

The Breakfast Club

Constitutional Minute for 25 May 2024

The Confusing World of Presidential Immunity

Does a U.S. President enjoy immunity against prosecution for acts committed during his service as the President?

The multiple prosecutions of Donald Trump for acts committed during his four-year term as the 45th U.S. President have riveted the nation's attention in the leadup to the 2024 election, in which it now is certain that Trump will be on the ballot as the Republican nominee.

This obvious political witch hunt designed to interfere with former President Trump's ability to campaign or, at worse, incarcerate him for alleged crimes has raised all manner of questions concerning the underlying issue of Presidential Immunity. There is a lot to unpack in this issue and many, many enticing rabbit holes but I'll try to keep it simple. Much of this information comes from a Congressional Research Service Report entitled: "Presidential Immunity, Criminal Liability, and the Impeachment Judgment Clause" available for download [here](#), and Wikipedia's page on this subject found [here](#).

The Constitution is mostly silent on this subject. The only applicable reference is found in what is called the Impeachment Judgment Clause in Article 1, Section 3, Clause 7 which states:

"Judgment in 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."**

While this does not address the President by title, obviously as an impeachable official, the President is covered herein. The plain meaning is that once **convicted** in an impeachment proceeding, the President remains vulnerable to subsequent **Indictment, Trial, Judgment and Punishment** under existing law. The clause does not differentiate between civil and criminal law. But what of an individual who is *acquitted* in an impeachment proceeding? More on that later.

The Tenth Amendment makes the case that only powers enumerated in the Constitution are enjoyed by any of the three branches of the federal government, but the ink was barely dry on the document when Congress was forced to conclude that at least some powers, while unenumerated, had to be part of the President's vesting, particularly his power to fire an official he appointed. The Constitution specifically states the President:

“shall have Power, by and with the Advice and Consent of the Senate, to ... appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.”ⁱ

It makes sense that if the President has the power to appoint an official, he also enjoys the power to “unappoint” an official. This and other *implied* Presidential powers have been recognized by the Supreme Court as part of the President’s portfolio.

If the President has an implied power to fire officials in the Executive Branch does he also have an implied power of immunity from prosecution for official acts? To answer that question we have limited Supreme Court opinions to draw upon.

In [Mississippi v. Johnson](#) (1867), the Supreme Court ruled President Andrew Johnson could not be sued since the actions in question were discretionary.

In [Nixon v. Fitzgerald](#) (1982), the Court held that a former or current president was absolutely immune from *civil suits* for acts taken “within the ‘outer perimeter’ of his official responsibility.”ⁱⁱ The Court further stated that this civil immunity for official acts taken while in office also applied *after* the President leaves office, but they [suggested](#) that the immunity was intended to only protect the Office of the President and thus the current President’s ability to carry out his constitutional functions, leaving specific applications of the immunity enveloped in fog. In [Clinton v. Jones](#) (1997), the court ruled that the President had *no* immunity from suits alleging civil improprieties *before becoming* President.

Concerning *criminal liability*, there is no question in the Court’s eye that the President is immune from *criminal* prosecution while in office (outside of impeachment), but his immunity after leaving office is much in question, which gives rise to Jack Smith’s indictment.

In a D.C. District Court, Smith obtained an indictment of Trump on four grounds:

- (1) violation of [18 U.S.C. § 371](#) in plotting to defraud the United States by attempting to reverse the 2020 election results,
- (2) violation of [18 U.S.C. § 1512\(k\)](#) in conspiring to impede an official process—specifically, Congress’s certification of the [electoral](#) vote,
- (3) violation of [18 U.S.C. §§ 1512\(c\)\(2\)](#) in hindering and attempting to hinder the electoral vote certification, and
- (4) violation of [18 U.S.C. § 241](#) in scheming against the voting rights of one or more individuals to cast and count their votes.

Trump brought suit against the government’s indictment action ([Trump v. United States](#)) and filed motions to dismiss the indictment based on presidential immunity including some novel

arguments concerning double jeopardy since he was acquitted of some of these charges in his second impeachment proceeding. The District Court denied Trump’s motions and he appealed to the D.C. Circuit Court, which sustained the decision of the District Court. Trump then appealed to the Supreme Court and the Court heard Trump’s appeal on April 25, 2024. A transcript of the oral arguments can be found [here](#). The Court will probably render an opinion in late June or early July. The narrow question they agreed to consider is “whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office.”

The decision will hang on whether the Court finds the acts Jack Smith alleges Trump was guilty of were private acts outside even the “outer perimeter” of the President’s official responsibilities.

Unfortunately, we all must patiently wait for the Supreme Court to speak.

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ⁱ Article 2, Section 2, Clause 2.

ⁱⁱ Congressional Research Service Report LSB11121.