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Resolved: A sitting President should be indictable.

A Constitutional Puzzle: Can the President Be Indicted?

By Adam Liptak, The New York Times, May 29, 2017

WASHINGTON — The Constitution does not answer every question. It includes detailed instructions, for instance, about how Congress may remove a president who has committed serious offenses. But it does not say whether the president may be criminally prosecuted in the meantime.

The Supreme Court has never answered that question, either. It heard arguments on the issue in 1974 in a case in which it ordered President Richard M. Nixon to turn over tape recordings, but it did not resolve it.

Reports that President Trump asked James B. Comey, then the F.B.I. director, to shut down an investigation into his former national security adviser, Michael T. Flynn, prompted accusations that the president may have obstructed justice. Robert S. Mueller III, the former F.B.I. director who has been appointed special counsel to look into ties between the Trump campaign and Russia, will presumably investigate the matter.

But would the Constitution allow Mr. Mueller to indict Mr. Trump if he finds evidence of criminal conduct?

The prevailing view among most legal experts is no. They say the president is immune from prosecution so long as he is in office.

"The framers implicitly immunized a sitting president from ordinary criminal prosecution," said Akhil Reed Amar, a law professor at Yale.

Note the word "implicitly." Professor Amar acknowledged that the text of the Constitution did not directly answer the question. "It has to be," he said, "a structural inference about the uniqueness of the president himself."

The closest the Constitution comes to addressing the issue is in this passage, from Article I, Section 3: "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."

This much seems clear: The president and other federal officials may be prosecuted after they leave office, and there is no double jeopardy protection from prosecution if they are removed following impeachment.

However, "whether the Constitution allows indictment of a sitting president is debatable," Brett M. Kavanaugh, who served on the staff of Kenneth W. Starr, the independent counsel who investigated President Bill Clinton, wrote in a 1998 law review article. Mr. Kavanaugh, who is now a federal appeals court judge, also concluded that impeachment, not prosecution, was the right way to address a sitting president's crimes.

The most prominent dissenter from the prevailing view is Eric M. Freedman, a law professor at Hofstra University and the author of a 1999 law review article that made the case for allowing criminal prosecution of incumbent presidents.

Professor Freedman demonstrated that the issue had divided the founding generation and argued that granting sitting presidents immunity from prosecution was "inconsistent with the history, structure and underlying philosophy of our government, at odds with precedent and unjustified by practical considerations."

He pointed out that other federal officials who are subject to impeachment, including judges, have been indicted while in office. Courts have rejected the argument that impeachment is the sole remedy for such officials.

But Professor Amar said that presidents were different.

"If you're going to undo a national election, the body that does that should have a national mandate," he said. "Even a federal prosecution would follow only from an indictment from a grand jury sitting in one locality."

Vice President Spiro T. Agnew, facing a grand jury investigation that would lead to his resignation in 1973, argued that he was immune from prosecution while in office. Impeachment, he said, was the only remedy.

The Justice Department, in a brief signed by Solicitor General Robert H. Bork, disagreed. But, though the question was not before the court, Mr. Bork added that "structural features of the Constitution" barred prosecutions of sitting presidents.

Since the president has the power to control federal prosecutions and to pardon federal offenses, Mr. Bork wrote, it would make no sense to allow the president to be prosecuted until after he is removed from office and forfeits those powers. (Mr. Bork would go on to become a federal appeals court judge and an unsuccessful nominee to the Supreme Court.)

A year later, Leon Jaworski, the Watergate special prosecutor, took a less categorical position.

"It is an open and substantial question whether an incumbent president is subject to indictment," he told the Supreme Court during his successful quest to obtain the White House recordings that contributed to Nixon's resignation.

In a series of memorandums, the Justice Department's Office of Legal Counsel concluded that indicting a sitting president would violate the Constitution by undermining his ability to do his job. Those memos, too, though, said the answer was a matter of structure and inference.

"Neither the text nor the history of the Constitution ultimately provided dispositive guidance in determining whether a president is amenable to indictment or criminal prosecution while in office," a 2000 memo said, summarizing an earlier one. "It therefore based its analysis on more general considerations of constitutional structure."

The Justice Department's regulations require Mr. Mueller, the special counsel, to follow the department's "rules, regulations, procedures, practices and policies." If the memos bind Mr. Mueller, it would seem he could not indict Mr. Trump, no matter what he uncovered.

But Andrew Manuel Crespo, a law professor at Harvard, has questioned whether the special-counsel regulations should be read that broadly. The regulations, he wrote on Take Care, a law blog, "focus more on administrative protocols and procedures than on legal analyses, arguments or judgments."

Even if Mr. Mueller has a measure of discretion, Professor Amar said, the right process for assessing Mr. Trump's conduct, should it come to that, is the one described in detail in the Constitution: impeachment.

"Much of the recent pontificating about the technical elements of obstruction of justice is quite beside the point," he said. "Donald Trump is to be judged by the House and the Senate, who are in turn judged on Election Day by the American people more generally."

Can the President Be Indicted? A Long-Hidden Legal Memo Says Yes

By Charlie Savage, The New York Times, July 22, 2017

WASHINGTON — A newfound memo from Kenneth W. Starr's independent counsel investigation into President Bill Clinton sheds fresh light on a constitutional puzzle that is taking on mounting significance amid the Trump-Russia inquiry: Can a sitting president be indicted?

The 56-page memo, locked in the National Archives for nearly two decades and obtained by The New York Times under the Freedom of Information Act, amounts to the most thorough government-commissioned analysis rejecting a generally held view that presidents are immune from prosecution while in office.

"It is proper, constitutional, and legal for a federal grand jury to indict a sitting president for serious criminal acts that are not part of, and are contrary to, the president's official duties," the Starr office memo concludes. "In this country, no one, even President Clinton, is above the law."

Mr. Starr assigned Ronald Rotunda, a prominent conservative professor of constitutional law and ethics whom Mr. Starr hired as a consultant on his legal team, to write the memo in spring 1998 after deputies advised him that they had gathered enough evidence to ask a grand jury to indict Mr. Clinton, the memo shows.

Other prosecutors working for Mr. Starr developed a draft indictment of Mr. Clinton, which The Times has also requested be made public. The National Archives has not processed that file to determine whether it is exempt from disclosure under grand-jury secrecy rules.

In 1974, the Watergate special counsel, Leon Jaworski, had also received a memo from his staff saying he could indict the president, in that instance Richard M. Nixon, while he was in office, and later made that case in a court brief. Those documents, however, explore the topic significantly less extensively than the Starr office memo.

In the end, both Mr. Jaworski and Mr. Starr let congressional impeachment proceedings play out and did not try to indict the presidents while they remained in office. Mr. Starr, who had decided he could indict Mr. Clinton, said in a recent interview that he had concluded the more prudent and appropriate course was simply referring the matter to Congress for potential impeachment.

As Robert S. Mueller III, the special counsel in the latest inquiry, investigates the Trump campaign's dealings with Russia and whether President Trump obstructed justice, the newly unearthed Starr office memo raises the possibility that Mr. Mueller may have more options than most commentators have assumed. Here is an explanation of the debate

and what the Starr office memo has to say.

Why do some argue presidents are immune?

Nothing in the Constitution or federal statutes says that sitting presidents are immune from prosecution, and no court has ruled that they have any such shield. But proponents of the theory that Mr. Trump is nevertheless immune for now from indictment cited the Constitution's "structural principles," in the words of a memo written in September 1973 by Robert G. Dixon Jr., then the head of the Justice Department's Office of Legal Counsel.

This argument boils down to practicalities of governance: The stigma of being indicted and the burden of a trial would unduly interfere with a president's ability to carry out his duties, preventing the executive branch "from accomplishing its constitutional functions" in a way that cannot "be justified by an overriding need," Mr. Dixon wrote.

In October 1973, Mr. Nixon's solicitor general, Robert H. Bork, submitted a court brief that similarly argued for an "inference" that the Constitution makes sitting presidents immune from indictment and trial. And in 2000, Randolph D. Moss, the head of the Office of Legal Counsel under Mr. Clinton, reviewed the Justice Department's 1973 opinions and reaffirmed their conclusion.

What was the Starr office's stance?

In laying out his case, Mr. Rotunda played down arguments that permitting a president to be indicted would cripple the executive branch. Instead, he placed greater emphasis on immunity issues that the Nixon — and, later, Clinton — legal teams dismissed.

Among them, he noted that the Constitution's speech-or-debate clause explicitly grants limited immunity to lawmakers for certain actions. "If the framers of our Constitution wanted to create a special immunity for the president," he argued, "they could have written the relevant clause."

He also wrote that the 25th Amendment, which allows for temporary replacement of a president who has become unable to carry out the duties of the office, created a mechanism that would keep the executive branch from becoming incapacitated if the president was on trial.

And he noted that if indictments had to wait until a president's term was up, some crimes would become untriable — such as those where the statute of limitations had run out. That could happen for crimes that do not rise to an impeachable offense, he wrote, citing the example of a president who punches an irritating heckler.

"No one would suggest that the president should be removed from office simply because of that assault," he wrote. "Yet the president has no right to assault hecklers. If there is no recourse against the president, if he cannot be prosecuted for violating the criminal laws, he will be above the law."

What has the Supreme Court said?

The Supreme Court has never addressed the question of whether a sitting president can be indicted and tried. But in a landmark 1997 ruling, Clinton v. Jones, it permitted a lawsuit against Mr. Clinton for unofficial actions — accusations of misconduct before he became president — to proceed while he was in office.

In his 2000 memo, Mr. Moss dismissed this ruling, emphasizing that the burdens of being a criminal defendant were greater than the burdens of being sued by a private litigant. But in the Starr office memo, Mr. Rotunda deemed the ruling far more significant for the criminal question.

"If public policy and the Constitution allow a private litigant to sue a sitting president for acts that are not part of the president's official duties (and are outside the outer perimeter of those duties), and that is what Clinton v. Jones squarely held," he wrote, "then one would think that an indictment is constitutional because the public interest in criminal cases is greater."

Could Mueller go where no prosecutor has before?

Even if Mr. Mueller were to uncover sufficient evidence to indict Mr. Trump, decide that the legal arguments in the Starr office memo were correct and conclude that he wanted to ask a grand jury for an indictment while Mr. Trump is president — all big ifs — yet another uncertainty would loom: whether he must accept the Office of Legal Counsel's analysis, even if he disagreed with it.

The Justice Department's regulations give Mr. Mueller, as a special counsel, greater autonomy than an ordinary prosecutor, but still say he must follow its "rules, regulations, procedures, practices and policies." They also permit Deputy Attorney General Rod J. Rosenstein to overrule Mr. Mueller if he tries to take a step that Mr. Rosenstein deems contrary to such practices.

There is no guiding precedent about whether Office of Legal Counsel memos would fall into that category, or if a special counsel is free to reach his own legal judgments. But as Mr. Mueller's office investigates, the ambiguity about the rules could influence calculations in the Trump camp about how much to cooperate and how much to fight, said

Renato Mariotti, a former federal prosecutor turned defense lawyer.

"I would be surprised if Mueller indicted the president for the same prudential reasons that swayed Starr," Mr. Mariotti said. "But the specter that he might do that could have an impact on things. If I were on the president's team, I would say, 'I don't think it's likely that he would, but it's possible,' depending on what the facts are."

A Sitting President Can't Be Prosecuted

By Cass Sunstein, Bloomberg View, July 31, 2017, 8:30 AM EDT

Alexander Hamilton helps clarify the constitutional remedy.

Can a sitting president be prosecuted? Might Donald Trump, or any president, face the prospect of jail?

A memorandum of law, written in 1998 but released last week, concludes that the answer is a qualified "yes." The memorandum was written by Chapman University law professor Ronald Rotunda, who was then at the University of Illinois, for Kenneth Starr, the independent counsel appointed to investigate President Bill Clinton.

Rotunda's memorandum is learned, illuminating and impressively detailed. The issue is both tough and unsettled. But there's a better answer: an unqualified "no."

The drafters of the Constitution spent a lot of time on the question of how to respond to presidential wrongdoing. Their remedy was impeachment (by the House of Representatives) and then conviction (by the Senate), which could occur for "Treason, Bribery, or other high Crimes and Misdemeanors."

But what happens if the president is convicted by the Senate? Here's the constitutional answer:

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.

A reasonable interpretation of this provision is that it sets out a temporal sequence: Impeachment, then conviction and removal from office -- and only after that, indictment, trial, judgment and punishment.

Alexander Hamilton seemed to read the provision exactly that way: "The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law."

That means you can't indict and try a sitting president. He has to be removed first.

True, this interpretation isn't inevitable. You could read the text to mean only that the consequence of conviction is removal from office, and that a convicted president can be prosecuted -- but to be silent on, and so not to resolve, the question whether a president can be prosecuted for crimes while in office. On that interpretation, nothing in the Constitution rules out a prosecution of the president for (say) obstruction of justice or for perjury.

Rotunda also emphasizes that a president might commit crimes, such as battery, shoplifting and document destruction, that may not be "high" in the constitutional sense, and so not a legitimate basis for impeachment. If he's immune from prosecution, does the president get a free ride? Since the founders believed no one should be above the law, Rotunda doesn't think that makes a lot of sense.

Importantly, though, he does not contend that the president can be prosecuted for actions he undertakes in his official capacity. His conclusion that a sitting president can be prosecuted is strictly limited to actions committed before becoming president, and actions that a president does not undertake in his role as president, such as Clinton's alleged perjury. (True, the line between the official and unofficial acts can be thin.)

The problem with Rotunda's argument is that presidential immunity from criminal prosecution -- while in office -- is a pretty reasonable inference from the constitutional design. Whether or not you like the current occupant of the Oval Office, he has an awesome array of responsibilities. Even on a slow day, numerous decisions reach his desk. They might involve potential terrorist attacks, a looming epidemic, immigration or air pollution. Facing a criminal prosecution seems fatally incompatible with the president's constitutional role.

Aware of this argument, Rotunda notes that the Supreme Court allowed Paula Jones's sexual harassment suit to go forward against Bill Clinton, notwithstanding Clinton's argument that to do his job, a sitting president needs to have immunity against such lawsuits. Among other things, the Supreme Court answered that trial judges could find ways to accommodate the president's schedule. Why isn't the same thing true for a criminal prosecution?

That's a fair question, but a criminal proceeding is unique, and the problem isn't really about scheduling. Realistically speaking, any White House would be pretty well disabled if the president is under a criminal indictment and faces the prospect of trial and imprisonment.

Rotunda is aware of the risk, and leaves open the possibility that imprisonment itself might be delayed, so that the

prosecution would not compete with the impeachment mechanism. But that's hardly sufficient. The question is whether the president's ability to perform his constitutional functions would be impaired by the prosecution itself. There's little doubt that it would.

Does this mean that the president is above the law? Not at all. In cases of serious wrongdoing, and breaches of public trust, the Constitution provides a remedy: impeachment.

Donald Trump not immune to indictment as sitting President thanks to precedent set by Watergate's 'Nixon tapes'

Philip Allen Lacovara, The Washington Post, December 8, 2017

Supreme Court may follow hand of history to bring criminal charge

As Special Counsel Robert Mueller racks up indictments and guilty pleas, and President Donald Trump continues to dig himself further into a potential obstruction-of-justice charge, a question lingering since Mueller's appointment comes front and centre: May a sitting President be indicted for a federal crime?

I believe the answer is yes. When I was counsel to the Watergate special prosecutors, one of the issues that we had to address during the investigation of President Richard Nixon was whether the President was subject to indictment for his role in the Watergate cover-up. As we later informed the Supreme Court in briefing the "Nixon tapes" case, we concluded that a president may be indicted while still in office. The Justice Department's Office of Legal Counsel has taken a different position, first under Nixon and later under the administration of President Bill Clinton.

The principal argument in favour of presidential immunity is that the President, as chief executive, is the officer ultimately responsible to "take care that the laws be faithfully executed." Therefore, for the government to pursue a criminal indictment of the President would be like the President prosecuting himself.

The argument is misguided. In England, it used to be said that "the king can do no wrong." Indeed, when the Colonies declared independence, English prosecutions were in the name of the king - Rex v. Smith, for example. But the Founders rejected the tradition of royal supremacy. In writing the Constitution, they created a limited immunity for members of Congress protecting them against - but only against - prosecution for "speeches or debates" during congressional proceedings. By contrast, the Constitution is silent on any comparable immunity for the president.

In fact, in the Nixon tapes case, the Supreme Court rejected essentially the same point that Trump supporters are making. There Nixon argued that, as chief executive overseeing enforcement of the federal laws, he was not subject to demands by the special prosecutor that the president produce evidence sought by the prosecutor. The court unanimously upheld the fundamental constitutional principle that no person is above the law, and even the president is subject to the ordinary obligations and prohibitions of federal law applicable to everyone else. The caption of the case says it all: United States v. Richard M. Nixon, President of the United States.

Another major argument for presidential immunity is that the burden of defending against a criminal charge would distract an incumbent president from performing his important public duties. That argument, too, did not convince the Supreme Court when President Bill Clinton claimed immunity from having to defend against the civil sexual harassment lawsuit brought against him by Paula Jones. The court emphasised that a president acquires no special immunity from being held accountable for personal misconduct and explained that trial courts are capable of managing legal proceedings in a way that minimises the impact of a trial on the performance of presidential duties.

Finally, the Constitution does not specify or even imply that no prosecution of a president may occur unless he is impeached and removed from office first. The text simply notes that impeachment does not foreclose later prosecution.

Most significant, the argument proves too much. A single section in Article II of the Constitution specifies, without distinction, that the "president, vice president, and all civil officers" may be impeached by the House and may be removed upon conviction by the Senate of treason, bribery, or other high crimes and misdemeanours. The Constitution does not distinguish between treatment of the president on the one hand and the vice president and other civil officers on the other. History has demonstrated, however, that hundreds of civil officers, as well as Vice President Spiro Agnew, have been prosecuted for federal offences without having been impeached and removed from office.

In addition, criminal prosecution and impeachment are fundamentally different. Impeachment by the House and conviction by the Senate represent a political judgment that an official is unfit for office. By contrast, the federal criminal code includes many offences of a nonpolitical nature, and these offences are pursued by grand juries, conducted by professional prosecutors and ultimately tried before civil courts and juries.

Whether Mueller and a grand jury conclude that Trump has violated the federal criminal law against obstruction of justice is a complex matter. There may be reasons of "prosecutorial discretion" not to pursue a criminal charge, even if one is otherwise justified. But the President and his supporters are claiming an immunity from criminal culpability that

our constitutional system of justice does not and should not tolerate.

The president can be indicted — just not by Mueller

By Ronald Rotunda July 27, 2017, The Washington Post

Ronald Rotunda is a professor at Chapman University's Fowler School of Law.

Nearly two decades ago, then-independent counsel Kenneth Starr asked me to evaluate whether a federal grand jury could indict a sitting president — in that case, Bill Clinton. My answer — that such an action would be permissible — was recently unearthed in response to a Freedom of Information Act request from the New York Times, and it may have relevance for a new special counsel and the current president.

My fundamental conclusion remains intact: Nothing in the Constitution would bar a federal grand jury from returning charges against a sitting president for committing a serious felony. But — and this is a big but — differences between the Clinton situation then and the investigation of President Trump now mean that where Starr had the authority to indict Clinton if he chose, Mueller most likely does not possess the same power.

On the underlying question of whether the Constitution bars indictment of a sitting president, no previous case is directly on point. The Justice Department has taken a different view than the conclusion I reached — both beforehand, during the Watergate investigation, and afterward, at the end of the Clinton administration. But the history and language of the Constitution and Supreme Court precedents suggest that the president does not enjoy general immunity from prosecution.

First, the framers knew how to write a clause granting such immunity when they wanted to. Members of Congress enjoy "privilege from arrest" in civil cases when going to and from Congress (now irrelevant because we no longer use that procedure) and may not be criminally prosecuted for "any speech or debate" in Congress. If the framers wanted to protect the president from prosecution while in office and to make impeachment the sole mechanism for proceeding against a president, they could and would have said so.

Second, some argue that criminal prosecution would distract the president and make him unable to perform his duties. During Watergate, Richard Nixon's lawyers argued that "if the president were indictable while in office, any prosecutor and grand jury would have within their power the ability to cripple an entire branch of the national government and hence the whole system." The Supreme Court never reached that question, and Nixon left office without being indicted.

In my view, questions about "crippling" the government are not compelling, and the precedents in favor of the power to indict a sitting president were strengthened with the Supreme Court's ruling that a private sexual harassment lawsuit against Clinton involving alleged conduct before he took office could go forward even during his presidency.

As I wrote in the memo to Starr, "If the president is indicted, the government will not shut down, any more than it shut down when the Court ruled that the president must answer a civil suit brought by Paula Jones." In addition, the 25th Amendment offers another answer to the government-could-not-proceed objection, by providing a mechanism to keep the executive branch running if the president is temporarily unable to discharge his powers. In this country, no one is above the law.

Nonetheless, there is a significant — in fact, likely dispositive — difference between the Clinton situation and that facing Trump. Starr served as independent counsel under a now-defunct statute. By contrast, special counsel Robert S. Mueller III serves under Justice Department regulations put in place after the independent counsel law expired.

This is not a technical distinction but one that I discussed in my memo, distinguishing between the independent counsel statute and the regulations such as those establishing Mueller's office.

And this difference has enormous implications for Mueller's power. Supreme Court cases going back 150 years emphasize that the president retains complete authority to control federal criminal prosecutions. Without a statutorily appointed special counsel given special tenure, Trump could fire anyone who tried to indict him.

Moreover, the regulations governing Mueller mandate that he "comply with the rules, regulations, procedures, practices and policies of the Department of Justice." They permit removal of the special counsel for "good cause, including violation of Departmental policies."

As Clinton was about to leave office, his Justice Department's Office of Legal Counsel ruled that the president could not be indicted. Is this legal opinion a departmental policy that binds Mueller? It would seem so, given that OLC's stated function is "to provide controlling advice to Executive Branch officials on questions of law" (emphasis added). If that creates a Catch-22 situation in which a special counsel can never proceed against a president, my answer is: I don't write the rules, I just read them.

As interesting as this debate is, it also strikes me as entirely premature. In my assessment, the "case" against Trump right now amounts to a mountain of innuendo built on a foundation of loose sand. The facts so far do not come close to

making an obstruction case against the president, and for now there is no evidence that he engaged in any underlying crime.

If and when Mueller comes up with something that might create an indictable case, though, he is apt to run into serious questions about the limitations of his office, questions that Starr did not face.

How the President Can Be Prosecuted as a Criminal

By MARTIN LONDON, Time, January 29, 2018

London is a retired partner for the law firm Paul, Weiss, Rifkind, Wharton & Garrison and the author of The Client Decides; he was a principal lawyer for Vice President Spiro Agnew.

"The President, Vice President and civil officers of the United States shall be removed from Office on Impeachment for, and conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

— Article II, section 4, U.S. Constitution

"Judgment in cases of Impeachment shall not extend further than to removal from Office … but the party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to law."

— Article I, section 9, U.S. Constitution

These passages explain that, despite all the political rhetoric emanating from the White House, the Capitol building and elements of the media, if the House impeached and the Senate convicted Donald Trump, the only result of that Congressional action would be his removal from the Presidency.

But what is equally important is what they don't say. There is no language in the Constitution providing the President with any immunity from prosecution by the appropriate criminal authorities: he is subject to the ordinary criminal processes of "Indictment, Trial, Judgment and Punishment, according to law." Furthermore, there is not one syllable directly putting the President beyond the reach of the criminal law even if Congress does not impeach.

The argument that the President is immune from the criminal laws is just that — an argument. It involves two issues:

First is the question of whether an obstruction of justice charge can be brought in this case. The President's supporters argue that key elements of any such indictment could not support a conviction. If everything the President did was legal, they say, he could not possibly be convicted of a crime. And indeed the President was legally entitled to ask then–FBI Director James Comey to go easy on former National Security Advisor Flynn, and then to fire Comey for that or any other reason — just as he is legally entitled to fire Special Counsel Robert Mueller, Deputy Attorney General Rosenstein or anybody else in the Department of Justice. But the law is clear: an otherwise legal act can be an obstruction of justice if undertaken for corrupt purposes. Yes, the President has the right to fire the head of the FBI. But there is no Constitutional support for the notion he can do so corruptly to immunize himself from "Indictment, Trial, Conviction, and Punishment" for money laundering (whether involving Russians or otherwise), obstruction of justice, a violation of the election laws or any other felony. An imperial Presidency was the worst fear of the Founders.

The second question is not whether, but when. Can the President avoid indictment while in office? But again, there is no language in the Constitution saying he enjoys any such protection. The Department of Justice itself has made this argument before with regards to Article I Officers. I saw it first-hand. During the then–Vice President Spiro Agnew bribery investigation, our legal team argued on behalf of the Vice President that because he was subject to impeachment under Article II, Section 4, he was immune from criminal prosecution unless and until he had been impeached by the House and convicted by the Senate. In effect, we argued that the Vice President had to be impeached and removed from office first — and then criminal charges could proceed. The Department vigorously rejected that claim. They insisted there was nothing in the Constitution that said impeachment was the exclusive remedy for crimes committed by Article I Officers: the Vice President and, by logical extension, the President could be subject to both impeachment and indictment, even if those proceedings were pursued simultaneously. Surprising no one, the Department was quick to nonetheless urge that President Nixon was immune yet Vice President Agnew was not. But that was based on derived argument — not on the hard Constitutional language that self-proclaimed "conservative" jurists insist is the only real guide to Constitutional interpretation. And the current president has certainly made clear that "conservative" judges are the only ones he will appoint.

A Nixon indictment for his evident criminal conduct in obstructing justice regarding the Watergate break-in and cover-up would certainly have produced an interesting legal battle. But the prosecutors dodged the question by naming him a co-conspirator and not a defendant. So the issue remains judicially undetermined.

Does the recent revelation that Trump went so far as to issue a directive to fire Mueller add weight to an obstruction count? Did the President add to the proof of obstruction by offering three absurd reasons for his decision? Does the President's claim that he is absolutely immune from criminal process while in office offend the fundamental precepts of

the Founders?

The answers to all three questions is “yes.”

If Special Counsel Mueller finds evidence to bring criminal charges against the sitting President, he should obtain a Grand Jury indictment and proceed. If the President wants to fight the legality of the indictment, he should do so in court — not by means of craven Congressmen publishing spurious claims about the integrity of Mueller and his team. That campaign is more than divisive. It smacks of political venality and is a threat to the architecture of our constitutional democracy.

US Constitution, Article I, SECTION. 6.

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They 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 in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.