

# BOZEMAN DAILY CHRONICLE

## **Francis Wilkinson: Impeachment and the 'preposterous' power of the presidency**

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December 7, 2018

Robert Bauer served as counsel to President Barack Obama's 2008 and 2012 presidential campaigns and as White House counsel from 2009 to 2011. One of the leading experts in U.S. laws regulating political activity, he teaches law at New York University. In late November we communicated via email. What follows is a lightly edited transcript.

Wilkinson: Does the Office of White House Counsel serve a president or the presidency? How can we tell?

Bauer: The White House Counsel is a government lawyer, paid by the taxpayers, and the president as chief executive is the counsel's "client." In other words the counsel is neither the personal lawyer to the president nor the lawyer for his personal political projects, like a re-election campaign.

At the same time, it complicates matters that the chief executive being counseled is a specific president with a specific program, elected on a promise to advance certain policies and whose political fortunes and prospects for success in policy making are not easily separated. So the line-drawing can be challenging.

It helps to have a president who understands where the line falls between institutional responsibilities and a personal political agenda, and who therefore doesn't make unreasonable demands on the lawyer. I'm not naming names: It is clear whom I have in mind, and it is not the president I worked for. It is also helpful, perhaps indispensable, for the White House counsel to have the support of the senior staff in acting within the boundaries of his or her appropriate institutional role.

One example, drawn from a real-life set of events: A president is infuriated with an attorney general who has recused himself from an investigation directly affecting the president's political and legal affairs. The attorney general is confident that he is complying with the terms of the relevant recusal regulations.

The president is unimpressed. He directs the White House counsel to demand an accounting from the attorney general. The counsel can certainly ask the question: What is the basis for your legal conclusion that the recusal rules apply to you in these circumstances? If, however, it is the president's purpose to have the counsel pressure the attorney general to ignore recusal rules or seek to evade them with an untenable, bad faith interpretation of their scope, the White House counsel would be working toward an improper end and should decline the assignment.

Wilkinson: What you're describing, I believe, is a job that is shaped to a large degree by the personal ethics and professional integrity of the person who holds it. That's true to a very large degree of the president, as well. You can be a surprisingly crooked president if you lack a moral compass and you are unconstrained by the majority party. Has the Trump administration caused you to rethink anything about presidential powers or the constitutional system?

Bauer: The experience with Donald Trump and his administration is forcing a reckoning with a problem that has been obvious for some time: the preposterous power, responsibility and expectations that have come to define the office of the presidency. And yet, in a devil's bargain that we have also seen, the metastasis of institutional authority and policy making latitude represents for each of the major parties both a horror and an opportunity — that is, they take offense at the expansion of presidential power except in the circumstances where they would like to take advantage of it.

At the same time that we have an office that is so exceptionally powerful and susceptible to abuse, we have a candidate selection system that is arbitrary, and a competition for this inviting constitutional prize that is wide open. Anyone can apply with some hope of success, and, increasingly, anyone does.

We can blame Donald Trump's instrumental view of the law for his assumption that he should be able to control the Department of Justice and wield its powers as he pleases to punish his political enemies and protect himself and his family. Without a doubt, we can look for an explanation of this outlook and behavior in deep character flaws — including a fundamental amorality.

But we should not discount the risk we have always run of choosing for this office someone lacking in any relevant experience and poorly equipped by any measure to meet the demands of the job. Trump comes to government without any understanding of how government works, of norms governing the exercise of his own authority, and so forth. Add to that the absence of a moral compass or appreciation of the role of lawyers or the rule of law, and the scale of this problem we face with the presidency in the constitutional order — a problem we have every reason to believe could arise again after Trump — could not be clearer.

Wilkinson: When he was White House counsel, Donald McGahn is reported to have dissuaded Trump from ordering the U.S. attorney general to prosecute two of Trump's perceived enemies, Hillary Clinton and James Comey. Can you provide some insight into what is going on here, even though I'm guessing you have never had this kind of experience? Did McGahn do the right thing by burying this? Should he have resigned and alerted Congress that the president is a threat to democracy? Or is blunting a president's despotic impulses just part of the counsel's portfolio?

Bauer: You rightly suspect that I have not had experience with a dangerous presidential urge of this kind. Would it be enough in this situation to stop the president from ordering a political prosecution? Should the lawyer do more by resigning and alerting the Congress?

It's difficult to say without knowing the surrounding circumstances. Let's say a president routinely flies into rages during which he spouts nonsense, but he typically can be calmed and restored to his senses. Then the counsel is well advised to contribute what he can to a successful staff intervention.

But if it appears that the intervention is failing and the president is hell-bent on finding a way to use the justice system for political purposes, then the lawyer — who is a servant of the public, not of the autocrat — should resign and report this behavior to the Congress and the public.

To “bury” or not to “bury” knowledge of this behavior depends on what is being interred: information about a president’s mindless but eventually harmless outbursts, or corruption?

Wilkinson: In a similar vein, negotiations over sworn presidential testimony can be driven by legitimate efforts to preserve presidential prerogatives or perhaps less noble impulses. How do you view the lengthy negotiations between special counsel Robert Mueller’s office and the White House counsel over Trump testimony in Mueller’s investigation? Can you compare this extraordinarily lengthy process with similar negotiations in previous administrations?

Bauer: I have not compared these negotiations in any detail to others in the past. One could say that these are second to none in being public, protracted and acrimonious. And this is not surprising, given Trump’s repeated attacks on the special counsel and his motivations.

There are additional aggravating factors. It’s not entirely clear who’s in charge of the president’s legal team, Trump is a very difficult client; former close associates like Michael Cohen are giving damaging testimony against him; and this president may have very powerful, self-protective reasons to avoid or limit questioning about the specific matters that the special counsel wants to explore.

Wilkinson: Congress has acceded to the growth of presidential power in general over many years and to the lawless impulses of this president over the preceding two years. You seem to believe that every president is now too powerful, and that this one, given his character, most certainly is. What is to be done, both in the general case of too much power concentrated in the presidency and in this particular instance?

Bauer: It’s a difficult problem, because at the root is public expectation. Gene Healy of the Cato Institute wrote some years ago an excellent book entitled “The Cult of the Presidency.” He writes that “few Americans find anything amiss in the notion that it is the president’s duty to solve all large national problems and to unite us all in the service of a higher calling. The vision of the president as national guardian and redeemer is so ubiquitous that it goes unnoticed.”

The flip side of what passes sometimes for this almost religious devotion is the inevitable rage at results that do not materialize. This is a deeply unhealthy state of affairs.

The re-invigoration of democracy requires renewed attention to all the other formal institutions and informal channels for political participation and problem solving. Institutional imbalances, like that between Congress and the executive, have to be rectified — no easy challenge in an age of polarized partisan politics.

Congress certainly has to do better in holding up its part of the constitutional bargain. And, speaking of the current incumbent, when a president crashes through one norm after another and lies so methodically that even his political supporters concede the point, this behavior cannot go unaddressed.

It is impossible to say now where all this will end. But we have to slowly get away from the idea that impeachment is a source of constitutional crisis rather than a constitutional response to crisis brought on by systematic executive misconduct.

If the record supports it, and there is growing evidence that it does, Congress should not hesitate to initiate a full-fledged and well-designed inquiry into grounds for impeachment. Whatever the outcome, there is enormous merit in clearly identifying and enforcing limits and putting future executives on notice.