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Presidential Immunity from Prosecution: Tolling the Statute of Limitations

*Margit Livingston**

In 1998 Brett M. Kavanaugh, having recently left the position of associate counsel in the Office of the Whitewater Independent Counsel, published a law review article in which he argued that sitting presidents cannot be indicted.¹ He called for Congress to pass a statute making that prohibition explicit.² But he also urged Congress to enact legislation tolling³ the statute of limitations during the period of a presidency for any offenses committed by the president against the United States.⁴ It is time for Congress to take Justice Kavanaugh up on his second recommendation.

The Mueller Report did not exonerate President Donald Trump from having engaged in obstruction of justice before and during his presidency.⁵ Hence President Trump may or may not have commit-

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1. Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2146 (1998). Brett Kavanaugh, of course, was confirmed as Associate Justice of the United States Supreme Court on October 6, 2018. Deanna Paul, *With Kavanaugh Confirmed, Impeachment Could Follow. Here's How*, WASH. POST (Oct. 6, 2018, 2:11 PM), <https://www.washingtonpost.com/politics/2018/10/04/if-kavanaugh-is-confirmed-impeachment-could-follow-heres-how/>.

2. Kavanaugh, *supra* note 1, at 2146.

3. Tolling means to stop or suspend the running of a limitations period. *Pearson Dental Supplies, Inc. v. Superior Court*, 229 P.3d 83, 88 (Cal. 2010); *Castro v. Stanwood Sch. Dist. No. 401*, 86 P.3d 1166, 1168 (Wash. 2004). One court explained the concept as follows: "Tolling may be analogized to a clock that is stopped and then restarted. Whatever period of time that remained when the clock is stopped is available when the clock is restarted, that is, when the tolling period has ended." *Woods v. Young*, 807 P.2d 455, 461 n.3 (Cal. 1991).

4. *Id.*

5. 2 ROBERT S. MUELLER, III, U.S. DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 2 (2019), https://www.justice.gov/storage/report_volume2.pdf ("The evidence we obtained about the President's actions and intent presents difficult issues that prevent us from conclusively determining that no criminal conduct occurred. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.").

ted federal crimes.⁶ The statute of limitations for most federal criminal offenses is five years.⁷ If President Trump is re-elected in 2020⁸ and serves another full term, the five-year statute of limitations for federal crimes will have expired for acts committed in 2017 or earlier by the time that he leaves office in January 2025.

Several authorities agree that a sitting president may not be indicted, and that impeachment is the only remedy available if a president has committed criminal acts in office.⁹ The Mueller Report itself emphasizes that it would be unfair for a prosecutor to bring even a sealed indictment against a sitting president or to suggest in an official report that the president is guilty of criminal offenses.¹⁰ Thus, a president is immune from prosecution while in office and may go unpunished for criminal offenses committed before or during his term because of the running of the statute of limitations.

Arguably, no public official, even or especially the president, should be able to escape the consequences of his or her crimes—particularly those that go to the heart of our rule of law and the integrity of our election system. In this case, President Trump may be completely innocent of any offense, including obstruction of justice.

6. See Bret Stephens, *Donald Trump's High Crimes and Misdemeanors*, N.Y. TIMES (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/opinion/donald-trump-cohen-impeachment.html> (discussing some of the possible federal crimes that President Trump has committed); Benjamin Wittes, *Five Things I Learned from the Mueller Report: A Careful Reading of the Dense Document Delivers Some Urgent Insights*, ATLANTIC (Apr. 29, 2019), <https://www.theatlantic.com/ideas/archive/2019/04/ben-wittes-five-conclusions-mueller-report/588259/>.

7. 18 U.S.C. § 3282 (2018).

8. Although President Trump's approval ratings are not strong, one recent analysis of his reelection prospects concluded that his "advantage in the Electoral College, relative to the national popular vote, may be even larger than it was in 2016." Nate Cohn, *Trump's Electoral College Edge Could Grow in 2020, Rewarding Polarizing Campaign*, N.Y. TIMES (July 19, 2019), <https://www.nytimes.com/2019/07/19/upshot/trump-electoral-college-edge.html> (citing an Upshot analysis of election results and polling data).

9. Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS J. OPINION 11, 11 (1997); Philip C. Bobbitt, *Impeachment: A Handbook*, 128 YALE L.J. F. 515, 564 (2018); Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Office of Legal Counsel, Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office 16 (Sept. 24, 1973), <https://fas.org/irp/agency/doj/olc/092473.pdf>; A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 236–37 (2000), <https://www.justice.gov/olc/file/626926/download>.

10. MUELLER, *supra* note 5, at 2 ("An individual who believes he was wrongly accused can use [the judicial] process to seek to clear his name. In contrast, a prosecutor's judgment that crimes were committed, but that no charges will be brought, affords no such adversarial opportunity for public name-clearing before an impartial adjudicator.").

But the criminal justice system should be permitted to function against him as it would against any other citizen. The maxim that no person is above the law should be more than a hollow promise.

I. STATUTES OF LIMITATIONS AND POLICY CONSIDERATIONS

Statutes of limitations, which have existed for centuries in Anglo-American law, restrict the time period during which a civil or criminal action may be brought.¹¹ They serve three primary purposes in the criminal context: prevention of stale claims, repose within the justice system, and diligence in prosecution of claims.¹²

First, statutes of limitation are designed to prevent the prosecution of stale claims where important evidence may have been lost.¹³ Documents may be lost, and witnesses' memories may fade with the passage of time. A defendant cannot mount a proper defense or receive a fair trial if evidence has disappeared or has been compromised.

The second purpose of limitation periods is to provide repose to defendants and to the court system.¹⁴ If the statute of limitations is unlimited, defendants never know when they will be free from civil suit or criminal indictment, and courts face the prospect of dealing with old cases that clutter the docket years after the claim accrued or the crime was committed. That said, some offenses, such as murder, are so heinous that in many jurisdictions, there is no statute of limitations applicable to them.¹⁵

Finally, the criminal limitations statutes encourage prosecutors to investigate suspected criminal activity diligently and bring charges promptly.¹⁶ Knowing that limitations periods will bar stale claims,

11. See G. Robert Blakey, *Time-Bars: Rico-Criminal and Civil-Federal and State*, 88 NOTRE DAME L. REV. 1581, 1663–64 (2013) (noting that the first permanent English statute of limitations in civil actions dates from 1540 during the reign of Henry VIII).

12. *Toussie v. United States*, 397 U.S. 112, 114–15 (1970).

13. *United States v. Gouveia*, 467 U.S. 180, 192 (1984); *United States v. Barraza-Lopez*, 659 F.3d 1216, 1220–21 (9th Cir. 2011).

14. *United States v. Marion*, 404 U.S. 307, 322 n.14 (1971); *United States v. DeLia*, 906 F.3d 1212, 1217, 1222 (10th Cir. 2018).

15. See, e.g., 18 U.S.C. § 3281 (2018); ARK. CODE ANN. § 5-1-109(a)(1) (2019); NEV. REV. STAT. ANN. § 171.080 (2019); *United States v. Gallaher*, 624 F.3d 934, 940–41 (9th Cir. 2010).

16. *United States v. Kozeny*, 541 F.3d 166, 172 (2d Cir. 2008).

prosecutors are encouraged to investigate possible offenses while the evidence is still fresh and witnesses' memories sharp.

In considering whether the five-year federal statute of limitations should be tolled with respect to possible crimes that a president commits before or after assuming office, one should balance the concerns about stale claims and repose against the broader policy of effecting justice through holding individuals accountable for their crimes. Arguably, in President Trump's case, because the Mueller investigation preserved many of the key documents and witness statements related to a possible obstruction charge, the problem of missing or suspect evidence is reduced if not eliminated. Regarding repose, President Trump is hardly unaware of the investigation into his actions and his potential culpability for federal offenses. He must know that if he loses the 2020 presidential election, the five-year statute of limitations will not have run out, and he will be vulnerable to prosecution. The need to avoid stale claims and achieve repose theoretically will still be served in many instances involving presidential misconduct because of the high-profile nature of these cases.

II. MECHANISMS FOR TOLLING

Traditionally, federal statutes of limitations may be tolled in a variety of ways, including special legislation, the use of a sealed indictment, and the judicial application of equitable tolling. These mechanisms reveal that tolling, while possible, is a relatively rare phenomenon.

A. Special Tolling Legislation

Congress may pass a statute specifically tolling a statute of limitations in certain circumstances. Congress has done so where there are certain impediments to the timely commencement of an action. There are numerous statutes of limitations that provide for tolling in various federal civil actions.¹⁷

17. See, e.g., 28 U.S.C. § 2401(a) (2018) ("The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."); *Giel v. Winter*, 503 F. Supp. 2d 208, 211 (D.D.C. 2007) (citing 50 U.S.C. app. § 526(a) ("[T]he period of a service member's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any necessary action or proceeding in court.")).

On the criminal side, Congress has enacted at least four laws tolling a statute of limitations. Under the first, the statute will toll when a court dismisses an indictment brought within the applicable limitations period.¹⁸ If the dismissal occurs after the statute has expired, the prosecutor has six months from the date of the dismissal in which to bring the indictment again.¹⁹ Congress created this tolling provision to allow prosecutors to refile indictments where a court has dismissed them on technical grounds.²⁰ In other words, rather than allow a defendant to escape justice because of a technical error in the initial indictment, Congress permits prosecutors to file an amended indictment within a relatively short period of time.

Under the second tolling statute, Congress tolls the statute of limitations where the putative defendant is “fleeing from justice.”²¹ The obvious purpose here is to prevent criminal suspects from avoiding prosecution by absenting themselves from the country or going into hiding. Suspects cannot evade the limitations period by remaining unreachable until that period has expired.²²

The third tolling statute allows a district court to suspend the running of the limitations period when evidence of a crime reasonably appears to be in a foreign country.²³ The prosecutor applying for the suspension must show that an official request for the evidence has been made to the appropriate foreign authority.²⁴ Suspensions allowed under this provision cannot exceed three years.²⁵ Through this tolling provision, Congress recognizes that a prosecutor’s collection of evidence in a foreign country may be arduous and time-consuming. Because of those difficulties, federal prosecutors should have extra time to procure the necessary evidence from overseas.

18. 18 U.S.C. § 3288 (2018).

19. *Id.*; *United States v. Shipsey*, 363 F.3d 962, 970–71 (9th Cir. 2004).

20. *United States v. Hill*, 494 F. Supp. 571, 580 (S.D. Fla. 1980).

21. 18 U.S.C. § 3290 (2018).

22. Under this tolling provision, the government must prove that the defendant intentionally fled or remained concealed to avoid prosecution. *United States v. Greever*, 134 F.3d 777, 780 (6th Cir. 1998). The defendant’s intent to evade prosecution “can be inferred from the defendant’s knowledge that he was wanted and his subsequent failure to submit to an arrest.” *Id.*

23. 18 U.S.C. § 3292 (2018).

24. *Id.*

25. *Id.*

Under a fourth federal tolling provision, Congress has suspended the statute of limitations for pecuniary crimes committed against the United States during wartime.²⁶ The limitations period does not run until “[five] years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.”²⁷ This law acknowledges the opportunity for fraud in government contracts executed hastily while the United States is at war, as well as the difficulty of prosecuting fraudfeasors while the conflict is ongoing.²⁸

Congress has exercised its power to curtail the statute of limitations for federal crimes in the instances outlined above, thus acknowledging that it is appropriate to extend the limitations period in certain circumstances: where a defendant is in hiding, where war prevents prompt prosecution of pecuniary crimes against the government, and where evidence is difficult to obtain. These circumstances arguably are present in any situation in which a sitting president is suspected of having committed federal offenses either before or after he assumed office. If a sitting president cannot be indicted, he or she is essentially unavailable for prosecution, like a defendant in hiding. The term of the presidency is analogous to a wartime situation where the government is unable as a practical matter to indict and try a defendant without interfering with the conduct of the government. And if a sitting president cannot be subpoenaed, then crucial evidence will be unavailable until after the president leaves office. These analogies should spur Congress to enact a law that tolls the statute of limitations for federal crimes while the president is in office.

B. Use of a Sealed Indictment

Another mechanism for tolling the criminal statute of limitations is the use of a sealed indictment. Once a prosecutor brings such an indictment, the statute of limitations tolls at that point.²⁹ But the

26. 18 U.S.C. § 3287 (2018).

27. *Id.*

28. *Bridges v. United States*, 346 U.S. 209, 218–19 (1953). The suspension provision applies only to criminal offenses and not civil fraud claims. *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1978 (2015).

29. Federal district courts have broad discretion to seal an indictment “when it is in the public interest or serves a legitimate law-enforcement purpose.” *United States v. Ellis*, 622 F.3d 784, 792 (7th Cir. 2010); *United States v. Wright*, 343 F.3d 849, 857 (6th Cir. 2003); *United*

same authorities asserting that the United States Attorney cannot indict a sitting president also state unequivocally that sealed indictments are forbidden as well.³⁰ Accepting that premise, the federal prosecutor must seek other methods to toll the five-year criminal statute of limitations.

C. The Judicial Doctrine of Equitable Tolling

In addition to the mechanisms described above, federal courts have sometimes used the doctrine of equitable tolling to extend the limitations period. Federal civil statutes of limitations may be tolled for equitable reasons, such as government misconduct or deception, as long as the plaintiffs pursued their claims with reasonable diligence.³¹ In these cases, courts have said that the statute of limitations should be tolled “as a matter of fairness.”³²

Criminal statutes of limitations, however, are rarely tolled in this way,³³ and the standard for the application of equitable tolling is vague. The presumption is in favor of repose—that is, if the prosecutor has filed charges after the limitations period has run out and the defendant escapes justice, that result is unfortunate but inevitable.³⁴ Apart from the defendant’s “intentional inducement or trickery,” a federal court will toll a criminal statute of limitations only in “the rare situation where equitable tolling is demanded by sound legal principles as well as the interest of justice.”³⁵

In connection with federal criminal cases, equitable tolling arises most commonly where an incarcerated defendant files a petition for habeas corpus. In those situations, courts will apply equitable tolling

States v. Thompson, 287 F.3d 1244, 1251 (10th Cir. 2002); United States v. Sharpe, 995 F.2d 49, 50 (5th Cir. 1993).

30. MUELLER, *supra* note 5, at 2.

31. United States v. Kwai Fun Wong, 575 U.S. 402, 411–12 (2015); Land Grantors in Henderson v. United States, 64 Fed. Cl. 661, 713 (2005).

32. Johnson v. Nyack Hosp., 86 F.3d 8, 12 (2d Cir. 1996).

33. See Wallace v. Kato, 549 U.S. 384, 396 (2007) (“Equitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs.”); Gardner v. Davis, No. 4:19-2185, 2020 U.S. Dist. LEXIS 53457, at *13 (S.D. Tex. Mar. 27, 2020) (“Equitable tolling is an extraordinary remedy which is sparingly applied.”); Binkley v. Ryan, No. CV 18-08243 PCT DLR (CDB), 2019 U.S. Dist. LEXIS 229434, at *7 (D. Ariz. Apr. 29, 2019) (“Equitable tolling is to be rarely granted.”).

34. Toussie v. United States, 397 U.S. 112, 115 (1970); United States v. Miller, 911 F.3d 638, 645 (1st Cir. 2018); United States v. Grimm, 236 F.3d 452, 456 (8th Cir. 2001).

35. United States v. Atiyeh, 402 F.3d 354, 367 (3d Cir. 2005).

only when defendants show they pursued their rights with reasonable diligence, and “extraordinary circumstances” prevented them from asserting those rights.³⁶ To prove extraordinary circumstances, a habeas petitioner must establish “either that he has been actively misled, that he was prevented from asserting his rights in some extraordinary way, that he timely asserted his rights in the wrong forum, or that the court misled him regarding the steps he needed to take to preserve his claim.”³⁷

Beyond the factors enumerated in habeas cases, federal courts have provided little guidance as to what constitutes “sound legal principles” and the “interest[s] of justice”³⁸ sufficient to warrant equitable tolling of the limitations period for criminal prosecutions. It is uncertain, therefore, whether a court would apply the equitable tolling doctrine to the prosecution of a former president if the five-year statute of limitations had expired. Certainly, the federal prosecutor could argue that the inability of the U.S. Attorney to indict a sitting president constitutes extraordinary circumstances, given the extreme rarity with which that situation would arise. In addition, the interests of justice arguably dictate that a former president who has potentially violated federal criminal laws, particularly those that pertain to the integrity of the election process, face appropriate charges. Possible prejudice to the defendant is less evident because a president will often know that such charges are a possibility, and much of the relevant evidence will already have been preserved.

Arguably then, a court might have grounds to apply equitable tolling to criminal charges brought against a president after he or she leaves office. But that path is highly uncertain. Precedent overwhelmingly leans against equitable tolling of criminal statutes of limitations. It would take a courageous and resolute judge to apply equitable tolling against a former president facing criminal indictment several years from now. Of course, the constitutional remedy of impeachment is available if Congress believes that the president has commit-

36. *Holland v. Florida*, 560 U.S. 631, 649 (2010).

37. *Mitchell v. Att’y Gen. of N.J.*, No. 16-0532(MCA), 2019 U.S. Dist. LEXIS 10695, at *13 (D.N.J. Jan. 18, 2019).

38. For cases referring to these concepts generally, see *United States v. Atiyeh*, 402 F.3d 354, 367 (3d Cir. 2005); *Cooper v. Ferguson*, No. 19-cv-4030, 2020 U.S. Dist. LEXIS 41445, at *26 (E.D. Pa. Mar. 6, 2020); *Bussanich v. Adult Video Only, Inc.*, No. C16-5231RBL, 2016 U.S. Dist. LEXIS 119344, at *4 (W.D. Wash. Sep. 2, 2016).

ted high crimes and misdemeanors. But that remedy is arduous, politically charged, and potentially divisive of the country in the extreme.³⁹ As recent events show, it is highly unlikely that a president would be removed from office by impeachment where his or her party controls the Senate, the body that conducts the impeachment trial.⁴⁰

III. CONCLUSION

Thus, as Justice Kavanaugh asserted over twenty years ago, Congress should pass a law expressly tolling the statute of limitations for federal crimes where indictment has been delayed because the defendant is a sitting president. Though this proposed law might readily pass the Democrat-controlled House of Representatives, it concededly might fail in the Republican-controlled Senate. Even if such legislation did pass the Senate, no doubt the President would veto it, and Congress could only overrule the veto through a two-thirds majority of each chamber.⁴¹ In the face of a presidential veto, Congress should muster the courage to implement Justice Kavanaugh's proposal and toll the limitations period for federal offenses while the president is in office. In addition, a veto would highlight the president's resistance to being subject to the same laws as other public officials, and citizens could consider that resistance in determining whether to vote for reelection.

No president should be allowed to manipulate the election process or shield those who have done so by obstructing justice. Through that kind of manipulation, a president could gain the ad-

39. Even after Robert Mueller's testimony before Congress in July 2019, House Democrats remained divided over whether to bring impeachment proceedings against President Trump. Nicholas Fandos et al., *Mueller Testimony Deepens Democratic Divide on Impeachment*, N.Y. TIMES, Jul. 26, 2019, at A1 ("The majority of the Democratic caucus remains skeptical about what it sees as a politically perilous push that would lead to an almost certain acquittal in the Senate and further drain attention from its legislative work.").

40. On Feb. 5, 2020, the U.S. Senate acquitted President Trump of the two charges brought against him by the U.S. House of Representatives—abuse of power and obstruction of Congress. The vote on obstruction of Congress was strictly along party lines; the second vote saw one Republican senator crossing party lines to vote to convict on the charge of abuse of power. Peter Baker, *Impeachment Trial Updates: Senate Acquits Trump, Ending Historic Trial*, N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/05/us/politics/impeachment-vote.html>.

41. U.S. CONST. art. I, § 7, cl. 3.

vantage of incumbency and thus a smoother path to a second term that would thereby put him or her beyond the reach of criminal prosecution. A law tolling the statute of limitations during a president's term of office would encourage the president and his or her associates to adhere to the legal norms that undergird our democracy.