

Criminal Responsibility of the President of the United States of America

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Abstract: Observed from a wider historical perspective, the most recent period of the constitutional life of the United States of America risks to be remembered as the one during which the presidential impeachment procedure was used incomparably more often than ever before. This sometimes attracts particular attention to the topic of criminal responsibility of the President, on which the Constitution itself remains silent. At the same time, legislation and jurisprudence seem to have been shying away from addressing this important and rather actual issue. The question whether the presidential immunity protects a sitting or a former president from arrest, trial, or punishment for deeds committed during the presidential term of office thus represents a particularly complex legal puzzler. This is particularly the case since the traditional checks-and-balances system appears to be displaying signs of weakness due to an overtly politicized procedure, notably in the absence of firm legal guidelines or clear theoretical perspectives.

Keywords: President of the United States, criminal responsibility, presidential immunity, impeachment.

INTRODUCTION

The subject of legal responsibility of a president of the United States of America (the US) for transgressions of the US Constitution (the Constitution) has been attracting more attention in the previous three decades than ever before. After a single effort to impeach the president in over 200 years (the unsuccessful initiative against Andrew Johnson in 1868), not less than four comparable motions were put before the US Senate (the Senate), in the last quarter of a century: the one against Bill Clinton in 1999, two against Donald Trump (in 2020 and in 2021), and, finally, the ongoing impeachment trial against President Joseph Biden (put into motion in 2021). In addition, a promising impeachment attempt against President Richard Nixon led to his resignation (the only one in the history of the Presidency) in 1974, only half a century ago. This means that until the very end of the 20th century, no living person witnessed a presidential impeachment, and from that moment since – one could have lived through four. The topic has also become a subject that has been boasting a vast literature for decades.

This tendency demonstrates that the question of criminal responsibility – or impunity – of the American head of state for his actions taken while in office raises theoretical attraction

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and calls for practical solutions more than in earlier periods of American constitutional history. Since the Supreme Court of the US (the Supreme Court) has not clearly answered the question whether the President can be indicted, and bearing in mind that the Constitution remains silent on the topic, there is a continuing need for further theoretical observations and creative suggestions.

Some may argue that the ongoing proliferation of impeachment procedures, combined in some cases with replying to the question of presidential criminal responsibility, has a thing or two to do with possible threats to democratic legitimacy of the highest office in the US. This paper will explore whether the President can be subject to criminal procedure, in the midst of an ongoing scholar debate whether the dispute is even capable of judicial resolution. The author will attempt to discover whether a fresh legislation or a constitutional amendment will be needed to resolve the troubling issue at least from legal point of view, understanding that any impeachment procedure (or all of them) have been, at least in part, politically motivated and guided by partisanship, and will remain so.

A theoretical and practical requirement to make a distinction of the criminal responsibility of a former president, in comparison with the one of a sitting president, seems to exist. The cavalier fashion with which the impeachment process has been used in last decades outlines the practical necessities of determining whether the President's culpability presents merely an abstract possibility or it is based on a roughly solid legal grounding.

LEGAL FRAMEWORK FOR CRIMINAL LIABILITY OF THE PRESIDENT OF THE UNITED STATES

Law on the criminal responsibility of the President is scarce. There is no plain language in the Constitution regarding the topic. Indeed, it is truth that “the Constitution supplies no obvious answer to the question of presidential amenability to prosecution and punishment” (Prakash, 2021: 58). Nevertheless, the document's reading is rather precise in a manner it treats the removal from the office of the President. Namely, Article III Section 4 of the Constitution lays several possible grounds for the removal of the President from office, namely “Treason, Bribery, or other high Crimes and Misdemeanors”. The same provision uses the expression *Impeachment* to identify the legal proceeding through which this removal is organized and put into effect. The authority of the House of Representatives (the House) to impeach the President is marked with exclusivity, on account of the fact that it “shall have the sole Power of Impeachment” (Article I Section 2 Paragraph 5 of the Constitution).

On the other hand, the Senate is solely entitled “to try” the President, under the chairmanship of the Chief Justice of the Supreme Court. It is required that at least two-thirds of the present members of the Senate vote for the conviction of President in order for it to be legally binding (Article I Section 3 Paragraph 6). In addition – and what is of greatest importance for the purposes of the subject to which this paper is dedicated – it is claimed in the Article I Section 3 Paragraph 7, that “judgments in cases of impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any office of honor”, as well as that “the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law”. The cited expression



nevertheless will be of good serve to the US Department of Justice (the Department) in 1973, which claimed that this term “constitutes a bar to the prosecution of a person subject to impeachment prior to the termination of impeachment proceedings” (U.S. Department of Justice, Office of Legal Counsel, 2000: 224).

The Supreme Court has not been entirely silent regarding the possibility of bringing up criminal charges against an incumbent President. Still, in the case the Supreme Court has decided on the issue (*United States v. Nixon*, 1974; *Clinton v. Jones*, 1997; *Nixon v. Fitzgerald*, 1982), it did not explicitly answer whether the President can be prosecuted (U.S. Department of Justice, Office of Legal Counsel, 2000: 237). A Washington DC court concluded, in *Hastings v. United States*, that impeachment, being an “extraordinary remedy”, “must be invoked and carried out with solemn respect and scrupulous attention to fairness”. It is also outlined that “fairness and due process must be the watchword whenever a branch of the United States government conducts a trial, whether it be in a criminal case, a civil case or a case of impeachment” (*Hastings v. United States*, 1992: 492).

Representing an instrument of supreme importance for manifesting check on the executive, from the comparative legal perspective, impeachment can be assessed a revolutionary invention, at least at the time of the adoption of the Constitution. However, neither the Supreme Court nor constitutional scholars have established a consensus on the topic. It is of essential importance to signify the dissimilarity that lies between the criminal responsibility of a sitting president and that of a president who still holds office at the moment of the initiation of criminal proceedings against him or her.

CRIMINAL RESPONSIBILITY OF A FORMER PRESIDENT

Can a former President stand trial for violating the Constitution? Or, expressed from a different institutional perspective, can the Constitution be construed so that the power to impeach is *also in this case* recognized to the Congress? Let us look back into history. Framers of the Constitution (the Framers) avoided to set any restraints on the House’s “sole Power to try all impeachments”, or the Senate’s “sole Power to try all Impeachments”. Therefore, one may legitimately conclude that Congress’s jurisdiction is not limited to trying and impeaching *only* a sitting president (or any other executive official).

According to some, former presidents *can* be tried after the ending of their term of office. This line of thought is founded on several arguments. The Framers relied on the example of trying a former British colonial governor Warren Hastings in establishing the impeachment procedure, borrowed from the English constitutional law. The debate’s records at the Constitutional Convention clearly point at the conclusion that former officials can be tried *via* the impeachment procedure; in addition, early member-states’ constitutions explicitly claimed that former executive officials could be impeached (Congressional Record, 2021: S591). Indeed, it is hard to imagine that the impeachment procedure established by the Constitution could be *suspended*, or *ignored* in the final days of a president’s term of office, because that period of time theoretically sets the most inviting background for a holder of the office to commit “high crimes and misdemeanours” related to the elections and the consequent transition of power (better to stay – putting obstacles to such transition). In addition, exercising powers delivered to him by Article II Section 2 Paragraph 1, President



Gerald Ford (1974–1977) pardoned former President Nixon (1968–1974) “for all offenses against [the US] which he, Richard Nixon, has committed or may have committed or taken part in” whilst he was in office. As a reason for determining to pardon his predecessor, President Ford invoked “the tranquility [of] this nation”, which “could be irreparably lost by the prospects of bringing to trial a former President”, and might induce “divisive debate over the propriety of exposing to further punishment and degradation a man who has already paid the unprecedented penalty of relinquishing the highest elective office” (*Office of the Federal Register*, 1974).

Presidential immunity from indictment is not enshrined in the Constitution. Because of the recent dynamics of the impeachment, there is not much place for a person to be surprised if he or she finds out that a Speaker of the House has instructed no less than three House committees to start a formal impeachment inquiry against the President. However, in this case, Kevin McCarthy (Speaker of the House) did this in order to commence the procedure against a *former* president – Donald Trump, who was accused for having “incited a violent resurrection” on the day chambers of Congress met to conclude the process of presidential election held in November 2020; he was “impeached for inciting a violent insurrection – an insurrection where people died in this building, an insurrection that desecrated our seat of government” (Congressional Record, 2021: S591–S592). It is important to outline, nevertheless, that Trump was impeached by the House at the moment he still was a *sitting* president, since President Biden took office no earlier than on January 20, 2021. What some qualified nothing less than *insurrection*, organized by (at that moment still – sitting) President Trump, led to particularly violent attack on US Capitol Building in Washington D.C., and the subsequent evacuation of members of the Electoral College on January 6, 2021. Trump’s supporters tried to prevent the Electoral College to hold a session and confirm the presidential election results, i.e. to elect Joe Biden as the 46th president. Since August 2, 2023, Trump faces criminal charges for allegedly trying to overturn the presidential election results in the State of Georgia. In addition, federal prosecutors claim that, determined to remain in power, he tried to convince the then vice-president, Mike Pence, to reject the outcome of the Electoral College voting. According to one of the proponents of Trump’s impeachment, “if that is not an impeachable offense, then there is no such thing” (Congressional Record, 2021: S591).

On February 9, 2021, the Senate continued its session as the Court of Impeachment, for the trial of the Article of Impeachment exhibited by the House against Trump on January 21. Senator Chuck Schummer informed his fellow-Senators that they are about to conduct the procedure initiated because of “the gravest charges ever brought against a [President] in American history”. On February 9, 2021, by 56 affirmative against 44 negative votes, the Senate confirmed that Trump *is* subject to impeachment for actions he committed at the time he was incumbent, in spite of the expiration of the term of office (Congressional Record, 2021: S589, S609). This enabled the Senate to proceed with the trial against the former President. Mr Jamie Raskin, the lead impeachment manager of the House, claimed that Trump’s legal advisers’ main argument was “that if you commit an impeachable offense in your last few weeks in office, you do it with constitutional impunity”, and that, as President, “you can suddenly do in your last few weeks in office without facing any constitutional accountability at all”; this is nothing less than “an invitation to the President to take his best shot at anything he may want to do on his way out the door, including using



violent means to lock that door, to hang on to the Oval Office at all costs, and to block the peaceful transfer of power”. This supposed anomaly was ironically dubbed “January exception to the Constitution” (Congressional Record, 2021: S590).

There is, however, another line of argumentation waiting to be confirmed, in order to absolve Trump of any responsibility from what may be assessed as nothing less than insurrection against the government, interrupting, for the first time in history, a peaceful transfer of power between two presidential administrations. Therefore, “an impeachment trial of Private Citizen Trump held before the Senate would be nothing more nor less than the trial of a private citizen by a legislative body”, which violates Article I, section 9 of the Constitution, which provides that “[n]o bill of attainder . . . shall be passed”. In addition, a question was posed: “From which office shall a non-President be removed if convicted? A non-President does not hold an office, therefore cannot be impeached under this clause, which provides for the removal from office of the person under the impeachment attack”, and, therefore, “Presidents are impeachable because Presidents are removable”; however, “former presidents are not because they cannot be removed” (Congressional Record, 2021: S605–S607).

There seems to be no clear legal basis for prosecuting former presidents. In absence of a firm constitutional ground for imposing the *punishment* for a former president by removing him from office, we should assume that there is no logical explanation for extending the Congressional power of impeachment to the legislators’ (supposed) authority to organise and execute a criminal trial against a former president. Any criminal responsibility of a former office-holder resembles nothing more than a responsibility of a person under regular jurisdiction of the US legal system. This appears to have little to do with the presumption (or a fact) that a former president violated the Constitution (or any other legal act) while in office. As soon as his or her term of office expires, misdeeds attributed to the President are no longer impeachable, and are, in consequence, punishable only by the means of a standard criminal legal procedure, which has no further connection with the highest executive office.

POSSIBILITIES OF A TRIAL AGAINST A SITTING PRESIDENT

A specific legal dilemma arrives from the fact that a sitting President has never, throughout the American history, been criminally indicted, although in the past 24 years there were three impeachment procedures commenced against sitting presidents. The power of the Senate to impose removal of a current president from the office is clear. However, there remains a space for exploring whether a sitting president can be prosecuted, and – consequently – if that possibility *does* exist, if a punishment would burden or incapacitate the executive. It is important to underline that stripping a president of his or her immunity before a criminal court could easily lead to a serious distraction from his or her daily duties. Whereas Article 1, Section 6, Paragraph 1 clearly states the members of the Congress shall “be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same” (with some narrow exceptions), no such guarantee is laid for the President.



Pressing criminal charges against a sitting president is merely a theoretical possibility; therefore no precedent has been established. Still, one document may be of help in resolving the question pertaining to the possibility of investigating criminal liability of a president who is still in charge. In October 2000 (just a couple of weeks before one of the most disputed presidential elections in the Nation's history were held), the Department issued a Memorandum in which it explored the legal possibilities of making a sitting president criminally responsible. This 39-pages long document follows previously established (internal) standard for considering the issue in question. Its authors remind that the Department concluded in another Memorandum, written in 1973, that “the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions”. To this authors of the new Memorandum had nothing to add, expressing their belief “that the conclusion reached by the Department in 1973 still represents the best interpretation of the Constitution” (U.S. Department of Justice, Office of Legal Counsel, 2000: 222).

This means that in Nixon's administration (as it apparently was the case with Clinton's administration) it was officially held that the President, for the mere reason of *functionality* of the executive branch, cannot be held accountable for his wrongdoings while he is still occupying the highest executive office, because such an action “would be inconsistent with the constitutional structure” (U.S. Department of Justice, Office of Legal Counsel, 2000: 228). In addition, the Memorandum of 1973 concluded that all other federal civil officers – with the notable exception of the President – *are* subject to criminal prosecution at the moment in which they are still holding office; therefore, “the President is uniquely immune from such process”. The Memorandum of 2000 concludes by the words in accordance to which “we continue to believe that the better view of the Constitution accords a sitting President immunity from indictment by itself”, and “our view remains that a sitting President is constitutionally immune from indictment and criminal prosecution” (U.S. Department of Justice, Office of Legal Counsel, 2000: 222, 259–260).

This line of legal thinking seems to reflect an important piece of the classical British constitutional doctrine, in accordance to which *the King can do no wrong*. This was also the logic of one of the Constitution Framers. Indeed, criminal (as well as political) liability of chief of state is almost altogether excluded in monarchical forms of government, whether a monarchy is an *absolute* (as is the case in Saudi Arabia, Brunei, etc.) or *parliamentary* one (all European monarchies with a renowned exception of Vatican City).

On the other hand, in the *United States v. Nixon*, the subject of the Supreme Court's consideration was the question whether the then-President Nixon was obliged to deliver certain documentation and tape recordings of his meetings with his staff. The Supreme Court outlined that “neither the doctrine of separation of powers nor the generalized need for confidentiality of high-level communications, (...) can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances”. It concluded that “the President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases” (United States v. Nixon, 1974: 418), thus effectively limiting any President's claim of executive privilege. This line of thought might correctly communicate to a scholarly opinion that no American can stand above the law, not even a President (Prakash, 2021: 64).



However, it appears to be justified to claim that the Congress is entitled to impeach a President only when it is in the position to assert that the executive branch manifested an intolerable degree of assertiveness in relation to Congress's legislative powers (Skibell, 2004: 184-185). Also, according to Antonin Scalia, a deeply influential former Associate Justice of the Supreme Court (1986-2016) and a strong upholder of the logic of executive independence, the President's immunity is "implicit in the separation of powers established by the Constitution" and acknowledged by the practice. Scalia denies that judiciary has any authority to remedy acts of the executive, because "unless the other branches are to be entirely subordinate to the Judiciary, we cannot direct the President to take a specified executive act or the Congress to perform particular legislative duties" (Brisbin, 1998: 103). One can condemn Congress for abuses in the procedure of initiating and conducting impeachment proceedings. The Clinton impeachment process (1998-1999) should perhaps not have reached the Senate voting point, even though this chamber did not support the House's proposal for impeachment which appears to have been driven mostly by partisan motives. Similarly, the House Intelligence Committee approved its Impeachment Report against President Trump in 2019 "in a party-line vote, with thirteen Democrats endorsing the report and nine Republicans dissenting"; exactly the same thing, naturally with different numbers, happened days later, in the House Judiciary Committee, and finally – and most noticeably – on the House and the Senate floors themselves (Galbraith, 2020: 500-502). Namely, the standard set for the impeachment in that case was set uncommonly low, compared to the threshold determined by the Constitution – whose purpose was (and still is) to protect the executive from unwarranted congressional encroachment (Popp, 2000: 223-228).

One of Trump's legal representatives claimed in the Congress that "we are really here because the majority in the House of Representatives does not want to face Donald Trump as a political rival in the future", which is equal to the denial of the right to vote and the right to run for elective office, protected by the 1st and 14th Amendments, based on "the guise of impeachment as a tool to disenfranchise" (Congressional Record, 2021: S600, S602). According to one author, "the outright threat to exploit an apparent loophole in our criminal justice system by President Trump [meaning that he could interfere with criminal investigation against him] has a plethora of legal scholars in a frenzy" (Lozano, 2019: 152). There is also a solid argument for claiming that a president can employ his *absolute* power of pardoning individuals (Article II Section 2 of the Constitution) in such a wide manner that he can actually pardon *himself*, because, from the originalist perspective, it may sound logical that "if the Framers feared Presidents would begin pardoning themselves, then the Framers would have at the very least debated the issue" (Lozano, 2019: 158), and one should bear in mind that the "originalist interpretation of the Constitution, sometimes called historicism, "holds an outstanding place in modern constitutional literature" (Bulajić, 2019: 94). It also indicates that the original text of the Constitution did not envisage presidential term limits, therefore implying a potentially dominant position of the chief of the executive relative to other constitutional subjects.

There is no doubt that a time-consuming process of the impeachment of a sitting president could seriously harm national security and legitimacy of the executive. It might raise the political division of the electorate to unreasonable degrees. To put it mildly, "indictment alone risks visiting upon the President the disabilities that stem from the stigma and



opprobrium associated with a criminal charge, undermining the President's leadership and efficacy both here and abroad" (U.S. Department of Justice, Office of Legal Counsel, 2000: 250-251). Such a process may also impair the impartiality of the justice system, which would be put in the position of needlessly harming the checks-and-balances, deeply enshrined in the constitutional structure of the US. The visible silence of the Constitution on the topic should not be misused to presume what the Framers did not explicitly want: the head of state exposed to potential judicial mistreatment and thus heavily distracted from his or hers numerous and sensible responsibilities.

CONCLUSION

It is true that "the question of whether an incumbent President can be arrested, indicted, prosecuted, and punished will never go away" (Prakash, 2021: 58). The Constitution does not explicitly bar impeachment trials against former presidents, and it could be claimed with validity that it also remains silent about the possibility of establishing criminal responsibility of the President while in office. However, it is not easy to imagine the theoretical and practical difficulties arising from the proposition that a sitting President could be prosecuted by *executive* officers. This possibility would be marred with difficulties regarding the impartiality of prosecutors in charge, as can be witnessed by the *Watergate* prosecution, which effectively ended in Nixon's resignation.

Dangerous political implications of prosecuting a sitting President may also arise, at the same time bearing the risk of establishing a hazardous precedent which could easily inflame partisan hostility in a country that is currently (and has been for a long period) deeply politically fractionated. Political weaponization of the impeachment process is indeed more than probable, because there is no clear boundary between justified demands for establishing an office-holder's responsibility and partisan plinking. Papering over political crises rarely leads to a legitimate resolution of conflicts founded on different political points of view.

One important suggestion risks to be overlooked. Namely, the Constitution confers to the Congress the authority "to make all Laws which shall be necessary and proper for carrying into Execution" of its Powers (Article I, Section 8, Paragraph 18). Even though the President can veto any legislature passed by the Congress, there still is a constitutional tool available to the Congress to override this veto, by securing, within its ranks, a wider support to a given legislative measure (Article I, Section 7, Paragraph 2). In case there are doubts whether legislating on such an important issue as is the criminal responsibility of the head of the executive endangers the balance between the Congress and the president, amending the Constitution itself represents a legitimate and available measure. The Congress is not constitutionally restricted from defining immunities of any executive office-holder – even of the office of the President itself – or from restraining them. Legislators are welcome to take more responsibility in their efforts to set comprehensible standards instead of spending their time foretelling executive moves, because their check on presidential activities needs to occur *before* a President acts, rather than afterwards. Such a move would not constitute a measure directed at weakening of separation of powers, but, on the contrary, it would help in sustaining and strengthening this core principle of American constitutionalism.



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