

Can America Restore the Rule of Law Without Prosecuting Trump?

di Jonathan Mahler

EARLY IN NOVEMBER, as President Trump challenged the integrity of the election with baseless lawsuits, Joe Biden delivered his first speech as president-elect, declaring it a “time to heal.” It was a phrase that many Americans were surely longing to hear, given the precarious state of the nation’s political culture. But it was also one that carried significant historical weight and possible implications for the future. When President Gerald R. Ford pardoned Richard Nixon for his role in the Watergate scandal, he, too, spoke about the need for “healing.” (Ford titled his subsequent memoir “A Time to Heal.”) When President Lincoln delivered his second inaugural address during the waning days of the Civil War, he spoke in similar terms about the imperative to “bind up the nation’s wounds.” Whether Biden intended to do so, his words provided an early signal about one of the first questions he is going to confront as president: What to do about Donald Trump? Biden faces many daunting challenges — mitigating the ongoing damage from the pandemic, repairing institutions, restoring faith in government — but how to deal with his predecessor’s flagrant and relentless subversion of the rule of law is in many ways the most vexing.

Last year, one of Trump’s lawyers, William Consovoy, [memorably argued in open court](#) that a sitting president could shoot a man in public and not be prosecuted. The legal validity of this claim notwithstanding, there is nothing to protect a *former* president from prosecution. No ex-president has ever been indicted before, but no president has ever left office with so much potential criminal liability.

As the election approached and the polls pointed to a Trump defeat, there was a growing sense that his moment of reckoning was coming. He was, after all, already the subject of a criminal investigation by the district attorney of Manhattan as well as a civil investigation by the attorney general of New York State. Both of those inquiries concern his conduct as a private businessman. The bigger and infinitely more fraught question is how to address Trump’s potentially criminal acts as a political candidate and president. Those would most likely be federal crimes that could only be prosecuted by the federal government.

As president, Trump cavalierly called for the imprisonment of political opponents, shattering a longstanding democratic norm. This is not a precedent to follow lightly. Presidents have historically gone out of their way to avoid using the power of the office to pursue their political rivals. When President George H.W. Bush pardoned six Reagan White House officials who were involved in the

Iran-contra affair, [he warned](#) of “a profoundly troubling development in the political and legal climate of our country: the criminalization of policy differences.” Bush was sparing members of his own party. President Obama created what is perhaps an even more relevant precedent for Biden by choosing not to prosecute members of the George W. Bush administration who had authorized the unlawful torture of detainees; his nominee for attorney general, Eric Holder, used the very same phrase — the criminalization of policy differences — [when the issue came up](#) during his House confirmation hearings. Over the summer, I asked David Cole, the national legal director of the American Civil Liberties Union, what he thought would happen to Trump if he lost the election. “My gut is that you’re very unlikely to see a federal prosecution,” he told me. “For me, the real accountability will be on Nov. 3, if he is sent packing from the White House.”

It was a sentiment that I heard from a lot of legal thinkers and former government officials in the months leading up to the election: The visions of Donald Trump in an orange jumpsuit were more fantasy than reality. His true moment of reckoning would happen at the ballot box. But the election has now come and gone, and Trump, along with most of his party and many millions of Americans, has refused to accept the results. Accountability feels as if it might be further away than ever.

The stakes of an indictment would be very high. The commander in chief’s broad powers under the Constitution could make it difficult to secure convictions. The damage to democracy that would be caused by a failed prosecution of a former president is hard to even fathom. An acquittal could also set back future efforts at accountability, and embolden aspiring abusers of authority. Even once he’s out of office, Trump is going to be a powerful force in the country’s political life; putting him on trial for his conduct as president would be tantamount to putting on trial the more than 72 million Americans who voted for his re-election. One institution that Biden will no doubt be focused on trying to rebuild is the Justice Department; prosecuting Trump could complicate any effort to restore the agency’s reputation for independence and integrity. There are logistical issues, too. Prosecuting a former president could mean convicting him, and the idea of sending a former president to prison does indeed seem fantastical.

If history is any guide, the desire to “move on” will only grow stronger in the weeks and months ahead. But how does the country move on from a president whose disregard for the law has been so constant and pervasive? Every president seeks to exploit the immense power of the office, but Trump’s exploitation of this power represented a difference in both degree and kind. Never before had a president leveraged so much of the “energy” of the executive branch — Alexander Hamilton’s word — to advance his personal interests. Presidents Reagan and George W. Bush stretched the limits of their authority in the name of national security. Trump stretched the limits of his authority not just to enrich himself and his family but to block investigations into his personal and official conduct and to maintain his grip on power.

Trump's conduct as president was a product of his unique character. But it was also enabled by the office. The accumulation of decades' worth of lawmaking, legal theorizing and historical precedent had given the president almost total freedom from accountability, rendering useless any seemingly applicable tool of law enforcement. Under the special-counsel regulations, the independent prosecutor who was charged with investigating the Trump campaign's links to Russia effectively served at the pleasure of the Trump administration. The federal prosecutors who indicted Michael Cohen for an illegal campaign-finance scheme were bound to respect a decades-old legal opinion from the Justice Department asserting that the president — who, according to Cohen, directed him to carry out the scheme — was immune from criminal prosecution. There was nothing, and no one, to stop Trump from ordering numerous officials not to cooperate with his impeachment inquiry. Not that this mattered; Trump's acquittal by the G.O.P.-controlled Senate was a foregone conclusion before the hearings even opened. One after another, Trump's close associates faced charges for actions committed on his behalf, even as he walked through still more open doors, confident that as long as he remained in office, he was untouchable.

It would be wrong to think about Trump's behavior as existing on the same spectrum as that of his post-Watergate predecessors. To see why, you have to first look back on the entire Trump presidency in a different way — one that sees his possibly criminal conduct not as a byproduct of the pursuit of a political agenda but as a central, self-perpetuating feature of his tenure. In this light, Trump's potential criminality becomes a kind of throughline, the dots that connect his life as a businessman to his entry into politics and then onward across his four years as president. One potentially illegal act led Trump to the next: from his law-bending moves as a businessman, to his questionable campaign-finance practices, to his willingness to interfere with investigations into his conduct, to his acts of public corruption and, finally, to the seemingly illegal abuse of the powers of his office in order to remain in office.

The stakes of prosecuting Donald Trump may be high; but so are the costs of not prosecuting him, which would send a dangerous message, one that transcends even the presidency, about the country's commitment to the rule of law. Trump has presented Biden — and America, really — with a very difficult dilemma. “This whole presidency has been about someone who thought he was above the law,” Anne Milgram, the former attorney general of New Jersey, told me. “If he isn't held accountable for possible crimes, then he literally *was* above the law.”

FINANCIAL CRIMES

Donald Trump's singular relationship with the law, which long predated his presidency, was perhaps an inevitable consequence of [his relationship with Roy Cohn](#) during his formative years in business. It was Cohn who taught Trump that the law was not a set of inviolable rules but a system to beat and even work to your advantage, the most powerful tool in a businessman's toolbox. “I

decided long ago to make my own rules,” Cohn told Penthouse magazine in 1981. (Trump later passed along one of those rules to his first White House counsel, Donald McGahn, when he told him, “Lawyers don’t take notes.”)

As a businessman with an inherited and growing fortune, Trump engaged in a great deal of litigation — “I’m like a Ph.D. in litigation,” he joked at one campaign rally in 2016 — answering suits with countersuits; wearing down his adversaries with endless rounds of delays, motions and appeals; compelling his employees to sign sweeping nondisclosure agreements. At risk of defaulting on a \$640 million loan from Deutsche Bank in 2008, Trump [sued the institution for \\$3 billion](#), blaming it for helping cause the global financial meltdown that had made him temporarily insolvent. Unhappy with the \$15 million property-tax valuation placed on a golf course that he had paid \$47.5 million to buy and renovate, Trump [sued the town of Ossining, N.Y.](#), claiming that the property was worth only \$1.4 million.

Trump had figured out something about the American system: You could solve a lot of problems with money, lawyers and a willingness to double down. This attitude led him, inexorably, toward business practices that tested the line of legality. After Trump’s financial struggles in the early 2000s made it more difficult for him to borrow money from established financial institutions, he sought partnerships with private individuals [like the Russian oligarch Aras Agalarov](#), whom Senate investigators have linked to organized crime. (A spokesman for the Trump Organization challenged the notion that the company was struggling at the time and said that it in fact “enjoyed great success in the 2000s.”) Trump’s real estate training program, Trump University, [was essentially a pyramid scheme](#), encouraging consumers, in particular the elderly, to purchase high-priced seminars for supposedly proprietary investment advice that in fact came from third-party marketing companies. Trump used money raised by his nonprofit foundation to settle lawsuits against his for-profit businesses (as well as to buy a gigantic painting of himself, which he had hung at one of his golf clubs). According to the congressional testimony of Trump’s longtime personal lawyer, Michael Cohen, Trump deliberately inflated the value of his assets by hundreds of millions of dollars in order to secure bank loans and cheaper insurance rates, and deflated their value to lower his tax burden. (A spokesman for the Trump Organization said Cohen’s claims were “completely untrue.”)

Trump’s tax strategy, enabled by a large team of accountants and lawyers, stretched the limits of tax avoidance and may well have crossed the line into tax fraud. Trump has steadfastly refused to disclose his tax returns, but a team of investigative reporters at The Times obtained reams of his tax data; [what they revealed was startling](#). In 2010, Trump took a \$72.9 million tax refund for an abandoned Atlantic City casino venture, which would require him to have received absolutely nothing in return for his investment, and he appears to have grossly overstated the value of several properties in order to claim larger deductions known as conservation easements. During Trump’s years on “The

Apprentice,” he wrote off \$70,000 in haircuts as a business expense. He also wrote off the expenses associated with a family compound in Westchester County by classifying it as an investment property, and he paid his daughter Ivanka more than \$740,000 in consulting fees when she was an employee of the Trump Organization.

Most major financial crimes carry a five-year statute of limitations, so any illegal acts committed since 2015 would be chargeable. Both the New York attorney general, Letitia James — who entered office in 2019 vowing to use “every area of the law” to investigate President Trump — and the Manhattan district attorney, Cyrus R. Vance Jr., operate independently of the federal government, and even if Trump were to successfully engineer a pardon for himself, he would not be immune from state charges.

Vance’s inquiry appears to cover a range of possible white-collar crimes; one of his office’s filings made reference to “potentially widespread and protracted criminal conduct” at the Trump Organization. Tax fraud and insurance fraud have been mentioned explicitly in court documents, but some of the prosecutors and white-collar defense lawyers I spoke with suggested other possibilities, too. Given Trump’s history of doing business with foreign actors with a demonstrated need to conceal the sources of their income, another one might be money laundering. If investigators are able to establish that Trump engaged in a pattern of illegal activity, he could also be indicted under New York’s racketeering statute.

But prosecuting Trump under state law poses challenges of its own. New York’s state courts afford defendants far more protections than the federal courts. There are stricter rules governing evidence that can be presented to a grand jury, and even minor procedural errors can result in indictments being thrown out. “If you’re a white-collar defendant, you’d rather be in New York State court than in federal court any day of the week,” Daniel R. Alonso, who served as Vance’s top deputy from 2010 to 2014 and is now in private practice, told me.

Trump could also face federal prosecution for tax fraud. He is currently in the midst of a protracted audit at the Internal Revenue Service concerning the casino-venture refund. If the agency’s auditors find a “firm indication” of fraud, they can refer the case to the agency’s criminal investigators or even the Department of Justice. (A spokesman for the Trump Organization said that all of the company’s transactions occurred under the supervision of tax lawyers and “followed all applicable provisions of the tax code.”) Historically, the I.R.S. has not hesitated to prosecute high-profile figures; it’s an efficient way to send a message to the public that there are serious repercussions for committing tax fraud. One of Trump’s fellow New York City real estate moguls, Leona Helmsley, [served 18 months in federal prison](#) for using corporate funds to renovate her Connecticut mansion. More recently, a former New York City police commissioner, Bernard Kerik, admitted to failing to disclose the receipt of a gift from a contractor who renovated his Bronx apartment for free; after pleading

guilty to two counts of tax fraud and six other felonies, he was sentenced to four years. ([Trump pardoned him last winter.](#))

But cases like these are rare. Wealthy businesspeople are generally able to take extraordinary liberties with their taxes without fear of prosecution. In criminal tax-fraud cases, prosecutors are required to prove that the misconduct was intentional, which is a high bar to clear. A jury might agree that Trump's daughter's consulting services were not worth \$740,000, but if Trump argued that he thought they were, that could constitute a viable defense. So could ignorance: Trump's large team of accountants gives him cover for many potentially fraudulent claims that might be uncovered in the course of an investigation. The sheer complexity of Trump's finances — the numerous partnerships, limited-liability corporations and shell companies through which he does business — would make it difficult to build a case that a jury could follow.

Most of the tax lawyers I spoke with said that it was much more likely that Trump's I.R.S. audit will remain a civil matter; he could face steep penalties, but he would be spared the prospect of prison. "Even if Trump weren't in politics, his celebrity would make him a super appealing prosecutorial target for the I.R.S.," said Daniel Shaviro, a tax professor at New York University Law School. "But in the fraught political world we're in, politics will have to be considered."

ELECTION-LAW VIOLATIONS

When Donald Trump announced his presidential candidacy, he entered a new realm, with new laws to govern his conduct and new forms of potential liability. Fund-raising was a challenge for a long-shot, anti-establishment candidate, so Trump sought financing through unconventional, and at least in some instances possibly illegal, means. Days before the first Republican nominating caucuses, he used his foundation to host a televised fund-raiser for military veterans and then redirected millions of the dollars in donations to his campaign, prompting an investigation by the New York State attorney general, Eric Schneiderman. (The foundation was eventually fined \$2 million for the misappropriation of funds and [shut down under court supervision.](#))

When potentially damaging episodes from Trump's past surfaced, or threatened to surface, he shut them down as expeditiously as he could, without apparent concern for legal consequences. After a former contestant on "The Apprentice," Summer Zervos, accused Trump of sexual assault, he publicly called her a liar, prompting a defamation suit. His lawyer Michael Cohen arranged for six-figure hush-money payments to be made to two women, Stormy Daniels and Karen McDougal, who were threatening to go public with their claims of having had affairs with Trump.

At the same time, Trump's campaign eagerly embraced Russia's effort to interfere in the election. The campaign's chairman and chief strategist, Paul Manafort, had a long history of carrying out Russian influence operations. He [shared internal polling data](#) with a Russian intelligence agent, while another adviser, Roger Stone, [helped arrange for WikiLeaks to publish](#) — minutes after the

release of the “Access Hollywood” tape in which Trump joked about sexually assaulting women — a large cache of Democratic Party emails stolen by Russian hackers. (Stone has said that he didn’t know where the emails came from or what was in them.)

A number of Trump’s campaign associates, including Cohen, Manafort and Stone, have since faced federal charges and been sentenced to prison. Once Trump is out of office, he could also be investigated and potentially prosecuted for his conduct during the campaign. Robert Mueller, the special counsel, did not find sufficient evidence to prove that Trump’s participation in his campaign’s involvement with Russia violated the federal conspiracy statute. But the fifth and final volume of the Senate Intelligence Committee’s bipartisan report on Russian interference in the 2016 election, which was released in August, made it clear that Mueller’s investigation was not exhaustive. The Senate report [detailed numerous new instances of engagement](#) between the Trump campaign and Russian actors and documented a flurry of conversations between Trump and Stone that investigators suspected involved the imminent Democratic National Committee email dumps. Still, most of the prosecutors I spoke with thought that the Mueller investigation effectively foreclosed the possibility of a criminal inquiry of Trump’s conduct with respect to Russia. “People can disagree about how it was done or how it went, but that doesn’t mean it wasn’t a thorough process,” Milgram said. “It doesn’t feel to me like someone would go digging there to see if there was more. That could feel vindictive because Mueller already made the call.”

An election-law case against Trump might be more appealing to a Biden Justice Department. When Cohen pleaded guilty to violating two campaign-finance laws in the Southern District of New York, he testified in federal court that Trump directed him to arrange for the hush-money payments. Trump was part of the investigation, but was protected by the Justice Department policy against indicting a sitting president. He was instead named an unindicted co-conspirator in the case — “Individual-1,” as the prosecution’s filings called him.

There is not much disagreement among campaign-finance experts about whether Trump could be indicted. The hush-money payments to Daniels and McDougal were clearly meant to prevent the disclosure of information that could have damaged Trump’s campaign. As such, they almost certainly violated several campaign-finance laws, including the prohibition against accepting contributions in excess of \$2,700 and the failure to properly report contributions to the Federal Elections Committee. And because the amount of money involved exceeded \$25,000, the violations would be considered felonies; each one would be punishable by up to five years in prison. Judging from the facts, it looks like a strong case. There is already material evidence of the scheme: Cohen presented congressional investigators with copies of [canceled checks from Trump](#) and the Trump Organization — reimbursements for the payments that he made to Daniels and that the Trump Organization classified as legal fees.

Campaign-finance laws were designed to limit the influence of private actors in elections — “to prevent not only the actual corruption of public officials but even the appearance of corruption that could undermine voter faith in government,” as Paul S. Ryan, the vice president of policy and litigation at the election-watchdog group Common Cause, told me. But it’s a body of law that has proved difficult to enforce. The Supreme Court has struck down a host of campaign-finance restrictions in recent years, and the government’s failed prosecution in 2012 of the former Democratic vice-presidential nominee John Edwards on charges of campaign-finance violations had a chilling effect on possible subsequent indictments.

Edwards’s case was not so different from Trump’s. He was accused of illegally arranging for two of his wealthy supporters to pay \$925,000 to help him keep his pregnant mistress, Rielle Hunter, out of public view during a critical phase of the primary campaign. The Justice Department argued that because the money was intended to prevent a disclosure that could have hurt Edwards’s presidential bid, it should be considered a campaign contribution. But prosecutors had a hard time making their case to the jury. One of the two wealthy supporters died before the indictment; the other, the 101-year-old banking heiress Bunny Mellon, was too frail to testify. Edwards’s lawyers exploited the confusing nature of campaign-finance laws to their advantage. After four years of legal wrangling and six weeks in court, [the trial ended in a hung jury](#). The government decided to cut its losses and drop the case.

OBSTRUCTION OF JUSTICE

The presidency offered Trump both new opportunities and a new degree of protection. He would have all of the formal and informal powers of the office at his disposal, but he would also have full immunity from criminal prosecution, [thanks to a legal opinion](#) from the Justice Department’s Office of Legal Counsel in 1973 stating that a sitting president should not be indicted. It was just a memo, not an actual ruling, but it had been honored by federal prosecutors for close to 50 years. The power of the office would not only allow Trump to enrich himself and his family but to frustrate any investigations into his actions as president — or, for that matter, into his prior conduct.

Nearly all of Trump’s modern predecessors separated themselves from their financial interests before entering office to eliminate the possibility of any conflicts. Trump announced that he would do the opposite, [consolidating his businesses in a family trust](#). His two eldest sons would run the Trump Organization, and he would become the trust’s sole beneficiary, allowing his family to take full advantage of the office’s financial potential.

Money flooded into the inaugural committee, which raised an unprecedented \$107 million. The laws governing contributions to inaugural committees are far more forgiving than those governing campaign finance. Nevertheless, Trump’s inaugural committee appears to have broken a number of them. The committee [may have violated its nonprofit status](#) by paying more than \$1 million to rent

event space at Trump's new Washington hotel — well above market rate and the hotel's own pricing guidelines — and spending another \$300,000 to rent a room in the hotel for a private, after-hours party for Trump's children. The inaugural committee's disclosure report to the Federal Election Commission contained dozens of false entries; it reported, for instance, that Katherine Johnson — the NASA mathematician who was one of the subjects of the movie "Hidden Figures" and was then 98 years old — had contributed \$25,000, listing her address as the address for NASA's research center in Hampton, Va. (Johnson did not contribute to the committee, nor did she reside at NASA.) The inaugural committee's activities have already prompted federal prosecutions. The Republican lobbyist Samuel Patten pleaded guilty in 2018 to illegally arranging for a Ukrainian oligarch to purchase four tickets to the inaugural for \$50,000. And a venture capitalist in California, Imaad Zuberi, pleaded guilty earlier this year to trying to hide from investigators the source of a portion of the \$900,000 contribution he made to the committee.

Just a few months into Trump's presidency, the news broke that the F.B.I. had begun an investigation into his campaign's links to Russia. Trump tried to derail it. His first attorney general, Jeff Sessions, had recused himself from the inquiry because he had been involved with the campaign; [Trump pressed him to "un-recuse" himself](#). He also pressed the director of the F.B.I., James Comey, to announce that he wasn't a target of the investigation and to [back off his former national security adviser, Michael Flynn](#), who pleaded guilty to lying to investigators about a meeting with the Russian ambassador Sergei Kislyak. Trump eventually fired Comey, which led to the appointment of Mueller as special counsel, and Mueller took over the investigation. Trump soon tried to stop Mueller too, [ordering his White House counsel, Donald McGahn, to fire him](#). When the story of Trump's order — and McGahn's refusal to follow it — became public, Trump told McGahn to publicly deny it and [ordered him to create a false record](#) to substantiate the lie. (He didn't.)

As Mueller's investigation continued and started claiming its first victims, Trump floated the idea of pardoning a potential witness against him — his former campaign manager Manafort, who was convicted of eight felonies and pleaded guilty to two others. And he tried to intimidate and then discredit another potential witness, Michael Cohen, first publicly predicting that he wouldn't "flip," and then, once he did, calling him a "liar."

Mueller's brief was to investigate the Trump campaign's Russia connections, but it did not take long for him to begin a parallel inquiry into whether the president's resistance to the initial investigation constituted obstruction of justice. Mueller proceeded as though he did not have the authority to indict a sitting president, but the second volume of his report [detailed 10 potentially obstructive acts](#). There was broad agreement among the dozens of prosecutors and legal experts with whom I spoke that Mueller presented more than enough evidence to seek a grand-jury indictment against Trump for obstruction. In fact, when Mueller's report was released in the spring of 2019,

more than 700 former federal prosecutors from Republican and Democratic administrations signed an open letter stating that if those same acts had been committed by anyone but the president, they would have resulted in multiple felony charges.

It is not uncommon for criminal investigations to splinter into obstruction investigations. After the tech boom of the late 1990s, the investment banker Frank Quattrone was investigated for taking kickbacks in exchange for shares in hotly anticipated I.P.O.s; he wasn't charged with securities fraud, but he was indicted for directing employees to "clean up" their files after learning that the inquiry might be imminent. (He was convicted but the verdict was overturned.) When political figures are prosecuted, it is often for obstruction. Scooter Libby, an adviser to Vice President Dick Cheney, was never charged with leaking the name of a covert C.I.A. operative to the media, but he was convicted of lying to a grand jury investigating the leak. (His sentence was commuted by George W. Bush.) Roger Stone was not prosecuted for his efforts to get Trump elected; he was [convicted of obscuring those efforts](#) by lying under oath, withholding documents and threatening an associate if he cooperated with a congressional investigation into the campaign's ties to Russia. (His sentence was commuted by Trump.)

Obstructing justice is the mechanism by which powerful people try to place themselves above the law. And yet it's not entirely clear how fully the obstruction statute applies to the president, or if it does at all. An obstructive act requires "corrupt intent," which would mean convincing 12 members of a jury that the president had corrupt motives. For that matter, some legal thinkers have gone so far as to argue that because the president has complete authority over the administration of justice, he cannot by definition commit an act that interferes with it.

PUBLIC CORRUPTION

Since the days of Roy Cohn, Trump had always been able to find the right lawyer for the job, whether the issue at hand was a failed deal or a failed marriage. It took Trump a little while to find the right attorney general. But after temporarily replacing Jeff Sessions with the more compliant Matthew Whitaker, he landed on the man he really needed: William P. Barr.

Decades earlier, Barr was part of a group of conservative legal thinkers who developed and championed a new theory of presidential power known as "[the unitary executive.](#)" The argument was that Article II of the Constitution not only gave the president unfettered control over foreign policy and covert operations but also protected him against incursions into that authority by independent prosecutors. Then a young policy lawyer in the Reagan White House, Barr later served as attorney general to President George H.W. Bush, whom he helped persuade to pardon all of the Reagan officials still at risk of indictment in the Iran-contra scandal.

After Bush left office, Barr spent many years in the private sector. He was approaching 70 when the chance to return to the Justice Department presented itself, this time working for a president who

needed no encouragement to push the limits of his authority. With his reflexive instinct to harness and exploit any power available to him, Trump was the perfect test case for Barr's expansive view of executive power. Even before he was sworn in as Trump's attorney general, [Barr wrote an unsolicited legal memo](#) to the Justice Department characterizing Mueller's investigation as a "fatally misconceived" assault on the presidency. The president's authority on all of the nation's law-enforcement matters — even those concerning his own conduct — was "illimitable," Barr wrote in a 19-page defense of presidential power. "Constitutionally, it is wrong to conceive of the President as simply the highest officer within the Executive branch hierarchy," he concluded. "He alone *is* the Executive branch." Once ensconced in the Justice Department, Barr pre-empted the release of the Mueller Report with a misleading summary of its findings and then refused to provide Congress with an unredacted version of the report, citing executive privilege.

Backed now by a constitutional theory giving him nearly limitless power, and an attorney general eager to implement it, Trump could test still more legal boundaries, leveraging his "unitary" authority over the nation's foreign affairs for political purposes. For this, he needed the help of a very different sort of lawyer, Rudy Giuliani, who [set the scheme in motion](#). The plan called for holding back from Ukraine \$391 million in congressionally approved military aid until the country's newly elected president, Volodymyr Zelensky, agreed to investigate two debunked conspiracy theories — one casting doubt on Russia's interference in the 2016 election, the other raising ethical questions about Joe Biden. United States diplomats, including the ambassador to the European Union and the special envoy to Ukraine, were pressed into service to aid in the effort.

When a whistle-blower filed a complaint, Barr's Justice Department again came to Trump's defense, dismissing it as unworthy of further investigation and refusing to make it available to Congress, arguing that it was not a matter of "urgent concern." The House of Representatives soon opened a formal impeachment inquiry, which Trump tried to obstruct, directing various agencies to refuse to comply with congressional subpoenas for documents and ordering numerous executive-branch officials not to testify.

One reason the framers opted for a president over a governing council was to facilitate accountability — to ensure that a single, identifiable person could be held responsible for the conduct of the government. There is a broad consensus among legal scholars that presidents can be impeached without having engaged in explicitly criminal conduct: For one thing, when the framers drafted the Constitution, creating the office of the president, the United States did not yet have a criminal code. But the House Judiciary Committee nevertheless decided to detail the crimes they believed Trump had committed in their impeachment report: bribery (18 U.S.C. 201), wire fraud (18 U.S.C. 1343) and honest-services fraud (18 U.S.C. 1346). "We thought it was important that the American people understand that the president of the United States engaged in conduct for which any other citizen

could, and likely would, have been prosecuted,” Barry Berke, a white-collar defense lawyer who served as special counsel to the committee, told me. Some of the prosecutors I spoke with mentioned two other possible charges: conspiracy to defraud the United States and extortion.

Acts of public corruption are often vigorously prosecuted at the local and even state level, in part because they undercut one of the basic tenets of democracy — the idea of a government run by the people, for the people. In 2011, the former governor of Illinois, Rod Blagojevich, was convicted of trying to sell the Illinois Senate seat of the newly elected President Obama and increasing the Medicaid reimbursement rates at a children’s hospital in exchange for campaign contributions. (While awaiting trial, a disgraced but now nationally recognizable Blagojevich appeared on Trump’s reality TV spinoff, “The Celebrity Apprentice.” [Trump commuted his 14-year sentence in February.](#))

When it comes to their obligation to prioritize the public good, presidents might be judged by the same, if not higher, legal standards than local officials. The presidency is, after all, the ultimate public trust. But experts largely agree that this isn’t the case. Barr’s view of the unitary executive may be extreme, but there is little dispute that the framers intended to invest the president with nearly unquestioned authority on matters of national security and foreign diplomacy. Legal challenges to that authority are rare and have historically been met with wariness from the courts, which don’t like to contradict a president’s insistence that he was acting in the best interests of the nation.

PARTISAN COERCION

As the 2020 election approached, Trump appeared emboldened by his years of presidential unaccountability. Thanks to his self-compounding liability, he was also confronting an increasingly urgent need to retain it.

The Justice Department had by now been transformed under Barr. There seemed to be no Trump problem that the agency wouldn’t at least try to fix. It began a counterinvestigation into the F.B.I.’s investigation into Trump’s campaign, tried to block the distribution of a memoir by the former national security adviser John Bolton that was unflattering to Trump and intervened in a defamation lawsuit brought by the author and columnist E. Jean Carroll, who accused Trump of raping her in the mid-1990s, arguing that Trump’s insulting comments about her fell within the scope of his official duties as president. (Trump has denied Carroll’s allegations.)

Trump, meanwhile, continued to test the limits of his seemingly limitless authority. He pushed out five inspectors general charged with overseeing the conduct of the executive branch, commuted Stone’s prison sentence and openly defied the authority of the other two branches of government in an effort to stoke his political base. Rather than nominating Chad F. Wolf, who oversaw the administration’s “law and order” response to the racial-justice protests in Portland, Ore., to serve as secretary of the Department of Homeland Security, Trump appointed him acting director to avoid the Senate confirmation process. Even after the Government Accountability Office and a federal judge

ruled that Wolf was [most likely serving in his job illegally](#) — and that many of his actions may have thus been unlawful — Trump left him in place. He similarly disregarded a federal judge’s order compelling him to restore the Obama-era DACA program that enabled hundreds of thousands of immigrants to remain in the United States.

Even as Trump was exercising his power in bold new ways, the potential threats awaiting him if he lost the election were proliferating and intensifying. Not only was the Manhattan D.A.’s investigation progressing, but a watchdog group had accused Trump’s re-election campaign of illegally funneling \$170 million in funds to unidentified recipients through firms controlled by the campaign’s recently deposed manager, Brad Parscale, and other officials. (The Trump campaign denied any wrongdoing.) Out of office, Trump would almost certainly face financial problems too. [The presidency had been good for business](#), bringing in tens of millions of dollars in foreign projects to the Trump Organization, providing a steady stream of favor-seeking patrons to Trump’s Washington hotel and allowing Trump and his children to bill the government for hundreds of “official visits” to his properties. But his golf courses had been losing millions of dollars every year, and he had \$421 million in personal debt obligations, most of which is coming due in the next four years.

And so, in the final weeks of his term, Trump moved into a new sphere of potential criminality, directing all of the weight of the government’s executive branch toward his re-election effort. He turned the White House into a stage prop for the Republican National Convention, pardoning a former prisoner and participating in a naturalization ceremony as part of the festivities. In October, days after checking out of Walter Reed hospital with Covid-19, Trump held a campaign rally on the South Lawn. Even this was not enough to move his poll numbers. Still trailing in the final days of the campaign, [Trump lashed out](#) at some of his staunchest allies in the administration for not using their power aggressively enough on his behalf, even calling out Barr for failing to arrest his political rivals, including Biden, and trying to push the secretary of state, Mike Pompeo, to make public Hillary Clinton’s more-than-four-year-old emails.

In 1939, in the face of widespread claims that Works Progress Administration employees were being pressured to work on Democratic Party campaigns, Congress passed a law known as the Hatch Act to prevent federal officials from exploiting their authority for partisan purposes. Most presidential administrations have since taken pains to separate their public and political operations, so as not to break the law. Civil violations of the act are handled by an independent agency known as the Office of Special Counsel. President Obama’s secretary of Housing and Urban Development, Julián Castro, was censured for discussing the 2016 election during a TV interview. He issued a public apology, explaining that the error was inadvertent.

Presidents and vice presidents are exempt from the statute's civil provisions. Because they are effectively always on the job, some of the prohibitions — like the one against engaging in political activity while on duty — would be difficult to apply. Dozens of Trump administration employees, including at least nine high-level appointees, have been investigated for Hatch Act violations. Kellyanne Conway violated the act on more than 60 occasions, prompting the Office of Special Counsel to recommend that Trump remove her from her position as a senior White House official. (“Blah, blah, blah,” [Conway said at the time](#). “Let me know when the jail sentence starts.”)

But the Hatch Act also has criminal provisions from which the president is not exempt; one is the prohibition against using one's official authority to influence a federal election. “That's the very heart of the Hatch Act,” Kathleen Clark, a professor of legal and government ethics at the law school at Washington University in St. Louis, told me. “Public power is for public good, not for private good.” Trump's flagrant violations of this prohibition were widely noted at the time of the Republican convention. Neither Trump nor his senior staff seemed that worried about it. “No one outside the Beltway really cares,” his chief of staff, Mark Meadows, said.

IN THE END, THE DILEMMA over what to do about Donald Trump may be less about Trump than it is about the structural problems his presidency exposed. Trump may have turned the executive branch into an instrument for his personal gain and deliverance, but it was the country's legal and political systems that enabled him to do it. And even out of office, he may still face no consequences.

In September, two former executive-branch lawyers, Bob Bauer (who served under Obama) and Jack Goldsmith (who served under George W. Bush) published an entire book, “After Trump,” addressing the subject of how to reform the presidency. They identified the many open doors that Trump had charged through and offered some 50 suggestions on how to close them, whether that meant rewriting existing laws or passing new ones. Among other things, they proposed requiring campaigns to report any contact with foreign governments and clarifying the obstruction statute to eliminate ambiguity about when the president has violated it. The one subject on which Bauer and Goldsmith couldn't agree was what to do with Trump; they divided that chapter in half, with Bauer advocating for a full investigation and Goldsmith urging caution.

Even as I write this, Trump's subversion of democratic norms continues. He still has not conceded, and Barr has overruled the head of the Justice Department's Election Crimes department to approve investigations into “vote tabulation irregularities.” These legal maneuvers may be less about Trump trying to overturn the results of the election than they are about him trying to gain leverage to limit his liability when he leaves office. Even though Biden pledged during the campaign not to pardon him, Trump could still try to trade his concession for the promise of leniency. He could also try to pardon himself, though this has never been done before and may not hold up in court.

(Another, probably more far-fetched scenario has Trump resigning so President Pence can pardon him.)

The nation may desire healing. But there is also the matter of justice, and there is no guarantee that what feels right now will look right through the longer lens of history. Ford was widely assailed for pardoning Nixon. But one of his most outspoken critics at the time, Senator Edward M. Kennedy of Massachusetts, later honored Ford with a Profile in Courage award, explaining that he'd been moved to rethink his views after witnessing the sprawling and protracted investigation into President Clinton by the independent counsel Ken Starr. It may be time to rethink Ford's decision once more; it's hard not to wonder if a Trump presidency would have been possible if Nixon had been criminally prosecuted rather than pardoned.

In that sense, the problem that Trump poses for Biden may also present an opportunity, a chance to repair more than just the damage of the last four years. To begin with, this may require recognizing that when a president brazenly flouts the law, electoral defeat might not be enough of a punishment. "There's a mind-set that we need to reset," Stephen Vladeck, a constitutional law professor at the University of Texas, told me. "Breaking the law is not a political difference." It might also require recognizing that to really move on from Trump, "healing" may have to mean something fundamentally different from what it has in the past — and that without accountability, it may in fact be impossible.