THE PRESIDENTIAL IMMUNITY DECISION

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In *Trump v. United States*,[1] the Supreme Court issued one of the most resounding defenses of executive power in its history. It held that former Presidents enjoy absolute immunity from federal prosecution for actions within their core constitutional powers. Writing for a 6-3 majority, Chief Justice John Roberts claimed the decision had little to do with the charges against Donald Trump for the January 6, 2021 Capitol attack and everything to do with the proper working of the executive branch. Immunity may shield a future President who commits criminal acts, but it also provides a President with "the maximum ability to deal fearlessly and impartially with" the duties of his office.[2]

The opinion had barely issued when Trump's critics greeted it as holding that the President was "above the law," and that immunity posed a grave threat to "our democracy."[3] Yet although the decision was difficult, it followed the Court's precedents both on official immunity and executive authority.

While the decision represented a signal victory for Trump in his fight with special counsel Jack Smith, it was rooted in "enduring principles" that transcend the political passions of the moment. The Court, Roberts said, "cannot afford to fixate exclusively, or even primarily, on present exigencies," but was required to consider the decision's "profound consequences for the separation of powers and for the future of our Republic." By making it much less likely that outgoing Presidents will face criminal charges brought by their successors, the Court hopes to spare the Republic from the "frightful despotism" of "alternate domination of one faction over another, sharpened by the spirit of revenge," in George Washington's words.[4] The Court seeks to forestall recurring cycles of partisan revenge in which criminal justice becomes a weapon against political rivals.

Trump also reveals the Court's role in settling political controversy. In cases such as abortion (*Dobbs*)[5] and the Second Amendment (*Bruen*),[6] the Justices have adopted a broadly originalist approach that seeks to adopt the understandings of those who ratified the constitutional text. But

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[1] 144 S.Ct. 2312 (2024).

[2] *Id.* at 2329 (quoting Ferri v. Ackerman, 444 U.S. 193, 203 (1979)).

[3] *Id.* at 2371–72 (Sotomayor, J., dissenting).

[4] *Id.* at 2347 (quoting 35 Writings of George Washington 226-27 (J. Fitzpatrick ed. 1940)).

[5] Dobbs v. Jackson Women's Health Organization, 142 S.Ct 2228 (2022).

[6] New York Rifle & Pistol Ass'n v. Bruen, 142 S.Ct 2111 (2022).

in the most important decision on executive power of the last half century, the Court rejected the strong originalist evidence against presidential immunity. Instead, it sought to build consensus, and claim legitimacy, by relying on precedent and reaching broad inferences from the nature of executive power within the modern presidency. While reflecting an effort to find common ground among Justices with widely different jurisprudential commitments, the reliance on precedent and inference alone lacks the stronger foundations that a deeper engagement with constitutional text and history would yield.

THE HOLDING

Trump brought to the Court the Justice Department's investigation of the January 6, 2021 attack on the Capitol. In his indictment, special counsel Jack Smith did not allege that Donald Trump had direct involvement with the attack itself. Instead, it focused on Trump's efforts to encourage state legislators and election officials to question the validity of the November 2020 election, to have the Justice Department investigate the vote, and then to organize supporters to submit false electoral votes to Congress, where Vice President Mike Pence would count them for the Republican ticket. DOJ charged Trump with committing fraud against the United States, obstructing a congressional proceeding, and suppressing the voting rights of everyone who cast ballots for President in the election. The indictment involved a mix of official and non-official presidential conduct, from Trump's directives to the Justice Department and discussions with the Vice President to his phone calls as a candidate for re-election.

Trump held that a President could not be prosecuted after he left office for official actions within his core constitutional powers. Chief Justice Roberts' reasoning ran contrary to the textual and historical evidence at hand, which Justice Sotomayor's dissent briefly surveyed. The constitutional text does not explicitly provide for executive (or judicial) immunity even as it specifically grants Members of Congress immunity in the Speech and Debate Clause. In Federalist No. 69, Hamilton explained that the Constitution would subject abusive presidents to impeachment while in office and prosecution after they left.[7] Hamilton emphasized that impeachment was not a criminal proceeding, but only one to remove an executive officer guilty of "treason, bribery, and other high crimes and misdemeanors from office." Unlike the practice in England, impeachment would not result in a prison sentence, fine, or any other punishment—those sanctions would be up to the criminal justice system.

The difference between impeachment and a criminal trial explains why the Constitution appointed the Senate the trier of impeachments, rather than the federal courts: Judges might have to try the president after his removal for the very crimes for which he was impeached. Hamilton wrote: "The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender." Rather, "After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law." If the judiciary were the trier both in the impeachment case and any later criminal case based on the same charges, then an impeachment conviction would essentially decide the second criminal trial in advance. "The loss of life and estate would often be virtually included in a sentence which, in

[7] THE FEDERALIST No. 69 (Hamilton).

its terms, imported nothing more than dismission from a present, and disqualification for a future office," Hamilton wrote. It is difficult, if not impossible, to find evidence from the founding period that overcomes Hamilton's clear statements, which he made to defend the proposed Constitution during the fight over ratification.

Instead of following its usual originalist instincts, the Court instead appealed to structural separation of powers principles and its own precedents on official immunity. Chief Justice Roberts borrowed heavily from the logic of the 1982 decision in *Nixon v. Fitzgerald*,[8] which held the President absolutely immune from civil suits for official acts. Roberts particularly emphasized *Fitzgerald's* consideration of history and public policy. The analysis started by distinguishing (as the Court has done for over half a century) between the two main sources of presidential authority: the Constitution itself, and Acts of Congress.

According to the Court, the Constitution vests certain "core" powers exclusively in the President, such as the powers to command the military, to pardon, to veto proposed legislation, to appoint and remove principal officers of the United States, or to recognize foreign governments. When Presidents exercise these core powers, the Court held, they must enjoy absolute immunity from criminal prosecution.

> Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority. It follows that an Act of Congress – either a specific one targeted at the President or a generally applicable one–may not criminalize the President's actions within his exclusive constitutional power. Neither may the courts adjudicate a criminal prosecution that examines such Presidential actions. [9]

When a President's actions rest at least partly on congressional authorization, the Court followed the functionalist analysis employed by *Nixon v. Fitzgerald*. *Fitzgerald* held that a former President enjoyed absolute immunity from civil suits seeking damages for his official acts. Emphasizing the uniqueness of the presidency, the Court sought to ward off the harm that would be done to a President's ability to perform his constitutional functions were he exposed to damages liability for official acts. "We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history," the *Fitzgerald* Court wrote.[10] "Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Fitzgerald* also emphasized the highly discretionary and sensitive nature of presidential decision-making. On issues of the "most intense feelings,"[11] the Court observed, "there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office."[12] The Court found this interest "compelling" because the President "must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system."

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[8] 457 U.S. 731 (1982).
[9] *Trump*, 144 S.Ct at 2328.
[10] *Fitzgerald*, 457 U.S. at 749.
[11] *Id.* at 752 (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).
[12] *Id.* at 752 (quoting *Ferri*, 444 U.S. at 203).

Closely following *Fitzgerald*, *Trump* extended *Fitzgerald* from civil to criminal liability. This is a logical move in that the criminal prosecution of a President for official conduct would raise the stakes even higher and would constrain the exercise of presidential discretion even further. Chief Justice Roberts observed that "[p]otential criminal liability, and the peculiar public opprobrium that attaches to criminal proceedings, are plainly more likely to distort Presidential decisionmaking than the potential payment of civil damages."

The Court, however, did not extend absolute immunity to all official presidential actions: some official presidential actions exercised powers shared with Congress, and hence were non-exclusive or noncore. When the exercise of noncore powers is at issue, immunity is only presumptively absolute. Criminal law seeks to redress an injury to the public as a whole, not just a wrong to an individual. Therefore the need for freedom and fearlessness in presidential decision-making must be balanced against the compelling interest in fair, effective law enforcement. Hence in some cases, the President's acts "within the outer perimeter of [the President's] official responsibility" might not be shielded by an absolute immunity. "At a minimum, the President must . . . be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.'"[13] It will surely be very difficult for prosecutors to meet that standard.

The Court did not examine which types of immunity applied to the charges in the *Trump* indictment. It did, however, rule on some of Trump's conduct. The majority ruled that charges based on Trump's meetings with Justice Department officials were absolutely immune. They involved the core presidential function of prosecuting alleged federal crimes. Trump's threat to remove the Acting Attorney General also enjoyed absolute immunity because the President's core power to remove executive officers "may not be regulated by Congress or reviewed by the courts." Trump's effort to persuade Vice-President Pence to reject electoral ballots was deemed "official" and so "at least" presumptively immune. It was accordingly "the Government's burden to rebut the presumption of immunity" for acts in this category. Finally, the indictment based some of its charges on interactions between Trump and state legislative and election officials, private persons, and the public at large. Here, the Court sensibly handed off to the lower courts to make the fact-sensitive determinations that would be needed to determine whether the actions were official or private.

A final category covers Trump's conduct in connection with the events of January 6th itself, primarily his communications with the public through Tweets and a public address. The Court indicated that a broad swathe of presidential communications with the public could be considered "official." On the other hand, when the President speaks in "an unofficial capacity – perhaps as a candidate for office or party leader," his conduct would be personal or private. Drawing lines here, the Court said, "must be fact specific and may prove to be challenging."

[13] *Trump*, 144 S,Ct at 2331 (quoting *Fitzgerald*, 457 U.S. at 754).

OBJECTIONS TO THE HOLDING

Trump's reliance on *Fitzgerald* undercuts the rhetoric that the President is "above the law."[14] *Fitzgerald* shows that the President already held immunity from civil lawsuits for official acts. *Fitzgerald* also reminds us that if the President is absolutely immune from certain legal sanctions, so are prosecutors and judges. *Trump*, like *Fitzgerald*, makes clear that the President enjoys no immunity for private, unofficial acts. And while absolute immunity from civil liability does not entail immunity from criminal liability, the reasoning for absolute presidential immunity is strikingly similar in both cases.

Fitzgerald also does something to blunt (though it does not wholly answer) the complaint that the Court's reasoning is neither textualist nor originalist. *Fitzgerald* did not rely on any explicit textual provision, but rather on constitutional structure and functionalist considerations. *Fitzgerald* had previously conceded that "a specific textual basis has not been considered a prerequisite to the recognition of immunity." What sustains presidential immunity are, primarily, the constitutional nature of the Presidency, the need for its occupants to perform their duties effectively and exercise their responsibilities fairly, and the risk that legal liability will compromise their discretion.

The danger that a President will be constantly looking over his shoulder when making critical decisions is very real, perhaps more than ever in an age of extreme political antagonism and polarization. Political thinkers beginning with Machiavelli have pointed out that executive power, by its very nature, has a problematic relationship with strict legality. Can a local magistrate order a private house to be destroyed because it stands in the way of a fire that will spread to other buildings? Can a retreating general order the destruction of a privately owned oil refinery on American soil to prevent it from falling into the hands of an enemy? May the President order the military to furnish weaponry and intelligence information to a foreign government to enable it to shoot down civil aircraft suspected of engaging in drug trafficking? Plainly, intentionally destroying private property would be illegal or even criminal in ordinary circumstances. But the compelling "necessity" of destroying the house or refinery or civil aircraft for the sake of the greater public good should give the executive a defense to a civil or criminal suit.

Presidents must act in situations where the legality of their choices can reasonably be questioned. Take President Obama's September 2011 decision to order the launching of drones that targeted and killed Anwar al-Awlaki, an American citizen of Yemeni origin who was supporting al Qaeda. Al-Awlaki was killed by a Central Intelligence Agency drone in Yemen. Reports differ, but at least three others (and perhaps as many as seven) were killed in the attack, among them Samir Khan, another American citizen.[15] It is conceivable that after the end of President Obama's term, he might have faced a criminal prosecution at the hands of a politically hostile successor over the killing of al-Awlaki or other American citizens.

[14] *Id.* at 2345 (quoting various portions of Justice Jackson's and Justice Sotomayor's dissents in *Trump*).

[15] Karen DeYoung & Peter Finn, *U.S. acknowledges killing of four U.S. citizens in counterterrorism operations*, THE WASHINGTON POST (May 22, 2013, 9:20 PM), https://www.washingtonpost.com/world/national-security/us-acknowledges-killing-of-four-us-citizens-in-counterterrorism-operations/2013/05/22/7a21cf84-c31d-11e2-8c3b-0b5e9247e8ca_story.html

Trump properly forbids such a prosecution. As President, Obama was charged with the responsibility for directing the operations of the military and intelligence agencies, of protecting the United States from terrorist threats, and of safeguarding the national security. He was also bound not to deprive American citizens of their constitutional right to life and liberty without due process of law. He should have been free to resolve any tension between these constitutional obligations without fear of a potential criminal prosecution after his term. If his decision had to be made under the shadow of future prosecution, it would have been appreciably harder, if not impossible, to have made it purely based on the public interest.

There is the obvious response that immunizing presidential decisions creates an unacceptable risk of abuse. If we wish to hold Obama immune from prosecution in the al-Awlaki case, would we want to hold former President Nixon immune from the criminal activities authorized by his White House staff against his political opponents in the name of national security? If the risk of presidential abuse is considered too great, however, the American Presidency would be a different institution from the one this nation has long had. Trump is not the first, and he will not be the last, American President to be accused of criminal, albeit official, acts. A Supreme Court decision holding the President potentially liable for crimes of an "official" nature would weaken the institutional presidency drastically.

Furthermore, there are safeguards against abusive, criminally-minded Presidents. First and foremost, of course, is the threat of impeachment for having committed high crimes or misdemeanors. Then there is the possibility of a congressional investigation and oversight. Then there is journalism and public opinion. A first term President's desire to be re-elected, or a second term President's wish to leave a legacy unmarred by crime, will also deter criminal conduct.

BIDEN'S REACTION AND SMITH'S PROSECUTION

President Biden had a sharply critical view of the Court's work. Calling *Trump v. United States* a "terrible disservice" to the country, he predicted that the decision "certainly means that there are virtually no limits on what a president can do."[16] Without the courts to hear the prosecutions, he concluded, "the American people must decide whether Donald Trump's assault on our democracy on Jan. 6th makes him unfit for public office in the highest office in the land. The American people must decide if Trump's embrace of violence, to preserve his power, is acceptable."

Biden only dimly understood the consequences of prosecuting Trump. Crossing the constitutional Rubicon of using the criminal justice system to attack a former president and the leading opposition candidate for the office not only wasted a year of the nation's life, but it also forced the Supreme Court to intervene to shut down this misuse of federal prosecutorial power. *Trump* reflects the Court's rejection of lawfare, starting most immediately with special counsel Jack Smith.

Earlier last Term, the Court in *Fischer v. United States* eviscerated the main tool in the Biden Justice Department's prosecution of the January 6 rioters: the 2002 Sarbanes-Oxley (SOX) law's

[16] President Biden, Remarks on the Supreme Court's Immunity Ruling (Jul. 1, 2024, 7:45 PM).

prohibition on tampering with documents needed for an official investigation.[17] Even though the January 6 rioters had nothing to do with this kind of evidence or proceeding, DOJ misread SOX to allow it to punish anyone who interfered with the congressional meeting to count the 2020 electoral votes. Once the Court held this law not to apply to January 6, the remaining charges against Trump for fraud and depriving Americans of their voting rights failed. The Court has already held that federal fraud involves only efforts to acquire money or property, not the pursuit of political interests. Regardless of how one views Trump's conduct on January 6th, it does not involve financial benefits. And Smith's notion that Trump's effort to change the electoral-vote count somehow deprived all Americans simultaneously of their voting rights is so overbroad that it invites yet another embarrassing defeat at the Supreme Court.

Add the Court's immunity decision to these weaknesses, and you have a vote of no confidence in President Biden and the Justice Department. The Justices' disdain for the special counsel was so open and notorious that Justice Clarence Thomas even called on judges to examine whether the special counsel's appointment violated federal employment law and the Constitution. A Florida federal district judge took Justice Thomas up on his challenge and subsequently found the special counsel to be unconstitutional. [18] Smith led an investigation that produced no new facts and charged Trump with such tenuous readings of federal criminal law that the Supreme Court quickly and easily doomed the case on legal grounds without a single fact yet presented to a jury.

THE BIG PICTURE

A larger consequence of the *Trump* case involves its impact on executive power under the Constitution. The Court majority saw as its grander purpose the protection of the office of the presidency from a Congress and a partisan successor who would use the law to undermine the institution. The Founders included a president in the Constitution not just to execute the laws (the ground on which the lower courts had held Trump had no immunity), but also to respond to emergencies, crises, and war. In contrast to Congress, the president's powers are left undefined. Article II of the Constitution vests "the executive power" in him because the written law cannot foresee every future circumstance that might require action on behalf of the nation. Therefore, the Framers invested the president with "energy" and expected a single man, rather than a committee, to act with decision, swiftness, and sometimes even secrecy, to protect the national security and ensure domestic tranquility.[19]

As the Roberts Court recognized, binding down the president with Congress's written laws would allow the legislature to intrude upon the proper scope of the executive's authority. But it would do much worse: Prosecution could deprive presidents of the very essence of what it is to be an executive by depriving them of that energy and independence needed to take immediate action. That independence and energy does not just accrue to the president's benefit. As the Court and theorists have long recognized, the separation of powers creates independent branches of government to protect liberty; by preventing any one branch from becoming all-powerful, each

[17] 144 S.Ct. 2176 (2024).
[18] United States v. Trump, No. 23-80101-CR-CANNON, 2024 WL 3404555 (S.D. Fla. Jul. 15, 2024).
[19] *Trump*, 144 S.Ct. at 2331 (quoting THE FEDERALIST No. 70. (Hamilton)).

of the three can keep a constant watch of the others to prevent them from intruding on individual freedom.

Justice Sotomayor has received much attention for the closing line of her opinion: "With fear for our democracy, I dissent." The Constitution, however, creates a republic, not a democracy. Part of our republican design is to prevent the operation of a simple democracy where 50.1 percent of the population can set all policy at once. Our founders created a president, Congress, and Supreme Court to prevent a democracy from quickly controlling the government and imposing its will on the nation. Instead, as *Trump* reminds us, the separation of powers protects individual liberty by creating a presidency that must have independence from Congress in order to act swiftly, decisively, and with energy against threats to the nation's security and at times against the will of the other branches.

Trump also should end the partisan, misguided efforts to use the criminal-justice system to eliminate viable presidential candidates. It protects the very characteristics of the presidency that make it executive in nature, which will enhance the separation of powers and the national security. And it will force the other branches of government and, ultimately, the electorate to take up their responsibility to check abuses of executive power. Viewed from this broader perspective, *Trump* falls within the broader effort of the Roberts Court to protect executive prerogatives while calling on Congress and the people to perform their constitutional responsibilities as well. Unfortunately, it took more than a year, after the Department of Justice crossed the Rubicon of prosecuting a former president and leading opposition candidate, for Biden to finally understand that the American people—and not prosecutors—must judge Trump for his involvement in January 6.