Presidential Immunity

By Paul Engel

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- In a constitutional republic, is anyone immune from prosecution?
- When government actors are immune for their actions, how can they be held accountable?
- If, as the Supreme Court has said, the President is immune for his official actions, how does that not make him a king?

When the delegates to the Constitutional Convention debated the role of the chief executive, many expected George Washington to become our first king. Between Mr. Washington's humility, and the delegates recent experience with a king, they decided we'd be better off with a President rather than a king. With the recent case of Trump v. United States, many have asked: Have we turned the office of President into the office of king?

Background

On January 6th, 2021, Congress had met to witness the counting of the ballots from the presidential electors, commonly known as the Electoral College. Many people had issues with how the preceding election had been handled, myself included. Some of them showed up at the capital to both display their displeasure, and some to seek redress of their grievances. One of those who was there was then President Donald J. Trump.

Before we go further, I think it's important to point out a certain misconception, one that is repeated frequently in this

court’s opinion. I said Congress was in session to witness the counting of the ballots, not to certify the election, as is often claimed.

the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;

U.S. Constitution, Amendment XII

Congress is there to observe, not certify, the counting of the ballots. The two houses are also present in case no one gets a majority of votes for either President or Vice President.

The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. …

The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President;

U.S. Constitution, Amendment XII

While this fact is not directly related to the case, what Congress was doing January 6, 2021 is so often misrepresented by the court, the media, and pundits in general, I thought it worth correcting the record.

The Case

This particular case started with an indictment for Mr. Trump regarding his actions on and around January 6th.

A federal grand jury indicted former President Donald J. Trump on four counts for conduct that occurred during his Presidency following the November 2020 election. The indictment alleged that after losing that election, Trump conspired to overturn it by spreading knowingly false claims of election fraud to obstruct the collecting, counting, and certifying of the election results. Trump moved to dismiss the indictment based on Presidential immunity, arguing that a President has absolute immunity from criminal prosecution for actions performed within the outer perimeter of his official responsibilities, and that the indictment's allegations fell within the core of his official duties. The District Court denied Trump's motion to dismiss, holding that former Presidents do not possess federal criminal immunity for any acts. The D. C. Circuit affirmed. Both the District Court and the D. C. Circuit declined to decide whether the indicted conduct involved official acts.

Trump v. United States

Trump says he has immunity, the District and Circuit courts disagreed. However, the Supreme Court did not.

Held: Under our constitutional structure of separated powers, the nature of Presidential power entitles a former President to absolute immunity from criminal prosecution for actions within his conclusive and preclusive constitutional authority. And he is entitled to at least presumptive immunity from prosecution for all his official acts. There is no immunity for unofficial acts.

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The court based its decision on the doctrine of separation of powers. Under the Constitution, each of the three branches of government are given specific powers which only they can exercise. The court expands on this in their opinion.

This case is the first criminal prosecution in our Nation's

history of a former President for actions taken during his Presidency. Determining whether and under what circumstances such a prosecution may proceed requires careful assessment of the scope of Presidential power under the Constitution. The nature of that power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is entitled to at least presumptive immunity.

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Interesting that the court claims immunity is a question of separation of powers, because the court ignores the fact that the powers are vested in the office, not the person holding it at any point in time.

This is an historic case. Not simply because a former President is accused, but the circumstances under which he was indicted. Let's start with whether or not such a prosecution should move forward.

(1) Article II of the Constitution vests "executive Power" in "a President of the United States of America." §1, cl. 1. The President has duties of "unrivaled gravity and breadth." Trump v. Vance, 591 U. S. 786, 800.

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The Constitution does vest the executive power of the United States in its President, but the duties that Constitution vests are not unrivaled in gravity or in breadth. For example, the President is the Commander in Chief of the Army & Navy (Article II, Section 2, Clause 1), but it is Congress that sets the rules for the military (Article I, Section 8, Clause 14). The President can sign treaties and make appointments, but only with the advice and consent of the Senate (Article II, Section 2, Clause 1). Notice, this court points to the

Constitution for the President's executive power, but to another court when discussing its gravity and breadth.

His authority to act necessarily "stem[s] either from an act of Congress or from the Constitution itself." Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 585. In the latter case, the President's authority is sometimes "conclusive and preclusive." Id., at 638 (Jackson, J., concurring). When the President exercises such authority, Congress cannot act on, and courts cannot examine, the President's actions. 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. The Court thus concludes that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority.

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This is where I see the court drifting from its constitutional power. Yes, the President's power comes from the Constitution, but nowhere in the Constitution is Congress delegated the power to grant him authorities other than his constitutional ones. The court appears to try to "split the baby" between official acts that are within his constitutional powers and those that are not.

Not all of the President's official acts fall within his "conclusive and preclusive" authority. The reasons that justify the President's absolute immunity from criminal prosecution for acts within the scope of his exclusive constitutional authority do not extend to conduct in areas where his authority is shared with Congress. To determine the President's immunity in this context, the Court looks primarily to the Framers' design of the Presidency within the separation of powers, precedent on Presidential immunity in

the civil context, and criminal cases where a President resisted prosecutorial demands for documents.

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Do you see the contradiction? The court talks about separation of powers while claiming there are powers shared with Congress. Are the powers separate or not? When the court looks at the Framers' design of the Presidency, it appears their view is myopic. As the dissent pointed out:

At the Constitutional Convention, James Madison, who was aware that some state constitutions provided governors immunity, proposed that the Convention "conside[r] what privileges ought to be allowed to the Executive." Records of the Federal Convention of 1787, p. 503 (M. Farrand ed. 1911). There is no record of any such discussion. … Delegate Charles Pinckney later explained that "[t]he Convention which formed the Constitution well knew" that "no subject had been more abused than privilege," and so it "determined to . . . limi[t] privilege to what was necessary, and no more." … "No privilege . . . was intended for [the] Executive."

Other commentators around the time of the Founding observed that federal officials had no immunity from prosecution, drawing no exception for the President. James Wilson recognized that federal officers who use their official powers to commit crimes "may be tried by their country; and if their criminality is established, the law will punish. A grand jury may present, a petty jury may convict, and the judges will pronounce the punishment." Debates on the Constitution 177 (J. Elliot ed. 1836). A few decades later, Justice Story evinced the same understanding. He explained that, when a federal official commits a crime in office, "it is indispensable, that provision should be made, that the common tribunals of justice should be at liberty to entertain jurisdiction of the offence, for the purpose of inflicting, the common punishment applicable to unofficial offenders." Commentaries on the

Constitution of the United States §780, pp. 250–251 (1833). Without a criminal trial, he explained, "the grossest official offenders might escape without any substantial punishment, even for crimes, which would subject their fellow citizens to capital punishment." … This historical evidence reinforces that, from the very beginning, the presumption in this Nation has always been that no man is free to flout the criminal law.

Trump v. United States – Dissent

Contrary to the court's opinion, not only is presidential immunity not included in the Constitution, but apparently the idea of privilege was rejected during the convention. The evidence shows that the idea of immunity for any office was downright offensive to those who drafted and commented on the Constitution.

The court went on to explain their position.

(i) The Framers designed the Presidency to provide for a "vigorous" and "energetic" Executive. The Federalist No. 70, pp. 471–472 (J. Cooke ed. 1961) (A. Hamilton). They vested the President with "supervisory and policy responsibilities of utmost discretion and sensitivity." Nixon v. Fitzgerald, 457 U. S. 731, 750. Appreciating the "unique risks" that arise when the President's energies are diverted by proceedings that might render him "unduly cautious in the discharge of his official duties," the Court has recognized Presidential immunities and privileges "rooted in the constitutional tradition of the separation of powers and supported by our history." Id., at 749, 751, 752, n. 32. In Fitzgerald, for instance, the Court concluded that a former President is entitled to absolute immunity from "damages liability for acts within the 'outer perimeter' of his official responsibility." Id., at 756. The Court's "dominant concern" was to avoid "diversion of the President's attention during the decision making process caused by needless worry as to the possibility of damages actions stemming from any particular official

decision."

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Once again we see that courts, not the Constitution, are the source of this idea of presidential immunity. Yes, we want an executive that's energetic in exercising his duties, but how far does that go? If we look at the context of Federalist #70 we find Alexander Hamilton was asking the same question:

Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the convention?

Federalist Paper #70

The court seemed very concerned about the prospect of impairing the President's ability to act, but not the dangers of a lack of restraint.

The Court's "dominant concern" was to avoid "diversion of the President's attention during the decision making process caused by needless worry as to the possibility of damages actions stemming from any particular official decision." Clinton v. Jones, 520 U. S. 681, 694

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What about the consideration of the consequences of the President's actions? Shouldn't someone with the powers of the President consider the legality of their actions? Is there not a need to worry about the impact of one's actions, especially if those actions are criminal? Shouldn't the court's dominant concern be about the application of the law, rather than covering over the bad actions of the President.

Taking into account these competing considerations, we conclude that the separation of powers principles explicated in our precedent necessitate at least a presumptive immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility. Such an immunity is required to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution.

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The court has yet to provide a constitutional argument of how the separation of powers places anyone's actions above review. What this court has done is promote the opinion of previous judges, unsupported by law or Constitution, above the supreme law of the land, and create a privilege for the President that was not only rejected by the federal convention, but by those who observed and commented on it.

The essence of immunity "is its possessor's entitlement not to have to answer for his conduct" in court. Mitchell, 472 U. S., at 525. Presidents therefore cannot be indicted based on conduct for which they are immune from prosecution. As we have explained, the indictment here alleges at least some such conduct.

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The court never answers what appears to be the most important question. How can we know if a president's conduct is immune from prosecution if the deciders of facts, the courts, are not allowed to look? The court's position not only creates a self-fulfilling prophesy, but an active immunization of any President for his actions while in office. If a President cannot be held to answer for his conduct, how can that be considered anything but placing the office above the law?

The court even admits that their position is not based on the

Constitution.

True, there is no “Presidential immunity clause” in the Constitution. But there is no “‘separation of powers clause’” either.

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True, the phrase “separation of powers” does not exist in the Constitution, but the principle is clearly spelled out in the first clause of the first three articles.

All legislative Powers herein granted shall be vested in a Congress of the United States,

U.S Constitution, Article I, Section 1

The executive Power shall be vested in a President of the United States of America.

U.S Constitution, Article II, Section 1, Clause 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S Constitution, Article III, Section 1

Each branch is vested with specific and separate powers. Hence, the “separation of powers”, but those powers are vested in offices, not the people in them. Furthermore, Article III not only vests the judicial power of the United States, it set their jurisdiction as well.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

U.S. Constitution, Article III, Section 2, Clause 1

How can the court have jurisdiction in all cases in law and equity if this court exempts the President from said jurisdiction?

The court's opinion dealt with several of the dissent's arguments. One however, I think is worth discussing here.

The principal dissent then cites the Impeachment Judgment Clause, arguing that it "clearly contemplates that a former President may be subject to criminal prosecution." … But that Clause does not indicate whether a former President may, consistent with the separation of powers, be prosecuted for his official conduct in particular.

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As the court points out, the Impeachment Clause does not prohibit criminal prosecution after conviction, but neither does prohibit prosecution without impeachment. In fact, the Impeachment Clause specifies:

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.

U.S. Constitution, Article I, Section 3, Clause 7

If the Impeachment Clause states that a President can be subject to trial after impeachment, how can the court claim he is immune from answering for such crimes? This court claimed that any such actions would be outside of the President's official duties, but that doesn't make sense. As the dissent points out:

When he uses his official powers in any way, under the majority's reasoning, he now will be insulated from criminal

prosecution. Orders the Navy's Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune.

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All of those actions, and plenty more, are part of the core official powers of the President, and expressly illegal.

Thomas Concurrence

Justice Thomas agreed with the court, but brought up a very interesting point.

In this case, the Attorney General purported to appoint a private citizen as Special Counsel to prosecute a former President on behalf of the United States. But, I am not sure that any office for the Special Counsel has been "established by Law," as the Constitution requires. Art. II, §2, cl. 2. By requiring that Congress create federal offices "by Law," the Constitution imposes an important check against the President—he cannot create offices at his pleasure.

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This is an interesting point. Is this whole case a product of an illegal case brought by a Special Counsel that does not legally exist? And if the Special Counsel office is invalid, was Mr. Smith's appointment legitimate?

Even if the Special Counsel has a valid office, questions remain as to whether the Attorney General filled that office in compliance with the Appointments Clause. For example, it must be determined whether the Special Counsel is a principal or inferior officer. If the former, his appointment is invalid because the Special Counsel was not nominated by the President and confirmed by the Senate, as principal officers must be. Art. II, §2, cl. 2. Even if he is an inferior officer, the

Attorney General could appoint him without Presidential nomination and senatorial confirmation only if "Congress . . . by law vest[ed] the Appointment" in the Attorney General as a "Hea[d] of Department." … So, the Special Counsel's appointment is invalid unless a statute created the Special Counsel's office and gave the Attorney General the power to fill it "by Law."

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Just another interesting twist to this interesting case.

Barrett Concurrence

Barrett agreed with most of the court's opinion, except Part III-C.

For reasons I explain below, I do not join Part III–C of the Court's opinion. The remainder of the opinion is consistent with my view that the Constitution prohibits Congress from criminalizing a President's exercise of core Article II powers and closely related conduct. That said, I would have framed the underlying legal issues differently.

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What is this part Justice Barrett disagreed with?

The Constitution does not insulate Presidents from criminal liability for official acts. But any statute regulating the exercise of executive power is subject to a constitutional challenge. See, e.g., Collins v. Yellen, 594 U. S. 220, 235–236 (2021); Zivotofsky v. Clinton, 566 U. S. 189, 192–194 (2012); Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U. S. 477, 487–488 (2010). A criminal statute is no exception. Thus, a President facing prosecution may challenge the constitutionality of a criminal statute as applied to official acts alleged in the indictment. If that challenge fails, however, he must stand trial.

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If the Constitution does not insulate a President from criminal liability for official acts, why did Justice Barrett concur with court's opinion? Was that not a violation of her oath of office, and by extension, bad behavior?

Dissent

Justice Sotomayor's dissented, and was joined by Justices Kagan and Jackson.

Today's decision to grant former Presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law. Relying on little more than its own misguided wisdom about the need for "bold and unhesitating action" by the President, … the Court gives former President Trump all the immunity he asked for and more. Because our Constitution does not shield a former President from answering for criminal and treasonous acts, I dissent.

[Trump v. United States]

While I rarely agree with Justice Sotomayor, I agree with most of what she said here. It is this court, not the Constitution, that is granting immunity to the President. It does place the office of President above the law by preventing prosecution. While it does not give President Trump all that he asked for, it gives him enough.

Conclusion

What can we conclude from this historic decision? First, we have yet another example of the court simply making up laws out of thin air. As both the opinion and the dissent noted, there is no immunity clause for the President in the Constitution, yet the court makes one up. The court claims that the separation of powers grants the President immunity,

but said immunity actually contradicts the separation of power by preventing the judicial branch from doing what it is constitutionally bound to do. It appears that the court needs to take a very close look in the mirror, for it seems to be projecting itself on the dissent.

The dissents' positions in the end boil down to ignoring the Constitution's separation of powers and the Court's precedent and instead fear mongering on the basis of extreme hypotheticals about a future where the President "feels empowered to violate federal criminal law."

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It is not the dissent that is ignoring the Constitution, but the majority. The separation of powers is just that, separation of powers, not the isolation of the branches of government. By claiming the executive has power to evade the power of the judiciary, it is the court that is violating separation of powers.

The court's disregard of the Constitution goes far beyond Donald Trump and his January 6th actions. Consider that attacks against pro-lifers advocates, parents, traditional Roman Catholics, and so many more by the Biden Administration's so-called Department of Justice. The armored raid of people's houses who are accused of misdemeanors, the targeting of political opponents as potential domestic violent extremists, and the coercion of social media outlets to suppress information; those acts are deprivation of rights under color of law, and federal crime under 18 USC §242. If any of those acts can be tied back to Joe Biden, that would make him a conspirator, and criminally liable under §241. But according to the court, Mr. Biden is immune from prosecution, and effectively immune from investigation, since there's no need to investigate a crime that cannot be prosecuted. It's not just Joe Biden; Barack Obama, George W. Bush, and even Jimmy Carter are living Presidents who may have committed

crimes for which they cannot be held legally accountable, thanks to this court.

This court looked at examples of malicious prosecution, and rather than finding out the truth and applying the law, they got into politics and made the law. Rather than punishing the bad actors in these cases, the court has exposed each and every American to an expansion of the tyranny already coming from the executive branch. After all, since there is no distinction made for the President when it comes to criminal charges, how can the court logically extend them to those who work for him? Since those in the executive branch are exercising the powers vested in the President, don't they get the same protection?

This opinion is so bad, such a violation of the justice's oaths of office, that I believe it rises to the point of bad behavior. I don't believe justices should be impeached over their opinions, and I don't believe the justices should be impeached simply for this opinion. But when the courts protect criminal activity via mock trail, when such a long train of abuses and usurpations evidence design to reduce us under absolute Despotism, I believe it is imperative that the justices responsible be held accountable. After all, it is this court that has claimed that you have no redress of grievance against a President who commits a criminal act. They have conspired to deprive the American people of their right to seek redress under color of law, making this a conspiracy to deprive us of rights under the color of law. If this is the state of our republic, then someone should have told Benjamin Franklin that we were only able to keep it for about 230 years.

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