



THE EVOLVING AMERICAN PRESIDENCY

Prosecution of the
President of
the United States
The Constitution,
Executive Power,
and the Rule of Law

H. Lowell Brown

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The Evolving American Presidency

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For Ella, as always

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and Revolutionary State Constitutions

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Introduction

The presidency of Donald J. Trump posed many challenges to the norms, values, and institutions of the American democracy that have evolved over the centuries since the founding. Among them, President Trump's personal conduct both prior to and following his becoming President has once more raised the question whether an incumbent President is subject to indictment and prosecution in a federal or state court independently of the process of congressional impeachment and removal specified in the Constitution. The issue is a weighty one whose resolution is not free from doubt. Indeed, the record of the Federal Constitutional Convention and the ratification debates are inconclusive whether the Framers considered the President to be immune from criminal prosecution while in office, and although there is precedent in the courts that the President is not immune, there is no consensus on the issue among scholars and commentators.

Nevertheless, the report of Special Counsel Robert Mueller as well as reports in the press and allegations in litigation strongly suggest that President Trump may have engaged in acts of possible obstruction of justice¹; federal and state tax fraud²; racketeering³; mail and wire fraud⁴; foreign corrupt practices⁵; money laundering⁶; campaign finance violations⁷; and sexual assault and rape.⁸ These possibly criminal acts fall into three broad categories: (1) acts committed by Trump while he has been President; (2)

acts committed in connection with Trump's campaign for the presidency; and (3) acts committed by Trump prior to becoming a candidate for the presidency.

At the conclusion of the Mueller investigation, Mr. Mueller stated with respect to whether President Trump had obstructed justice that the evidence of President Trump's "actions and intent" presented "difficult issues that would need to be resolved," had he recommended prosecution. Nevertheless, Mueller went on to say that, "If we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state," but based on "the facts and the applicable legal standards," Mueller said, "we are unable to reach that judgment."⁹

Mueller explained that no decision had been made whether to seek indictment because "The Office of Legal Counsel has issued an opinion finding that the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions in violation of the constitutional separation of powers." But without conceding that his investigation was subject to that policy, Mueller stated that "this Office accepted OLC's legal conclusions for the purpose of exercising prosecutorial discretion."¹⁰

Mueller was referring to a memorandum issued by the Department of Justice Office of Legal Counsel in 2000 that confirmed an earlier memorandum in 1973 concluding that as a matter of constitutional law, a sitting President is immune from prosecution. The basis of those conclusions by the OLC has been a subject of controversy, but in any event, in light of the comments and actions of Attorney General William Barr at the time the Mueller Report was completed,¹¹ it is unlikely that the filing of the indictment would have been authorized.

The question is not, however, whether President Trump should have been indicted for obstruction of justice as set forth in Volume II of the Mueller Report. Rather the question is whether there is a constitutional basis for such immunity at all.

In addition to the OLC, proponents of presidential immunity include respected scholars and commentators on the Constitution.¹² In essence, they argue that despite the Constitution's silence as to presidential immunity (in contrast to the limited immunity of members of Congress specified in Article I, Section 6), commentary by some of the Founders at the time of the drafting and ratification of the Constitution evidenced an

intention that the President should be immune from prosecution while in office. The evidence of this intent is, at best, inconclusive.

The proponents argue that the structure of the Constitution's scheme of government, and most particularly the vesting of executive powers in the President alone under Article II, Section 1, mandates that the President be shielded from the burdens and distractions of a prosecution so as not to interfere with the President's discharge of the executive function. In this regard, they argue that criminal prosecution would transgress the separation of powers as an unconstitutional incursion of the judicial branch into the affairs of the executive.

The proponents further contend that the impeachment process in the Congress is the sole means by which a President may be held to account while in office. They point to the provision in Article II, Section 3, that a President convicted by the Senate "shall nevertheless be liable and subject to indictment, trial and judgment, according to law," as establishing a mandatory sequence of: impeachment → trial → removal → prosecution.

Each of these arguments is flawed, however, and both the arguments for presidential immunity and the critique are the subjects of this book. Part I examines the memoranda produced by the OLC in the light of Supreme Court's decisions and other judicial proceedings involving Presidents Nixon, Clinton, and Trump, as well as the scholarly commentary, including testimony before the Senate Judiciary Committee following Clinton's impeachment.

In Part I, Chapter 2 examines the sometimes conflicting views on presidential immunity expressed by the founders during the formation and ratification of the Constitution and in the commentary after ratification. Chapter 3 analyzes the positions taken by the Department of Justice in the prosecution of Vice President Spiro T. Agnew and in the investigation of the Watergate burglary and cover-up, particularly with respect to the grand jury's access to taped White House conversations, which gave rise to the 1973 Office of Legal Counsel memorandum on presidential immunity. Chapter 4 discusses the assertion of presidential immunity in the civil litigation between Paula Corbin Jones and President William Jefferson Clinton and the ensuing investigation of possible criminal conduct by Independent Counsel Kenneth W. Starr. Chapter 5 considers the testimony in the hearing conducted by the Senate Judiciary Committee concerning presidential immunity in the wake of the Clinton impeachment. Chapter 6 looks at the 2000 Office of Legal Counsel memorandum that reaffirmed the conclusions of the earlier 1973 OLC

memorandum, and to which Special Counsel Mueller referred in declining to prosecute President Trump for obstruction of justice and other related crimes. Part I concludes in Chapter 7 with an analysis of the decisions of the district court, the court of appeals and the Supreme Court rejecting President Trump's sweeping claim of absolute immunity in connection with a subpoena for business and financial records issued to Trump's accountants by the district attorney for Manhattan, Cyrus R. Vance.

Part II focuses on the argument that prosecution of a President would transgress separation of powers (Chapter 8); and the proponents' contention that impeachment is the sole process for addressing presidential criminality (Chapters 9 and 10). Part II concludes with consideration of the implications of presidential immunity for the rule of law, an immunity that is not enjoyed by any other citizen or resident of the United States (Chapter 11).

While this is not a book about President Trump, the unresolved allegations of misconduct, including possible criminality prior to his becoming President that would not be reachable by impeachment, have cast a harsh light on the adequacy of impeachment as the means for holding the President accountable. Furthermore, to the extent that the misconduct would violate federal or state laws, the prosecution of those possible violations would be subject to the applicable statute of limitations, which impose time limits within which criminal charges must be lodged or otherwise be barred. Foreclosing prosecution of an incumbent President would in effect immunize a President from liability for crimes committed up to five years (the general limitations period for federal crimes)¹³ prior to taking office. Thus, the issue of presidential immunity has far greater implications for the rule of law in America than simply whether President Trump should be held to account for his alleged criminal misconduct.

NOTES

1. Robert S. Mueller, *Report on Investigation into Russian Interference in the 2016 Presidential Election*, Volume II (New York: Scribner, 2019) (Mueller Report).
2. "Trump Engaged in Suspect Tax Scheme As He Reaped Riches From His Father," *The New York Times*, October 7, 2018.
3. *Art Cohen v. Donald J. Trump*, Civil Action No.: 13CV2519DMSRBB (S.D. CA. 2013); see *Sonny Low v. Trump University, LLC*, Civil Action No.: No. 17-55,635 (9th Cir. 2018) (settlement affirmed).

4. *Art Cohen v. Donald J. Trump*, Civil Action No.: 13CV2519DMSRBB (S.D. CA. 2013).
5. “Is Floating A \$50 Million Trump Tower Penthouse For Vladimir Putin Illegal?,” *The Washington Post*, November 20, 2018.
6. “Deutsche Bank Faces Criminal Investigation For Potential Money-Laundering Lapses,” *New York Times*, June 19, 2019; *see also* “Trump Inaugural Committee Ordered to Hand Over Documents to Federal Investigators,” *The New York Times*, February 4, 2019.
7. “The Evidence That Trump Broke Campaign Finance Laws,” *The Washington Post*, December 18, 2018; *see* “Trump Inaugural Committee Ordered to Hand Over Documents to Federal Investigators,” *The New York Times*, February 4, 2019.
8. *Jane Doe v. Donald J. Trump and Jeffrey E. Epstein*, Civil Action No.: 1:16-cv-04642 (S.D. N.Y. June 2016); “All The Assault Allegations Against Donald Trump Recapped,” PBS News Hour, June 21, 2019.
9. Mueller Report, vol. 2: 1.
10. Mueller Report, vol. 2: 1.
11. *See* Letter from Attorney General William Barr to Senators Lindsey Graham and Diane Feinstein, and Representatives Jerrold Nadler and Doug Collins, dated March 24, 2019.
12. These include Professors Akhil Amar, Alexander M. Bickel, Charles L. Black, Phillip Bobbitt, Philip Kurland, and Cass Sunstein, as well as former Supreme Court Justice Arthur Goldberg.
13. 18 U.S.C §3282.

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“Trump Inaugural Committee Ordered to Hand Over Documents T Federal Prosecutors,” *The New York Times*, February 4, 2019.

Part I



The Founding Era

The Constitution establishes the sole process by which a President may be involuntarily removed from office. Under Article II of the Constitution, the President as well as the Vice President and all other civil officers, “shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors.”¹ With regard to the process for removal, the Constitution provides first, “The House of Representatives ... shall have the sole power of impeachment,” and second, “The Senate shall have the sole power to try all Impeachments ... And no Person shall be convicted without the Concurrence of two thirds of the Members present.” When it is the President who is on trial, the Chief Justice of the United States is to preside over the proceedings.²

With respect to the consequences of conviction, the Constitution states that “Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold any office of honor, trust, or profit under the United States.” However, in order to dispel any claim of double jeopardy in a subsequent judicial proceeding, the Constitution stipulates “the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to Law.”³

The Constitution is silent whether an incumbent President is subject to federal or state prosecution while in office. Instead, the only provision in the Constitution granting immunity from prosecution is that for Members of Congress while traveling to or from or attending sessions of congress. Similar immunity had been conferred on the Members of Congress under the Articles of Confederation.⁴

THE CONSTITUTIONAL CONVENTION OF 1787

At the Constitutional Convention, following the report of the Committee of Eleven concerning alterations and additions to the draft constitution,⁵ Charles Cotesworth Pinckney of South Carolina moved the addition of the clause “that each House should be the judge of the privilege of its own members,” which was seconded by Gouverneur Morris of Pennsylvania. In the discussion that followed, James Madison of Virginia suggested “the necessity of considering what privileges ought to be allowed the Executive.”⁶ The record suggests that Madison’s proposal was rejected as no further action was taken by the Convention.

This was born out by a statement of Senator Pinckney to the Senate on March 5, 1800. Pinckney noted that with respect to the Constitution’s provision for legislative immunity that “it was the design of the Constitution, and that not only of its spirit, but letter, warrant me in the assertion, that it never was intended to give Congress, or either branch, any but specified, and those very limited, privileges indeed.” That was because, Pinckney said, the Convention delegates “well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority would ever be exercised here.” For that reason, the delegates “not only intended, but did confine their privileges within the narrow limits mentioned in the Constitution.”⁷

Pinckney also addressed “why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shown so little to the President of the United States in this respect.” Pinckney informed the Senate that “No privilege of this kind was intended for the Executive, nor any except that which I have mentioned for your legislature.” Pinckney illuminated this, telling the Senate, “The convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary and no more.”⁸

Thus, it would appear that when the issue of presidential immunity was raised by Madison, no action was taken by the Convention because, as Pinckney told the Senate, the Framers did not intend to confer any immunity from prosecution on anyone, explicitly including the President, other than that limited immunity provided for Members of Congress as specifically stated in the Constitution.

THE RATIFICATION DEBATES

The Federalists and the Anti-Federalists

To the extent that the issue of immunity figured into the ratification debates, the record is inconclusive. Arguing for ratification, Alexander Hamilton, who had been a delegate to the Federal Convention from New York, contended in Federalist No. 69 that the Constitution contemplated that a President who had acted unlawfully would be first impeached by the House of Representatives and after conviction and removal by the Senate, “would afterwards be liable to prosecution and punishment in the ordinary course of law.”⁹ Hamilton reiterated this sequence of impeachment and removal before prosecution in Federalist No. 77.¹⁰ Hamilton had submitted this sequence as part of his plan for the Constitution, but his plan does not appear to have been acted on.¹¹

Other proponents of the Constitution argued that the President would be subject to judicial prosecution. Tench Coxe, a delegate to the Federal Convention from Pennsylvania, wrote that unlike British royalty, the President “may be proceeded against like any other than man in the ordinary course of law.”¹² Coxe also wrote in discussing the powers and duties of the Senate that the Senate’s authority in matters of impeachment extended only to removal and incapacitation of a “dangerous official,” but the “punishment of him as a criminal remains within the province of the courts to be conducted under all the ordinary forms and precautions.”¹³

Alexander Contee Hanson also responded to the fear that the newly created President would, “in every essential, be an emperor, king, or stadtholder at least.” It was Hanson’s view that under the Constitution, “every citizen in the union will be a censor on his conduct,” and “not even his person is particularly protected.”¹⁴ Hanson also commented on the President’s vulnerability to prosecution in his observations on the balance of powers in the legislative process. Hanson noted that once a bill had passed both houses of Congress, the bill still had to be submitted to

the President, who was independent of the legislature. Hanson wrote that “From the mode of his election it is impossible he can intrigue to advantage, and from the nature of the other things [his term in office and fixed compensation] he will never succeed by bribery and corruption. *Like any other individual, he is liable to punishment.*”¹⁵

James Iredell, a leading North Carolina Federalist, who was later appointed to the Supreme Court, also alluded to the President’s amenability to prosecution in his response to the argument by George Mason, a delegate to the Federal Convention from Virginia, that the President’s appointment and pardon powers would provide the means with which the President could prevent discovery of misconduct and thereby be shielded from punishment. Iredell wrote that “such a thing ... is possible; and accordingly, [the President] is not exempt from a trial, if he should be guilty, or supposed guilty, of that or any other offense.”¹⁶

Clearly there was no unanimity of opinion whether the President enjoyed any immunity from criminal prosecution, even a temporary immunity pending impeachment and removal.

The Debates in the State Conventions

That lack of unanimity was reflected in the debates on ratification at the state conventions. For example, on December 4, 1787, James Wilson, a delegate to the federal convention and later a Justice of the Supreme Court who had been the principal architect of Article II,¹⁷ argued that the Constitution’s single chief executive was preferable to a proposed President and Council structure. As part of his argument, Wilson told the Pennsylvania Convention that a single executive would ensure personal responsibility and would not allow the President, “to roll upon any other person the weight of his criminality.” Wilson further stated that despite the President’s powers that were “far from being contemptible,” it was the case that “not a single privilege is annexed to his character.” Wilson distinguished the consequences of a President’s misconduct in a private capacity from misconduct in public office, stating that under the Constitution, “far from being above the laws, he is amenable to them in his private character as a citizen, and his public character by *impeachment.*”¹⁸

In the South Carolina debate on January 17, 1788, Robert Barnwell addressed the responsibility of the President. In the course of his commentary, Barnwell observed that “in the day of adversity,” the people “would be apt to make the President the pillow upon whom they would

rest all their resentment,” but that the Framers had “postponed the period at which he could be tried with propriety until the fervor of party, and cool reflection can determine his fate,” suggesting that the President would not immediately be subject to prosecution.¹⁹

At the Virginia Convention on June 5, 1788, Patrick Henry, an opponent of the Constitution, decried the lack of checks on the President’s power. Noting the ease with which the President could “render himself absolute,” Henry argued that in the event the President violated the laws, he would be motivated to use that power to evade prosecution. Henry told the Convention, “If he be guilty, will not the recollection of his crimes teach him to make one bold push for the American throne? Will not the immense difference between being master of everything, and being ignominiously tried and punished, powerfully excite him to make this bold push?” From his comments it appears that Henry believed the President to be subject to prosecution while in office.

Roughly five days later, on June 10, George Nichols, a Federalist, suggested that impeachment precede prosecution. In discussing the treaty power, Nichols argued that the President was “very great security” against the misuse of the authority by the Senate (the issue being whether ratification of treaties should require the consent of at least nine states), as the President was elected “by the people at large” and therefore, would not have the same “local interest” as Members of Congress. Nichols added that if the President were to deviate from his duties, he would be “responsible to his constituents,” and “will be degraded and will bring on his head the accusations of the representatives of the people—an accusation which has ever been, and always will be, very formidable.” As a consequence, Nichols told the Convention, “He will absolutely be disqualified to hold any place of profit, honor, or trust, and liable to further punishment if he has committed such high crimes as are punishable at common law.”²⁰

On June 14, George Mason, an opponent of the Constitution, spoke of the weakness of the impeachment clause as respected Members of Congress. Mason had been a delegate to the Federal Convention and was the author of the phrase “high crimes and misdemeanors” as a ground for impeachment.²¹ Mason posited a treaty that was “manifestly repugnant to the interests of the country,” that had been “made by the means of bribery and corruption,” and asked how the Senators who consented to the treaty would be punished. If the House of Representatives were to impeach them, the Senators would conduct the trial themselves. Mason then asked, “in what court members of the government were to be tried

for the commission of indictable offenses or injuries to individuals,” and answered, “they could be tried neither in the state nor federal courts.”²²

In the North Carolina debates on July 24, 1788, William Taylor raised the question of whether civil officers of the federal government in North Carolina (such as tax collectors) had to be impeached and removed by Congress before they could be tried in North Carolina courts, which he said would place a great burden on the state. Richard Dobbs Spaight, a delegate from North Carolina to the Federal Convention, observed that “though the power of impeachment was given, yet [the Constitution] did not say that there were no other means of giving redress—that it was very certain and clear that, if any man was injured by an officer of the United States, he could get redress by a suit at law.” Archibald Maclaine concurred with Spaight, telling the Convention, “Impeachments are only for high crimes and misdemeanors. If anyone is injured in his person or property, he can get redress by suit at law.” Maclaine also suggested that a “poor, insignificant, petty officer,” would not be subject to impeachment. James Iredell stated that Taylor’s objection, “would be right if there was no other mode of punishing” the officer. However, he said, “it is evident that an officer may be tried by a court of common law. He may be tried in such a court for common law offences, whether impeached or not,” and further, where exclusive jurisdiction did not lie in the federal courts, “redress may be had in the common-law courts of the state.” Governor Samuel Johnston took the contrary position saying that, “men who were in very high offices could not be come at by the ordinary course of justice; but when called before this high tribunal and convicted, they would be stripped of their dignity, and reduced to the rank of their fellow-citizens, and then the courts of common law might proceed against them.”²³

Iredell returned to the issue of executive immunity on July 28 in the debate whether the President should be assisted by a council in the same way the English king had a Privy Council. Arguing against the proposal, Iredell distinguished the President from the British monarch, who could do no wrong and who could not be tried in any court, and as to whom there was no “constitutional method of depriving him of his thrown.” In contrast, Iredell told the Convention, under the Constitution, “No man has authority to injure another with impunity. No man is better than his fellow-citizens, nor can he pretend to any superiority over the meanest man in the country,” such that were the President to commit “a single act by which the people are prejudiced, he is punishable himself, and no other man merely to screen him.” Accordingly, if the President “commits

any misdemeanor in office, he is impeachable, removable from office, and incapacitated to hold any office of honor, trust, or profit, and if the President commits any crime, he is punishable by the laws of his country, and in capital cases may be deprived of his life.”²⁴ In this, Iredell read the Constitution as conferring no immunity from prosecution on the President, and he appeared to have drawn a distinction in that regard between the misconduct in office that would give rise to impeachment and the violations of the criminal law that would give rise to prosecution in the ordinary course.

Thus, the views of the Framers appear to have been consistent that there was no official immunity from criminal prosecution conferred on the President by the Constitution. However, there does not appear to have been consensus as to whether impeachment and removal was a necessary predicate to criminal prosecution of the President, which in effect would have conferred a temporary immunity on the President during the President’s time in office.

Moreover, nothing in the record of the Federal Convention, the broadsides attacking and defending the Constitution, or the debates in the state ratification conventions evidences any consideration of a President’s amenability to criminal process for acts committed prior to the President taking office.

Commentary Following Ratification

So too, in the period following ratification of the Constitution, while the Framers were still actively engaged in public affairs, opinions regarding presidential immunity remained inconclusive. William Maclay, a Senator from Pennsylvania in the first Congress, recorded in his journal a conversation with Vice President John Adams and Senator Oliver Ellsworth of Connecticut, who had been a delegate to the Federal Convention and would later be the Chief Justice of the United States, touching on immunity. At the time, the House of Representatives had passed legislation to the effect that writs would issue in the name of the United States and not in the name of the President as had been the practice. Maclay voiced the opinion that while writs in England were issued in the name of the king, “with us it seems rather confusing the executive and the judicial branches.” Adams demurred saying that, “the President personally, could have no action brought against him; was above the power of all judges, justices etc.” Adams and Ellsworth put the question to Maclay, “would

you put it in the power of a common justice to exercise any authority over him and stop the whole machinery of government?" Maclay answered that, "although President, he is not above the laws," to which Adams and Ellsworth replied, "you could only impeach him, and no other process whatever lay against him." When Maclay posed the hypothetical of the President committing murder, Adams and Ellsworth replied that the President would be impeached and removed under that circumstance, and when no longer President, "you can indict him," and when Maclay asked what would happen if neither the House nor the Senate were available to act, they replied that "the people would rise up to restrain him." When Senator Philip Schuyler of New York joined them, he too was asked for his thoughts on the jurisdiction of the courts over the President, and Schuyler told them he thought "the President a kind of sacred person."²⁵

Later, in March 1800, Senator Charles Pinckney of South Carolina commented on the subject of privilege. His comments were made in the context of the Senate's debate on the ability of Congress under the Constitution to take action against a publication, *The Aurora*, for statements regarding Members of Congress. Pinckney opposed the Congress taking action on the grounds that Congress's privileges were limited to those expressed in the Constitution. As he had as a delegate to the Federal Convention, Pinckney referred to the limited privileges conferred by the Constitution on Members of Congress, but not on the President. Pinckney explained that, "No privilege ... was intended for your Executive, nor any except that which I have mentioned for your legislature." As noted earlier, Pinckney told the Senate that the delegates to the Federal Convention, "well knew that this was an important point, and no subject had been more abused than privilege." The delegates had "therefore determined to set the example, in merely limiting privilege to what was necessary and no more."²⁶

The privilege of the President from judicial proceedings was also commented on by Joseph Story, later justice of the Supreme Court, in his highly influential *Commentaries on the Constitution of the United States*. Story wrote that there were "incidental powers" with which the presidency was invested emanating from Article II of the Constitution. Among those incidental powers, "must necessarily be included the power to perform them without any obstruction or impediment whatsoever." In order to effectuate that ability to perform the President's Article II duties, it was Story's position that, "The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in discharge of the