The Prospect of a President Incarcerated

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The judiciary could appropriately find the President immune from criminal prosecution, but not because the Constitution requires immunity. The Framers did not explicitly bar criminal prosecutions of a President. A constitutionally mandated immunity also cannot appropriately be inferred. Neither the text of the Constitution, the history surrounding its creation, nor the governmental structure that it implements necessarily calls for criminal immunity for the President. Nonetheless, the judiciary could legitimately confer limited presidential immunity from criminal prosecution as federal common law. This also means that Congress could dominate the field in the first instance or in response to a judicial ruling.

I. Public Policy Favoring Limited Immunity From Prosecution

Prudential arguments, I believe, favor temporary immunity from prosecution for the President. First, because the immunity would be temporary, it would not imply that the President is “above the law.” For serious offenses, a President could be impeached and, after removal, prosecuted. Even for charges that did not spur impeachment, prosecution could occur when the President otherwise left office. Hence, despite immunity, the President would still face potential sanctions for criminal conduct.

I do not mean to suggest that temporary immunity would be entirely costless. During the delay caused by immunity, something could happen that might foreclose a legitimate prosecution. An important witness, for example, might suddenly die or become incompetent. Thus, some legitimate prosecutions could never proceed. Likewise, the privilege perhaps could erode public confidence in the presidency because of a perception that the President would have more protection from prosecution than the ordinary person. Yet, in my view, these problems do not represent

* Scott Howe is a Professor of Law at Chapman University School of Law; A.B., 1977, University of Missouri; J.D., 1981, University of Michigan. Before entering academia, Mr. Howe served as Staff Attorney with the Public Defender Service for the District of Columbia and, later, as Deputy Director of the Texas Death Penalty Resource Center.
overwhelming concerns.

The delay caused by immunity would seriously prejudice a prosecution only if something unusual occurred. Many prosecutions that are delayed for several years, nonetheless, successfully proceed. Likewise, the problem of lost trust in government appears overstated. Most citizens will recognize that a President is sometimes a target for potential prosecution because of his political office. Temporary immunity tends to counter this potential for politically-motivated investigations and prosecutions. To give the President temporary immunity means that charges that lack political motivations plausibly can adhere after the President leaves office. By contrast, charges that stem largely from political motivations are more likely to disappear. Most people would recognize these realities. Therefore, they may not generally see the grant of temporary immunity as providing a significant, undeserved protection for the President.

The benefits of a presidential privilege, I believe, also more than offset its costs. First, immunity can help to ensure that a President is undistracted from official duties by the need to defend against a criminal prosecution. Again, because the immunity lasts only as long as the President survives politically, truly serious criminal charges usually could be resolved promptly. The President could be impeached, removed from office, and prosecuted. For charges too inconsequential to spur impeachment and removal, however, the President should not be distracted from the important obligations of the office. Indeed, to deny the President temporary immunity is to say that any of the myriad of federal or state prosecutors throughout the country could bring the President to task for petty or politically-influenced allegations. Such charges might not be leveled often, as evidenced by the absence of such charges in the past. However, the pursuit of charges on even a few occasions, I believe, could prevent the President from performing with maximum effectiveness.

The President also serves an unusual role in our government. If a federal legislator is ensnared in a criminal prosecution, her problems would not likely impair the

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functioning of the legislative branch. Likewise if a federal judge were charged with a crime, the problem would not likely impair the effective functioning of the federal judiciary. The President, by contrast, is the sole head of the executive branch. This means that the absence of broad immunity for other public officials does not conflict with a grant of temporary criminal immunity for the President. The President’s distraction in defending against criminal charges and in fulfilling any sentence imposed could impede his best efforts to make decisions that we entrust to the President alone.

This grant of temporary immunity would coincide with the many other efforts taken to eliminate personal problems that could seriously distract the President. The President’s personal needs, and those of the First Family, are attended by a large coterie of federal employees. The services are provided to help ensure that the President can focus on the nation’s important problems rather than on private concerns. Of course, it is impossible to protect the President from every distraction. However, just about all that is feasible to do is done to shield the President from personal entanglements. Protecting the President from the need to defend against a criminal charge serves the same general end.

An equally important reason to provide temporary immunity to the President focuses on preserving the prestige of the office. If the President has committed a serious criminal infraction, he can promptly be impeached and removed from office. Serious problems must be solved even if they cause some derogation in institutional prestige. With that caveat, however, the President should be immune even from indictment while in office.¹ For our President to become a criminal defendant or convict would demean the office in the eyes of our citizens and of government officials around the world. Apart from the personal distraction caused the President, the prosecution could itself undermine the President’s effectiveness in instituting domestic and foreign policy.

II. No Constitutional Requirement of Presidential Immunity

Despite prudential arguments favoring temporary immunity from criminal prosecution for the President, I do not believe the Constitution mandates this immunity. The Constitution contains no explicit mandate of presidential privilege. Immunity also cannot appropriately be
inferred. No matter how long one ponders the text of the document, the history surrounding its creation, or the governmental structure and intra-governmental relationships it contemplates, a bar to prosecutions of the President remains unconvincing as constitutional doctrine. Although presidential immunity may be good policy, the privilege is not reasonably thought a prerequisite to the successful functioning of our government. Hence, I do not believe that federal judges appropriately use their license in articulating Constitutional doctrine to mandate the immunity.

The two provisions upon which immunity proponents have advocated a constitutional bar to presidential prosecution both fail to justify such a doctrine. The two sections are the impeachment provision in Article I, Section 3, and the specification of executive power in Article II, Section 1, as amplified by the separation-of-powers doctrine. Neither section grants the President criminal immunity.

It is only wishful thinking that the impeachment provision means that an official cannot be prosecuted criminally prior to impeachment. The relevant clause provides:

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.²

Immunity proponents contend that the order of events conveyed in the clause

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indicates that criminal prosecution must follow removal from office. However, the impeachment provision indicates the separate and distinct functions to be accomplished by impeachment and judicial prosecution, not that impeachment must precede judicial prosecution. It indicates that impeachment does not bar subsequent, judicial prosecution, but does not clarify whether judicial prosecution may precede impeachment.³

The articulation of presidential power in Article II, combined with the
doctrine of separation-of-powers, also cannot fairly be understood to require a presidential privilege from criminal prosecution. Article II, Section 1, states that the “executive Power shall be vested in a President of the United States of America.” The argument for a constitutional privilege is that because the executive authority is vested in a single official, a criminal prosecution of that person would effectively thwart that person from fulfilling the Article II responsibilities. However, this argument overstates the problem. Criminal prosecution of the President could well impede the functioning of the Chief Executive. Yet, this does not mean that the President would likely be so substantially disabled as to violate Article II, Section 1. The Constitution indisputably provides for intrusion on the effective fulfillment of presidential functions through an impeachment trial by the legislative branch. If Article II, Section 1, does not protect the President from having to defend in the impeachment context, it is not easily understood to protect the President from having to answer a criminal charge in the federal courts. Of course, the prospect of a President incarcerated suggests a major disablement of presidential functioning. However, the likelihood that this would occur without spurring impeachment seems remote, and surely it would not happen recurringly. The probability is too speculative to read Article II, Section 1, as requiring that the President remain unaccountable while in office to other branches for misconduct.

The history surrounding the drafting of the Constitution also fails to support the proposition that the Framers intended the President to enjoy any kind of constitutional immunity. Indeed, the better view is that the Constitution’s silence on the question reflects the Drafters’ understanding that the President would not enjoy a constitutional privilege. At the Convention of 1787, Madison called for the need to consider “what privileges ought to be allowed to the Executive.” Thus, the specific question of presidential immunities seems to have been presented. Moreover, several of the Convention participants later reported that the Drafters had left out mention of presidential immunities consciously, intending to withhold any constitutionally-mandated privilege for the Chief Executive. This history provides no basis to infer a presidential immunity from general provisions in Articles II and III of the Constitution. Indeed, the history undermines such Constitutional exegesis.

The general structure of government
created by the Constitution also does not
demand constitutional immunity for the
President. I believe that prudential
arguments support temporary presidential
immunity from prosecution. Nonetheless, a
constitutional command of presidential
immunity is not inherent in our governmenal
structure. Presidential immunity is a good
idea, but hardly so essential as to warrant
judicial inclusion in the Constitution. Even
as regards to the basic operational structure
of the federal government, the Constitution
does not call for all that may be thought good
policy.

Perhaps, one might also ask whether
a significant structural problem exists that

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would impede a more democratic resolution
than through constitutional fiat of questions
about when to provide presidential immunity.
On this front, the argument for constitutional
immunity also fails. Ultimately, the question
is why Congress should not have a role in
deciding the extent of immunity to be granted
the President. There appears no persuasive
reason to deny Congress such a role. No
problem exists here, for example, with a
cognizable, yet politically powerless group

who would be prejudiced by the failure of
the judiciary to interpret the Constitution to
mandate presidential immunity. This
conclusion only underscores that presidential
immunity does not merit constitutional
enshrinement.

III. Presidential Immunity As Federal
Common Law

Although the Constitution does not
require criminal immunity for the President,
the judiciary could appropriately confer
immunity on the President through federal
common law. The prudential argument in
favor of temporary presidential immunity is
strong, even if insufficient to warrant a
Constitutional mandate. If

a President were indicted,
but not impeached, the
courts would have to ask whether the
Congress had already addressed the
particular immunity question. If not, I believe
the judiciary could extend the privilege as
common law doctrine.

The notion of a federal common law
created in connection with interpreting the
Constitution has long existed.8 As
description, the notion of constitutional
common law proposes that many Supreme
Court decisions, with some grounding in the

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immunities for the President, although it does not mandate them. The only basis for argument on this point stems from the explicit grants in the Constitution of limited immunity, in the arrest and speech and debate clauses, to members of Congress. Yet, to contend that the express privileges granted reveal an intent to prohibit additional immunities goes too far. A refusal to constitutionalize a privilege is not the same as its constitutional prohibition. Congress surely could confer temporary, criminal immunity on the President. Similarly, the Court could confer the same limited immunity on the President as common law.¹⁰

Although the common law grant of presidential immunity would involve judicial implementation of policy untethered by a theory of constitutional “constructivism,”¹¹ the approach would at least start with an appreciation of our constitutional structure and history and, more importantly, would embody a deference to democratic processes. The common law approach would allow Congress a principal role in the process of determining the scope of presidential privileges. Congress could legislate particular immunities for the President, or proscribe them, and these laws would warrant deference from the courts.
Likewise, the Congress could respond to an immunity ruling by the Court that legislators deemed inappropriate. This approach, then, acknowledges a role for the legislative process that is missing when the Court embraces presidential immunity as Constitutional doctrine.

A common law grounding for presidential criminal immunity also would find support in the immunity against damage actions that the Supreme Court has conferred on other public officials. Long ago, for example, the Supreme Court held, as a matter of common law that heads of federal executive departments, in the exercise of their official acts, enjoy absolute immunity from common law damages actions.\(^12\) The Court subsequently extended the immunity defense to actions other than those at common law, including actions brought directly under the Constitution. For example, as a matter of common law, federal prosecutors, in the exercise of their official duties, enjoy absolute immunity from constitutional tort claims.\(^13\) The Court has also extended this sort of immunity to a variety of other governmental officials.\(^14\) These rulings find justification in the Court’s common law authority to confer on public officials those immunities justified by the interests of the citizenry.\(^15\)

Federal common law also helps explain the Supreme Court’s decision in *Nixon v. Fitzgerald*,\(^16\) granting the President immunity against certain civil actions. In *Nixon*, a five-Justice majority held that a President is absolutely immune from damages actions predicated on official acts and that this immunity survives even after the President leaves office.\(^17\) One of the majority Justices, Chief Justice Burger, wrote a concurring opinion emphasizing that the immunity identified by the majority was mandated by the Constitutional doctrine of separation of powers.\(^18\) This concurrence clarified that Chief Justice Burger did not view the immunity conferred as subject to abolition by Congress. Nonetheless, the majority opinion itself strongly suggested that several of the Justices viewed the immunity as resting on the Court’s authority to articulate common law. The majority opinion emphasized the common law origins of immunity doctrine and explicitly adverted to the possibility that the President’s immunity could be abolished through explicit congressional action.\(^19\)

What should be the boundaries of the President’s common law immunity? In the criminal context, absent congressional action, I do not think it should matter in the
conferral of temporary immunity whether the alleged crime occurred before the President assumed office or later. Further, it should not matter whether the alleged crime arose in connection with the exercise of core presidential functions or in some less official sphere of conduct. The balance of considerations regarding temporary immunity seem to be essentially the same in all of these situations. As for whether the President should have permanent immunity from criminal prosecution for actions related to certain official functions, I think not, because the question of permanent, criminal immunity raises far greater concerns than for temporary immunity.

As for civil cases, I believe the President should always have at least temporary immunity while in office. Of course, Nixon conferred permanent immunity on a President from damage suits based on official actions while in office. That decision, however, did not address whether immunity exists for civil actions against the President based on events that occurred before the President assumed office. This situation poses the problem involved in Clinton v. Jones currently before the Supreme Court. I believe that there, as in the criminal context, the Constitution does not mandate immunity for the President. At the same time, I believe that temporary immunity from civil suits for the President is justifiable as federal common law.

I believe the same immunities should extend to the Vice President. As the potential Chief Executive, the Vice President should no more have to face civil or criminal prosecution than the President. Whatever the status of the President at the outset of a case against the Vice President, the President could suddenly die or become incapacitated. Rather than have the Vice President's immunity commence only upon assuming the presidency, possibly disrupting litigation previously commenced, the Court could appropriately draw a categorical rule that would also confer on the Vice President the same immunity as the President.

One might also consider whether common law immunity should extend to other members of the First Family, particularly the
President's spouse. A criminal prosecution or civil suit brought against the President's spouse could severely distract the President and even undermine to some extent the credibility of the President. The President would also have political difficulty pardoning in this situation even if that were constitutional. Nonetheless, the concerns raised by legal action against the spouse are less weighty as a general rule than for actions brought against the President. Among the members of the First Family, I believe immunity should be limited to the President.

One of the benefits of the common law grounding for executive immunity, however, is that the judiciary has both flexibility and factual context in drawing the doctrinal boundaries. As for flexibility, the courts can more credibly pursue functional immunity rules turning on factual subtleties through a common law approach than through purported constitutional interpretation. To suggest that the Constitution helps reveal nuanced doctrinal boundaries in this area would only compound the fiction involved in identifying a constitutionally mandated privilege in the first instance. At the same time, the added contextual grounding available through judicial decision-making provides a possible advantage over efforts by the Congress to regulate all presidential immunity questions through legislation. Unlike the Congress, the Court can determine executive immunity in relatively piecemeal fashion and in contexts provided by actual cases.

IV. Conclusion

Does the Constitution permit criminal prosecution of a sitting President? If a President were to be criminally charged, I would hope that the President would receive temporary immunity. Nonetheless, I believe that the judiciary would go too far in finding such a privilege in the Constitution. I have argued that the courts could justify such executive immunity as federal common law in the absence of congressional action on the problem. Ultimately, however, we should hope that we are never confronted with conduct by a President that would require resolution by the courts of this question.

\[1\] I do not believe that immunity should extend so far as to bar the naming of the President as an uncharged co-conspirator in a criminal conspiracy.

\[2\] U.S. CONST. Art. I, Sec. 3, Cl. 7.
3 See, e.g., Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* 88 (1996) (["T]he operative language could . . . be construed as merely anticipating (but not requiring) that impeachments would precede criminal prosecutions but that, regardless of the order in which they proceed, an impeachable official may be subjected to both in appropriate cases.").


5 The "separation of powers" notion does not add any force to the argument for the constitutionally mandated privilege. The separation of powers notion only concerns the allocation of authority among the federal branches so that it does not address the possibility of a President facing criminal prosecution in state court. Indeed, regarding state prosecutions, notions of federalism would arguably favor allowing the prosecution to proceed. Hence, Article II, section I, itself must provide the privilege in both state and federal contexts, if any privilege is constitutionally required.


7 See, e.g., *id.* at 1066 (discussing post-convention comments of Mr. Pinckney); *Nixon v. Fitzgerald*, 457 U.S. 731, 771-79 (1982) (White, J., dissenting) (discussing post-Convention comments of several participants including Governor Johnson, Mr. Wilson and Mr. Pinckney).

8 See, e.g., *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) ("Federal common law implements the federal Constitution and statutes, and is conditioned by them.").


11 See generally Akhil Reed Amar & Neal


12 See Spalding v. Vilas, 161 U.S. 483, 498 (1896)(drawing upon immunity principles in English common law cases, and concluding that “[i]n the interests of the people” required such immunity).


15 See Meltzer, supra note 9, at 1173 (noting that Butz “is a common law decision, which Congress surely could overturn”).


17 See id. at 750.

18 See id. at 759, 761 (Burger, C.J., concurring).

19 See id at 749, n. 27.