



What's Federalism Got to do with Trump's Indictment?

John Kincaid

Everyone knows the [indictment](#) of former Republican president, Donald J. Trump, is unprecedented. But what unprecedented facets of federalism underlie the indictment? The case sheds light on federalism as a key facet of American governance.

ALL POLITICS IS LOCAL

Former U.S. House Speaker Paul O'Neill's famous aphorism applies here. Manhattan District Attorney (DA) Alvin L. Bragg—an elected officer in one borough of New York City—indicted a former president of the United States. How is this possible?

The indictment demonstrates not only that no person is above the law but also that our federal system has multiple access and veto points. The system allows a local DA to reach more than 1200 miles across states' lines to indict a resident of another state who allegedly committed a crime in the DA's state, and across jurisdictional lines to prosecute a former federal official.

By [declaring Florida his legal domicile](#) in 2019, Trump illustrated how people can “vote with their feet” in our federal system so as to live in a state or locality that better satisfies their tax and service preferences. Unlike New York, Florida has no income tax. But moving doesn't shield a person from prosecution in their former state for a crime committed there.

WHAT ARE THE UNPRECEDENTED CHARGES?

Bragg convinced a borough grand jury to indict Trump, a Florida resident, on 34 felony charges of falsifying business records with intent to violate state and federal election laws, and maybe state tax laws. Falsifying business records in the second degree is a misdemeanor in New York. But if the falsification aims to conceal a crime, it becomes a felony.

The Trump indictment states: “The grand jury of the county of New York, by this indictment, accuses the defendant of the crime of falsifying business records in the first degree,

in violation of penal law §175.10. . .with intent to defraud and commit another crime and conceal the commission thereof.” All 34 charges read the same. They just involve different transactions. Trump pled “not guilty.”

The case stems from “hush money” allegedly paid to stop a doorman and two women from going public before the 2016 presidential election with allegations of extra-marital sexual conduct. Trump allegedly funneled “hush money” through a lawyer and listed the payments as legal services on company books. New York's election law “makes it a crime to conspire to promote a candidacy by unlawful means,” said Bragg. Further, if the payments were made to influence the election, they should have been reported as campaign spending under federal law.

The indictment is somewhat similar to the 2012 federal indictment of former Democratic presidential aspirant John Edwards. He was acquitted on charges of accepting \$900,000 to help conceal his extra-marital affair with a campaign worker, with whom he had a child, while his wife was dying of cancer.

IS IT A POLITICAL PROSECUTION?

The threshold issue is whether New York's courts should dismiss the indictment as improper because it rests on an unprecedented legal theory. Bragg apparently seeks to prove that Trump intended to commit state and federal election crimes without proving he actually committed such crimes in order to convict Trump of a felony under a New York misdemeanor law for which the statute of limitations for prosecution expired several years ago. Also, the indictment doesn't say who or what was defrauded. Trump might, therefore, challenge the indictment for infringing his rights under Article 1, Section 6 of New York's constitution and Amendment VI of the U.S. Constitution to know “the nature and cause of the” charges against him.

The unusual indictment, the discretion available to a DA, and the unwillingness of the previous Manhattan DA and also the

U.S. Department of Justice under Democratic President Joe Biden to prosecute Trump for the alleged crimes, prompted Trump's supporters to label the indictment a political prosecution by a Democratic DA bent on interfering with the 2024 presidential election. "I believe the New York prosecutor has stretched to reach felony criminal charges in order to fit a political agenda," said Republican U.S. Senator [Mitt Romney](#). However, due to the separation of powers, courts are reluctant to question a DA's motives for filing an indictment.

[CNN](#) found that 76% of Americans believed politics played at least some role in the indictment; even so, 60% approved the indictment. The country also is split over whether the indictment strengthens or weakens our federal democracy.

ARE THERE PRECEDENTS?

Not exactly, but the U.S. Constitution allows indictment, at least after a president leaves office. Article I, Section 3 says that any officer removed by impeachment "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." This could be federal or state law. In 1973, the U.S. [Department of Justice](#) concluded: "The indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions."

In 1872, Republican President Ulysses S. Grant was arrested in Washington, DC, by a black police officer who was a former slave and Union Army veteran. Grant was "fast driving" his carriage again. The [officer said](#), "you are the chief of the nation and I am nothing but a policeman, but duty is duty, sir, and I will have to place you under arrest." Grant complied and posted a \$20 bond at the police station. He forfeited the \$20 (about \$493 today) by failing to appear in court later. Republican President Warren G. Harding might have faced criminal charges for the Teapot Dome scandal had he not died in office in 1923. Republican President Richard M. Nixon, whom a grand jury named in 1974 as an unindicted co-conspirator in the Watergate scandal, might have been indicted had Republican President Gerald Ford not pardoned him in 1974.

In 1999, Democratic President Bill Clinton was found guilty of contempt of court for perjury while still in the White House. He paid a \$90,686 fine. In 1997, the Supreme Court had ruled that a sitting president has no absolute immunity from civil litigation in federal court for actions done before assuming office and not related to the office. However, the Court noted that if Paula Jones had filed in state court, her case might have raised "federalism and comity concerns, as well as the interest in protecting federal officials from possible local prejudice." In that event, Clinton could have invoked "the authority to remove certain cases brought against

federal officers from a state to a federal court" (*Clinton v. Jones*, 520 U.S. 681, 691). In 2001, facing possible perjury and obstruction-of-justice charges, Clinton entered an agreement in which he gave up his law license for five years and paid a \$25,000 fine.

WHAT IS CONCURRENT JURISDICTION?

State and federal courts have concurrent jurisdiction over many types of cases. Such cases can be tried in federal or state court. For example, a federal-law civil claim can be tried in a state or federal court. State courts can also try federal criminal-law cases, although state courts have declined to do so.

During the Constitutional Convention of 1787, there was debate about whether the Constitution should create courts below the Supreme Court. Many framers saw no need for lower federal courts because they believed state courts would try federal-law civil and criminal cases in addition to state-law cases. The Supreme Court, which was established under Article III, would be the appellate court for federal-law cases appealed from state courts. This is why the Article VI, Section 2, supremacy clause of the federal Constitution states that "the Judges in every State shall be bound" by the Constitution. The clause doesn't mention state legislators or governors.

The Convention compromised by making the creation of lower federal courts discretionary. Hence, Article III, Section 1 states that Congress "may" rather than "shall" establish inferior courts. Congress did create lower courts but limited their jurisdiction. Congress did not, for example, authorize federal courts to hear federal-law suits until 1875, but Congress did so by authorizing concurrent federal and state jurisdiction. In 1990, the Supreme Court reiterated the "deeply rooted presumption in favor of concurrent state court jurisdiction" (*Tafflin v. Levitt*, 493 U.S. 455, 459). However, Congress can oust state courts from federal jurisdiction if it wants to do so.

Bragg has not gone so far as to charge Trump with a federal criminal offense, only an intent to commit a federal crime. President Biden's administration could intervene but has not done so. When a state case like Trump's indictment implicates federal law, the U.S. Department of Justice can ask a state or local prosecutor to step aside. State or local prosecutors usually defer to such federal requests.

However, the Federal Election Campaign Act [amendments](#) of 1974 "supersede and preempt [i.e., displace] any provision of State law with respect to election to Federal office." Congress ousted state courts from concurrent jurisdiction to charge violations of federal campaign-finance law. Such charges must go to federal court. Presumably the preemption applies to Bragg's "intent" charge because one purpose of the preemption is to prevent local DAs from using state law to harass

candidates for federal office who belong to a different party.

CAN TRUMP STILL BE ELECTED?

Yes. The federal Constitution stipulates only three qualifications to be president: 35 years old, a natural-born citizen, and a U.S. resident for 14 years. The U.S. Supreme Court has been adamant that neither Congress nor state or local legislative bodies can add to those qualifications. Disqualifying indicted or convicted persons from running for president would require a constitutional amendment.

CAN TRUMP SERVE AS PRESIDENT IF JAILED?

Yes, and his inauguration would probably be a temporary get-out-of-jail card—although this is uncharted constitutional terrain. Serving as president from a state prison cell would cripple the president's ability to serve as chief executive and commander in chief. The U.S. Constitution's supremacy clause would seem to require at least a suspension of a state prison-sentence during the convicted president's four-year term. Furthermore, if "we the people of the United States" elect Trump to the presidency, then the people of New York would presumably lose their authority, temporarily, to prevent him from serving the will of the sovereign American people. At his term's end, Trump would presumably return to prison.

Short of White House service, an interesting federalism question is how state and federal officials would work out Secret Service protection for Trump in a state prison. Again, due to the federal Constitution's supremacy clause, state prison officials would presumably have to accommodate Secret Service protection for a jailed ex-president. Would Secret Service agents be housed in adjacent cells?

COULD TRUMP PARDON HIMSELF?

Depends. When Socialist Eugene V. Debs ran for president in 1920 while serving a federal prison-sentence for sedition, he pledged to pardon himself if he became president. Debs got only 919,799 votes; so, Harding went to the White House. If Debs had won, he could have pardoned himself because he was convicted of a federal crime. If Trump is convicted of a federal crime, he could likewise pardon himself.

If Trump is convicted of a state crime and sentenced to a New York prison, he will not be able to pardon himself if elected president. Only the governor of New York could pardon him. However, the wrinkle in Trump's case is that he might be convicted of a state criminal offense because of an intent to commit a federal crime. This intent to violate federal law might justify a Trump self-pardon of his state conviction. The U.S. Supreme Court has held that states cannot punish a person for a presidentially pardoned crime (*Boyd v. United States*, 142 U.S. 450, 1892).

COULD TRUMP BE REMOVED FROM OFFICE?

Probably not. A Democratic U.S. House might impeach Trump on the afternoon of his inauguration, but conviction requires a two-thirds Senate vote. Some observers suggest he could be removed under the 25th Amendment. This is unlikely because the amendment would require the vice-president and a majority of the president's Cabinet to declare Trump "unable to discharge the powers and duties of his office." Trump is unlikely to select a running mate and Cabinet officers who would eject him shortly after his inauguration.

WILL OTHER DAs INDICT PRESIDENTS?

Trump also faces possible indictment by a Fulton County (Atlanta) grand jury convened by DA Fani T. Willis for alleged efforts to influence Georgia officials to overturn the state's 2020 election result. A long-term danger is that Trump's indictment might incite some local prosecutors and state attorneys general to indict former presidents and sitting presidents in tit-for-tat cycles of political revenge. Such an outcome could subordinate the federal government's chief executive to the mercy of state and local officials.

DISCUSSION QUESTIONS

- Is Trump's indictment an appropriate use of local government power and prosecutorial discretion in our federal system?
- Is it proper for a local prosecutor to elevate a state misdemeanor to a felony by contending an intent to commit a federal crime?
- If the sovereign people of the United States elect a president who is serving a state prison sentence, should the state be required to release that person to serve their White House term?
- Should state courts start hearing federal criminal offenses in addition to federal civil-law claims, especially to relieve overloaded federal dockets due to the increased federalization of criminal law?
- Should we amend the federal Constitution to prohibit persons who have been indicted and/or convicted of civil and/or criminal federal and/or state behavior from serving as president?
- Should we amend the federal Constitution to prohibit presidents from pardoning themselves?

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