

Substantial Disruption



The Court-Martial of Cadet Bone Spurs

By Mike Tully

The Trump administration scandals may result in a Constitutional recalibration that redefines the presidency and shifts the fulcrum under the separation of powers. Special Counsel Robert Mueller's investigations into the President and his campaign have awakened a dormant issue the Founders never fully resolved: whether the presidency is an imperial institution wherein the incumbent is immune from criminal prosecution while in office. The presidency has long hovered between chief administrator and monarch but has gravitated toward the latter as history vested increasing powers in the office. History may be about to change its mind.

If Mueller's investigations uncover sufficient evidence to indict and convict Donald Trump of felonies, both he and the Justice Department will face an elemental question: should they pursue an indictment and prosecution? That has never been attempted and federal courts haven't ruled on the issue. An indictment and prosecution of a sitting president could have calamitous consequences, so reason and prudence dictate the procedure be used infrequently and cautiously. However, the option may not exist because many commentators believe the President is constitutionally immune from criminal prosecution. That is the position adopted by the Department of Justice (DOJ).

The DOJ addressed the issue twice, first in a 1973 memorandum by Assistant Attorney General Robert G. Dixon. At the time President Richard Nixon was under investigation for crimes that led to his resignation. Dixon's memo concluded a sitting President was immune from criminal prosecution. Nixon was eventually designated an "unindicted co-conspirator" by a federal grand jury, and the Special Prosecutor, Leon Jaworski, deferred to the impeachment process, whereupon Nixon resigned in lieu of impeachment. The second time DOJ addressed the issue was in 2000 in a memo prepared by Assistant Attorney General Randolph D. Moss. Both memos concluded that a sitting president is Constitutionally immune from criminal prosecution.

The DOJ relies on the premise that the President, simply by the virtue of the office itself, is immune from criminal prosecution while serving. This is tantamount to declaring the President above the law. The 1973 memo notes Article I, Section 3, Clause 7 of the Constitution specifies that impeachment is limited to removal from office, but "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." That seems to allow impeachment and criminal proceedings to proceed simultaneously. Only a dozen federal officers had been removed through impeachment by 1973, but "scores, if not hundreds, of officers of the United States have been subject to criminal proceedings for offenses for which they could have been impeached," Dixon wrote.

The Dixon memo acknowledged that delaying prosecutions while the defendant is in office could impair criminal cases. When a criminal case is delayed evidence can be lost, witness memories can fade and the statute of limitations could run. Dixon noted, "a rule that impeachment must precede indictment could operate to impede, if not bar, effective prosecution of offending civil officers." "The sensible course," he wrote, "is to leave to the judiciary the trial of the indictable criminal offenses, and to Congress the scope of the overlapping impeachment jurisdiction. The gross

impracticalities of a rigid rule that impeachment precede indictment demonstrate that it would be an unreasonable, and improper construction of the Constitution.”

But what if, as the memo asks, criminal prosecutions would “improperly interfere with the President's constitutional duties and be inconsistent with his status?” “The spectacle of an indicted President still trying to serve as Chief Executive,” wrote Dixon, “boggles the imagination.” “A necessity to defend a criminal trial and to attend court in connection with it,” reads the memo, “would interfere with the President's unique official duties, most of which cannot be performed by anyone else.” “(A) President may not be able fully to discharge the powers and duties of his office if he had to defend a criminal prosecution,” Dixon wrote, adding, “only the Congress by the formal process of impeachment, and not a court by any process should be accorded the power to interrupt the Presidency or oust an incumbent.” Dixon stated, “the Presidency would be derailed if the President were tried prior to removal.” What of allowing an indictment, but delaying prosecution until the presidential term ended? Dixon finds that untenable as well, writing, “an indictment hanging over the President while he remains in office would damage the institution of the Presidency virtually to the same extent as an actual conviction.”

In 2000, Moss revisited the earlier memo in the light of subsequent Court opinions, such as Paula Jones’ lawsuit against Bill Clinton. He wrote, “In 1973, the Department of Justice concluded that the indictment and criminal prosecution of a sitting President would unduly interfere with the ability of the executive branch to perform its constitutionally assigned duties, and would thus violate the constitutional separation of powers,” and concluded, “Our view remains that a sitting President is constitutionally immune from indictment and criminal prosecution.” Since both DOJ memos conclude that a sitting President cannot be indicted or prosecuted, most observers expect Mueller to decline prosecution and defer to the impeachment process.

But does respect for the presidency extend to a president who is not respectable? Does the DOJ analysis apply when the president presents a danger to the nation? There’s a chilling irony in Dixon’s observation that “there would be a Russian roulette aspect to the course of indicting the President but postponing trial, hoping in the meantime that the power to govern could survive.” What of the “Russian roulette aspect” of preserving a presidency when the president is an agent of a hostile foreign power and works against the national interest? The hope then is that the nation could survive. Tragically, that is not a hypothetical question.

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Supporting Materials:

- [1973 DOJ Memorandum \(Dixon\)](#)
- [2000 DOJ Memorandum \(Moss\)](#)