

South Dakota Newspapers
"We the People"
December 20, 2022

"Constitutionally Speaking, A Former President May Be Prosecuted"

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It is unclear if the Department of Justice will charge former President Donald Trump with four crimes referred by the January 6 Committee, but there should be no doubt, constitutionally speaking, that an ex-president is subject to criminal prosecution.

Chief Justice John Marshall, presiding at the Aaron Burr treason trial in 1807, observed that a former president is returned to the citizenry. The president, Marshall stated, "is elected from the mass of the people" and "returns to the mass of the people."

No special dispensation is required to permit prosecution of a citizen. And there is no evidence whatsoever—no statements, indications, or train of discussion—that the framers of the Constitution intended or even flirted with the idea of clothing an ex-president with any immunity from prosecution. Indeed, immunity was denied to him as president.

The founders, who lived in dread fear of a strong executive, grounded in their own experience under King George III and their keen reading of history, which taught lessons of tyranny, harbored no reason to insulate officials from criminal liability merely because they were elected or appointed to office. Like all citizens, they were responsible under the law. The Supreme Court, in 1882, in *United States v. Lee*, declared: "No officer of the law may set that law at

defiance with impunity. All the officers of government, from the highest to the lowest, are bound to obey it."

Pretensions of executive immunity from prosecution wither under the heat of the Impeachment Clause. Article 1, section 3 of the Constitution provides that "the Party . . . shall nevertheless be liable and subject to indictment." Former Solicitor General Robert H. Bork, long a darling of conservatives, writing on October 5, 1973, that then Vice-President Spiro Agnew could be indicted before being impeached, stated: "A civil officer could be both impeached and criminally punished even absent the Article 1, section 3 proviso." Bork's conclusion was anticipated by the Supreme Court, in 1879, in *Langford v. United States*, where Justice Samuel F. Miller wrote that "the ministers personally, like our President, may be impeached; or if the wrong amounts to a crime, they may be indicted."

The only explicit immunity in the Constitution is the limited immunity granted in Article 1, section 6, to members of Congress: "The Senators and Representatives . . . shall in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same."

The framers were fastidious draftsmen, and they knew very well how to provide for immunity, where they wished to grant it. It is logical to assume that where no immunity is mentioned, none exists.

Charles Pinckney, a delegate to the Constitutional Convention from South Carolina and one of the most active of the framers, declared that that no immunity was intended. Speaking in the Senate in 1800, Pinckney said that "it never was intended to give Congress any but specified privileges, and those were very limited privileges indeed." He added, "No privilege of this

kind was intended for your Executive, nor any except which I have mentioned for your Legislature. The Convention well knew that no subject had been more abused than privilege."

James Wilson, second in importance to James Madison as an architect of the Constitution—a status confirmed by George Washington, who considered Wilson "to be one of the strongest men in the Convention"—assured the Pennsylvania Ratifying Convention that, "not a single privilege is annexed to the President's character. The executive power," he stated, "is better to be trusted when it has no screen." In his landmark Lectures on the Constitution, delivered in 1791 while serving as a Supreme Court Justice, restated the principle: "The most powerful magistrates should be amenable to the law. No one should be secure while he violates the constitution and the laws."

The legal distinction between the English King, who could do no wrong, and the American president, subject to the law at every turn. presented precisely what the framers had in mind when they discussed the rule of law. Alexander Hamilton rebuffed throughout the Federalist Papers efforts by opponents of the Constitution to draw parallels between the authority of the king and that vested in the president. In Federalist No. 68, he was constrained to rebut attacks on grants of power to the president by those, "calculating upon aversion of the people to monarchy," who portrayed the president "as the full-grown progeny of that detested parent." A king could not be indicted, but the president could.

Time will reveal whether the Department of Justice will act on the historic criminal referrals recommended by the January 6 committee. The charges are among the most serious that can be made against a sitting president. If the DOJ decides against prosecution, it won't be because of lack of authority.

