

South Dakota Newspapers
"We the People"
March 22, 2023

"Vulnerable to Indictment, Trump's Cases Subject to the Law"

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Former President Donald Trump has said he expects to be indicted by a Manhattan grand jury any day now. Although widely anticipated, there is no certainty that he will be indicted by grand jurors in New York or, for that matter, by citizens serving on grand juries in Washington or Atlanta, led by prosecutors examining, respectively, his potential obstruction of justice of a federal investigation involving the "Mar-a-Lago Papers" or his effort to overturn the results of the 2020 election in Georgia.

Trump's supporters in Congress and those scattered across the country decry the investigations as "witch hunts" and acts of "political persecution." Many others, however, rightly support them as critical to the defense of the rule of law.

Whether Trump is indicted in any of these cases should turn on a simple question: Is there probable cause to believe that he committed the crimes for which he is charged? There are no grounds, in history or law, to suggest that a former president should be held to a standard different than that applied to all other citizens. In fact, there are no legal or historical grounds to suggest special standards for a *sitting* president.

In the Constitutional Convention, no delegate argued for a presidential privilege, which is hardly

surprising given the drafters' commitment to eliminating all vestiges of monarchical prerogatives. The royal prerogative, James Wilson observed, was irrelevant to the creation of a republican form of government. Wilson, second in importance to James Madison as an architect of the Constitution, summed up the views of his colleagues when he told the Pennsylvania Ratification Convention that "not a *single privilege* is annexed to his [a president's] character."

Doubts about presidential vulnerability to indictment are swept away by Article I, Section 3, Clause 6, which addresses the authority of the Senate to try all impeachments and provides that "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to law." That provision was inserted in the Constitution to avoid claims that a president, having been convicted by the Senate in an impeachment trial, is therefore immune from criminal prosecution by virtue of the protection against double jeopardy. The Senate trial is focused on the issue of removal from office and potential prohibition of further service on behalf of the United States. Failure by the Senate to impeach a president has no bearing on decisions made by criminal justice officials.

The Convention's rejection of presidential immunity from criminal indictment is confirmed by the fact that there is no language in the Constitution that affords it. The framers certainly knew how to confer immunity when they wanted to do it. The only provision for immunity from prosecution is that which is granted to Congress in Article I, section 6: "The Senators and Representatives. . . shall in all Cases, except Treason, Felony and 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." Since the framers knew how to, and did,

spell out immunity, the logical inference is that no immunity exists where none is mentioned.

Since a sitting president is not immune from indictment there is no reason to exalt the treatment of a former president. And, even if—speaking purely hypothetically—a sitting president were immune from indictment by virtue of the structure of the office and the attendant duties and responsibilities of the executive, those factors certainly do not apply to an ex-president.

Americans are divided on the desirability, wisdom, and merits of indicting a former president. The question of a grand jury indictment of former President Trump should turn on the same evidentiary standards applied to other citizens. As Wilson told his colleagues in Pennsylvania, there is "not a single privilege annexed" to the character of a president and, by inference, an ex-president.

In their creation of the presidency, the framers sought to cut all connections to the Royal Prerogative of the English kingship. They institutionalized and constitutionally confined the executive power, which King James I declared was inherent in the king by virtue of his royalty and not his office. The American system was designed in part to overcome the personalization of executive power and the principle that the king was above the law. In their replacement of personal rule with the rule of law, the framers rejected the historical admiration of the executive and the claims of personal authority that at least since the Middle Ages, in one form or another, had conceived of executive rights as innate, which is they were derived not from the office but, we could say, from the blood and bone of the man.

At the time of the Philadelphia Convention, executive power across the world was personal, not

juridical. For their part, the framers tried to transform personal rule into a matter of law and to subordinate the executive to constitutional commands and prescriptions. In a word, they were intent on establishing the rule of law, which meant the president was subject to the same laws, in the same manner, as all other citizens. That principle applies to former presidents as well.