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US Presidents Are Not Immune From Criminal Prosecution

By **David Chaiken**

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David Chaiken

For over 40 years, America's top constitutional scholars have uniformly concluded that nothing in the text or the history of the U.S. Constitution bars the criminal indictment, arrest, trial, conviction or imprisonment of a sitting president. So why then has pundit after pundit recently opined — in the context of special counsel Robert S. Mueller III's investigation into Russian interference with the 2016 presidential election and related matters — that a president cannot be criminally prosecuted while in office?

What these pundits appear to be relying on is the position taken by the Office of Legal Counsel of the U.S. Department of Justice in 1973 and 2000, during the Nixon and Clinton administrations.[1] Specifically, in a 1973 memorandum and in a 2000 memorandum that summarized and expanded upon the earlier one, the OLC concluded that a sitting president was immune from criminal prosecution because it would interfere with the executive branch's ability to perform its constitutionally assigned duties and thus violate the constitutional separation of powers.[2]

Notably, a Freedom of Information Act request by the New York Times recently uncovered a 1998 memorandum prepared for the Office of the Independent Counsel investigating then-President Clinton that concluded, contrary to the OLC, that a sitting president can be indicted.[3] The article also referenced a 1974 memorandum prepared by the Watergate Special Counsel's Office that reached the same conclusion, perhaps leading some to infer that there is now a stalemate among constitutional scholars — two for and two against. But a careful review of the OLC memos reveals that no such inference should be drawn. First, the 1998 memorandum did not mention the OLC, much less address either of its opinions on the issue, one of which had not yet been written. Second, a careful analysis reveals that the reasoning in the two OLC memos cannot survive basic scrutiny, and is thus unworthy of deference.

By now, Americans should have a healthy skepticism of the OLC. After all, this is the same office that approved President Donald Trump's controversial January 2017 and March 2017 executive immigration orders, at least as to form, and the same office that prepared several 2002 and 2003 memoranda authorizing enhanced interrogation techniques that were subsequently repudiated and resulted in a professional misconduct investigation of the memos' authors.[4] While the OLC may be the Justice Department's most authoritative in-house lawyer, it ultimately serves the executive branch and suffers

from that inherent bias.

Because neither the text nor the history of the Constitution immunizes a sitting president against criminal prosecution, recognizing such a defense to the criminal prosecution of a president would require a court to create it. This is essentially what the OLC tried to do in 1973 and 2000. After concluding that neither the Impeachment Clause, the Speech or Debate Clause, nor any other constitutional provision conferred presidential immunity—a conclusion shared by top scholars—the OLC proceeded to weigh competing government and public policy interests for and against presidential immunity in light of the history and structure of our constitutional system. As a result, for the most part the memos are not traditional legal analyses that interpret and apply precedent to reach an ultimate conclusion, but are instead mostly a collection of policy arguments. And this is where the OLC got it wrong.

On nearly every point, the OLC drew conclusions in favor of presidential immunity when the exact opposite conclusion should have been drawn, as if to reverse-engineer the result. And in many instances, the OLC elevated arguably specious concerns over sacred, deeply held American principles such as the rule of law and limited government.

The chief justification set forth in the memos was that a criminal prosecution would unconstitutionally interfere with the president's official duties because of the difficulty of simultaneously running the country and defending a criminal case. The problem with this argument is that the U.S. Supreme Court rejected it 20 years ago, albeit in a civil case, Clinton v. Jones.[5] The 2000 OLC memo attempted to sidestep this problem by contending that Clinton v. Jones merely involved civil litigation between private parties, which is less burdensome.[6] But lawyers who try civil and criminal cases — and judges who preside over them — know that this is incorrect.

Civil cases usually involve the review and production of hundreds of thousands of pages of documents, depositions of dozens of witnesses, countless hearings and motions, and time-consuming "written discovery" such as interrogatories and requests for admission that the parties are required to answer and often fight over. But in criminal cases, there are no depositions or written discovery, there are far fewer hearings and motions, and the documents are typically limited to those gathered by prosecutors during their investigation, before charges are brought. A serious criminal case is no doubt demanding, but no more so than an impeachment proceeding or a complex civil case. Further, recognizing the high stakes involved, judges presiding over criminal cases typically show even greater flexibility to the parties in matters of scheduling, continuances and deadlines, particularly in sophisticated white collar criminal cases, which often take many years to resolve and render the Speedy Trial Act a nullity.

In addition, while civil cases typically implicate only the rights of private individuals, criminal cases implicate the rights of society as a whole, triggering far more important public interests than private damages claims. For this reason, criminal cases take priority over civil cases every day in courtrooms across the country, state and federal, receiving preferential treatment in scheduling, resources, and judicial attention. If a civil case against a sitting president can proceed, then there should be no question that a criminal one can as well.

The only other rationale used by the OLC to support its unconstitutional interference conclusion was that, because "the President is the only officer of government ... whose temporary disability while in office incapacitates an entire branch of government," a sitting president cannot constitutionally be imprisoned.[7] While this is a better reason, it fails too. There are multiple remedies for an incapacitated president, including impeachment, presidential succession, delegations of power, and removal under

the 25th Amendment.

None of the remaining points in the memos established unconstitutional interference. Instead, the OLC merely provided a collection of reasons why the criminal prosecution of a sitting president might be unseemly or undesirable, none of which outweigh the enormous public interest in holding a president accountable to the rule of law.

For example, the OLC reasoned that the stigma of an indictment hanging over the president while he or she remained in office would damage the institution of the presidency in conducting domestic and international affairs. But far greater damage would be inflicted upon the country and respect for the rule of law if a sitting president could commit crimes with impunity, without fear of arrest or prosecution while in office. And what if a president committed a violent crime such as homicide or assault, or was committing an ongoing financial fraud that authorities were powerless to stop? What about the fact that a criminal investigation in and of itself, if publicly known, would have a substantially similar impact on the president's credibility and reputation anyway?

The 2000 OLC memo opined that a criminal trial of a sitting president would be tantamount to allowing a 12-person jury to undo a national election.[8] Why then do we permit 12-person juries to convict popularly elected governors, judges, and federal and state legislators? And in any event, the OLC acknowledged the weakness of this argument elsewhere in its own memo, observing that "a criminal indictment, or even trial and conviction, does not ... effect the removal of an impeachable federal officer."[9]

The OLC also reasoned that it would be unfair to entrust mere ordinary people with the task of sitting in judgment of a president, that Americans might not respect their verdict, and that a trial might be overly political, making Congress a more appropriate forum.[10] These purported justifications are not only inconsistent with critical founding principles of limited government, the rule of law, and equal protection; they are in essence an indictment of our federal jury system, the centerpiece of the finest criminal justice system the world has ever known. How could it be that trial jurors are fit to sit in judgment of senators, governors, Supreme Court justices, Fortune 500 CEOs, Hollywood celebrities, Hall of Fame athletes, hedge fund billionaires, and foreign leaders, but not a U.S. president? And there can be no question but that a president's best chance of obtaining a fair trial free of politics and passion would be before an impartial jury, not politicians.

And finally, the OLC observed that presidential immunity would not actually exempt a president from the rule of law because a president is always subject to removal from office upon impeachment, and is thereafter subject to criminal prosecution. But what if a president committed a crime that might not justify impeachment or Congress refused to consider impeachment no matter what crimes were committed? What about presidents who are impeached by the House but not convicted by the Senate, and thus remain in office? And what if a president served for multiple terms, beyond the typical criminal statute of limitations? This scenario would place a president completely above the law, and any attempt by Congress to fix it by extending the limitations period after its expiration would be barred as unconstitutional ex post facto legislation.[11]

There may be good reasons to decline to seek an indictment against a sitting U.S. president. Such reasons might include insufficient evidence to prove every element of a crime beyond a reasonable doubt or concerns over the credibility and quality of key witnesses and evidence, considerations that prosecutors analyze as part of every criminal charging decision. But the OLC memos — self-serving advisory opinions that are embodied in no known rule, regulation or policy of the Justice Department —

should not stop a prosecutor from pursuing criminal charges against a sitting president if such charges are supported by the law and the facts. In this country, no one sits so high that they are above the law.

David M. Chaiken is a partner in the Atlanta office of Troutman Sanders LLP and a former assistant U.S. attorney in the Economic Crimes Section of the U.S. Attorney's Office for the Northern District of Georgia.

[1] See, e.g., Ian Hanchett, "Dershowitz: DOJ Has Said Sitting Presidents Can't Be Indicted While in Office," Breitbart.com (June 20, 2017) (citing OLC memoranda); Rachel Stockman, "Why President Trump Won't Be Indicted For Obstruction of Justice," Law Newz (June 20, 2017) (same); Phil Shiver, "Levin: Trump CANNOT be indicted, say DOJ memoranda," Conservative Review.com (June 19, 2017) (same); "Can a Sitting President Be Indicted? The ACLJ's Jay Sekulow Answers the Question," CBNNews.com (June 19, 2017) (same); John P. Carlin, "Sitting presidents can't be prosecuted. Probably." Wash. Post (June 8, 2017) (same); Greg Price, "Is the President Above the Law? Trump Unlikely to Face Criminal Charges Unless He Is Impeached," Newsweek (May 17, 2017) (same).

[2] Memorandum from Randolph D. Moss, Assistant Att'y Gen., Office of Legal Counsel, to Janet Reno, Att'y Gen., Re: A Sitting President's Amenability to Indictment and Criminal Prosecution (Oct. 16, 2000) ("2000 OLC Memo"), available at https://www.justice.gov/olc/opinion/sitting-president%E2%80%99s-amenability-indictment-and-criminal-prosecution; Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., 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), available at https://fas.org/irp/agency/doj/olc/092473.pdf.

[3] Charlie Savage, "Can the President Be Indicted? A Long-Hidden Legal Memo Says Yes," N.Y. Times (July 22, 2017).

[4] Eric Lichtblau & Scott Shane, "Report Faults 2 Authors of Bush Terror Memos," N.Y. Times (Feb. 22, 2010).

[5] 520 U.S. 681, 703 (1997) ("The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution"), id. at 705 ("If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct").

[6] 2000 OLC Memo at 253-54

[7] Id. at 247.

[8] Id. at 230.

[9] Id. at 234.

[10] 1973 OLC Memo at 31; 2000 OLC Memo at 258.

[11] Stogner v. California, 539 U.S. 607, 632–33 (2003).
