

Criminal Prosecution of an Incumbent President

By John H. Kim, Esq.

“...in America THE LAW IS KING. For as in absolute governments the King is Law, so in free Countries the law ought to be king; and there ought to be no other.”
Thomas Paine, *Common Sense* 57 (Philadelphia 1776)

I) Introduction

Evidences of President Bush’s violations of international law and federal criminal laws are growing daily. The recent disclosure of the secret “Downing Street” memo strongly suggests that the Bush administration deliberately misled the American people in the 2003 invasion of Iraq.¹ Add to this the continuing reports of the U.S. violations of the international humanitarian and human rights laws in Iraq, Afghanistan, Guantanamo Bay, and other secret detention facilities. Above all, consider all the wanton destruction and killing of more than 100,000 Iraqi people² and the unnecessary deaths of more than 1,600 our soldiers! Enough is enough! It is about time for the American people to ask whether President Bush should be held accountable for the crime of aggression, torture, war crimes, and crimes against humanity under the principles of the Nuremberg Judgment.

It will be indeed a travesty of American justice if only a handful of the low-ranking soldiers involved in the torture of the Iraqi detainees at Abu Ghraib are prosecuted, but not the high officials of the Bush administration who made the key policy decisions for the war, treatment of detainees, and occupation in Iraq. Can an incumbent President and other high government officials of the United States be indicted and prosecuted for their criminal actions, aside from being impeached by the Congress?

While there are different legal opinions regarding criminal indictment of an incumbent President, there is a general consensus that Vice President and other “civil officers” of the United States can be indicted and prosecuted while they are still in office, prior to impeachment. This article will show that there are no legal barriers to a criminal prosecution of a sitting President. The best way to prove this truth would be to test the law in the federal court. A clear decision by the U.S. Supreme Court on this question will go a long way in the further promotion of American justice and democracy.

II) Prosecution of Vice President and Other Federal Officials

While there are different legal opinions about the President, there is a general consensus that Vice President and other “civil officers” of the United States can be indicted and prosecuted while they are still in office, prior to any impeachment. There are numerous legal cases that have firmly established this rule. For instance, in 1804, Aaron Burr, while Vice President, was indicted for the killing of Alexander Hamilton both in the state of New York and New Jersey. Burr never claimed any immunity from prosecution in the case, and had to serve out his office with the stigma of indictment.

Likewise, Spiro T. Agnew, while Vice President, was investigated by the U.S. Attorney in Baltimore for allegedly receiving payoffs from contractors when Mr. Agnew was governor of Maryland. Before entering a plea bargain to a reduced charge and resignation, Vice President Agnew made a motion to the federal court to enjoin the grand jury proceedings against him on the ground of immunity while in office. In response, then-Solicitor General Robert Bork filed a brief arguing that “considerations based upon the Constitution’s text, history, and rationale which indicate that all civil officers of the United States other than the President are amenable to the federal criminal process either before or after the conclusion of impeachment proceedings.”³ (underline added for emphasis)

Subsequently, the Office of Legal Counsel of the Department of Justice, under President Clinton, reaffirmed Bork’s conclusion, stating that “the Constitution requires recognition of a presidential immunity from indictment and criminal prosecution while the President is in office.”⁴ This seems to be, undoubtedly, the current position of the U.S. Department of Justice under the Bush administration as well.

III) The U.S. Constitution and the Judicial Interpretation

Does the Constitution really provide such an immunity exception for the President?

The answer seems to be no for many reasons. Above all, no provision in the Constitution explicitly grants the President immunity from criminal prosecution. The only provision that provides any explicit immunity, for limited purposes, is for Members of Congress while they are in session.⁵

The most relevant and contentious provision in the Constitution is in Article I, Section 3, Clause 7: “Judgment in the 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.”(underline added for emphasis). From this, it is clear that an impeached President can be prosecuted thereafter. Does this mean an impeachment must always precede a criminal prosecution? How about the prosecution of a President who underwent but survived an impeachment process? Can such President be still prosecuted while in office?

Many federal judges and Members of Congress, when they were indicted for various crimes, in fact, raised the defense that they could not be prosecuted prior to impeachment or that prior conviction or acquittal in the courts should bar impeachment by the Congress for the same offenses. However, the courts have largely rejected such defenses.⁶ In interpreting Art. I, Section 3, Clause 7 (the Impeachment Judgment Clause), the Court of Appeals in *U.S. v. Isaacs* held that the Clause “does not mean that a judge may not be indicted and tried without impeachment first. The purpose of the phrase may be to assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy...”⁷ Thus, federal judges such as Hastings, Clairborne and Issacs were all prosecuted first, prior to impeachment. In the case of Judge Hastings, he was even acquitted in a jury trial but still impeached by the Congress subsequently.

In other words, impeachment proceeding and criminal prosecution are two distinct, separate processes, although both can be related to each other. According to District Judge Gerhard Gesell:

“Impeachment trials are sui generic: in several instances in the Constitution, impeachment is distinguished from criminal proceedings....The Framers understood that impeachment trials were fundamentally political....”⁸

IV) Immunity of Federal Officials From Criminal Process

It is to be noted that there is a major difference in the American doctrine of immunity from civil liability and immunity from criminal liability. As one law professor observed, “while courts have invented doctrines of official immunity, they have done so only in civil cases, not criminal ones.”⁹ In accord with this view, in *Imbler v. Pachtman*, the U.S. Supreme Court stated that “this Court has never suggested that the policy considerations which compel civil immunity for certain government officials also place them beyond the reach of the criminal law.”¹⁰ In denying immunity for criminal conduct, the Court in *U.S. v. Isaacs* also pointed out that “criminal conduct is not part of the necessary functions performed by public officials. Punishment for that conduct will not interfere with the legitimate operations of a branch of government.”¹¹

Thus, it is not surprising that the interest of criminal justice and public interest overruled the claims of executive privileges of the President, as Nixon was forced to turn over records of his conversation with his advisers in response to a subpoena in a criminal case.¹² Due to the disclosure of the White House tapes and documents relating to the Watergate break-in, Nixon became the first President to resign his office as the impeachment proceedings started. Although he was not impeached, Nixon faced the distinct possibility of a criminal prosecution after his resignation. Thus, he sought and received a pardon from criminal liability by his successor, President Ford.

Even the Congress is in agreement with the above general rule that all federal officials are subject to criminal law and process. In the aftermath of the “Watergate” scandal, the Congress established the office of “special prosecutor” under the Ethics in Government Act in 1978. The law, although expired now unfortunately, specifically authorized the special prosecutor (a.k.a. “independent counsel”) to prosecute certain high officials, including the President.¹³

V) Investigation and Prosecution of President

Past history shows that there has been a general reluctance by the special prosecutors to indict a sitting President for various reasons. Chief among these are respect for the office as the Chief Executive Officer and the availability of the impeachment route. However, these personal or policy considerations do not justify a legal conclusion that an incumbent President cannot be prosecuted.

In 1973, President Nixon’s Attorney General named a Democrat, Archibald Cox, as special prosecutor to investigate and prosecute the Watergate scandal. But President

Nixon fired Cox because the special prosecutor was investigating him too aggressively. Then, Leon Jaworski was named to continue the prosecution. Although there was clear evidence of Nixon's participation in "a conspiracy to obstruct justice," Jaworski declined to prosecute him because he believed that the "impeachment process should take precedence over a criminal indictment."¹⁴ Nevertheless, his legal staff submitted a legal memo to Jaworski which strongly endorsed the right to indict a sitting President:

"As we understand it, the conclusions regarding indictment of an incumbent President reached by the Dept. of Justice, the U.S. Attorney's Office, and this office, are all consistent: there is nothing in the language or legislative history of the Constitution that bars indictment of a sitting President....."¹⁵

In the perjury case of President Clinton, regarding his sexual relations with Monica Lewinski, Special Prosecutor Ken Starr also took the easy route by referring the evidences he collected in the case to the House of Representatives for impeachment. Clinton was then impeached by the House in December 1998 but acquitted by the Senate in Feb. 1999. Interestingly, after Starr's resignation, Special Prosecutor Robert Ray impaneled a grand jury in July 2000 "to consider indicting Clinton after he left office."¹⁶ Although "sufficient evidence existed to prosecute President Clinton," Clinton avoided prosecution by striking a deal with Ray on January 19, 2001, the day before he left the White House. The deal required Clinton to admit publicly of giving a false testimony in a judicial proceeding and accept a 5-year suspension of his law license in Arkansas along with \$25,000 fine.¹⁷ Although the penalty is civil in nature in connection with a legal disciplinary proceeding, it is significant that Clinton was forced to admit his perjury under a strong pressure of Ray to prosecute him. Thus, it can be argued that a sitting President was subjected to a criminal prosecution process, even though Clinton got away with little punishment.

In any case, the general trend in the post-WWII international law has been to deny criminal immunity for heads of state for serious violations of international humanitarian law such as genocide, crime of aggression, war crimes or crimes against humanity.¹⁸ A good case in point is the indictment of then-President Charles Taylor of Liberia for the crime against humanity by the Special Court for Sierra Leone, which was set up by an agreement in 2002 between the United Nations and the Republic of Sierra Leone.

Under the current regulations of the Department of Justice, the U.S. Attorney General may appoint an outside "special counsel" to conduct a particular investigation when the prosecution by the U.S. Attorney's Office "would present a conflict of interest" and such appointment "would be in the public interest."¹⁹ Since Attorney General Alberto Gonzales worked closely with President Bush as his former White House Counsel, he has a conflict of interest. Therefore, he should step aside and let the Deputy Attorney General appoint a special prosecutor to investigate and prosecute the President for his probable violations of the federal criminal laws, including false statement, conspiracy, murder, torture, and war crimes

VI) Conclusion

Nothing in the international law, U.S. Constitution, federal statutes or court cases provides a blanket immunity for an incumbent President or other federal officials from criminal prosecutions. History and public policy also argue against such an immunity. As the U.S. Supreme Court pointed out long ago, “no man in this country is so high that he is above the law...All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.”²⁰ It is high time for the American people to uphold and defend this fundamental principle of equal justice for all, which is one of the most important American values now ingrained in the 14th Amendment of the Constitution (“equal protection of the laws”).

The crimes Bush and his gang committed are far more serious than what Nixon or Clinton did. And yet, both Nixon and Clinton were impeached by the Congress at least. Unfortunately, in the case of Bush, it seems there is little prospect that he will be impeached by the Republican-dominated Congress. However, the serious nature of Bush’s crimes demands a serious prosecution and punishment, not just an impeachment, if justice is to prevail. Since it is doubtful that the current officials in the Department of Justice will dare, on their own initiatives, to investigate and prosecute Bush, Cheney, Rumsfeld, and other high officials involved in the high crimes, it is now up to the “We the People” to accept the challenge of writing the necessary criminal charges and present the complaint to the Justice Department, taking it to the court if necessary.

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¹ “The Secret Downing Street Memo,” *The Sunday Times*, May 1, 2005.

² See “Mortality Before and After the 2003 Invasion of Iraq: Cluster Sample Survey,” *The Lancet*, Oct. 29, 2004 (published online, <http://image.thelancet.com/extras/04art10342web.pdf>)

³ Memorandum for the United States Concerning the Vice President’s Claim of Constitutional Immunity, filed Oct. 5, 1973, D. Md. No. 73-965.

⁴ Memorandum from Randolph D. Moss, Asst. Attorney General, *Re: A Sitting President’s Amenability to Indictment and Criminal Prosecution*, Oct. 16, 2000.

⁵ See Art. I, Section 6.

⁶ See *U.S. v. Isaacs*, 493 F.2d 1124; *U.S. v. Hastings*, 681 F.2d 706; *U.S. v. Claiborne*, 727 F.2d 845; *Burton v. U.S.*, 202 U.S. 344; and *U.S. v. Helstoski*, 442 U.S. 477.

⁷ *U.S. v. Isaacs*, 493 F.2d 1124, 1142.

⁸ *Hastings v. U.S. Senate*, 716 F. Supp. 38, 41 (D.D.C. 1989).

⁹ Eric M. Friedman, “To Catch a King,” *Legal Times*, March 19, 1997.

¹⁰ 424 U.S. 409, 429 (1976); See also *Gravel v. U.S.*, 408 U.S. 606, 627.

¹¹ *U.S. v. Isaacs*, 493 F.2d 1124, 1144.

¹² *U.S. v. Nixon*, 418 U.S. 683 (1974).

¹³ *See* 28 U.S.C. 591- .

¹⁴ 1975 Report of the Watergate Special Prosecutor Task Force, at 122; *See also* Ken Gormley, “Impeachment and the Independent Counsel: A Dysfunctional Union,” *51 Stanford Law Review* 309, 345 (1999). Gormley states that Jaworski also wanted to help the Congress since Nixon refused to cooperate with the subpoena issued by the House Judiciary Committee.

¹⁵ Memorandum dated Feb. 12, 1974, p. 10; *See 27 Hofstra Law Review* 677, Appendix, 1999.

¹⁶ *CNN*, Jan. 21, 2001.

¹⁷ *AP*, March 6, 2002.

¹⁸ *See* Nuremberg Principles; 1948 Convention on the Prevention and Punishment of the Crime of Genocide; also the 1998 Rome Statue of International Criminal Court.

¹⁹ *See* 28 C.F.R.. 600.1.

²⁰ *U.S. v. Lee*, 106 U.S. 196, 220 (1882).