

Prosecuting a President

Roman Mars: You might have heard this story before.

Elizabeth Joh: On August 2nd, 1804, a New York arrest warrant was issued for a man who'd fired a fatal shot in a duel in Weehawken, New Jersey. Now, murder was a crime in every state, and dueling was also prohibited in most of them. The accused man fled south from New York to Saint Simons Island--that's an island off the Georgia coast. A few weeks later, a grand jury dropped the murder charge. Instead, the charge was less serious. It was sending a challenge to a duel. In late October of that same year, a grand jury in Bergen County, New Jersey, issued an indictment for murder in the same incident--although those charges were later dismissed because the victim had died in New York and not in New Jersey. There were hundreds of men who participated in duels in the early days of the Republic. But this one duel stands out. The victim was Alexander Hamilton, the first Secretary of the Treasury and one of the authors of the Federalist Papers. And the accused? That was Aaron Burr--

Roman Mars: Sir.

Elizabeth Joh: Hamilton's longtime political rival and vice president of the United States. Burr never did stand trial in New York. And in fact, the very next year, in 1805, Vice President Burr would preside over the impeachment trial of Supreme Court Justice Samuel Chase in the Senate. Justice Chase would eventually be acquitted and returned to the Supreme Court until his death in 1811. Burr only found himself in temporary legal peril.

Roman Mars: But another vice president, Spiro Agnew, had it much worse. Even though he didn't murder someone.

Elizabeth Joh: Richard Nixon's vice president first became famous for the phrases he used to attack critics and the media. He called them the "nattering nabobs of negativism" and the "hopeless, hysterical hypochondriacs of history."

Roman Mars: He really liked alliteration--and cash bribes it turns out... Allegedly.

Elizabeth Joh: In 1973, Agnew became implicated in a bribery scandal from the time he'd been Governor of Maryland. In 1973, of course, President Nixon was facing his own legal troubles with Watergate. Ultimately, Agnew pleaded no contest to criminal charges for failing to record on his tax returns cash contributions he'd received. That's basically tax evasion. Agnew received three years' probation and no jail time--but make no mistake, it was a criminal conviction. On October 10th, 1973, when he appeared in federal court, Agnew had his letter of resignation from the vice presidency delivered to Secretary of State Henry Kissinger.

Roman Mars: Now, both of these vice presidents faced criminal charges during their time in office.

Elizabeth Joh: Neither was able to escape criminal prosecution just because of their positions in the executive branch.

Roman Mars: Right now, you might be asking yourself, "That's fine for vice presidents, but what about the president?"

Elizabeth Joh: Can a president face criminal charges while in office? And if not, why not? Why does any of this matter? Because President Trump, less than a year in office, may be implicated in criminal wrongdoing that has already ensnared his former campaign manager, a former campaign aide, a former foreign policy adviser, and most recently, his former national security adviser. Does the Constitution allow the prosecution of a president?

Roman Mars: Let's carefully consider another constitutional conundrum that this current crazy year has conferred upon the constituency. I could totally be vice president. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length where we take the tweets and hopes and dreams and nightmares swirling around the 45th president of the United States and channel that maelstrom into learning our Constitution like we never have before. Our music is from Doomtree Records. Our professor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. First, let's distinguish a criminal prosecution from impeachment.

Elizabeth Joh: The Constitution specifies how certain federal officials, including the president and vice president, can be impeached or removed from office. The House of Representatives decides whether to issue articles of impeachment--these are formal accusations--if it thinks that the person has committed treason, bribery, or other high crimes and misdemeanors. Once that happens, the Senate presides over the trial of the person being impeached.

Roman Mars: Now, all of this sounds like a criminal prosecution, but it really isn't.

Elizabeth Joh: Impeachment is different because of the outcome of a Senate conviction. The person is removed from office. That's it. No other consequences. Now, an actual criminal prosecution, of course, carries with it a lot of possible, very serious consequences: prison fines, probation--things like that.

Roman Mars: No one argues about whether the Constitution itself considers the president subject to impeachment. It is right there in black and white.

Elizabeth Joh: Article II of the Constitution specifically names the president as one of those people who can be subjected to impeachment, conviction, and removal. We've never seen the whole process happen before, but Presidents Andrew Johnson and Bill Clinton came pretty close. Both were impeached by the House and tried by the Senate. Nixon, of course, resigned in 1974 after the House Judiciary Committee approved three articles of impeachment but before the House as a whole voted on them.

Roman Mars: Now, what about the criminal prosecution of a president?

Elizabeth Joh: While a vice president can clearly be prosecuted--and in fact, they have been--it's not quite clear that the president himself could be. Now, if you look at the text of the Constitution itself, there's nothing there that says a president is immune from criminal prosecution. The closest thing that exists in the Constitution's text is actually about impeachment. In Article III, Section 3, it says that "the person removed by impeachment shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law." So, what most people think this means is that a person who has been impeached can also be prosecuted separately. But it doesn't answer the specific question of whether a sitting president--you know, someone who's still in office--can be criminally prosecuted, whether impeached or not.

Roman Mars: The Supreme Court has never decided a case that resolves this question.

Elizabeth Joh: What we do have instead are legal memos written during both the Clinton and Nixon presidencies that give us some opinions on the subject. They're not binding in the way that a Supreme Court case would be. But because they were written to provide official guidance, they're still pretty useful. In 1998, independent counsel Kenneth Starr asked Ronald Rotunda, a well-known conservative law professor and an expert on constitutional law, to write a memo on whether a sitting president--this was Clinton, of course--could be prosecuted. Rotunda responded with a 56-page legal memo. Its basic point was yes. Yes, a sitting president can be prosecuted. Rotunda thought that the president could delay imprisonment but not the prosecution itself. But there's an important qualifier to Rotunda's memo. He said he was analyzing President Clinton's very specific situation. Keep in mind, Clinton was ultimately impeached for obstruction of justice and perjury relating to the Paula Jones case; this was a case that had nothing to do with the presidency itself. Rotunda was saying, "Yep, Clinton can be criminally prosecuted for those things, too." In fact, Rotunda made it clear and said, "I express no opinion as to whether the federal government could indict a president for allegations that involve his official duties as president." And then there's Nixon, who ultimately resigned because of the Watergate scandal. This, of course, involved the president trying to cover up the scandal. In 1973, the Office of Legal Counsel in the Justice Department prepared a legal memo that concluded that a president was immune from criminal prosecution while in office.

Roman Mars: I can see why Nixon wanted that opinion out there.

Elizabeth Joh: In March of 1974, a grand jury handed down indictments--these are formal charges--against seven White House aides regarding Watergate. Now, President Nixon was named as an "unindicted co-conspirator." That term refers to a person who's alleged in an indictment to have engaged in a conspiracy. That's an agreement to do something illegal. But that person is not personally charged in the indictment. Special Watergate prosecutor Leon Jaworski advised the jury that, in his view, a president could not be prosecuted in these circumstances. In another memo dated August 9th, 1974--the same day that Nixon resigned--Jaworski received a memo from his staff answering the question of whether Nixon could now be prosecuted. The memo began with the premise that there was clear evidence that Richard M. Nixon participated in a conspiracy to obstruct justice. So, the memo points to reasons why Nixon should not be prosecuted, including a determination that it might just be good for everyone to move on rather than to aggravate political divisions. But the so-called "Jaworski Memos" also raised some reasons to favor prosecuting Nixon. That included the principle of equal justice under law, which requires that every person--no matter what his past position or office--answer to the criminal justice system for his past offenses.

Roman Mars: And in the case of Nixon, of course, it was all moot because President Ford pardoned him on September 8th, 1974. Ford claimed that the tranquility of the nation could be irreparably lost by the prospects of bringing to trial a former president of the United States.

Elizabeth Joh: Now, if there's any answer to the question of prosecuting a sitting president, it's not going to come from the literal words of the Constitution. But one accepted form of constitutional interpretation is to infer a constitutional idea from the structure of the Constitution.

Roman Mars: In other words, we read the Constitution as a whole and think about how the parts work together.

Elizabeth Joh: In a 2000 memo, the Justice Department's Office of Legal Counsel stated that "neither the text nor the history of the Constitution ultimately provided guidance in determining whether a president is amenable to indictment or criminal prosecution while in office. But if a president could be prosecuted while still in the White House, that might violate the Constitution by preventing the president from doing his job." It's that kind of reasoning that has led the Supreme Court to rule that a president can't be sued in a civil lawsuit for the official acts he takes as president. And it's also led the Supreme Court to decide that a sitting president can be a defendant in a lawsuit for things that have nothing to do with the presidency. The Supreme Court made that decision in the 1997 case of Clinton versus Jones. And of course, it was the aftermath of that case that ultimately led to President Clinton's impeachment.

Roman Mars: So, let's get to Trump.

Elizabeth Joh: Special counsel Bob Mueller has been investigating any possible links between the Russian government and the Trump campaign--an investigation that on May 18th, Trump tweeted as the "single greatest witch hunt of a politician in American history." On December 1st, Trump's national security adviser pleaded guilty to lying to the FBI about conversations he'd had with Russian Ambassador Sergey Kislyak last December. That plea, which was to a relatively minor offense, has been understood to mean that Flynn has now flipped. In other words, he's cooperating with Special Counsel Mueller in exchange for avoiding more serious charges.

Roman Mars: His plea agreement requires his full cooperation.

Elizabeth Joh: As of today, Trump's former campaign chairman, two campaign aides, and now his former national security adviser have now all been charged with felonies.

Roman Mars: So, there's at least two possible problems for Trump.

Elizabeth Joh: First, the statement of facts underlying Flynn's plea agreement said that a, quote, "very senior member of the presidential transition team directed Flynn to contact the Russian government." The statement also says that a, quote, "senior official of the presidential transition team spoke to Flynn about what to say to the Russian ambassador." We don't know who these people are, but we do know this: Flynn was Trump's national security adviser. If he is receiving a deal to avoid greater criminal responsibility, then it's because he has information on other people who are at least as important as or who were more important than he was in the White House. That's not a very large group of people. It might implicate President Trump. Second problem: the day after Flynn entered his guilty plea, Trump tweeted, "I had to fire General Flynn because he lied to the vice president and to the FBI. He has pled guilty to those lies. It is a shame because his actions during the transition were lawful. There was nothing to hide!" Now that's pretty interesting. Remember that President Trump originally justified forcing Flynn out of his position because Flynn had lied to Vice President Mike Pence about his conversations with the Russian ambassador. Flynn formally resigned on February 13th. The next day--Valentine's Day--Trump met with then FBI Director James Comey. According to Comey, Trump said, "I hope you can see your way clear to letting this go--to letting Flynn go. He is a good guy. I hope you can let this go." Comey said he made no promises to Trump. Comey would later publicly testify to all of this in June before the Senate Intelligence Committee. And on May 9th, Trump fired

Comey. If Trump knew, as his December tweet suggests, that Flynn had broken the law by lying to the FBI--and that's certainly a crime--when he asked Comey to lay off of Flynn, could that constitute the crime of obstructing or impeding the investigation of a crime? In other words, did Trump fire Comey for permissible reasons or impermissible ones? Now, if we were talking about an ordinary person--someone who with corrupt intent tries to impede or obstruct an investigation--well, that person is likely going to be guilty of the federal crime of obstruction of justice.

Roman Mars: But Trump is not an ordinary person, to say the least. But what's relevant here is that he's the president of the United States.

Elizabeth Joh: Just a few days after Trump posted that tweet about why he fired Flynn, it seems pretty clear that people in the White House knew that it did not look good. So, on December 4th, the president's lawyer, John Dowd, offered another defense. It's not that Trump personally didn't obstruct justice. It's that no president can obstruct justice under the Constitution. Okay, so let's think about this for a minute. Maybe Dowd meant that it's not obstruction for the president to do things he's already allowed to do, like fire the FBI director or say, "Hey. Drop this case because we have other priorities." But a more extreme version of this defense sounds a bit like the president can do no wrong. And that seems pretty incompatible with a democracy that no one, not the courts and not Congress, can hold a president accountable--that a president is above the law. It's that kind of thinking that led to Charles I losing his head in 1649. And keep in mind that both Clinton and Nixon had obstruction of justice charges levied against them by the House in impeachment proceedings--or at least the beginnings of impeachment proceedings.

Roman Mars: On the other hand, the criminal prosecution of the president while in office would be a destabilizing event for the country.

Elizabeth Joh: The 1973 memo from the Office of Legal Counsel suggested that it might be possible to bring charges against the president. But it offered this note of caution: "Given the realities of modern politics and mass media, and the delicacy of the political relationships which surround the presidency both foreign and domestic 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." So, does the Constitution allow the prosecution of a sitting president for things he has done as president of the United States? The answer is we just don't know for sure. And it's yet another norm breaking question we've had to address in this year of President Trump.

Roman Mars: I think I posed some pretty good follow-up questions for Elizabeth. You can hear them right after this. So, since the vice president is essentially a president-in-waiting, is it possible that the fact that two vice presidents have been criminally indicted could be seen as some kind of precedent that could apply to the position of president as well?

Elizabeth Joh: I think that's hard, in part because of what the Constitution specifically says about the president himself in a way that doesn't refer to the vice president. It says that all of the executive power shall be vested in a president. It doesn't give the vice president that same power. The president is also the commander in chief for example. "He shall take care to faithfully execute the laws." None of these responsibilities are given explicitly to the vice president. So, there's a pretty strong argument in the Constitution that there is something unique and special about that job, which on the one hand, makes the presidency incredibly important for a lot of good and positive things. But when it comes to wrongdoing of this sort, it raises serious questions of could it paralyze the country if a

president engaged in a crime, and we decided that the president had to be prosecuted for it.

Roman Mars: Is there something to the argument that the criminal prosecution of the president would be so disruptive as to make it just a terrible idea, even if it meant that justice isn't being applied equally to every person in the country?

Elizabeth Joh: If you think about how bad an impeachment process is for the country in terms of riveting our attention to it and nothing else, in some ways, a criminal prosecution would be worse because it's a much more severe potential punishment. And I think, you know, on balance, it's not just that it would be bad for the country. I mean, you can even think of it in terms of being a criminal defendant. Imagine being a criminal defendant and being the president of the United States. There really is no possibility of having a fair trial. "Have you, potential jurors, ever heard of the president of the United States? Can you imagine finding a juror who'd say, "I know nothing of this alleged wrongdoing." That would be impossible. And that's a central tenet of the criminal justice system--that we'd want to have a fair and impartial jury. It's really hard to think of a scenario where we'd have such a fair trial being accorded to the president.

Roman Mars: Sometimes I just want things to happen. Maybe it's because I'm a journalist, or maybe it's because I'm just curious. But I can see myself being really excited to live through the indictment of a sitting president. And I don't know what I'm asking here, but how does that sit with you? How does the prospect of that sit with you?

Elizabeth Joh: I think it's more on the scale of also wondering, "Gee, would it be constitutional to order a preemptive nuclear strike?" It's an interesting thing to think about, but I really don't want it to play out in part because the cost would be so enormous to the country. You know, there's a reason that these are hypotheticals. There's a reason why we encountered these questions so rarely. I mean, ultimately, I think what the entire year has shown us is that the buffers here are really about norms. The buffers here are people speaking up and saying, "Let's not get to the ultimate line of constitutional law. Let's think about other protections that are in place." Like, if we're going to place bets, I just don't think this is going to happen. I mean, I think it's far less likely than impeachment, which itself is pretty unlikely. But it raises the question in part because think about the president's lawyer's argument that the president cannot obstruct justice because he is the chief executive official of the United States. That's a remarkable argument. And even if we just debate it in the press, it's worth thinking about. I mean, do we want a president who believes that? That's the question.

Roman Mars: No. That's an easy debate for me. This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at trumpconlaw.com, Facebook, and Twitter. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip-Hop Collective. The music in this specific episode is from Dangerous Jumps, the new full-length album from SHREDDERS. They're currently touring the country right now. You should definitely go see them. Also, Dessa has a new single out that's fantastic and not to be missed. You can find out all about Doomtree Records, get merch, and learn about current tours at doomtree.net. We are a proud member of Radiotopia from PRX, supported by the Knight Foundation and donors who are listeners just like you.