



Four Ways Not to Indict Donald Trump

Benjamin Parker

August 1, 2019

For all political purposes, it appears that the Mueller moment has come and gone. Hardly anyone read his report, including members of Congress. President Trump's "No collusion, no obstruction, total exoneration" line, with the help of Fox News and others, hermetically sealed most Republicans from the damning results of the investigation. Democrats failed to capitalize on their opportunity, and Mueller's congressional testimony last week, which was never likely to be a showstopper, failed to light a fire under anyone except Louie Gohmert.

House Judiciary Chairman Jerry Nadler's insistence that his committee is conducting an impeachment inquiry under another name suggests any real appetite for impeachment has faded away. After all, if there was any momentum for impeachment articles or even a real inquiry, why disguise it?

There's always a chance that something extraordinary could happen to force the president from office. If the Trump era has taught us anything, it's that anything is possible. But assuming that doesn't happen, the failure of impeachment leaves a terrible precedent and no good options.

The President of the United States is an unindicted co-conspirator in an election law violation, and would surely stand accused of obstruction of justice (likely multiple counts) if he were anyone other than the president. He's in the unprecedented position of seeking reelection not only to prolong his term of office but also to avoid prison.

Impeachment was designed as a Congressional check on the president — a way of enforcing the rules against the rule-enforcer — but it has never been as strong a tool as a plain reading of the Constitution would suggest. Andrew Johnson was acquitted by a single vote of breaking the Tenure of Office Act, a law Congress had specifically passed over Johnson's veto to constrain him. Not an auspicious start.

Nixon resigned before Congress had time to impeach him. Ford's blanket pardon did much to soothe the country, but didn't set a very good precedent for enforcing laws and norms against delinquent presidents.

Congressional Democrats exacerbated the problem in 1999, when they opposed the Clinton impeachment on an almost perfect party-line vote (no Senate democrats voted to convict), clearly stating their preferences for party solidarity over the rule of law.

Any wonder that Speaker Pelosi refuses to mention the "i" word? There's no point in wasting all that time and energy on a process that has an 0-for-3 record.

The new norm that presidents can get away with whatever they want because their parties consider them too big to fail. If the country is to right itself, there has to be some other method of enforcing criminal laws against the president.

There are at least four ways this might be accomplished, although none of them is very good. Any one-off, extraordinary measure to enforce the law against Trump would risk setting an over-expansive precedent that could be used against any former president – or even any politician.

First, Trump could face delayed prosecution on obstruction charges. If he doesn't win reelection, the statute of limitations on obstruction of justice will not have run out by the time Trump returns to private life. A federal prosecutor under a successive administration could convince a grand jury to return an indictment on January 21, 2021.

Yet this solution breaks one norm to save another. Criminal law must never be used for political retribution. As warranted as it may be, indicting the previous president of a different party looks a lot like political law enforcement. That's banana republic stuff, and we've had enough norm-smashing as it is.

Second, Trump could also face charges related to his hush money to Stormy Daniels. In the same vein, a U.S. attorney could secure a post-presidency indictment for conspiracy in the Stormy Daniels case, in which Trump is already an unindicted co-conspirator. The advantage here is that the relevant facts of the case all occurred before Trump was president, so such an indictment would be less likely to be perceived as political retribution for Trump's conduct while in office.

But this could easily come across as an indictment for the way Trump won the election, which arguably might be worse. Given that the case rests on relatively shaky ground as it is—the only cases of this type resulted in a hung jury and a guilty plea, never a conviction—it could easily look like a political indictment for having won the election. That's not a very good precedent to set, either.

Third, some enterprising federal prosecutor might think to avoid these political nettles by bringing an indictment for something that has nothing to do with the Trump administration or campaign. Surely, there's some federal crime—money laundering, tax fraud, conspiracy against the United States, take your pick—of which Trump was guilty long before he descended the golden escalator.

There are a few problems with this, too. The federal statute of limitations generally runs for five years. Trump's presidential campaign formally launched on June 16, 2015. Filing charges after the end of Trump's term for conduct committed before his campaign would therefore be difficult if not impossible.

That's on top of the problem of treating every president like Al Capone. There are more federal crimes on the books than anyone has ever been able to count. Even the Justice Department gave up when it tried to tally them all in 1982. If a prosecutor wanted to pour the time and resources into charging a particular person with some federal crime, chances are they could find one. Harvey Silvergate of the CATO Institute estimated in 2009 that the average person unwittingly commits three federal felonies every day. One can only imagine what the average might be

for politicians. Somehow finding a pretext to prosecute former politicians doesn't smack of a well-functioning republic any more than unearned clemency does.

Fourth, some state attorney might take the law into their own hands. The state's attorney for Palm Beach County, home of Mar-a-Lago, is a Democrat. Hard to find a better way to make a name for yourself in today's Democratic party than to perp-walk Donald Trump.

As long as you're fine with the state's attorney in Alabama or Utah arresting Barack Obama the next time he visits. Precedents are tricky things.

The one tool the founders invented to make sure presidents obey the laws they swear to uphold is broken. Normal law enforcement won't work. There's no way of ensuring that presidents don't abuse their power, because no matter what, their parties will support them, and that's enough to stay in office.

None of this would be a problem if we chose higher-caliber people as our leaders, but that doesn't seem to be very important to the electorate lately.