Presidential Immunity

By Paul Engel

May 14, 2024

- Do presidents have immunity for their official acts?
- If so, where in the Constitution do we find it?
- Is the Supreme Court going to make this up an immunity clause?

In one of the many cases against Donald Trump, his attorneys' are claiming that he cannot be criminally charged for an act he performed in his official capacity as President. Why? Because of something called Presidential Immunity. Is there such a thing as Presidential immunity? If so, where is it stated in the Constitution? Or is the idea of Presidential immunity just the latest attempt to turn the President of the United States into a king?

There was a lot in the oral arguments for this case that didn't set well with me, not to mention how much of the more than two and a half hours were spent on hypotheticals and concerns about future cases. I want to focus on the core question asked: Do Presidents have any form of immunity for their actions in office? This is a fairly long article because there were a lot of important statements made. We start with the Petitioner, D. John Sauer for Mr. Trump.

Petitioner

Without presidential immunity from criminal prosecution, there can be no presidency as we know it. For 234 years of American history, no president was ever prosecuted for his official

acts. The Framers of our Constitution viewed an energetic executive as essential to securing liberty. If a president can be charged, put on trial, and imprisoned for his most controversial decisions as soon as he leaves office, that looming threat will distort the president's decision-making precisely when bold and fearless action is most needed. Every current president will face de facto blackmail and extortion by his political rivals while he is still in office.

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While many in the legal and political realm treat the office of President as an elected king, the idea that a President of the United States can commit crimes in office without even the possibility of accountability would be the true change in this nation as we know it. Remember, the idea that kings can never be wrong, and are therefore immune from prosecution, was one of the concepts from which we fought for independence. Simply because a president has not been charged yet doesn't mean they shouldn't have been, or that they should be in the future. You cannot claim that no one is above the law, and then place someone above it. Justice Thomas asked what I think is the most important question.

JUSTICE THOMAS: Mr. Sauer, to your last point, could you be more precise as to the source of this immunity?

1. SAUER: The source of the immunity is principally rooted in the Executive Vesting Clause of Article II, Section 1.

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What is the Executive Vesting Clause?

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

U.S. Constitution, Article II, Section 1

Do you see anything about immunity there? I don't. Perhaps it comes as part of the executive powers.

Having the quality of executing or performing; as executive power or authority; an executive officer. Hence, in government, executive is used in distinction from legislative and judicial. The body that deliberates and enacts laws, is legislative; the body that judges, or applies the laws to particular cases, is judicial; the body or person who carries the laws into effect, or superintends the enforcement of them, is executive

Executive: Webster's 1828 Dictionary

Nope, no mention of immunity there. So where has Mr. Sauer come up with this idea of Presidential Immunity?

JUSTICE THOMAS: And how does that happen?

1. SAUER: That – the source of it, Justice Thomas, I think is, as you described in your separate opinion in Zivotofsky, for example, that the Executive Vesting Clause does not include only executive powers laid out explicitly therein but encompasses all the powers that were originally understood to be included therein.

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OK, so Mr. Sauer points to an opinion Justice Thomas wrote in the case Zivotofsky v. Kerry:

Our Constitution allocates the powers of the Federal Government over foreign affairs in two ways. First, it expressly identifies certain foreign affairs powers and vests them in particular branches, either individually or jointly. Second, it vests the residual foreign affairs powers of the Federal Government—i.e., those not specifically enumerated in the Constitution—in the President by way of Article II's

Vesting Clause.

Zivotofsky v. Kerry

However, just because Justice Thomas said it's so in a concurring opinion in this case doesn't make it true. In fact, the Tenth Amendment states exactly the opposite:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Constitution, Amendment X

If a power is not delegated to the United States by the Constitution, it belongs either to the states or the people. The Constitution specifically delegates powers; it most certainly does not imply them.

Mr. Sauer also reached for the case Marbury v. Madison as evidence of presidential immunity.

And Marbury against Madison itself provides strong evidence of this kind of immunity, a broad principle of immunity that protects the president's official acts from scrutiny, direct – sitting in judgment, so to speak, of the Article III courts, that that matches the original understanding of the Executive –

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In fact, Marbury said no such thing. That court found:

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction, so conferred, can be exercised.

Marbury v. Madison Opinion

What the Marbury court actually found was that Congress could not give the judicial branch the power to order public officers around. A writ of mandamus is an order by the court to an official to perform their duties. Since the official in this case was a member of the executive branch, a constitutional branch of government, Congress did not have the authority to grant such power to the courts.

In response to a question from Justice Jackson, Mr. Sauer brought more evidence to support his position.

1. SAUER: I would quote from what Benjamin Franklin said at the Constitutional Convention, which I think reflects best the Founders' original understanding and intent here, which is, at the Constitutional Convention, Benjamin Franklin said: History provides one example only of a chief magistrate who is subject to public justice, criminal prosecution. And everybody cried out against that as a violation.

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I found the quote Mr. Sauer mentioned in Farrand's Record of the Federal Convention of 1787, and it seems to say something quite different. The Congress was debating whether or not to remove from the impeachment clause that a president could be removed from office on impeachment and conviction for certain behaviors. During the debate, Mr. Franklin said:

Docr. Franklin was for retaining the clause as favorable to the executive. History furnishes one example only of a first Magistrate being formally brought to public Justice. Every body cried out agst this as unconstitutional. What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in wch. he was not only deprived of his life but of the opportunity of

vindicating his character. It wd. be the best way therefore to provide in the Constitution for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.

Farrand's Record of the Federal Convention of 1787

This was not a discussion of criminal or even civil immunity from prosecution, only whether there would be a mechanism to remove the president from office in the Constitution. Yes, people cried out at the idea of removing the President, but I think Mr. Franklin provided a very good reason why he thought impeachment should remain in the Constitution. Seeing as removal from office on impeachment and conviction remained in the document, I would say Mr. Franklin's position was the one adopted.

Mr. Sauer also called on George Washington's Farewell Address to bolster his position. Washington did warn about the "alternate domination of one faction over another, sharpened by the spirit of revenge, natural to party dissension", and how these have led to "frightful despotism". He even went so far as to describe how that might happen.

The disorders and miseries which result gradually incline the minds of men to seek security and repose in the absolute power of an individual; and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation, on the ruins of public liberty.

Washington's Farewell Address 1796

If there is one position in this case that Mr. Washington seems to be warning about, it's the idea of consolidating power in the presidency. Perhaps that's one reason why the idea of presidential immunity does not appear in the Constitution, as Justice Kagan pointed out.

JUSTICE KAGAN: The Framers did not put an immunity clause into the Constitution. They knew how to. There were immunity clauses in some state constitutions. They knew how to give legislative immunity. They didn't provide immunity to the president.

And, you know, not so surprising, they were reacting against a monarch who claimed to be above the law. Wasn't the whole point that the president was not a monarch and the president was not supposed to be above the law?

1. SAUER: I would say two things in response to that. Immunity – they did put an immunity clause in in a sense. They put in the Executive Vesting Clause, which was originally understood to – to adopt a broad immunity principle that's set forth in the very broad language of Marbury against Madison.

And also, they did discuss and consider what would be the checks on the presidency. And they did not say, oh, we need to have criminal prosecution. Right there at the Constitutional Convention, Benjamin Franklin says, we don't have that. That's not an option. Everybody cried out against that as unconstitutional. The structural check we're adopting is impeachment. And they're very clear on that in pages 64 to 69 of the second volume of [Farrand].

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Again, Mr. Sauer refers to the non-existent immunity he believes inherent in executive powers, the reaction to Mr. Franklin's statement about the impeachment clause, and the Marbury v. Madison case, all of which I've shown to be misleading.

The last of Mr. Sauer's arguments I will deal with came in response to a question from Justice Barrett.

JUSTICE BARRETT: So, Mr. Sauer, you've argued that the

Impeachment Clause suggests or requires impeachment to be a gateway to criminal prosecution, right?

1. SAUER: Yes. I think that's the plain meaning of that second phrase in the clause.

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There are actually two impeachment clauses: Article II, Section 4 which describe who can be impeached for what, and Article I, Section 3, Clause 7, which describes the punishment.

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.

U.S. Constitution, Article I, Section 3, Clause 7

This clause states that, after conviction of impeachment, the party is still liable for any violations of the law. There's nothing in this language that states the person involved is immune from criminal prosecution until they are removed from office by impeachment. Justice Barrett brings up another point.

JUSTICE BARRETT: Okay. So there are many other people who are subject to impeachment, including the nine sitting on this bench, and I don't think anyone has ever suggested that impeachment would have to be the gateway to criminal prosecution for any of the many other officers subject to impeachment. So why is the president different when the Impeachment Clause doesn't say so?

1. SAUER: Someone very important has made the opposite suggestion as to the president himself, which is

> Solicitor General Bork, which is reaffirmed in the OLC opinions on this, where the – where Solicitor General Bork, in 1973, as to the issue of the vice president, reviewed the historical materials, and he said the sequence is mandatory only as to the president.

That is DOJ's view of the original understanding of the Impeachment Judgment Clause, which is exactly our position. The sequence is mandatory only as to the president. Keep in mind that the criminal prosecution of a president – president prior to impeachment contradicts, in our view, the plain language of the Constitution but also hundreds of years of history and what DOJ admits is the Framers' intent.

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So Mr. Sauer is now quoting two sources from the Department of Justice, a part of the executive branch, that claim the Impeachment Clause requires something that it does not state. First, that the clause requires impeachment before prosecution, and second, that the rules for the President are different than for the Vice-President, other civil officers, and as Justice Barrett noted, federal judges.

Respondent

Now that Mr. Trump's attorney has had his chance, it's time for the government to present their case, made by Mr. Michael R. Dreeben, Counselor to the Special Counsel, Department of Justice.

This Court has never recognized absolute criminal immunity for any public official. Petitioner, however, claims that a former president has permanent criminal immunity for his official acts, unless he was first impeached and convicted. His novel theory would immunize former presidents from criminal liability for bribery, treason, sedition, murder, and, here, conspiring to use fraud to overturn the results of an election and perpetuate himself in power.

Such presidential immunity has no foundation in the Constitution. The Framers knew too well the dangers of a king who could do no wrong. They therefore devised a system to check abuses of power, especially the use of official power for private gain.

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I think Mr. Dreeben has stated the point quite effectively. The Supreme Court has never recognized absolute immunity for any public official. This novel idea has no foundation in the Constitution of the United States, and would seem to contradict the foundational principles that the United States would be a nation of laws, not men. Justice Thomas questioned the scope of Mr. Dreeben's statement.

JUSTICE THOMAS: Mr. Dreeben, does the president have immunity, or are you saying that there's no immunity, presidential immunity, even for official acts?

1. DREEBEN: Yes, Justice Thomas, but I think that it's important to put in perspective the position that we are offering the Court today. The president, as the head of the Article II branch, can assert as-applied Article II objections to criminal laws that interfere with an exclusive power possessed by the president or that prevent the president from accomplishing his constitutionally assigned functions.

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Mr. Dreeben points out that the president does have the power to violate laws that would prevent him from performing his duties under Article II, what's commonly referred to in this case as "core powers". For example, if Congress passed a law criminalizing the appointment of members of certain groups to office, the President could point to his Article II appointment powers to say such law could not apply to his because it would be unconstitutional.

During her questions of the respondent, Justice Jackson tried to deal with a concern the petitioner had brought.

JUSTICE JACKSON: All right. The final sort of set of questions that I have have to do with what I do take as a very legitimate concern about prosecutorial abuse, about future presidents being targeted for things that they have done in office.

I – I take that concern. I think it's a real thing. But I wonder whether some of it might also be mitigated by the fact that existing administrations have a self-interest in protecting the presidency, that they understand that if they go after the former guy, soon they're going to be the former guy and they will have created precedent that will be problematic.

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Why haven't previous presidents been criminally charged for their actions in office? I believe there are several reasons. First, we are in a unique election cycle where a previous president is again running for office against the man who defeated him. It's like having two first-term incumbent presidents both running for office. Mr. Trump is not just a previous president, but an extremely polarizing one at that. Simply look at the claims of those who support him and those who oppose him. Second, we have witnessed over the last couple of decades, a willingness, especially from one political party, to take short-term gains for long-term losses. Simply look at the Senate getting rid of the filibuster for Supreme Court nominees, which quickly led to getting rid of it for all judicial nominees. In short, the traditions that have allowed competing parties to peacefully co-exist have been abandoned, just as George Washington warned us.

The alternate domination of one faction over another, sharpened by the spirit of revenge, natural to party

dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism.

Washington's Farewell Address 1796

Conclusion

Mr. Sauer's argument for presidential immunity rested on several pillars: The Executive Vesting Clause, Marbury v. Madison, the reaction to Franklin's statement in the Federal Convention of 1787, and George Washington's Farewell Address. I've shown in this article that none of those documents in any way suggests a presidential immunity from criminal prosecution. While much of the questioning from the justices focused on the impact of their decision, primarily not in this case but in future ones, space prevents me from diving into that topic here. Let me summarize by stating that while each side stated their positions, the evidence brought by Mr. Sauer was a flawed as the rest of his case.

Mr. Sauer was not alone in having flaws in his argument. To me the saddest quote of all came from Mr. Dreeben.

We are trying to design a system that preserves the effective functioning of the presidency and the accountability of a former president under the rule of law.

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Rather than following the Constitution and laws of the United States, the courts, and all of the attorneys arguing the cases, are attempting to design a system to meets their ends. They are legislating from the bench, rather than applying the law to the case at hand. While Mr. Trump is attempting to turn the Presidency into a Kingship, the courts are trying to turn the United States into an oligarchy. All so one faction can have dominion over another. Quite a frightful despotism indeed.

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