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Can We Indict a Sitting President?

Susan Low Bloch
Georgetown University Law Center, bloch@law.georgetown.edu

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Foreword

Susan Low Bloch *

This symposium addresses the difficult question of whether a President can be criminally prosecuted while still in office or whether indictment and prosecution must await his leaving. The question is difficult because the text of the Constitution gives us some hints but no dispositive answers. At first reading, Section 3 of Article I seems to suggest that impeachment must precede any criminal prosecution: "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." Thus, the provision suggests it may be prescribing a temporal order — impeachment and then prosecution. However, closer analysis reveals that the provision may simply be defining and limiting the effects of impeachment and making clear that other punishments can be still imposed by the criminal process without violating any prohibitions against double jeopardy; it may not be addressing the issue of order at all.

In attempting to answer this thorny question, the articles in this symposium run the full gamut. On one side of the debate is the conclusion offered by Professor Akhil Amar and Brian Kalt, who argue that the President is unique and cannot be subject to prosecution by state or federal systems while in office. He must first be removed either by impeachment, the voters, or the expiration of his term. They infer this temporary immunity from Article II and the separation-of-powers of the Constitution.

Professor Jay Bybee also concludes that impeachment must precede criminal indictment and prosecution, but he goes farther than Amar and Kalt in applying that rule not only to the President but to all federal officers subject to impeachment, *i.e.*, the Vice President, federal judges, and all civil officers

* Susan Low Bloch is a Professor of Law at Georgetown University Law Center; B.A., Smith College; M.A., University of Michigan (Mathematics); Ph.D., University of Michigan (Computer Science); J.D., University of Michigan; Law Clerk to Justice Thurgood Marshall.

of the United States. In his view, both the text of the Constitution and policy considerations dictate this conclusion. However, Professor Bybee treats civil actions against Presidents differently; in particular, he concludes that sitting Presidents have no temporary immunity from civil actions.

Professor Scott Howe presents a slightly different view. In his opinion, the Constitution cannot be read to provide a sitting President any temporary immunity from prosecution. However, he believes that policy arguments favor such an immunity as a matter of federal common law. While Professor Howe's analysis is similar to that of Professor Amar and Brian Kalt, Howe's conclusion that the immunity is not constitutionally required can have important implications. If immunity is only a matter of federal common law, as Professor Howe suggests, then Congress can change it at any time. Congress can restrict its scope, eliminate the immunity entirely, or expand its usage. If, on the other hand, the Constitution provides the immunity, as Amar and Kalt, and Bybee believe, Congress cannot eliminate it.

Professor Howe goes on to examine how far the immunity extends. He concludes that it should apply as well to the Vice President, but not to the President's spouse. He also suggests that temporary immunity should apply to civil as well as criminal cases. Thus, he agrees with the position being advocated by President Clinton's lawyers in the Supreme Court in the *Clinton v. Jones* case. The one distinction between Professor Howe's position and that being argued by the President's lawyers is that Howe believes this immunity is a matter only of federal common law; the President's lawyers argue the immunity is to be inferred from the Constitution.

On the other extreme is the view of Professor Eric Freedman: sitting Presidents are not immune from criminal prosecution. Analyzing the constitutional text, the Framers' debates, historical precedent with respect to other federal officials, as well as policy arguments, Professor Freedman finds no support for such immunity; moreover, he sees no need to infer it. While he does not explicitly discuss the question of immunity for civil actions, I suspect his analysis would also lead him to conclude that there shall not be any immunity from civil actions.

Terry Eastland offers an interesting perspective on Professor Freedman's theme. He agrees there is no constitutional immunity

from criminal prosecution for a sitting President. Nor does he believe that any immunity should be found in federal common law. But he suggests that whether or not a prosecution goes forward is entirely in the control of the President. Because the President has the responsibility under Article II, Section 3, to take care that the laws are faithfully executed, and has the power under Article II, Section 2, to pardon, including, in Eastland's view, the power to pardon himself, the President can control whether or not he is indicted, prosecuted, and sentenced. The only check on the President's use of these powers is a political check by the people and Congress' power to impeach. Thus, if the President wants either to order the suspension of a prosecution or to pardon himself, and is willing to take the political consequences, nothing in the Constitution precludes his doing that.

Professor Erwin Chemerinsky addresses a somewhat different question and concludes that there should be no temporary immunity for civil actions against a sitting President for conduct unrelated to the presidency. Thus, in his view, civil suits against the President for unofficial acts can proceed while the President is still in office. In particular, he believes that Paula Jones' sexual harassment suit against President Clinton for conduct allegedly occurring prior to his presidency can proceed immediately.[1] Professor Chemerinsky does not indicate whether he believes there is also no temporary immunity for criminal actions but much of his reasoning suggests that he is likely to agree with Terry Eastland and Professor Eric Freedman.

As these articles indicate, the questions raised by the prospect of suing a sitting President are not easy to resolve. And while it would be good if we never had to answer them, history indicates they cannot be avoided. The Supreme Court will give us some answers in the *Jones* case now pending before it; while that case addresses only the question of civil actions against a sitting President, the Court's analysis may give us at least some guidance on the issue of criminal prosecutions as well.

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[1] In the course of his discussion, Professor Chemerinsky wonders whether those law professors who filed an amicus curiae brief in Clinton v. Jones arguing for temporary immunity would be taking the same position if Paula Jones were suing a Republican

President. As one of the authors of the amicus brief, I would respond personally that the answer is "Yes." Obviously, the argument has nothing to do with the identity or party affiliation of the incumbent; the question is what the Office of the Presidency requires.