

Inquiring Minds topic - October 15, 2021

TO WHAT EXTENT IS A U.S. PRESIDENT

(In or Out of Office)

ABOVE THE LAW?

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Introduction:

The further historians are removed from an event, the clearer their vision often becomes. Presidents who were vilified by many while in office i.e. Truman and Carter are awarded a more favorable place in history after a half a century of debates.

However, events may unfold that require less time to determine and evaluate a response to historic activities. Time appears to be of the essence when events seem to jeopardize the principles of democracy and the ethical nature of elected officials. For example, various safe-guards were put in place soon after Nixon claimed “absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.” The Supreme Court upheld executive privilege, but not absolute immunity.

It should also be remembered that no legal actions were brought against former President Nixon once President Gerald Ford took office from his predecessor. Within this historic context, how should the recent actions of a twice-impeached president be evaluated, and what should that response entail?

Editorial: Is the US president really above the law? November 3, 2019.

<https://wfcourier.com/opinion/editorial/editorial-is-the-us-president-really-above-the-law>

The U.S. Constitution makes no mention that a president is above the law while in office as once professed by Richard Nixon and Bill Clinton and now

Donald Trump.

“When the president does it, that means that it is not illegal,” Nixon maintained in 1977, three years after resigning while facing impeachment.

The first three sections of Article 2 deal with the qualifications, election and duties of the executive branch. Section 4 states, “The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”

James Madison, “the father of the Constitution,” stated, “If men were angels, no government would be necessary. You must first enable the government to control the governed; and in the next place oblige it to control itself.”

The Constitution doesn’t mention executive privilege, but President George Washington initially refused to provide documents to Congress in 1792 concerning a military defeat against Native Americans.

Secretary of the Treasury Alexander Hamilton contended Congress “might demand secrets of a very mischievous nature.” Washington eventually provided those papers that “the public good would permit.”

President Dwight Eisenhower refused to allow advisers to testify before a Senate hearing in 1954, claiming White House conversations must remain under wraps. “Any man who testifies as to what he told me won’t be working for me that night,” he said.

Trump, claiming a “witch hunt” by congressional Democrats, has declared executive privilege at every turn. It was even invoked by his former campaign manager Corey Lewandowski — who never worked at the White House — in regard to discussions with Trump and his advisers.

Attorneys for the president have maintained in two separate cases in federal courts that a sitting president doesn’t have to comply with either state or congressional investigations into possible malfeasance.

In New York, state prosecutors want Trump’s tax returns. His former personal attorney Michael Cohen previously testified Trump paid hush money to adult film star Stormy Daniels to cover up an affair, accusations Trump denied.

Cohen pleaded guilty to eight criminal counts, including violation of campaign finance laws.

The U.S. Attorney for the Southern District of New York declined to seek charges against “Individual 1,” presumably Trump, who Cohen said ordered him to make the hush-money payments. But Democratic New York prosecutors are doing so.

Appellate Court Judge Denny Chin asked Trump’s attorney William Consovoy about candidate Trump’s statement that he could “stand in the middle of Fifth Avenue and shoot somebody and ... wouldn’t lose voters.”

“Local authorities couldn’t investigate? They couldn’t do anything about it?” Chin asked.

“That is correct,” Consovoy said, adding, “Once a president is removed from office” he could be subject to criminal investigation. “This is not a permanent immunity.”

Justice Department legal opinions state sitting presidents cannot be charged by prosecutors.

However, in a civil case in 1997 involving sexual harassment, *Clinton v. Jones*, the U.S. Supreme Court ruled, “We have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity.”

Previously, U.S. District Judge Victor Marrero declined to block a subpoena seeking Trump’s taxes.

“The President asserts an extraordinary claim (that) the person who serves as President, while in office, enjoys absolute immunity from criminal process of any kind,” he wrote. “This Court cannot endorse such a categorical and limitless assertion of presidential immunity.”

In *U.S. v. Nixon* in 1974, the U.S. Supreme Court affirmed executive privilege, but not absolute immunity when Nixon sought to stop Congress’ access to White House tapes. It rejected Nixon’s insistence on an “absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”

Trump's attorneys also sought to rebuff House Democrats' attempt to procure grand jury documents from Special Counsel Robert Mueller's investigation.

Federal District Court Judge Beryl Howell rebuked White House Counsel Pat Cipollone for a directive that no documents or testimony should be provided in the impeachment investigation.

"Congress's need to access grand jury material relevant to potential impeachable conduct by a president is heightened when the executive branch willfully obstructs channels for accessing other relevant evidence," she wrote.

Georgetown University law professor Randy Barnett has stated that Trump's foes "have been alleging impeachable offenses since before President Trump took the oath of office" and now "they're just trying to fill out the bill of particulars."

Inevitably, these cases will reach the U.S. Supreme Court. It will decide for posterity to what extent any president — Trump and all successors — is untouchable while in office, and whether impeachment is first required as a recourse to investigate allegations of violations of the law.

Questions:

- 1. Should any court or governmental body seek legal inquiry into the actions of a president who is no longer in office? Why/why not?**
- 2. What are the ramifications of pursuing or not pursuing legal actions against a former President whose activities are constitutionally questionable?**
- 3. Did President Ford's response to the actions of former President Nixon serve the country's best interests? Why/why not?**
- 4. Should President Ford's response provide a template to current situations? why/why not?**
- 5. If a former President is indicted on the basis of unlawful activities while in office, how should these activities be addressed? The following questions may be helpful: a.) What would best serve the nation? b.) What would deter such activities in the future? c.) What would promote responsibility and justice for previous actions?**