

# Presidential Immunity

*Marbury v Madison, 5 US 137 (1803)*

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The President of the United States possesses absolute immunity from criminal prosecution for his official acts while President.<sup>1</sup> This issue is currently before the US Supreme Court and has led to a great deal of uninformed comment in the media. It seems many otherwise intelligent people are unable to think clearly when Donald Trump is mentioned. This paper explains the state of the law.

## Immunity

First of all, immunity from civil liability is common – even here in Australia. Judicial officers are not liable for errors they make when acting in their judicial role. Judgments are regularly appealed and overturned by appellate courts. The successful appellant cannot sue the judge below as he or she is immune from liability. Likewise, Members of Parliament are immune from prosecution for political acts. If you are harmed by illegal government action, you can sue the government, but you cannot sue the Prime Minister personally nor any other minister.

Finally, police officers are immune from personal liability when acting in good faith.<sup>2</sup> If you are brutalized by a police officer, you can sue the police force and get compensation, but you cannot sue the officer who wrongfully arrested you. The system would not work without this immunity. Who would be a police officer getting paid \$50 per hour if, as soon as they made a mistake, they could be sued for millions of dollars?

Similarly, the President of the United States, as Chief Executive, must take bold and unhesitating action in the agony of the moment, sometimes with incomplete information. This would be impossible if he were to face politically motivated prosecution after leaving office regarding his most sensitive and controversial decisions.

## Marbury v Madison

Marbury v Madison (1803) is the most important case ever decided by the US Supreme Court because it established the doctrines of judicial review & judicial supremacy and defined the power of each branch of the US government – the legislature, the executive and the judiciary. Chief Justice John Marshall held at pages 165-6:

*“By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.*

...  
*[The President’s] “acts are only politically examinable.” and “can never be examinable by the courts.”*

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<sup>1</sup> Nixon v Fitzgerald (1982) at 756

<sup>2</sup> s213 Police Act (NSW) 1990

This principle has been upheld by the US Supreme Court for over 200 years. Most Recently, in Nixon v Fitzgerald, the court held at page 756:

*“In view of the special nature of the President’s constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the ‘outer perimeter’ of his official responsibility.”*

It follows that the president would also be immune from criminal prosecution for his official acts under the same reasoning. So, the issue to be determined in Trump v United States, currently before the US Supreme Court, is whether the acts covered by the indictment are private or official - within the ‘outer perimeter’ of his official responsibility. This case will be remanded to the court below for these questions of fact to be determined by evidence.

## Is the President above the Law?

No. The President is subject to the constitution and, in particular, the Impeachment Clause:<sup>1</sup>

*“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”*

Thus, impeachment and conviction are conditions precedent to criminal prosecution. Upon conviction in the Senate, the President loses immunity and can be charged for the conduct that was the subject of the impeachment trial. To hold that the President can be prosecuted without impeachment would rob the clause of any effect. The US Supreme Court held in Marbury at page 174:

*“It cannot be presumed that any clause in the Constitution is intended to be without effect, and therefore such construction is inadmissible unless the words require it.”*

This analysis was affirmed by the US Supreme Court in Fitzgerald at page 757:

*“A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials.”*

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<sup>1</sup> US Constitution, Article 1, section 3, clause 7