

WHAT ARE THE LEGAL IMPLICATIONS OF INDICTING A UNITED STATES PRESIDENT?

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*If men were angels, no government would be necessary.*¹

Indicting a United States President brings the executive privilege of immunity from judicial process into direct tension with the Rule of Law. The President is not above the law, but the Constitution likely requires the Senate to remove the President from office before he can be criminally indicted. Further, it is unlikely that a former President could be convicted after leaving office for official capacity conduct. Indicting a President therefore implicates the boundary between personal and official conduct as well as separation of powers, executive privilege, due process, and equal protection.

It is widely recognized that indicting a sitting President is “out of the question.” *Trump v. Vance*, 140 S. Ct. 2412, 2444 (2020) (Alito, J., dissenting). This conclusion finds textual support in the Constitution. Article I, Section 3 is easily interpreted as describing presidential impeachment, conviction, and removal from office as prerequisites to “indictment, trial, judgment and punishment, according to Law.” Further, indicting a sitting President might unconstitutionally interfere with his ability to perform his executive duties.

Indicting a former president, on the other hand, is not out of the question. Indeed, Article I, Section 3 contemplates the indictment of a former President after removal from office. A court considering the indictment of a former President should begin by determining whether the alleged criminal acts occurred while the former President was in office, and if so, whether the alleged acts were carried out in his official or personal capacity. An indictment based on actions taken in a former President’s official capacity could be unconstitutional under the doctrine of separation of

¹ THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

powers, and the evidence necessary to secure a conviction on such an indictment might be largely protected by the executive privilege protecting confidential high-level communications.

Even indicting a former President for alleged criminal acts carried out in his personal capacity is likely to raise questions about the separation of powers, due process, and equal protection. Such an indictment could undermine public trust in the judiciary by being perceived as a show-trial orchestrated by the former President's political rivals. On the other hand, special treatment for the indicted former President could call into question the judiciary's responsibility to enforce the law equally.

All men are not angels, and politicians are perhaps least likely to be so. Indicting a United States President is tricky business. Whatever the result, the losing party will likely claim unfair treatment. Nevertheless, the Rule of Law cannot bend—in either direction—to political will.

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“Perception is reality,” as once stated by Lee Atwater. Without a clear constitutional basis, indicting a U.S. President causes perception to become problematic in a time of highly polarized public opinions.

The Supreme Court has stated that the “extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees.”¹ It held that “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications...can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”²

In the 1970’s, the Office of Legal Counsel (OLC) released a memorandum which concluded that criminal prosecution of a President while in office would be “unconstitutional because it would impermissibly interfere with the President’s ability to carry out his constitutionally assigned functions.”³ Constitutionally, the President or other U.S. civil officer can be removed from office by impeachment of the House and conviction in the Senate for “Treason, Bribery, or other high Crimes and Misdemeanors.”⁴ The Impeachment Judgment Clause states that a

¹ *Butz v. Economou*, 438 U.S. 478 (1978).

² *United States v. Nixon*, 418 U.S. 683 (1974)

³ Memorandum from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Re: A Sitting President’s Amenability to Indictment and Criminal Prosecution* (Oct. 16 2000 (“OLC Memo 2”)); See Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office* (Sept. 24, 1973) (“OLC Memo”).

⁴ U.S. Const. art. 2, § 4.

“Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgement and Punishment, according to Law.”⁵ The OLC concluded that this could not be interpreted as barring the criminal prosecution of a sitting President, as this would extend to other civil officers as well; an absurd result, as civil officers have historically been prosecuted and even imprisoned while in office.⁶

The U.S. Constitution grants limited immunity to members of Congress via the Speech and Debate Clause, but no such express immunity is given to the President.⁷ OLC concluded that it was inconclusive whether this omission conferred no immunity or absolute immunity absent an express writing granting it or limiting it.⁸

Lacking a clear constitutional basis, the OLC concluded that indictment of a president would have a destabilizing effect upon the executive branch by impeding performance of its constitutionally assigned duties.⁹ The destabilizing effect could be attributable to public perception of such an event, due to the conflicting opinions concerning the current political climate, the administration of justice, and the fairness of a trial.

If perception is reality, the public’s reaction to such an event may prove more influential in both law and politics than any constitutional analysis or judicial opinion, particularly where such a profound lack of clarity or precedent exists.

⁵ U.S. Const. art. 1, § 3, cl. 7.

⁶ OLC Memo at 4-7.

⁷ U.S. Const. art. 1, § 6, cl. 1.

⁸ OLC Memo at 18.

⁹ OLC Memo 2 at 236.

The Implications of Indicting a U.S. President
By Andy Lantz

“The King is under the Law, for it is the Law that maketh him a King.”

– Henry de Bracton, as translated by C.S. Lewis

When asked by David Frost why he approved of a plainly illegal plan to monitor anti-war activists, former President Nixon responded, “Well, when the president does it . . . that means that it is not illegal.” While some may rightfully bristle at the audacity of such a statement by a federally elected official, Nixon’s claim has found notable support amongst constitutional scholars, the judiciary, and the Department of Justice. In the country’s 247-year history, no sitting U.S. President has been indicted, and just one has been indicted after leaving office, so offering the possible ramifications of a presidential indictment is highly speculative.

One can imagine that the implications would be broad and far-reaching in both scope and substance. The American people live on a political knife’s edge, one amplified by the purposeful divisiveness of cable news and social media platforms in a way that was unthinkable during Nixon’s presidency. While those on one side of the political spectrum might view an indictment as justice being properly served, those on the other side might see it as overreach or a weaponization of federal law enforcement agencies. Indeed, for former President Trump’s supporters, his indictments have seemingly only served to bolster their perception of a systematic “witch hunt” led by the establishment against a man trying to disrupt it. Indicting a president, then, whether while in office or not, would likely lead to a further entrenchment of an already staunchly divided electorate.

The Department of Justice, for its part, has concluded that while the plain language of the Constitution does not preclude a sitting president’s indictment, prosecuting a president while in office would offend constitutional ideals. For example, as a trial might interfere with a president’s ability to carry out their constitutionally assigned duties, it would also upset the separation of powers so central to American government. It would also mean that the strength of executive privilege, and the apparent impossibility of prosecuting the person who has the unique power of overseeing executive branch prosecutions, would both fall in the way of the judiciary’s exercise of its own constitutional duties. If this issue were to ever reach its docket, the Supreme Court would have the chance to shape branch powers to a degree perhaps unseen since *Marbury v. Madison*. In short, the legal consequences would be monumental.

Examining the implications of indicting a president is inexorably tied to the inverse question: what are the implications, in the face of overwhelming evidence of criminality, of *not* indicting a president? Despite the inherent risks of political fallout and division, and despite the uncertainty of the constitutional questions involved, a president must be held accountable, and we must allow the judicial branch to fulfill its constitutional duty to deliver justice. We must not allow anyone to be above the law.