never attempted to become, codified congressional law. Even without the suggestion of codification, the DOJ's policy does have its opponents.[119] Daniel E. Troy, a former member of the DOJ's Office of Legal Counsel during the Reagan and Bush Administrations, argues that the case against pre-impeachment indictment is far from clear-cut, an argument shared by other challengers.[120] Troy admits there is some evidence arguing in favor of immunity from criminal indictment. However, he points to strong evidence against such policy. Troy poignantly notes there is no express grant of immunity to the Presi-

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118 DOJ Memo, *supra* note 1, at 15-17.

Impeachment and early resignation by the president are commonly offered as alternatives to prosecuting a sitting president from criminal infractions. However, there is also an argument that, since the President is an elected representative of the 250 million citizens of the United States, it is those same citizens who should be his judge. This suggestion would leave the fate of the president to the voters on election day. *See* Krugman, *supra* note 120 at 740. However, this proposed solution brushes aside the fact that the voters' power only has force every four years. While it is within a president's best interest to keep the voters in his favor while in office in the hopes of reelection or merely national support, the threat of not being reelected may not be sufficient to deal with a president who has been accused of criminal infractions and who remains in office.

119 Harvard Law Professor Laurence Tribe is often cited as an opponent to presidential immunity from criminal prosecution, given his aversion to granting the U.S. President king-like qualities. *See* Amitai Etzioni, *Decriminalizing Politics*, March/April 2001, http://www2.gwu.edu/~ccps/etzioni/B344.html. However, in his treatise, he suggests that, while there is generally no executive immunity from criminal prosecution, he does not believe a criminal prosecution of an impeachable official like the sitting president should be permitted. He never comes to a conclusive answer however, stating "the question must be regarded as an open one." *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 4-13, at 200-02, 268-69 (2d ed. 1988).

Hofstra Law Professor Eric Freedman is also a noted opponent to presidential immunity from prosecution. *See generally* Freedman, *The Law as King and the King as Law: Is the President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L. Q. 7 (1992); Eric Freedman, *On Protecting Accountability*, 27 HOFSTRA L. REV. 677 (1999).

120 *See* Daniel E. Troy, *The Indictment Opinion*, THE NATIONAL REVIEW, April 6, 1998, http://www.nationalreview.com/06apr98/troy040698.html.

dent found in the Constitution, an argument widely asserted in opposition to this policy.[121] He contrasts this to the presence of the "speech-and-debate" clause in the U.S. Constitution, which immunizes Congressmen and women from liability for all matters arising out of their official duties.[122] Troy also points to case history, in which Vice President Aaron Burr was in fact criminally indicted while in office.[123] Troy argues there is no plausible reason to have a different rule for presidents. Troy points also to poignant language in the *Clinton v. Jones* opinion. The Supreme Court stated in that opinion:

> We have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity . . . . With respect to acts taken in his 'public character' — that is, official acts – the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts.[124]

Troy argues there is no difference between civil and criminal trials and that a sitting president should not be immune to either.[125]

In discussing the interaction between impeachment and congressionally-appointed independent counsel assigned to investigate the President, Julie R. O'Sullivan also argues for prosecuting a sitting president in a criminal trial prior to impeachment. She bases her argument on "the lack of any textual provision for criminal immunity pending impeachment, the weight of precedent and prac-

121 *See also* Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C. L. Rev. 879, 928 (1985) ("Although members of Congress are protected by the speech or debate clause, no explicit constitutional privilege protects administrative or executive officials against suit.").

122 *Id.*

123 *See* United States v. Burr, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694). Troy fails to mention in his argument that no sitting presidents have ever been criminally indicted, relying on an analogy to the Vice President to make his case. However, as discussed *supra*, the DOJ recognizes a difference between federal officials, including the Vice President, and the President himself when utilizing their policy against criminal indictment. *See supra* Section III.

124 *Clinton*, at 749. *Clinton v. Jones* is easily distinguishable from the case of a sitting president being indicted for criminal prosecution. *Clinton* was a civil litigation. Any language used by the Supreme Court is dicta at best as applied to the issue of criminal indictments. Troy does not address this fact in his argument against pre-impeachment immunity for presidents.

125 *See generally* Troy, *supra* note 120.

tice, and particularly the Supreme Court's recent decision in Clinton v. Jones."[126]

However, arguing against this immunity may be a fruitless effort. Prosecutorial discretion lies in the hands of the DOJ. And, the DOJ readily asserts their policy that, given the choice, they will not initiate a criminal prosecution against an incumbent president prior to impeachment.[127]

Those arguing against presidential immunity are in the minority. The current policy remains that a sitting president will not be subjected to pre-impeachment criminal indictments until his term in office has ended.[128]

IV. U.S. Policy vs. The Schifani Law

The policy against criminal prosecution of a sitting president has reached the status of a governing rule within the DOJ, even though the need to use said statute has not arisen with regularity. Even though the policy has its opponents amongst legal scholars, their opinions merely keep debate on the issue alive. Opponents will not have the opportunity to effect change within the department until they both infiltrate the leadership of the DOJ *and* have a sitting president accused of criminal conduct before them. While the DOJ's policy has force, it is not codified congressional law. Many argue that there is no constitutional right for sitting presidents to enjoy this immunity. It is arguable that if the United States Legislature did attempt to codify the immunity policy, that attempt would fail. If it did pass, the law would likely suffer the same fate as Italy's Schifani Law, which was quickly struck down as unconstitutional and violative of the right of equal protection under the laws.

George E. Danielson, an early writer on this subject, questioned two arguments often offered in favor of the DOJ's policy.[129] Danielson argues that it cannot be certain that the Framers intended presidents to enjoy immunity from criminal prosecution while in office simply because of the order of events listed in Article I, section 3, clause 7 of the United States Constitution. In that

[126] O'Sullivan, *supra* note 102, at 2262.
[127] *See supra* text accompanying Section B.
[128] Akhil Reed Amar, *On Prosecuting Presidents*, 27 HOFSTRA L. REV. 671 (1999).
[129] George E. Danielson, *Presidential Immunity from Criminal Prosecution,* 63 GEO. L.J. 1065, 1066-68 (1975); *see also* Freedman, *supra* note 119 (concurring in Danielson's opinions).

section, "impeachment" is listed first as a remedy, followed in the text by "criminal prosecution." Many in favor of immunity for sitting presidents argue that the plain language of the law as written requires that the president be impeached before he can be criminally prosecuted. Danielson rejects this notion.

Danielson also questions the argument that an incumbent president must be immune from criminal prosecution since Article II of the Constitution vests the entire executive power in only one person.[130] Proponents of immunity argue that since only one person occupies this key government position, and since it would not be possible to effectively run the position of the United States President if that one person were embroiled in criminal proceedings, the president should enjoy temporary criminal immunity. Danielson summarily rejects this argument.[131]

Danielson's discussion of the presidential immunity issue is strikingly similar to the attitudes parlayed by the Constitutional Court of Italy in striking down the Schifani Law. Danielson summarizes his thoughts by calling attention to the attitudes of the Supreme Court of the United States as expressed in *United States v. Lee*:

> In condemning lawless actions committed by government officials, the Supreme Court has observed:
>
> > *No man in this country is so high that he is above the law*. No officer of the law may set that law at defiance with impunity. *All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it*. . . . It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.
>
> This language recognizes that there is no room for presidential immunity from criminal prosecution in a society built upon a structure of laws, and not men.[132]

Danielson's rationale comports with the reasoning offered by the Italian Constitutional Court for striking down the Schifani Law.[133]

130 *Id*.
131 *Id.* at 1068.
132 *Id.* at 1069, *quoting* United States v. Lee, 106 U.S. 196, 220 (1882) (emphasis supplied).
133 *See supra* Section II(A).

No one man can be above all others and above the government. To suggest otherwise is a violation of the principle that all citizens are to be treated equally under the eye and arm of the law.[134]

The Italian Constitutional Court threw out the Schifani Law after finding that it violated the principle of equal treatment for all citizens.[135] However, when one compares the effect of the now defunct Schifani Law to the policy of immunity for sitting presidents regarding criminal matters expressed by the DOJ, the same argument can be made. The DOJ recognizes the argument that by granting temporary immunity from criminal prosecution to sitting presidents, the president is afforded greater rights than the average citizen. However, as discussed earlier, the DOJ easily justifies its policy by focusing on the uniqueness and importance of the president's role to the United States at large.[136] And, as discussed earlier, the role of the prime minister in Italy parallels the executive functions controlled by a United States president.[137]

Those in favor of the Schifani Law can make a strong argument that it should be upheld by analogy to the United States' policy. The public policy benefits enunciated by the DOJ in favor of immunity for sitting presidents are not exclusive to the United States of America. Any country would benefit by having the head of their government free from obstructions while serving as its leader.[138] Any country would want to avoid the stigma of having a leader of questionable merit. Any country would benefit locally and internationally if its elected head of government was allowed to complete his term without threat of criminal prosecution.[139]

If one were only to focus on the concerns that weigh in favor of the DOJ's policy (such as enabling the executive to function unhindered), these justifications could argue in favor of upholding a similar rule in Italy. The Schifani Law's goals might also be

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134 *Id.*

135 *See supra* note 59.

136 *See supra* Section III.

137 *See supra* note 9.

138 *See supra* notes 110 and 111. The Schifani Law, discussed *supra*, was written to grant immunity to the Italian President as well as the Italian Prime Minister. The policy reasons announced by the DOJ in favor of immunity, however, apply more when the US president is compared to the Italian Prime Minister.

139 As discussed *supra* in Section II, this may not be true for Italy. Given the level of Berlusconi's control over the country and his conflict of interests, there is a greater potential for abuse of this immunity in Italy than in other countries, particularly in the United States. *See supra* Section II.

achieved through extending this policy to the Italian system. However, the Italian government has another consideration that weighs heavily in its balance and may tip the scales away from affording immunity for the prime minister: the need to protect the government and public from the rampant abuse and corruption that would be sure to follow from such a law. As discussed earlier, the Italian government, whether during its days as a monarchy, a fascist regime, or a republic, has been riddled with corruption.[140] U.S. history shares a touch of corruption,[141] but not in the extreme and documented form of the Italian government. Given the Italian government's irrefutable and recorded history of a thoroughly corrupt government, a grant of immunity to a sitting prime minister would result in further abuse.

V. Conclusions

A. *Why the U.S. Policy Should Not be Utilized in Italy*

In form, the Schifani Law attempted to achieve through legislation what the U.S. government has achieved through policy: immunize the head executive from criminal prosecution while in office; allow him to do his job unimpeded and for the benefit of the country as whole. A simple comparison of the Schifani Law with the accepted immunity policy of the United States seems to illustrate strong similarities. Both the Schifani Law and the DOJ's policy attempt to protect the country's highest executive officer from criminal prosecution while in office.[142] And, the justifications behind such a rule seem to be the same as well; to allow the executive to perform his assigned duties unhindered for the benefit of the country at large.[143] At least superficially, the goals of the Schifani

140 *See supra* Introduction and Sections I and II.

141 The Nixon era and Watergate scandal present a notable example of corruptions plaguing the U.S. government in recent history. And, while President Clinton's sex scandals in office spoke more of his personal mores than of an attempt to abuse government power, the scandal tarnished U.S. history in the White House once again. However, while these stories may be embarrassing to the American government, they do not serve as the foundation upon which our government was built. The American system is not a system where every political post is for sale to the highest bidder, where only friends and family of those in power are favored, or a system that can be manipulated to operate only for the financial benefit of the Prime Minister and his *amici*, as some argue the Italian system is. *See* Stille, *supra* Section II.

142 *See supra* Sections II (A) and III.

143 *Id.*

Law seem to correspond with the goals and reasoning behind the policy enforced by the DOJ.

However, this analogy is far from perfect. The American system has advantages over the Republic of Italy that make the policy appropriate for the United States while potentially catastrophic for Italy.[144] In the case of Italy, there is a very strong argument that the immunity law does not benefit the country at large.[145] Though on paper an argument can be made in favor of immunity for the prime minister through comparison to the American counterpart, the actual state of affairs in Italy, the history of corruption in the Republic, and the history of current Prime Minister Berlusconi, caution against attempting to implement and enforce the American policy in Italy.[146]

An obvious distinction between the Italian and American immunity rules is that the Schifani Law attempted to achieve by legislation what America's DOJ achieves by uncodified policy.[147] One

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[144] *See supra* Section II(A) and (B) (discussion of corruption and Berlusconi-tailored legislation.)

[145] *Id.*

[146] Berlusconi denies any personal connection with corruption. When he first campaigned politically, part of his platform was to assert that he was a break from Italy's corrupt past. *See An Italian Story*, THE ECONOMIST, April 26, 2001, *available at* http://www.globalpolicy.org/nations/corrupt/2001/0426it.htm. "Since 1994, however, magistrates have investigated many allegations against Mr. Berlusconi, including money-laundering, association with the Mafia, tax evasion, complicity in murder and bribery of politicians, judges and the finance ministry's police, the Guardia di Finanza." *Id.* And, in 1994, shortly before he was elected Prime Minister, his company Finivest was investigated by the *Mani Pulite* campaign. *Id.*

[147] One might argue that if the United States were to pass legislation similar to the Schifani Law, it too might be struck down, also for reasons of unconstitutionality. However, since the U.S. policy has not been codified, it can still be followed even while opponents argue it is not a constitutional guarantee. *See supra* Section II(A) (discussing the Italian Constitutional Courts repeal of the Schifani Law as unconstitutional); *see also* Latto, *supra* note 66. *But see* Amar, *supra* note 134 (arguing "a sitting President is *constitutionally* immune from ordinary criminal prosecution – state or federal – but is. . . subject to ordinary prosecution the instant he leaves office"). Under Amar's view, the DOJ's policy against prosecution would survive if it were codified; the opposite result of Italian Constitutional Court's treatment of the Schifani Law. Amar argues that "a sitting President claiming the full privileges of his office may only be criminally tried by this 'court', the Senate, sitting in impeachment, and can be criminally tried elsewhere only after he has left office." *Id.* Amar points to the text of the Constitution and the history of the document found in the Federalist Papers to support his argument. *Id.* at 672. "[T]he Presidency is constitutionally unique – in the President the entirety of the power of a branch of government is vested." *Id.* at 673.

> The President is elected by the whole nation, and no one part of the nation should have the power to undo a decision of the whole. . . The President is elected by the entire nation, and should be judged by the entire nation. His

might then suggest that Italy should attempt to enforce an immunity rule through policy instead of through legislation, since such has been successful in the United States. If Italian prosecutors operated under a policy of waiting to prosecute high ranking officials until they had left office by end of term, impeachment, or forced resignation, this would enable the prime minister to focus on the job as executive rather than on a criminal defense. This would be equal to a policy of prosecutorial discretion. Italy's Constitutional Court had chosen to strike down the Schifani Law for reasons of unequal treatment of citizens under the law. This hurdle might be avoided if the Schifani Law were effected as a policy of prosecutorial discretion instead of codified as law.

But an important question arises. Would the Schifani Law function in Italy if it were instituted as a policy, as done in the United States, rather than as a codified statute? And, perhaps more importantly, if the policy could survive, would it benefit all of Italy or result in more harm than good? This Note argues that an adjustment from law to policy would be impossible in Italy given the nature of the relationship between Italy's prosecutors and heads of government. Given the history of corruption in Italian government, the main goal of Italy's prosecutors and magistrates over the last twenty years has been to prosecute government heads: the need to rid the government of its problem. This was and still is the goal of the *Mani Pulite* campaign. It would be contrary to the goals of the *Mani Pulite* campaign to lobby for prosecutorial discretion in favor of potentially corrupt and criminal government officials. Implementing the U.S. DOJ immunity policy rather than the Schifani law would thus be an impossibility, because those expected to apply the policy would be the same individuals in charge of eradicating corruption through *Mani Pulite*.

> true grand jury is the House, his true petit jury is the Senate, and the true indictment that he is subject to is called and impeachment. . . any effort to indict him by an independent counsel would also violate the Constitution's Article II Appointments Clause.

Id. 673-675. Amar even appears to address the exact point hinged upon by the Italian Constitutional Court in invalidating the Schifani Law. He argues:

> [O]f course no man is above the law. Once out of office, and ex-President may be tried just like anyone else – and that day of reckoning can of course be speeded up if the House and the Senate decide to impeach and remove. . . . The question is not whether a President is accountable to the law and to the country – but how, when, and by whom.

Id. at 676. *See generally* Danielson, *supra* note 135.

Even if this policy could be manipulated to function in Italy, the result would not benefit the country at large due to the ingrained corruption present in the government. While the simple solution of policy over codified law appears to solve the constitutional problems of the Schifani Law, it does so only at the surface. The solution only addresses constitutional issues of equality, but does not account for a much deeper problem in Italian government, namely corruption. Instead, it opens a door for further abuse.

Corruption and fraud have existed within Italy's highest houses of government since the creation of the Republic in 1946.[148] This corruption has pitted Italy's magistrates and prosecutors against the heads of the Republic through campaigns like *Mani Pulite* in an attempt to rid the government of corruption and clean the slate.[149] This paper has explored examples of such corruption immediately preceding and including Berlusconi's entrance into government, but the history extends back much further.[150] If one day the *Mani Pulite* campaign were to definitively complete its task of eradicating corruption from Italian government, only then would a policy of immunity for a sitting prime minister be able to achieve the goals and benefits of the U.S. policy. Only then could the advantages listed by the DOJ and the advocates of the criminal immunity policy be achieved in Italy. But, given the current distractions of corruption, there is a near certain probability that such a policy would be abused. This is evidenced by the sheer fact

148 Fedele Confalonieri, chairman of *Mediaset* and friend of Berlusconi was quoted as saying, "Italy is not a normal country. Even an anomaly like Mr. Berlusconi must be understood in the context of the country. He has done nothing worse than any businessman in Italy. . . . Mr. Berlusconi, they say, did only what all businessmen had to do to get ahead: pay off anybody, politicians and judges included, who was in a position to help." *See An Italian Story*, *supra* note 151 (quoting Confalonieri). This description of Italy as "not a normal country" helps to explain why the analogy between the United States and Italian policy of criminal immunity for sitting chief executives is imperfect. Even though the United States has experienced corruption in its history, the level of such corruption is not such that it is accepted knowledge that all politicians take advantage of it to achieve their post in government. *See also* STILLE, *supra* note 23, at 10 (describing the system of nepotism in Italian government and the extent of the corruption). Stille also explores the far reach of *Cosa Nostra* ("Our thing"; commonly known as the Mafia) within the government. *Id*.

149 *See generally* STILLE, *supra* note 23.

150 *Id.* Stille provides and in-depth discussion of the corruption present in Italy, with particular attention paid to the southern regions, and to the island of Sicily. The first chapters of his book, however, discuss ancient Italian history of corruption, spanning into Italy's time as a monarchy. *Id.*, at chs. 1-3; *See also* Clark, *supra* note 13, ch. 4 (same).

that the Schifani Law was undeniably passed to benefit Silvio Berlusconi's personal criminal predicament.[151]

As discussed *supra*, the United States Supreme Court engages in a delicate balancing test when faced with questions of granting temporary criminal immunity to presidents.[152] One should weigh the interests in granting immunity against any governmental or public interests in rejecting said immunity. As discussed above, the public interest in rejecting immunity far outweighs the benefits to Italy by allowing amnesty. The Schifani Law's advocates noted that the country as a whole would benefit by erasing any embarrassment felt to the nation by having Prime Minister Berlusconi embroiled in criminal litigation while simultaneously serving as European Union President. However, this nominal benefit is far outweighed by the harm to the nation from giving Berlusconi the power to step above the law and erase criminal proceedings against him.[153] Just as the court noted in *U.S. v. Nixon*, interference with the functioning of the criminal justice system is extremely problematic.[154] Also, the fact that the current prime minister is a criminal defendant for whom this law was tailored suggests that the rule would not benefit the country as a whole, but rather was intended to and will succeed in benefiting one man only, Berlusconi himself.[155] In general, the country's interest in ridding the government

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151 *See supra* Section II, A.

152 *See supra* Section III, A.

153 The word "erase" is used because, not only will Berlusconi's criminal proceedings be postponed until he leaves office under the Schifani Law, but the charges would in fact be "erased" because the statute of limitations will expire on all crimes. In Italy, the statute of limitations continues to run until the defendant has exhausted his last appeal. Berlusconi has been able to avoid criminal charges before by running the clock and so that the statute of limitations expired while his case was still at the appeals level. However, he would not even have to do that under the Schifani Law. Under this law, the statutes of limitations would expire while he was still in his post as prime minister, so when he left office it would be too late to try him on those crimes. *See supra* text accompanying note 50. *See also infra* text accompanying note 164.

The author's original thought was to argue that the statute of limitations should be suspended while the five officials named in the Schifani Law are in office. However, this suggestion will fail for two reasons. First, the officers might have a valid claim of unequal treatment under the laws, as the public at large did in the Schifani Law's actual case history. Second, a law such as this would never pass through the Italian legislative system successfully because of the strong majority that *Forza Italia*, Berlusconi's own party, holds in office.

154 *See supra* Section III(A) (*discussing* U.S. v. Nixon).

155 Of course, the law would also benefit the other four named high government officials, but none of those four is also a criminal defendant at this time or ever has been.

of corruption weighs heavily in this balance and tips the scales in favor of no immunity.

There is another distinction between the real life circumstances of implementing the policy of criminal immunity in the United States as compared to Italy. In the United States, the Constitution allows for Congress to impeach a president for high crimes and misdemeanors.[156] While Italy's Constitution allows for a similar process of removal for its ministers, the effect is not the same.[157] Berlusconi holds a very strong majority in Parliament, so strong that any impeachment proceeding would fail to succeed against him. The strength of Berlusconi's majority in Parliament is evidenced by the strong vote results that have passed the controversial "Berlusconi-tailored" laws of the past years.[158] Since the Prime Minister does not run the same risk of impeachment for inappropriate behavior as does the United States President, the analogy is weakened and the balance tips further against an immunity policy in Italy.

During Italian history, prime ministers have also been forced to resign in lieu of official impeachment. This was the fate of Berlusconi's predecessor and mentor Bettino Craxi.[159] Again, however, given the strong showing of support for Berlusconi within Italy's houses of government, such a resignation is not likely.[160] The alternatives of forced resignation and impeachment work in the United States to curtail abuse by one party or executive. This is due in part to the presence of a two party system and the need for a super majority vote to impeach a president. However, while this system works well in the United States, it does not function in a country like Italy where such a super majority could never be reached because of favoritism and near complete uniformity of political affiliation in Parliament.

Berlusconi has used his power in Parliament to pass legislation that significantly decreases the statute of limitations for social

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156 U.S. CONST. art. II, § 4. *See supra* text accompanying note 90 (for text of the impeachment article).

157 *See* ITAL. COST. art. 96.

158 *See supra* Section II.

159 *See supra* Section I (*discussing* Craxi's history).

160 Although Berlusconi holds a clear majority in Parliament, the citizens of Italy are split in their opinion of him. However, on March 23, 2002, a mass demonstration of between two and three million people amassed in Rome to march against Berlusconi and his preferential legislative changes. *See* Schwarz, *supra* note 76.

crimes in Italy.[161] As a result, the statute of limitations for accounting fraud or "cooking the books" was cut from seven years to only four and a half.[162] The statute of limitations for false accounting was similarly cut from fifteen years to seven and a half.[163] The "legitimate suspicion" statute allowed a defendant to petition for a change of venue on the suspicion that a judge was prejudiced against him. This became a tool to allow a criminal defendant to run the clock on the statute of limitations by tying up proceedings before a final judgment could be reached.[164] If an immunity policy were to be implemented, serious changes in the statute of limitations rules of Italy would have to follow to decrease the potential for abuse of immunity.

B. *A Workable Solution: Extension of Mani Pulite*

Rather than initiating a policy of temporary criminal immunity for sitting prime ministers and high officials, Italy should seek to further the *Mani Pulite* campaign. Italy could achieve many of the goals available through the immunity policy by first tackling the problem of corruption in its government. There would be no embarrassment to the nation if corruption was rid from the system. There would be an immediate increase in international respect if the country could show that corruption was no longer a problem. Instead of lobbying for immunity, the lobby should be to increase

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161 *See infra* Section III. In Italy, "social crimes" include bribery, false accounting, cooking the books, corruption, and accounting fraud. In the case of false accounting claims, Berlusconi lobbied for a reduction of statute of limitations from fifteen years from the date of the crime to seven and a half, and was successful. For suits regarding off shore banking scams, his political party lobbied for a reduction of statute of limitations from seven years to four and a half. Again, *Forza Italia* was successful. Italy's legal system is well known for being slow in reaching conclusive judgments. And, in Italy, a guilty finding at the trial court level is not a definite judgment. A defendant is not considered "guilty" by the public until he has exhausted all appeals. So, even though Berlusconi was found guilty of social crimes in three trial courts, and was sentenced to jail, he will not be legally guilty until his final appeal is over. If the appeal is not complete by the time set by the statute of limitations, Berlusconi can never be found legally guilty of that crime. Those who are aware of the slow legal process in Italy can take advantage of this loophole, especially combined with the seriously curtailed statutes of limitations put into place by Berlusconi and *Forza Italia*. *See* International Commission of Jurist's Report, Italy, Attacks on Justice (Aug. 27, 2002).

162 *See Berlusconi Under new Pressure After EU Court Opinion*, EU BUSINESS, Oct. 14, 2004, http://www.eubusiness.com/afp/041014121345.azlw7y1l.

163 *See supra* note 139.

164 *See supra* notes 80, 82 (discussing the "legitimate suspicion law").

the goals and power of the *Mani Pulite* campaign.[165] This is a solution that fits Italy's history and present situation. And, since the *Mani Pulite* campaign already exists (though not as large and powerful as it was in the eighties and nineties) it would require less cooperation from Parliament to promote this policy.

The concept of immunity for sitting prime ministers from criminal prosecution should not be completely erased as a possibility for the Republic of Italy. While the country is not ready for such a policy today because of the extent of corruption and conflicted interests in its present government, the benefits of this policy may one day outweigh the negatives. For example, Italy is a member of the European Union. The importance of the prime minister's executive function in Italy is increased because of this membership. It would be beneficial for the premier to be able to perform his duties to Italy and the E.U. unhindered.[166] Also, Italy's geographic location gives it economic advantages as a port country that an uninhibited prime minister could encourage if not concerned with criminal prosecution.[167] Ensuring that Italy's political leaders have the opportunity to run and grow the Italian economy undistracted while in office would serve the country just as well, if not better, than the U.S. is served by allowing the president to operate without the threat of impending criminal prosecution while in office.

In sum, the policy reasons behind the U.S. policy of immunity ring just as true for the Italian system as they do for America. However, the Italian government is faced with an added obstacle, abundant corruption, which tips the scale away from encouraging a policy of immunity from criminal prosecution for a sitting executive. This Note proposes that another Schifani Law is not the an-

[165] Recent action in Italian government suggests that the tide may in fact be turning this way, despite Berlusconi's overwhelming majority in government. Italian President Ciampi blocked numerous proposed legal reforms on Dec. 16, 2004 that had been pushed through Parliament by Berlusconi's following. Some reforms included removing the independence of prosecutors and magistrates (who are not a member of the executive branch of Italian Government) and restrictions to the Supreme Judicial Court. *See* Marianne Arens, *Italian President Ciampi Blocks Berlusconi's Justice Reforms*, WSWS, Dec. 29, 2004, http://www.wsws.org/articles/2004/dec2004/ital-d29.shtml.

[166] The DOJ recognized the need to handle foreign and national affairs as one distinctive factor weighing in favor of temporary immunity for a sitting president. *See* DOJ Memo, *supra* note 1 at 16-18.

[167] Today, the fastest growing industry in Italy is *agriturismo* (agricultural tourism). This industry aims at keeping the rural parts of Italy exactly as they are so as to attract lucrative tourism business. However, whether or not this is the best and most economically prosperous use of Italian resources remains to be considered. *See* Clark, *supra* note 13.

swer. The solution is instead to focus on the eradication of corruption in Italian government. Only when this goal has been reached can a policy of temporary criminal immunity for a sitting prime minister operate to the benefit of the country of Italy at large as it does in the United States.