Legal Sidebar

Presidential Immunity, Criminal Liability, and the Impeachment Judgment Clause

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The President of the United States "occupies a unique position" in the American constitutional system as the head of the executive branch of government "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." The Supreme Court has repeatedly recognized that the President—at least when acting within the "outer perimeter" of his official duties—cannot be treated as "an ordinary individual." While holding the nation's highest office does not place the President above the law, it does carry with it certain legal privileges. One such privilege is the doctrine of presidential immunity.

Questions as to the scope of presidential immunity have featured prominently in Special Counsel Jack Smith's prosecution of former President Donald Trump for allegedly attempting to overturn the results of the 2020 election. In an argument that has been rejected by two courts, the former President asserts that presidential immunity shields him from criminal prosecution for the acts charged. This immunity, he argues, derives from both the separation of powers and the Impeachment Judgment Clause, which provides that "the Party *convicted*" by the Senate after having been impeached by the House "shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law." Former President Trump maintains that since he was *acquitted* by the Senate for conduct similar to the criminal acts charged by the Special Counsel, the Impeachment Judgment Clause bars his current criminal prosecution. On February 24, the Supreme Court agreed to take up the question of whether a former President possesses immunity from prosecution "for conduct alleged to involve official acts during his tenure in office." Oral arguments in the case are set for the week of April 22, 2024.

This Sidebar briefly summarizes presidential immunity principles and discusses the two court decisions in *United States v. Trump* that considered and rejected former President Trump's asserted immunity from prosecution. The Sidebar also briefly addresses how Congress and the executive branch have viewed the Impeachment Judgment Clause and its relation, if any, to presidential immunity.

Presidential Immunity

The scope of immunity enjoyed by former and sitting Presidents is a topic of much uncertainty. This is perhaps unsurprising, given that presidential immunity is a legal doctrine with no explicit textual basis in

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the Constitution that has theoretically applied to only 45 individuals in all of American history—most of whom have not been faced with legal proceedings implicating questions of civil or criminal liability.

Civil Immunity

Despite the doctrine's limited application, the Supreme Court has established some parameters to the doctrine in two cases, but only with respect to presidential liability in noncriminal matters. In *Nixon v. Fitzgerald*, the Supreme Court held that former President Richard Nixon was absolutely immune from civil suits for acts taken "within the 'outer perimeter' of his official responsibility." This official act immunity, the Court reasoned, was a "functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers." The protection was primarily justified on two grounds: that civil suits based on a President's official actions would "divert[]" or "distract" a President in ways that threaten the "effective functioning of government" (the *distraction rationale*) and that a President must be free to "deal fearlessly and impartially with the duties of his office" without a concern for liability that could "render [the President] unduly cautious in the discharge of his official duties" (the *chilled-decisionmaking rationale*).

Although this civil immunity for official acts taken while in office applies after a President leaves office, the Supreme Court has suggested that it protects former Presidents only in the interest of protecting the presidency and the current occupant's ability to carry out his constitutional functions. In this sense, *Fitzgerald* reflects the Court's reasoning five years earlier in *Nixon v. Administrator of General Services*. There, the Court held that another of the President's exceptional legal prerogatives— *executive privilege*, or the privilege protecting presidential communications—erodes "over time" but nevertheless continues to protect official communications beyond the end of the President's term. Without a continued "assurance of confidentiality," the Court reasoned, "a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends."

In the 1997 decision of *Clinton v. Jones*, the Supreme Court clarified what was implicit in *Fitzgerald*, holding that Presidents do not enjoy immunity from civil suits predicated on *unofficial* acts. In that case, which involved sexual harassment claims made against President Bill Clinton for conduct that occurred before he assumed office, the Court found that neither the chilled-decisionmaking rationale nor the distraction rationale supported immunity for unofficial conduct. It explained that *Fitzgerald's* concern that civil liability could render the President "unduly cautious in the discharge of his *official* duties" had no application to potential liability for the manner in which he discharged his *unofficial* acts. The Court also explicitly rejected President Clinton's argument that both the particular claim in *Jones* and the "potential additional litigation" that might result from a rejection of immunity would impermissibly burden or distract the President. The *Jones* suit itself, the Court reasoned, would not impermissibly "burden the President's time and energy." The Court further noted that since only three Presidents had ever faced civil suits based on their private actions, "it seems unlikely that a deluge of such litigation will ever engulf the Presidency."

Criminal Immunity

The Supreme Court has never been in a position to interpret whether Presidents enjoy immunity from criminal prosecution. Both *Jones* and *Fitzgerald*, however, alluded to the fact that the immunity analysis would likely be different if a President faced a criminal prosecution, a proceeding where the public interest in the "fair administration of criminal justice" is both powerful and broad.

The executive branch has taken the position that sitting Presidents *do* possess absolute immunity from criminal prosecution, at least while they hold office. Like the Court did with civil immunity in *Fitzgerald*, the Department of Justice (DOJ) Office of Legal Counsel (OLC) bases this criminal immunity on the separation of powers, reasoning that imprisoning, prosecuting, or even indicting a sitting President would

"unduly interfere" with the President's ability to "perform his constitutionally assigned duties." Each stage of the criminal process would, in OLC's view, impose unacceptable burdens and distractions on the presidency that would outweigh the public interest in criminal accountability.

OLC acknowledges however, that a President's immunity from criminal process is "temporary" and ends when a President leaves office. In a 2000 opinion, OLC reasoned that "the constitutional structure permits a sitting President to be subject to criminal process only after he leaves office or is removed therefrom through the impeachment process."

The executive branch position, which has been subject to some scholarly criticism, is important not only because it represents the view of the branch of government that the President leads, but also because it binds federal prosecutors (including independent executive-branch prosecutors like special counsels) who may be called upon to make decisions about presidential prosecutions. It is this policy of temporary presidential immunity that prevented Special Counsel Robert Mueller from deciding whether to bring criminal charges against a sitting President but permitted Special Counsel Jack Smith to bring charges against a former President.

The Trump Case

Special Counsel Smith's investigation has led to a grand jury indictment against former President Trump that focuses on five main allegedly criminal actions or schemes that occurred while he was President: (1) attempting to influence state officials to "subvert the legitimate election results;" (2) organizing "fraudulent slates of electors"; (3) using the DOJ to "conduct sham election criminal investigations"; (4) knowingly and fraudulently attempting to influence the Vice President's role in certifying electoral votes; and (5) utilizing the events of January 6, 2021, to "levy false claims of election fraud and convince members of Congress" to delay the certification.

Former President Trump characterizes each of these acts as "official" conduct and asserts that under the separation of powers, he is fully and absolutely immune from criminal prosecution for all official acts taken while in office. He has also made a second argument that received significant attention during oral argument before the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit), for the existence of a slightly narrower, conditional form of immunity. This immunity arises, Mr. Trump argues, from the same separation of powers concerns articulated in *Fitzgerald* but is colored by principles of double jeopardy (the notion that one cannot be criminally tried twice for the same conduct) and tethered to the Impeachment Judgment Clause.

The Impeachment Judgment Clause, as noted above, provides that "the Party convicted" by the Senate (after being impeached by the House) "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." Mr. Trump reads the Clause together with separation of powers principles as establishing a narrow exception to what he views as the default rule that Presidents are immune from criminal liability for all official acts. The Clause, he argues, permits only a President who has been tried *and convicted* by the Senate to then face a subsequent criminal prosecution for that same conduct. Under this argument, the Clause's use of the phrase "Party convicted" means that it does not apply to impeached officials *acquitted* by the Senate. This distinction between impeached officers that have been convicted by the Senate and those that have been acquitted, he argues, is reinforced by double jeopardy principles. In Mr. Trump's view, the Clause exists to ensure that an individual judged guilty by the Senate could also be criminally punished, while protecting an acquitted official from having to face a second, criminal trial after surviving an impeachment trial. Since Mr. Trump was acquitted by the Senate for substantially similar conduct to that charged by the Special Counsel, the former President argues he is immune from prosecution.

A federal district court judge rejected Mr. Trump's arguments in *United States v. Trump*, holding that neither history nor law support criminal immunity for former Presidents and that the Impeachment Judgment Clause "does not provide that acquittal by the Senate during impeachment proceedings shields a President from criminal prosecution after he leaves office." Instead, the court reasoned that both the history and text of the Clause suggest that it was intended to ensure the availability of subsequent prosecution following an impeachment, rather than bar such prosecution through negative implication.

A unanimous panel of the D.C. Circuit affirmed the district court's decision. That opinion held that former Presidents enjoy no categorical immunity from criminal liability. In reaching this decision, the court made at least four key holdings pertinent to this Sidebar. First, the opinion distinguished between two kinds of official acts—discretionary (e.g., acts taken based on one's judgment) and ministerial (e.g., acts compelled by law)—with the former not "examinable by the courts" and the latter subject to judicial review. When a former President allegedly violates federal criminal law, the court reasoned, those acts cannot be properly viewed as "within the scope of his lawful discretion" and, as a result, can form the basis for a criminal prosecution that "the separation of powers . . . permits the judiciary to oversee."

Second, the court rejected Mr. Trump's argument that presidential immunity for former Presidents arose from the separation of powers and the distraction and chilled-decisionmaking rationales of *Fitzgerald*. The court balanced the interests at play and held that "the interest in criminal accountability, held by both the public and the Executive Branch, outweighs the potential risks of chilling Presidential action and permitting vexatious litigation." The court viewed those risks as both unlikely and unsupported by history, concluding that "the risk that former Presidents will be unduly harassed by meritless federal prosecutions appears slight." Moreover, it ruled that the public's interest was especially strong in the context of this case, where the specific charges against Mr. Trump implicated not just the administration of criminal laws but also the "citizenry's interest in democratically selecting its President."

Third, with respect to the Impeachment Judgment Clause, the court held that the Clause did not gave rise to an implicit immunity for impeached officials acquitted by the Senate. The court reasoned that the Framers knew how to create immunity for constitutional officials and did so, for example, for Members of Congress through the Speech or Debate Clause, but did not do so in the Impeachment Judgment Clause, which "says nothing about" immunity. To hold that the Clause established immunity, the court declared, would require a "tortured" interpretation, as the clause was intended "to ensure that a subsequent prosecution would *not* be barred." The court also identified certain practical concerns with Mr. Trump's interpretation, noting that adopting his argument would mean that no impeachable officer, whether President, Vice President, judge, or other "civil officer," could be criminally prosecuted unless first impeached and convicted.

Fourth, the court found the doctrine of double jeopardy entirely inapplicable, since impeachment is a political rather than a criminal proceeding, with removal and disqualification from office qualifying as political, rather than criminal, consequences.

Views of the Other Branches

The Supreme Court has acknowledged that, "in the performance of assigned constitutional duties, each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." The views of both the executive, in exercising its constitutional powers to administer the criminal law and "take Care that the Laws be faithfully executed," and Congress, in exercising its constitutional impeachment powers, would thus play an important role in any judicial interpretation of the Impeachment Judgment Clause. With this principle in mind, it appears that the executive branch and at least some in the legislative branch disagree with former President Trump's interpretation of the Clause and its relation to presidential immunity.

As previously noted, the executive branch has taken the position that the President is "subject to criminal process" after the conclusion of his term. In both 1973 and 2000, OLC specifically addressed the question of whether the Impeachment Judgment Clause gives rise to an implied immunity to former officials. Finding that it did not, the OLC determined in the latter opinion that "a former President may be prosecuted for crimes of which he was acquitted by the Senate." That opinion, though finding "reasonable arguments for the opposing view," concluded that subjecting former Presidents to criminal lability in such a scenario "accords with the text of the Constitution, . . . the founders' understanding[,] . . . the Senate's understanding of its role as the impeachment tribunal, and makes for a sensible and fair system of responding to the misdeeds of federal officials."

Congress's views, as is often the case given its fragmented structure, are more difficult to discern. Neither chamber, however, appears to view the Clause or the principles of double jeopardy as limiting the exercise of its impeachment powers. In the 1980s, for example, three federal judges were impeached and removed for criminal conduct after their trials. In two of the cases, the judge was tried and convicted before being impeached and removed. In neither case did either body suggest that those convictions were improper under the Impeachment Judgment Clause. In the third case, the judge was acquitted in his criminal trial, only to then be impeached and removed by the Senate. That impeachment proceeding suggests that Congress did not view a criminal acquittal followed by an impeachment conviction as presenting any double jeopardy concerns. Both the House Judiciary Committee and the Senate during the trial explicitly rejected such arguments, reasoning, in short, that "impeachment is not a criminal proceeding" and thus double jeopardy concerns do not attach.

As explored in this CRS Report, House and Senate impeachment deliberations frequently involve consideration of the scope and effect of the impeachment power. If Congress were to believe that either principles of double jeopardy or the Impeachment Judgment Clause barred a criminal prosecution after a Senate acquittal, it would be reasonable to suspect that there would be evidence of individual Members voicing concerns that a failed impeachment could have the consequence of immunizing the official from future criminal prosecution. In the House, for example, supporters of a given impeachment who recognized that conviction in the Senate may be unlikely may have openly struggled with the choice of either impeaching the official with the risk that such an act could lead to immunity from prosecution or choosing to forego impeachment in order to ensure that the official remained subject to future criminal liability. In the Senate, Senators voting to acquit on, for example, procedural grounds might likewise have wrestled with the fact that a vote to acquit was also a vote to accord the official immunity. To the extent that lawmakers have had these concerns, they do not appear to have been prominently discussed or debated during past impeachment proceedings.

Some Members have suggested an understanding of the Impeachment Judgment Clause that reflects the narrower and generally accepted view outlined in the *United States v. Trump* decisions that the Clause was intended to ensure, rather than obstruct, the availability of a criminal prosecution after impeachment and to represent a break from English impeachment practice by clearly distinguishing the political punishments of impeachment in America from the criminal punishments of prosecution. For example, during an earlier failed impeachment of President Andrew Johnson, Representative George Boutwell, who was later appointed as one of the House managers in Johnson's eventual trial, explained that the meaning of the Clause was "easily discovered":

> Its office was to change the common law practice of England. By that law a person convicted by the House of Lords upon a proceeding by impeachment could plead that conviction and sentence in bar of an indictment in a criminal court for the same offense . . . . The framers of the Constitution foresaw when they limited the sentence in cases of impeachment to removal from office and inability to hold office, that persons so convicted and sentenced, if afterwards arraigned upon an indictment would plead the judgment of the court of impeachment as a bar to the proceeding. Hence they employed affirmative and specific language controlling the English practice.

As noted by both OLC and the district court in *United States v. Trump*, Members expressed similar sentiments as to the question of immunity arising from Senate acquittal as early as 1798. During the nation's first impeachment trial, Representative Samuel Dana explicitly reasoned that "whether a person tried under an impeachment be found guilty or acquitted, he is still liable to a prosecution at common law."

On February 28, 2024, the Supreme Court agreed to review the D.C. Circuit decision and set oral argument in the case for the week of April 22, 2024. In granting certiorari, the Court stated that its consideration would be "limited" to the question of "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." Mr. Trump's trial, initially scheduled to begin on March 4, 2023, but since delayed by the district court pending resolution of the immunity issue, will remain paused until the Supreme Court issues its judgment.

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