NO ONE IS ABOVE THE LAW, OR SO WE THOUGHT

- Donald Trump is entitled to absolute immunity while acting within his "core constitutional powers."
- Trump has presumptive immunity while undertaking other "official acts."
- Trump has no immunity for "unofficial acts."
- It is improper for courts to inquire into Trump's motives in determining whether an act was official or unofficial.
- It is improper for courts to deem an action unofficial simply because it allegedly violates a generally applicable law.
- Evidence relating to conduct that is immune from prosecution (namely official acts) may not be introduced for purposes of proving allegations for which immunity is not available (namely unofficial acts)

"With fear for our democracy, I dissent"
Justice Sonia Sotomayor

While the presidential debate and President Biden's catastrophic debate performance that night have dominated the news and conversations certainly among Democrats since June 27th, we should not overlook yet one more reason why we must do all in our power to ensure that Donald Trump does not return to the White House. I refer to the Supreme Court's holdings in *Trump v. United States* (decided July 1) in which the Court, in effect, has provided its constitutional blessing for Trump to unleash his revenge and retribution agenda, with few legal constraints. For the conservative majority on the bench, it appears it is more important to achieve the goal long sought by conservatives to create an imperial presidency than to hold a President accountable for criminal acts committed while serving as President. This extends to interfering with the peaceful transfer of power and attempting to thwart the will of the people. In other countries, we would have called that an attempted coup d'état.

The Court has set an incredibly high bar for the January 6th indictments to proceed and, while the majority opinion couches the more insidious consequences of their rulings in constitutional circumlocution, the practical impact is clear – delay, potentially beyond the election. Just as Trump wants it. In doing so, not only does Trump gain the potential benefit, if he wins, of the opportunity to render the entire January 6th prosecution moot by directing his new Attorney General to withdraw the cases, but it also deprives the American people of the benefit before casting their votes of hearing the evidence presented in court and a jury verdict on Trump's actions.

Setting the Stage

By way of background, recall that Special Counsel Jack Smith convened a grand jury, which indicted Trump for attempting to overturn the results of the 2020 election. The indictment focused on five separate activities by Trump and his co-conspirators. They:

- attempted to get state legislators and election officials to change Biden votes to Trump votes;
- organized fraudulent slates of electors in seven states and caused these slates to transmit false certificates for the January 6th certification;
- attempted to use the Department of Justice ("DoJ") to conduct sham election crime investigations and to send letters to targeted states falsely claiming that the DoJ had identified significant concerns with the elections;
- attempted to persuade Vice President Mike Pence to alter the election results and directed the mob at the Ellipse to march on the Capitol; and
- took advantage of the disruption at the Capitol to raise false claims of election fraud and convince members of Congress to further delay the certification.

Trump moved to dismiss the case, which was denied by the District Court. The denial was affirmed by the Appellate Court. Trump then appealed to the Supreme Court, which took up the appeal to determine if, and to what extent, a President has immunity from criminal prosecution for conduct alleged to involve official acts while in office. As for adjacent precedent, in 1982, the Supreme Court held (in *Nixon v. Fitzgerald)* that a President is immune from liability in civil suits for actions taken as part of official duties, including those at the "outer perimeter of their official duties." In 1997, the Court held, in a case involving President Bill Clinton (*Clinton v. Jones*), that a President did not have immunity from civil suits involving private conduct.

No One is Above the Law

On June 28, the Supreme Court rendered its verdict. There are multiple strands to follow, as there were five opinions – the majority signed by Chief Justice John Roberts, a concurrence with the majority signed by Justice Clarence Thomas, a concurrence with part of the majority and a dissent in part by Justice Amy Coney Barrett, a dissent by Justice Sonia Sotomayor and a concurrence with the dissent by Justice Ketanji Brown Jackson. As expected, neither Justice Samuel Alito nor Justice Clarence Thomas recused themselves.

Before Trump's appeal, no one had credibly argued that a President would be absolutely immune from criminal liability after they left office for acts committed while in office, and certainly the Supreme Court had never addressed the issue as no President had been criminally charged. During the second impeachment, Trump's counsel, in arguing against impeachment, conceded that, even if he were acquitted, he could be criminally prosecuted after he left office. After all, no one should be above the law.

And recall Senate Majority Leader Mitch McConnell's remarks following the acquittal in that second impeachment trial: "President Trump is still liable for everything he did while he was in office, as an ordinary citizen, unless the statute of limitations has run, still liable for everything he did while in office, didn't get away with anything yet – yet. We have a criminal justice system in this country. We have civil litigation. And former presidents are not immune from being held accountable by either one."

In his majority opinion, even Chief Justice John Roberts would assert that "the President is not above the law," but then he and his five other Republican-appointed justices would veer into new constitutional territory and, in the words of Justice Sotomayor, invent "an atextual, ahistorical, and unjustifiable immunity that puts [President Trump] above the law." Adam Serwer, writing in The Atlantic ("The Supreme Court Puts Trump Above the Law") was more blunt: "Donald Trump's defenders on the Supreme Court repeat one of the most basic principles of American constitutional government: "The president is not above the law." They then proceed to obliterate it."

Trump Gets Much of What He Asked For, and More

There are four key takeaways from the opinions:

Trump has absolute immunity while exercising "core constitutional powers"

The Court announced a new theory of presidential immunity from criminal prosecution for "official acts" and any other acts a President might undertake while in office using the powers of that office. With respect to exercise of a President's "core constitutional powers," what the Court also described as "within his exclusive sphere of constitutional authority," this immunity is absolute. The Court found specifically that this would include any discussions Trump had with DoJ officials, including the then Acting Attorney General. The fact that as alleged in the indictment the investigations Trump requested were "sham[s]" or proposed for an improper purpose do not" in the words of the majority "divest the President of exclusive authority over the investigative and prosecutorial functions" of the DoJ and its officials.

Yes, this means what it looks like it means, namely that Trump could enlist DoJ officials in his efforts to overturn the election with impunity, and going forward, were he to again serve as President, he could direct the DoJ to prosecute his political enemies, or anyone for that matter, without consequence. In her dissent, Justice Sotomayor noted there "is a twisted irony in saying, as the majority does, that the person charged with 'tak[ing] Care that the Laws be faithfully executed' can break them with impunity."

Trump has presumptive immunity for his other "official acts"

The Court found that not all "official acts" fall within the "exclusive sphere of constitutional authority" (including those where authority is shared with Congress), and then created presumptive immunity for all such remaining "official acts" (what the Court termed "within the outer permitter of official responsibilities"). Presumptive immunity means, in the words of Joyce Vance ("SCOTUS: Actually, Presidents Are Kings"), that immunity "exists unless prosecutors establish that it doesn't – and [the majority] say it's not necessary for them to decide here whether Trump gets it or not at this stage."

The Court found that conversations between Trump and Pence fell within this category and, therefore, were presumptively immune. The government has the burden to rebut the presumption of immunity, and the Court remanded to the District Court the question of whether prosecution of Trump over his efforts to influence Pence over the certification proceedings on January 6th would "would pose any dangers of intrusion on the authority and functions of the Executive Branch."

Trump has no immunity for his "unofficial acts"

The Court confirmed that there is no presidential immunity for "unofficial acts."

The Court remanded to the District Court the question of whether the efforts of Trump and his co-conspirators to convince state legislators or state election officials (none of whom formed part of the Executive Branch) to change votes for Trump or to create false slates of electors were official (as somehow being connected to ensuring the integrity and proper administration of elections) or unofficial. The Court also remanded to the District Court a determination of whether Trump's tweets and speech at the Ellipse fall within the "outer perimeter of his official responsibilities" or whether he was speaking in an unofficial capacity.

The Court provides some guidance on whether Trump's actions were "official acts" or "unofficial acts"

The Court found it necessary to provide some guidance as to what is "official" as opposed to "unofficial" as no court has done so to date. This threshold determination is the key to understanding what is and what is not subject to immunity, and here lurks bad news for holding a president accountable.

Motive

First, the majority found it improper for courts to inquire into the President's motives in determining whether an act was official or unofficial. As Vance notes, "the fact that Trump wanted to overturn the election can't be considered for this purpose. That's shocking, but consistent with the tone of the entire opinion. The Justices seem to exist in an ivory tower where they debate presidential power without seriously acknowledging that they're talking about a former president who would have happily fomented insurrection to stay in office after he lost."

In her post "The 'Bloodless Coup' Has Started …with the Court," Asha Rangappa notes, this position "effectively means that it does not matter if a President uses the official levers of power with corrupt intent, for personal gain, or as retribution. In other words, the Court engages a sleight of hand where a critical distinction between *lawful and unlawful conduct* — the heart of criminal law, which rests on whether a person acted with a specific state of mind, or *mens rea* — ceases to exist when it comes to the President. Once this distinction is erased, the office of the presidency is basically a get out of jail free card, enabling the President to do pretty much anything that could plausibly be characterized as 'official'."

Violative of generally applicable law

Second, the majority also found it improper for courts to deem an action unofficial simply because it allegedly violates a generally applicable law. Again, quoting Vance, "Presidents can break the law while acting in their official capacity, but this is something more than that. The Court prohibits the district court from looking at whether a president's conduct violates the law to decide whether it is official or unofficial. That means an arguably official act stretching up to the outer perimeter of official duties gets immunity even if it's, say, killing

someone. This is all of the nightmare hypotheticals about was a sociopathic president could do without consequence. Now, the Court has said they can."

Evidence relating to immune conduct

Third, four of the five conservative Justices held that evidence relating to conduct that is immune from prosecution (namely official acts) may not be introduced for purposes of proving allegations for which immunity is not available (namely unofficial acts). Justice Coney Barrett dissented on this prong of the majority's holding.

In her dissent, echoing Justice Sotomayor's dissent, Justice Coney Barrett sets out the example of bribery. Under federal law, public officials are prohibited from seeking or accepting anything of value "for or because of an official act." Under the majority's holding, any mention of the official act would be proscribed. To establish the *quid pro quo* for bribery, one would expect a jury "to hear about both the *quid* and the *quo,* even though the *quo,* standing alone, could not be the basis for the President's criminal liability." She concludes that the prosecution would then be hamstrung.

The Dissents

In her scathing and forceful dissent (joined by Justices Elena Kagan and Ketanji Brown Jackson), Justice Sotomayor characterized the majority opinion as follows:

> 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.

She noted that under the reasoning of the majority, Trump's use of official powers in any way will be immune from prosecution. She cited ordering a political assassination, organizing a military coup to remain in power, and accepting a bribe in exchange for a pardon. All immune. She concludes then "[i]n every use of official power, the president is now a king above the law."

It should come as no surprise, given the intense focus on whether Trump would invoke the Insurrection Act and federalize National Guard units or active-duty military units in support of his revenge and retribution agenda, were he again to serve as president, that the immunity decision would have real world consequences for the military and National Guard. While Trump would likely be immune for issuing illegal orders, those carrying out those orders would not be (though could be pardoned if the illegality were federal). Eugene Fidell, visiting lecturer and senior research scholar at Yale Law School, said (as quoted in The Hill ("Supreme Court immunity ruling raises questions about military orders") "the Supreme Court 'rolled the dice for future presidents' and will force service members to also roll the dice."

Next Steps

The case now goes back to the lower court for the following determinations:

- which of the acts covered by the Special Counsel's indictment fall within Trump's core constitutional authority, for which he is absolutely immune from prosecution;
- for which of Trump's other "official acts" can he be prosecuted because the government meets its burden of showing that prosecution would pose no danger of intruding on the "authority or functions" of the presidency; and
- which of Trump's acts be said to constitute private conduct for which he can be prosecuted as he would have no immunity.

Under Supreme Court Rule 45.3, the earliest District Court Judge Tanya S. Chutkan can take up the case is likely August 2. She will need to issue a written opinion at the conclusion of the hearing, which Trump could then appeal to the D.C. Circuit and ultimately to the Supreme Court. The Special Counsel may drop some of the charges to expedite the process.

Concluding Thoughts

It need not have turned out this way. The Supreme Court could have declined to take up the appeal and let the lower court decision on immunity stand. At that point, the lower court proceedings could have continued, and we would have had a trial by now.

Or as Rangappa notes, there was an intermediate position the Court could have staked out, namely that any official act, whether a core constitutional power or one in the outer perimeter of a President's duties, would be entitled to presumptive immunity. That presumption could be rebutted "if the government established that the action was taken with a corrupt motive or for personal gain." That position, she notes, "would have discouraged politically motivated prosecutions, reinforced the rule of law, and helped protect the executive branch. It also would have preserved the difference between lawful and unlawful acts." Instead, the Court has immunized the one set of actions that should be criminalized and prosecuted.

On an issue as fundamental as whether Trump has immunity from prosecution for his efforts to overturn the outcome of the 2020 election, one would have thought the Chief Justice could have found a way to craft a unanimous decision. After all, one assumed rationale for taking the case was that a decision of this magnitude should have the imprimatur of the highest court in the land. But no, the 6:3 decision split along ideological lines and it is a far cry from the 8:0 decision in *United States v. Nixon* (the Nixon-tapes case) that held that then President Richard Nixon could not shield himself from producing evidence in a criminal trial based on the doctrine of executive privilege (again, in a sign of how far ethics has fallen, in 1974 Justice William Rehnquist recused himself from the case for having worked in the Nixon administration).

The bottom line is that even though parts of the indictment may well be salvageable, it will take time for the District Court to sort out what is/is not subject to immunity, giving rise undoubtedly to myriad bases for Trump to appeal. And, yes, there is an election coming up in four months. Perhaps the best we can expect is that the hearings will provide voters with

plenty reminders of Trump's conduct – though the question remains: which audiences that need to be convinced will be listening?

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