

UNITED OR UNTIED: ON CONFRONTING PRESIDENTIAL CRIMINALITY IN THE SAVAGE WARS OF PEACE

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Hypothetical One: On her first day in office, invoking national security or some presidential power, a sitting president orders illegal surveillance of an American citizen in the United States based on information that came from torture ordered by that president and that same president orders a drone strike that kills that American citizen and another 100 American citizens and residents because the president hated that American citizen and did not care about anyone else in the line of her fire. That sitting president that same week goes on to cover up her actions in a manner that might be viewed as obstruction of justice.

Hypothetical Two: On his first day in office, invoking national security or some presidential power, a sitting president is caught selling crack cocaine out of the Oval Office of the White House and using the presidential limousine to travel to the nearby city of Silver Spring, Maryland to distribute it and stash the money he makes from these sales.

In either of those cases, in the absence of impeachment, removal pursuant to the 25th Amendment¹, or resignation, does the Constitution really require us to wait the four (and if re-elected eight) years a sitting president is in office before federal or state criminal prosecution? The current conventional wisdom appears to be that a sitting president cannot be criminally prosecuted in United States domestic courts.² The argument of this essay is that the

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1. U.S. CONST., amend. XXV.

2. Akhil Reed Amar, *On Prosecuting Presidents*, 27 HOFSTRA L. REV. 671, 671 (1999). See Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11, 11 (1997). For a presentation of different other views on this topic, see Susan Low Bloch, *Can We Indict a Sitting President?*, foreword to *Ought A President of the United States Be Prosecuted*, 2 NEXUS 7, 7 (1997). A stronger view is that of then Professor Jay Bybee (all federal officers subject to impeachment are immune from prosecution while in office). Jay S. Bybee, *Who Executes the Executioner*, 2 NEXUS 53, 56–57 (1997). A more nuanced view is that of Professor Scott Howe (policy reasons favor such an immunity in office under federal common law but not the Constitution). Scott W. Howe, *The Prospect of a President*

authors of that conventional wisdom are wrong as to the Constitution's text. Moreover, the implicit arguments from domestic history, tradition, or Constitutional structure in favor of this view are certainly seductive but are derived from self-serving statements by those in or close to power. These reasonings insufficiently take into account the interests of the American people—the ordinary people far away from the centers of power yet subject to the action of a lawless president. Such implicit arguments from domestic history, tradition or Constitutional structure have a perverse result of leaving the American people for years at the mercy of a lawless and potentially profoundly destructive sitting president. These arguments leave the American people for years without the Hamiltonian people weighing in on the power rivalries, the Madisonian double protection of their rights foreseen in the Constitutional structure³—a recipe for tyranny⁴. In addition,

Incarcerated, 2 NEXUS 86, 91 (1997). Against the idea of immunity is Professor Eric Freedman (sitting Presidents are not immune from prosecution). Eric M. Freedman, *Achieving Political Adulthood*, 2 NEXUS 67, 84 (1997). Given the President's powers, as a practical matter Terry Eastland is saying it is not possible because the president as a practical matter, may either order the suspension of the investigation or pardon himself. Terry Eastland, *The Power to Control Prosecution*, 2 NEXUS 43, 43 (1997). Professor Erwin Chemerinsky's analysis was unclear at the time but was viewed as leaning toward Freedman's and Eastland's views. Erwin Chemerinsky, *Justice Delayed is Justice Denied*, 2 NEXUS 24, 24 (1997) See also, Keith King, *Indicting the President: Can A Sitting President Be Criminally Indicted?*, 30 SW. U. L. REV. 417, 418 (2001) ("The Nation and its citizens are entitled to a President who is able to govern the country without the disruption of a criminal indictment. The President should be immune from criminal indictment because of the constitutional requirement of separation of powers and the uniqueness of the President's office." *Id.* at 434.). The Department of Justice's Office of Legal Counsel (OLC) conducted an extensive discussion of the question and essentially tracks the above points and comes to the conventional wisdom conclusion. *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 OP. OLC 222 (2000) (hereinafter OLC Memo), available at https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf.

3. Alexander Hamilton: "Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. **The people, by throwing themselves into either scale, will infallibly make it preponderate.** If their rights are invaded by either, they can make use of the other as the instrument of redress. How wise will it be in them by cherishing the union to preserve to themselves an advantage which can never be too highly prized!" THE FEDERALIST No. 28 (Alexander Hamilton) (George Stated ed., 2006). (emphasis added).

And James Madison:

particularly given the role of the United States in the world, this state of affairs of domestic impunity would have an impact on the international plane for years through leaving the world vulnerable to the actions of such a sitting president. In the absence of a constitutional order requiring such deference to a sitting president, the conventional wisdom would seem to be a rationalization that is both unnecessary and dangerous.

This essay suggests two initial problems with the conventional wisdom: 1) that it obscures the text of the Constitution which only addresses criminal prosecution in the case of a successful impeachment and 2) the conventional wisdom fails to distinguish between the person of the president and the functions of the Presidency. Put another way, the frailties and qualities of the person elected president can and should be distinguished from the functions of the Presidency. Through this distinction one can begin to identify what are actions within the functions of the Presidency and what are actions outside of that function of the sitting president.⁵

A third problem is that the conventional wisdom does not carry within it the salutary lessons of international law in balancing concerns with sovereignty and international criminality. While a sitting head of state might be immune from prosecution in a foreign court for international crimes while in office (and after office only for crimes not within the function of head of state), international law recognizes these immunities do not carry over to domestic prosecution of the sitting president or other head of state in their

“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. **Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.**” THE FEDERALIST No. 51 (James Madison) (George Stade ed., 2006). (emphasis added).

4. Moreover, as Hamilton noted, the President purposefully was not given the tyrannical personal power of a King (“The person of the king of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution. In this delicate and important circumstance of personal responsibility, the President of Confederated America would stand upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware.”) THE FEDERALIST No. 69 (Alexander Hamilton) (George Stade ed., 2006).

5. This distinction is well known in international law in the distinction between immunity *rationae personae* of a sitting head of state and immunity *rationae materiae* after that head of state leaves office from prosecution in a foreign court.

domestic courts. On the contrary, international law sees the question of domestic prosecution of a sitting president in domestic courts as being primarily a question of domestic law which, depending on the state, may or may not provide such a privilege for a sitting president. International law calls to the domestic regime to play its appropriate role in protecting human rights, just like our Constitutional structure attempts to provide a double protection to the rights of the people.

I. THE CONSTITUTION TEXT

The relevant clause of the Constitution is Article I, Section 3, Clause 7 which states:

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 or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.⁶

The focus of the clause is on the consequences of a judgment of impeachment on a convicted person. Three possible situations therefore might arise of which the clause only addresses one. First, a sitting president commits a crime⁷ and there is no impeachment. In such a setting, the language about the liability of a convicted person is inapposite—the clause does not address unimpeached presidential criminality. Second, a president commits a crime, is impeached, but is not convicted. Again, the clause does not address unconvicted presidential criminality. Third, the president commits a crime, is impeached, and is convicted. It is only this third case that is referred to in the text and the reference is to make it very clear (“nevertheless”) that the sanction of impeachment does not preclude a criminal sanction.

6. U.S. CONST., art. I, §3, cl. 7

7. The “if the President does it, it is not illegal” aphorism actually has several permutations. First, the President does an act for which an indictment could issue, but, for whatever reason, a prosecutor decides not to indict the President. Second, the President is prosecuted for a crime but Constitutional and/or statutory powers provide a defense to that prosecution. Third, the sitting President’s act cannot be seen as a crime. Each of these situations lead to the President’s act remaining legal but based on different interactions with the prosecutor power, the judicial power, or Constitutional and statutory power.

Put this way, the question is what is the better view of how our system addresses unimpeached or (if impeached) unconvicted presidential criminality of a sitting president.

II. THE SELF-SERVING COMMENTATORS

The conventional wisdom has next turned to John Adams, as a vice president, who was reported to support the view that criminal prosecution would be only of a former president.⁸ With all due respect to Vice President Adams, who went on to serve as president, it is quite apparent that the views on immunity from prosecution in office of someone who was serving as vice president with ambition to become president are self-serving. That same conventional wisdom has next turned to Thomas Jefferson, who as president, focused on the independence of the separate branches of government with one not sitting in judgment of the other as a basis for the prosecution to be after leaving office.⁹ Again, a sitting president reassuring us of his inability to be prosecuted is the ultimate form of self-serving argument.

The remaining sources for the view of sitting president non-prosecutability draw on “history, tradition, and structure, attempting to sound in both separation of powers and federalism” and federal common law.¹⁰ Yet, as noted above, the views of history are at most self-serving history. While there may be a tradition of not prosecuting sitting presidents, traditions are not immutable nor necessarily wise. And, the structural and common law analysis posited are flawed because both fail to make the essential distinction between the Presidency and the president and underestimate the damage to the polity (and the world) of a free pass for years to the sitting president.

As we know, the executive has prosecuted both judges and legislators as well as lower members of the executive (including military) for various types of unimpeached or unconvicted lawlessness. Independence of the branches has not prevented such criminal prosecutions in the past. So the reason a sitting president should escape the fate of lower level executive officers must find its logic somewhere else than in the independence of the three branches of government or from the strictures of federalism. That logic is

8. Amar, *supra* note 2, at 671; Amar & Kalt, *supra* note 2, at 11.

9. Amar, *supra* note 2, at 672.

10. Scott W. Howe, The Prospect of a President Incarcerated, 2 NEXUS 86, 91 (1997).

summed up in the view of presidential uniqueness as the source of the Executive power of the federal government under the Constitution.¹¹

III. MY ARGUMENT

But, let us disaggregate these thoughts. I freely admit that a sitting president operating within the confines of the powers conferred by the Constitution and Congress would be operating within the express and implied powers of the Presidency. But, the fact the sitting president is operating within the powers of the Presidency would merely mean: 1) that if a state criminal prosecution of a sitting president for state law violations were instituted in a state court, either through habeas or federal officer removal said state criminal prosecution would be stayed or dismissed¹² and 2) that if a federal prosecution for federal law violations of a sitting president were envisaged, the prosecutor would have to address the kinds of well-recognized functional immunity jurisprudence leading to dismissal of the federal prosecution.¹³

Thus, under the first hypothetical above, if the sitting president were to make out a case of express or implied powers for the action, most likely there would be no federal prosecution at all. If, by some happenstance, such a prosecution occurred, the case would be dismissed or there would be an acquittal. Under the second hypothetical, the Washington, D.C. or Maryland state prosecutor would come up against the kind of qualified immunity recognized in state courts for lower federal officers in the proper course of their function. For example, one could imagine such a prosecution being removed from state to federal court and the case dismissed or a

11. *Id.* See also King, *supra* note 2, at 427.

12. I went over this ground at some length in Benjamin G. Davis and Bugliosi Research Team, *Research Report on Criminal Prosecution in California Courts of Former President George Bush for Conspiracy to Commit Murder and Murder*, July 25, 2011, (U. Toledo Legal Stud. Res. Paper No. 2012-12), <http://ssrn.com/abstract=1981275>. See also Benjamin G. Davis, et al., *State Criminal Prosecution Of A Former President: Accountability Through Complementarity Under American Federalism*, 24 FLA. J. INT'L L. 331 (2012).

13. *Id.*; Benjamin G. Davis, *Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 ST. JOHN'S J. LEGAL COMMENT. 503, 621–22 (2008).

collateral habeas action being done to stop the state prosecution. None of this is remarkable.

But, when we are confronted with a president who instrumentalizes the powers of the Presidency for illegitimate and illegal ends, then the question arises whether the Constitution requires us to accept that president being ascribed a form of personal immunity during his/her term beyond the functional immunity that has been well recognized for lower federal officers when they operate within their function. I would submit the answer cannot be yes but must be no.

One particular reason for this view is derived from international law. As noted in Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) 2002 I.C.J. 121 (Feb. 14) the kind of immunities *rationae personae* that are recognized by international law for incumbents

do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.¹⁴

It is well settled that this protective immunity of incumbents that international law provides each state for heads of state with respect to foreign tribunals is not extended by international law to the domestic tribunals of the person's home state. This rule is consistent with the idea of complementarity between international and domestic tribunals. Moreover, by leaving the question to the domestic system, international law demonstrates its respect for each state's sovereignty in addressing the risk of a lawless head of state. Whether the person is tried in the domestic court for the domestic version of an international crime, a domestic crime that vindicates an international rule, or a purely domestic crime is of no moment.

Another reason is to turn on its head the conventional wisdom that is concerned about the disruption to the Constitutional

14. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. Rep. 121, ¶ 61 (Feb. 14) *available at* <http://www.icj-cij.org/docket/files/121/8126.pdf>. I leave to the side the further situation of a federal waiver through a Congressional act of Presidential immunity because in my worst case scenario I imagine the President having sway over Congress so that a veto of such an act would be sustained.

order of a prosecutor of narrow jurisdiction taking on a sitting president who through the grant of power of the Constitution operates both on the national and international plane. That concern for the whole over the particular simply represents a lack of sufficient attention to the disruptive effect to the whole (to the Constitutional order) *not of a prosecution* but of a sitting president instrumentalizing presidential power for years and for ends that in anyone else would be subject to rapid criminal sanction.¹⁵

15. While the OLC opinion does get to the heart of the question in noting “The relevant question, therefore, is the nature and strength of any governmental interests in *immediate* prosecution and punishment.” (OLC Memo, *supra* note 2), the opinion is more concerned about the burdens on a lawless President than on the burdens on the people of being subjected to such a lawless President for the length of his/her term. This type of obsequiousness towards Presidential (as distinguished from Executive) power is highly problematic. Persons in that office seem structurally oriented to value pleasing the President rather than protecting the rights of the people in the sense that Hamilton and Madison discussed above (see footnotes 4 and 5). This implicit bias permeates the OLC opinion on the subject discussed above to the detriment of the protection of the rights of the people.

For completeness sake, I should add that I have wondered on occasion about from where springs this obsequiousness toward Presidents in domestic law that one does not particularly adhere to from an international law perspective. Of course, there may be some longing for the sovereign in the domestic sphere – an authoritarian father or mother figure - but I have wondered whether this facile confusion derives from a misapprehension of the difference between the President’s Executive Power and the Executive power seen in other settings such as in the American private sector (of at will employment) in the Chief Executive Officer. For example it has recently been stated that “The President of the United States is the chief executive officer of the United States.” Miranda Green, *Despite Clinton impeachment vote, Gingrich says President 'cannot obstruct justice'*, CNN.COM (June 17, 2017, 8:10 AM), <http://www.cnn.com/2017/06/16/politics/gingrich-defends-trump-again/>.

While seductive as a simplification, the differences between a Chief Executive Officer as known in the private sector and the President are so numerous as to make this analogy terribly misleading. For one, the Executive Power granted the President is the limited Executive Power granted to this co-equal branch of the federal government in our system of separation of powers and federalism. As such, the kind of Chief Executive Power that is available in a corporate setting over the entire corporation is structurally diffused (and most importantly *not delegated* by the President) among the Executives of the federal, state, and local governments with their varying roles under our Constitution. Moreover, the Chief Executive Officer is not confronted with co-equal branches in a separation of powers. Nor is such a Chief Executive Officer subject to judicial supremacy by a branch with co-equal power within the structure of the corporate organization. The analogy, in short, is seductive and for that reason is dangerous in the popular press if not in academia. However, a few minutes reflection demonstrates the analogy is pure nonsense.

Building on that idea, the criticism could be made that under the Constitution the president embodies the executive power and thus we cannot be without the person of a president through the phases of a criminal trial. But this argument is merely a plea for pragmatic organization of any such trial, taking into account all relevant circumstances. Every aspect from the grand jury, the indictment, the arrest, the arraignment through to the criminal process and appeals can be pragmatically organized by the courts to make sure that the functions of the president are not so burdened.

Another idea might be that, as the receptacle of the Executive Power, a truly lawless president would simply fire a federal investigating authority or a federal prosecutor who sought to bring such a case. This argument thus views the Constitutional structure as *de facto* creating a practical barrier to such a prosecution as any prosecutor would be subject to presidential revocation. And, one would expect a lawless sitting president—in the face of potential criminal liability—being willing to exercise such authority for self-preservation reasons.

Leaving to the side the question of whether such an exercise of authority would pass a challenge in the courts, one can again turn the conventional wisdom on its head. Unlike the federal prosecutor who serves at the pleasure of the president, the state prosecutor is not beholden to the president. Thus, in appropriate circumstances where state law addresses the sitting president's crime, a state prosecutor would be able to bring a case without being under the presidential federal executive power that might tend to subordinate a federal prosecutor.¹⁶ As noted above, the judicial scrutiny (state or federal) as to whether a sitting president was operating within his Constitutional and statutory powers would serve as a protection to the Presidency. In addition, with the risk of federal habeas or federal officer removal coupled with the filter of the state prosecutor being present, the protection of the functions of the president would be in place to avert the risk of a non-*bona fide* criminal complaint being brought forward.

IV. THINK DIFFERENT

The point of this brief analysis has been to suggest that in the savage wars of peace, the presidency and the person of the president need to be analyzed separately when thinking about the actions of a

16. The practicalities of such an interesting turn of events are discussed above. See Davis and Bugliosi Research Team, *supra* note 12, at 22–24.

sitting president and whether they can be criminally prosecuted during the term of office. The conventional wisdom tends to suggest that such a criminal prosecution is not possible until after the president has left office. The argument of this essay is that a limitation of such prosecution to former presidents is not required by the text of the Constitution. On the contrary, the option for a prosecution (either federal or state) of a sitting president preserves the protection of the rights of the people by avoiding giving a lawless president a multiyear free pass to lead the country to destruction. Paraphrasing Justice Robert Jackson in another setting, truly the Constitution is not a suicide pact¹⁷ that requires a fealty to lawless presidents who are able to block for years impeachment or other removal from office.

17. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).