

LURID REALITIES: TRUMP IMPLIES THAT SELLING NUCLEAR SECRETS IS TREASON

In this post, I noted that two passages from DOJ's response to Trump's Motion to Dismiss for Absolute Immunity – one pertaining to exchanging pardons as part of a *quid pro quo*, another describing otherwise official acts that would clearly be illegal – actually described things that may have or likely happened under Trump.

Here's the latter discussion:

The same is true of an even splashier passage. A paragraph describing the implications of Trump's claim to absolute immunity lays out what some commentators have taken as hyperbolic scenarios of presidential corruption.

The implications of the defendant's unbounded immunity theory are startling. It would grant absolute immunity from criminal prosecution to a president who accepts a bribe in exchange for a lucrative government contract for a family member; a president who instructs his FBI Director to plant incriminating evidence on a political enemy; a president who orders the National Guard to murder his most prominent critics; or **a president who sells nuclear secrets to a foreign adversary**. After all, in each of these scenarios, the president could assert that he was simply executing the laws; or communicating with the Department of Justice; or

discharging his powers as commander-in-chief; or engaging in foreign diplomacy—and his felonious purposes and motives, as the defendant repeatedly insists, would be completely irrelevant and could never even be aired at trial. In addition to the profoundly troubling implications for the rule of law and the inconsistency with the fundamental principle that no man is above the law, that novel approach to immunity in the criminal context, as explained above, has no basis in law or history.

These seemingly extreme cases of crimes a President might commit, crimes that everyone should agree would face prosecution, include (these are out of order):

- *A President ordering the National Guard to murder his critics*
- *A President ordering an FBI agent to plant evidence on his political enemy*
- *A bribe paid in exchange for a family member getting a lucrative contract*
- *A President selling nuclear secrets to America's adversaries*

Like the pardon discussion above, these hypotheticals – as Commander-in-Chief, with the conduct of foreign policy, with the treatment of classified materials –

invoke actions where DOJ typically argues that the President is at the zenith of his power.

We have no reason to believe that Trump ordered the National Guard, specifically, to murder his critics. But we do know that on January 3, 2021, Trump **proposed** calling out 10,000 members of the National Guard to “protect” his people and facilitate his own march on the Capitol.

And he just cut me off, and he goes, well, we should call in the National Guard.

And then I think it was Max who said something to the effect of, Well, we should only call in the Guard if we expect a problem. And then the President says, no, we should call in the Guard so that there aren't – so that there isn't a problem. You know, we need to make sure people are protected.

And he said – he looked over at Max, and I don't know if somebody was standing behind him or not. He just looked the other way from me and says, you know, want to call in 10,000 National Guard. And then opened my folder and wrote down 10,000 National Guard, closed my folder again.

We know that days later Mark Meadows **believed** the Guard would be present and Proud Boy Charles Donohoe **seemed to expect** such protection.

Similarly, we don't know of a specific instance where Trump ordered an FBI agent to plant information on his

As to selling nuclear secrets to a foreign adversary? Well, we know Trump had some number of nuclear secrets in his gaudy bathroom and then in his leatherbound box. We have no fucking clue what happened to the secrets that Walt Nauta allegedly withheld from Evan Corcoran's review that got flown to Bedminster just before a Saudi golf tournament, never to be seen again.

All of which is to say that these edge cases – examples of Presidential misconduct that some commentators have treated as strictly hypothetical – all have near analogues in Trump's record. [my emphasis]

Trump's reply to that response addresses this second passage – at least, two items from it – in what it deems to be “lurid hypotheticals.”

10 Ignoring actual lessons from history, the Government provides a list of lurid hypotheticals that have never happened—including **treason** and murder. Response, at 20 (speculating that a President might “murder his most prominent critics” or “**sell[] nuclear secrets to a foreign adversary**”). Some or all of these hypotheticals, depending on the facts, would likely involve purely private conduct, rendering them irrelevant here. See *id.* Yet even if such examples somehow were within the outer perimeter of a President's duties, it is overwhelmingly likely the House impeach and the Senate would convict, and the offending President would then be subject to “Indictment, Trial, Judgment and Punishment” by criminal prosecution. U.S. CONST. art. I, § 3, cl. 7. That is the process the Constitution provides, and the prosecution may not ignore it here. [my emphasis]

Since Trump doesn't include the entire list, here are the four items in it:

- A President ordering the National Guard to murder his critics
- A President ordering an FBI agent to plant evidence on his political enemy
- A bribe paid in exchange for a family member getting a lucrative contract
- A President selling nuclear secrets to America's adversaries

This footnote seems to suggest more than one and possibly *all* of these things – in a list including an order to the National Guard and an order to an FBI Agent – would be private acts.

That's a consistent stance with the claim, in a footnote that concludes on this very same page, that Nixon's suspected involvement in the DNC burglary as part of an attempt to win an election would also be a private act.

9 The Government relies on President Ford's pardon of President Nixon, arguing that it presupposes that Nixon could have been prosecuted for acts he committed as President. Doc. 109, at 18. Not so. The fact that Nixon was never prosecuted—despite widespread public outrage and compelling evidence of wrongdoing—provides compelling evidence of the *strength* of the historical tradition against prosecuting former Presidents for their official acts, not its weakness. Moreover, this argument overlooks that much of the conduct at issue in the Watergate scandal—such as ordering the burglary of the Democratic National Committee headquarters—may well

have been purely private acts, not shielded by immunity at all, thus necessitating a pardon. (Both of these points apply equally to President Clinton's admitted perjury in the Paula Jones litigation, for which he was never prosecuted. Response, at 19.)

FWIW, I agree with this reply's argument that DOJ doesn't aggressively lay out the extent to which Trump's alleged acts in the January 6 indictment are private acts. But if Trump concedes that Nixon's suspected role in the DNC break-in to win an election was a private act, then it seems to concede that Trump's own actions to reverse the outcome of an election he lost would also be a private act.

And Trump's extension of private acts to this list of four "lurid hypotheticals" would seem to swallow up the entire argument about Presidential immunity.

But it seems to do something else.

There is nothing on that list resembling treason.

Accepting a bribe from Saudi Arabia to win a \$2 billion contract for your son-in-law? Not treason.

Ordering the FBI to alter records to gin up an investigation against Joe Biden? Not treason.

Ordering 10,000 National Guard members to protect your mob as it attacks Congress? Not treason – at least not until it kicks off Civil War.

The closest thing on that list to treason is selling nuclear secrets to America's adversaries. Not treason.

But Trump's lawyers, including two of the lawyers representing him in the stolen documents case, lawyers who had their first good look at the documents Trump is accused of stealing last week, seem to suggest it could be.

To be clear: Trump has never been accused of selling nuclear secrets to America's adversaries.

He undoubtedly gave Israel's counterterrorism secrets to Russia – why, and whether there was a *quid pro quo* involved, we still don't know.

He is known to have Tweeted out highly sensitive satellite information to dick-wag Iran, with the result that Iran learned about the satellites targeting their country.

To spite Mark Milley, he showed a plan to attack Iran to Mark Meadows' ghost writers.

Ongoing reporting, first from ABC and then from NYT, reveals that after Australian billionaire Anthony Pratt paid millions for access to Trump, Trump shared details of a conversation he had about a call he had with Iraq's president after bombing Iraq, described his perfect phone call with Volodymyr Zelenskyy, and provided sensitive details of America's nuclear subs.

And he is accused of leaving nuclear documents – documents that Trump's lawyers may have reviewed for the first time last week – in unsecure ways at his beach resort, possibly even in his gaudy bathroom.

So, no. Trump has not (yet) been accused of selling nuclear secrets, to adversaries or anyone else. Though he did give away what he claimed to be nuclear secrets to a businessman from an allied nation after the guy paid a lot of money for access to Trump.

But as I noted, we don't yet know what happened to some of the secret documents that Trump snuck away from Mar-a-Lago after hiding them from Evan Corcoran in June 2022, documents he took with him to host a golf tournament the Saudis paid an undisclosed sum to host at Bedminster.

Those documents have never been located.

Just so long as Trump didn't sell any of these nuclear documents, but instead gave them away, I'm sure we're all good.