LAWFARE

EXECUTIVE POWER

Yes, the Constitution Allows Indictment of the President

By **Laurence H. Tribe** Thursday, December 20, 2018, 11:55 AM

In a recent opinion piece, I argued that the text and structure of the Constitution, a serious commitment to the rule of law, and plain good sense combine to preclude a rigid policy of "delaying any indictment of a president for crimes committed in winning the presidency." When a scholar I admire as much as Philip Bobbitt strongly disagrees and argues otherwise in this publication, I need to rethink my position and respond—either confessing error or explaining why I continue to hold to the views I originally expressed.

Not to extend the suspense: I haven't changed my mind. My op-ed argued against the Office of Legal Counsel (OLC) memos opining that the Constitution prevents the indictment of a sitting president. Nearly everyone concedes that any such policy would have to permit exceptions. The familiar hypothetical of a president who shoots and kills someone in plain view clinches the point. Surely, there must be an exception for *that* kind of case: Having to wait until the House of Representatives impeaches the alleged murderer and the Senate removes him from office before prosecuting and sentencing him would be crazy. Nobody seriously advocates applying the OLC mantra of "no indictment of a sitting president" to that kind of case.

The same is true for any number of other cases that come readily to mind. Among those, in my view, must be the not-so-hypothetical case of a president who turns out to have committed serious crimes as a private citizen in order to win the presidency. Whether the president committed such crimes in collusion with a shady group of private collaborators or did so in conspiracy with one or more foreign adversaries, it should not be necessary for the House to decide that such pre-inaugural felonies were impeachable offenses and for the Senate to convict and remove the officeholder before putting him in the dock as an alleged felon and meting out justice.

The onrush of daily, even hourly, news in the world today sadly furnishes plenty of other real-life examples. As those examples mount, the time may soon come when the Justice Department cannot avoid addressing the question: When does the anti-indictment policy have to give way to an emerging reality? It is this inescapable question that motivates me to continue this exchange with Professor Bobbitt.

Former OLC head Walter Dellinger has authoritatively canvassed the complex history of the Justice Department's wavering views on the indictment of a sitting president and analyzed the arguments underlying the relevant OLC memos and executive-branch submissions to the Supreme Court. He concludes that "putting a president on trial would be inconsistent with the Article II responsibilities of the modern presidency," although indicting the president and postponing the trial might not be. I will shortly discuss the postponement option, but what is essential now is to focus on one conspicuous fact about the OLC memos and Justice Department briefs: They simply don't address the situation that appears to be unfolding in the United States at the moment. There is mounting reason to ask whether the president and his associates sought to secure his election by conspiring with foreign adversaries and domestic accomplices to defraud the American people. Yet the memos in question would *shield* him from being held accountable precisely *because* he won that office. There is a maddeningly circular, bootstrap quality to arguing that even a crime committed to put somebody into a privileged position can't be pursued because, well, it helped put him into that position of privilege.

I believe the Constitution itself defeats that circular argument when one considers its structure and underlying premises. Professor Bobbitt doesn't really engage that basic idea. Instead, he says my explanation "depends on an artful reading of Article I, Section 3, which provides that 'the Party convicted [by the Senate in an impeachment proceeding] shall nevertheless be liable and subject to indictment,'" trial, conviction and punishment as provided by law. Bobbitt argues that the "natural import of those words" is that the "Party convicted" has to be a person "who has in fact [already] *been* convicted, i.e., who has gone through an impeachment process prior to being subject to indictment."

I have no quarrel with that argument, although Professor Bobbitt assumes I do. I read the language of Article I, Section 3 as *leaving* subject to indictment and trial an official who has been

impeached, convicted and removed for an impeachable offense that happens also to be a crime. Without that language, it might have been argued that the ban on double jeopardy would preclude such post-removal proceedings that seek to punish the removed official criminally for the very same conduct that led to the official's conviction and removal by the Senate. But that language says *nothing at all* about the amenability to indictment and trial of an official who *hasn't* yet been removed through impeachment. It is the Constitution's unspoken but clear commitment to the rule of law, and to the proposition that even the president is not above the law, that establishes the basic point that being president doesn't mean being immune to indictment.

All that Article I, Section 3 adds with respect to an official who has been removed through impeachment and conviction is that such an official cannot invoke the Senate conviction as a bar to subsequent criminal prosecution. That such an official "shall nevertheless be liable" to the criminal process says only that he shall "*remain*" liable to that process—just as he would have been prior to removal. In other words, the impeachment process doesn't serve as a crime-laundering device.

Ironically, it is Professor Bobbitt who has read Article I, Section 3 in a manner unsupported by the natural import of its words. He has read the statement that someone removed through the impeachment process "shall nevertheless *be* liable and subject to Indictment, Trial, Judgment and Punishment, according to Law" as though the Constitution states that anyone removed from office for committing an impeachable offense shall, upon being convicted by the Senate, for the first time *become* "liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." His reading would suggest that amenability to the federal criminal process springs from the ether once an officer has been put through the impeachment wringer and been found wanting.

That can't be right. For one thing, many impeachable offenses aren't federal crimes at all—a point on which Bobbitt and I strongly agree. Second, as to offenses that are *both* impeachable (because they constitute "Treason, Bribery, or other high Crimes and Misdemeanors," as Article II, Section 4 specifies) *and* criminal (in the sense of violating the federal criminal code), it's their *criminality from the outset* and not the removal of the criminally accused from office that subjects the accused to indictment and the rest. Finally, it makes no sense to read the words of Article I, Section 3, to mean one thing as applied to the president and another thing altogether as applied to the "Vice President and all civil Officers of the United States," all of whom are identically removable from office for committing impeachable offenses, and identically liable to subsequent criminal prosecution if their offenses happened also to be crimes.

Nothing in the Constitution supports treating amenability to the criminal process as something that kicks in only after a civil officer has been impeached and removed. To treat a sitting president as immune to that process until his presidency ends is to superimpose upon the impeachment framework—a framework designed as the way to *remove* a president who commits an impeachable offense that might or might not also be a federal crime—something quite extraordinary in a system priding itself on the axiom that no one is above the law.

The fact that the Constitution does indeed embody that axiom is illustrated by the care it takes to grant immunities from the law expressly and with relatively precise contours, rather than by implication and with striking imprecision. Consider, for instance, the Speech and Debate Clause of Article I, Section 6, specifying that senators and representatives "shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses … and for any Speech or Debate in either House, they shall not be questioned in any other Place." Note that no such privilege is accorded to the president of the United States and that, even when it *is* accorded to members of the House and Senate an exception is made for felonies.

If a parallel immunity were to be created by implication for the president by virtue of that officer's unique place in our government's structure, any such implied immunity would need to carve out at least those cases involving felonies committed to facilitate winning that high office. To imply presidential immunity without simultaneously excluding those pre-inaugural crimes that were committed in order to *become* president would be manifestly unjust. It would create a perverse incentive structure, telling those seeking the presidency that the more successful they become in fraudulently obtaining and holding onto it, the less likely they would be to be held fully accountable for their perfidy.

Indeed, pre-inaugural crimes in general share one interesting feature with the hypothetical case of the president who commits a garden-variety crime like murder after being inaugurated. Neither category of crimes possesses the defining feature of an impeachable offense. They are not abuses of a power distinctly conferred upon the president as chief executive—the first because that power hasn't yet been conferred, the second because that power isn't involved in the offense at issue. I don't doubt that the country would nonetheless properly treat murder while in office as grounds for removal, just as it would properly treat crimes committed to obtain office (even though committed pre-presidentially) as grounds for removal. But in both instances, this would require stretching the normal definition of "high Crimes and Misdemeanors" in order to rid the presidency of someone whose continuance in office would be unthinkable. In doing so, however, Americans should not simultaneously create a privilege to avoid criminal punishment and thus evade full accountability at the bar of justice.

The conventional response to this concern—which Professor Bobbitt has advanced—is that such miscreants will not forever escape such accountability. After all, a presidency cannot last longer than eight years. But by any standard, a four- or eight-year reprieve seems unjust. And the prospect of being able to wield the power of the presidency for so long without having to face the music of one's own criminality is enough to lure more than an occasional rascal (or worse) to seek the office and break the law in doing so. Moreover, it simply isn't the case that a president who wins office by committing or conspiring to commit crimes will be certain to face his comeuppance in criminal court upon leaving office. To say that requires assuming that the former president could still be prosecuted notwithstanding the statute of limitations and the possibility of being pardoned by the new president.

In my opinion piece, I argued that the constitutional design should not be understood to leave that escape route for presidents who tunnel their way into power by criminal means. Professor Bobbitt countered by insisting that the pardon-based escape route I envisioned (especially now that presidents and vice presidents run as a ticket, post-1804) wouldn't be airtight: "vice presidents, who must then serve out the disgraced president's term, [cannot] be confidently counted on to pardon their predecessors." Remember, he writes, the political price that Gerald Ford paid for pardoning Richard Nixon. But whether the pardon scenario I envisioned *guarantees* an indictment-free exit for the criminal president is not the question. The question is whether it creates an *unacceptable likelihood* that a criminally inclined, power-hungry office-seeker will be tempted to violate criminal laws in order to ensconce himself in the presidency in hopes of winning a pardon on his way out the door whenever his ride in the White House is about to end—either by voluntary resignation, or by defeat after his first term, or by the operation of the term-limits amendment (the 22nd), or by ouster through the threat or actuality of impeachment.

Beyond the prospect of a pardon, another fact of life is bound to add to the temptation that the Constitution should not be construed to create: the passage of time. The likelihood of a president permanently escaping accountability goes up substantially when one considers the statutes of limitation preventing criminal prosecution many years after the commission of the campaign finance violations or other crimes a corrupt president might have committed in order to make his victory more likely. There is no law currently in place that stops the clock from running on those crimes while the president enjoys the spoils of his own criminality, shielded from swift justice behind the walls of the White House. When such a criminal president returns to private life, his wealth quite possibly enhanced in the meantime by his use of the presidency to attract unconstitutional emoluments from foreign and domestic powers, the odds are good that it will be too late to hold him to account.

Professor Bobbitt says that my worry about the pardon scenario assumes that the president's "crimes are not subject to state prosecution," for which the sort of presidential pardon I envision is "ineffectual." But I make no such assumption. I am fully aware that some of a president's crimes with respect to the election he might have improperly won might indeed be subject to pursuit by state prosecutors, beyond the reach of a future president's exercise of the pardon power once the criminal is out of office. But many of the most serious crimes a presidential candidate might commit in connection with a national election are exclusively federal, and potentially permanent protection from being held accountable for those crimes should not be inferred from a Constitution whose fundamental premise is that nobody is above the law.

As for the structural arguments against what Professor Bobbitt has elsewhere characterized as "subject[ing] the president—and thus the country—to every district attorney with a reckless mania for self-promotion," I tend to agree that those arguments carry great constitutional weight—probably enough to overcome the case for letting states or localities indict a president before he leaves office. When the Supreme Court in *Clinton v. Jones* held that a sitting president is subject to civil suits in federal court, it noted in passing an observation of mine that without "explicit congressional consent," a federal official, obviously including the president, might well need to be shielded from the direct state commands that prosecution on non-federal charges would entail. That remains my view. But those arguments evaporate when the indictment is returned by a federal grand jury at the request of a prosecutor supervised by the U.S. attorney general and the trial is conducted by a federal court overseeing the proceedings with due sensitivity to the demands of the president's office.

Finally, as to the institutional demands unique to the office of the president, I plead guilty to the charge that I was being too glib in suggesting that, because an impeachment trial in the Senate would necessarily interfere with the president's schedule even more than an ordinary criminal trial, the interference such a criminal trial would represent needn't be taken very seriously. Professor Bobbitt is right to point out that the former demands, which are constitutionally required whenever a majority of the House has charged the president with impeachable offenses and summoned him to trial in the Senate, arise only when a uniquely high hurdle has been surmounted.

Still, the most this demonstrates is that putting an indicted president on public trial and subjecting that president to the possibility of imprisonment should perhaps be held in abeyance until that president resigns, is defeated at the next election or is removed through impeachment. It does *not* demonstrate that an otherwise amply merited criminal indictment should be scrapped or suspended altogether while the president serves out his term. Nor does it demonstrate that such an indictment should be secretly issued and put under seal and withheld from the general public to spare the president the reputational damage on the world stage that the fact of his indictment, and especially the details underlying it, would likely inflict. Those are relevant considerations, to be sure. But they seem to me to be more than balanced by the harms to the rule of law, to the remedy of removal through fully informed impeachment and to the

dangers of reelecting the secretly indicted scoundrel that inhere in shrouding his indictment behind a wall. The fact that a sitting president would otherwise be criminally indictable in the professional judgment of prosecutors, or the identification of that president as an unindicted co-conspirator, is at the very least highly relevant to whether he should be impeached and, even if not, to whether he should be reelected.

Thus, even if trial and sentencing are to be delayed, there is a compelling case for indicting such a president in plain view and offering him a choice. If he wishes, he could be publicly tried and invoke Section 3 of the 25th Amendment if he is ready to certify that the burdens of criminal trial prevent him from "discharg[ing] the powers and duties of his office" so that those powers and duties devolve on the vice president for the duration of the trial. Or his trial could be deferred if he expressly agrees, as a binding condition of such postponement, that he will not invoke the statute of limitations or accept a pardon to avoid trial and possible conviction once he is no longer in office. This seems to me the very least that the American legal system should ensure whenever the crime with which the president is charged goes to the very legitimacy of his role as leader of the government and head of state.

Topics: Federal Law Enforcement, Executive Power

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