



Trump v. United States

The Remaking of the Presidency

BY SCOTT S. BARKER



This article examines Trump v. United States and describes how the case has affected the scope of presidential power.

On July 1, 2024, the US Supreme Court issued its decision in *Trump v. United States*.¹ This historic decision was the first ever to address the issue of presidential immunity from prosecution of a former president for crimes alleged to have been committed while in office. The case understandably attracted a lot of attention at the time, but has fallen off most Americans' radar during the hurly-burly of the 2024 presidential election and its aftermath. This article reminds readers of the elements of the decision and assesses its impact on the nature and powers of the presidency.

Procedural History

The case arose out of the events at the US Capitol on January 6, 2021. On August 1, 2023, following an eight-month investigation by special counsel Jack Smith, a federal grand jury in Washington, DC, indicted then former President Donald J. Trump. Generally, the indictment alleged that, after losing the 2020 presidential election, the former president conspired to overturn the results by spreading knowingly false claims of election fraud to obstruct collecting, counting, and certifying the election results. The conspiracy allegedly culminated in the January 6, 2021, violent attack on the Capitol by a mob of Trump supporters that obstructed the constitutionally mandated counting of the Electoral College votes in a joint session of Congress.² The indictment further alleged that the purpose of the attack was to convince Vice President Mike Pence, who was presiding over the vote-counting ceremony, to take unconstitutional measures to cause Congress to delay the procedure.³

Based on the allegations of the indictment, the grand jury charged Trump on four counts: (1) 18 USC § 371 (conspiracy to defraud the United States); (2) 18 USC § 1512(k) (conspiracy to obstruct an official proceeding); (3) 18 USC §§ 1512(c)(2) (obstruction of and attempting to obstruct an official proceeding); and (4) 18 USC § 241 (conspiracy against rights).⁴

On October 5, 2023, Trump moved to dismiss the indictment based on several constitutional theories, including that he was immune from criminal prosecution for acts taken as president. The US District Court for the District of Columbia denied the motion in a Memorandum Opinion dated December 1, 2023.⁵ Trump appealed to the US Court of Appeals for the District of Columbia, which affirmed the district court's denial of the motion to dismiss in a ruling dated February 6, 2024.⁶

Trump then filed a petition for a writ of certiorari in the Supreme Court, which was granted. The Supreme Court asked the parties to address a single question: "Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office."⁷ Oral argument was held on April 25, 2024, and the decision was issued on July 1.

The Supreme Court Decision

Chief Justice John Roberts wrote for the majority, joined by Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. Justice Barrett also wrote a concurrence, noting her different approach to certain procedural issues. Justice Sonya Sotomayor dissented, joined by Justices Elena



Kagan and Ketanji Brown Jackson. Justice Jackson also wrote a separate solo dissent.

At the outset, the Court recognized, and the parties agreed, that a former president could be prosecuted for “unofficial [i.e., private] acts committed while in office.”⁸ With that exception, the Court concluded that “under our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office.”⁹

With respect to the “core powers” of the presidency, that immunity is “absolute.”¹⁰ The Court did not elaborate on the definition of “core powers,” and the Constitution contains no such definition. Accordingly, the breadth of this absolute immunity is unknown, but certainly extensive. The Court did rule that one such power resides solely in the president for “investigative and prosecutorial decisionmaking,” and that “Trump is therefore absolutely immune from prosecution for the alleged conduct involving his discussions with Justice Department officials.”¹¹ The Court next ruled that a president is also presumptively immune

from prosecution for all other “official acts,” defined as “acts within the outer perimeter of his official responsibility” . . . “so long as they are ‘not manifestly or palpably beyond [his] authority.’”¹² Because the lower courts had not separated the allegations into “official act” and “unofficial act” categories, the case was remanded for “further proceedings consistent with this opinion.”¹³

In separating official from unofficial acts, the lower courts were told that the government had the burden of rebutting the presumption of immunity by showing that “applying a criminal prohibition to that act would pose no ‘dangers of intrusion on the authority and functions of the Executive Branch.’”¹⁴ They were also instructed not to consider the former president’s motives for taking the actions in question, nor could they “deem an action unofficial merely because it allegedly violates a generally applicable law.”¹⁵

The Case on Remand

On August 2, the DC Circuit issued its mandate remanding the case to the district court. The presiding judge promptly began the process of

implementing the instructions of the Supreme Court. That process was halted as a result of Trump’s election as the 47th president on November 5. On November 25, the special counsel filed a motion to dismiss based on the Department of Justice (DOJ) policy (described more fully below) forbidding the criminal prosecution of a sitting president.¹⁶ Even though Trump would not be inaugurated until January 20, 2025, the special prosecutor concluded that the policy should be extended to the pending case. The Court granted the motion the same day.

Impact on the Presidency

Trump v. United States remade the presidency. As Justice Jackson pointed out in her dissent, immunity is not a defense to a charge. It is an “‘exemption’ from the duties and liabilities imposed by law. In its purest form, the concept of immunity boils down to a maxim—‘the King can do no wrong’—a notion that was firmly ‘rejected at the birth of [our] Republic.’”¹⁷ There is no provision in the Constitution granting immunity to presidents. To the contrary, as Alexander Hamilton ex-

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plained in *The Federalist No. 69* when discussing the impeachment provisions of the Constitution: “The President of the United States would be liable to be impeached, tried, and upon conviction of treason, bribery or other high crimes and misdemeanors, removed from office, and would afterwards be liable to prosecution and punishment in the ordinary course of law.”¹⁸

From 1789 to 1973, American presidents served under the implicit threat of prosecution for crimes committed while in office. In 1973, that implicit threat became explicit. That year, as the Watergate saga was unfolding, the DOJ Office of Legal Counsel (OLC) provided a memorandum to the attorney general regarding the amenability of a sitting president to prosecution. The OLC memorandum identified

serious separation of powers issues that led to the conclusion that the DOJ should adopt a policy of not prosecuting sitting presidents.¹⁹ It has remained in effect since then. That policy does not apply to former presidents.²⁰

Within a year, the DOJ’s view of the amenability of a former president to criminal prosecution was put to the test. In August 1974, President Richard Nixon faced certain impeachment in the House and conviction in the Senate for his abuse of presidential powers in attempting to skew the results of the 1972 election in his favor and orchestrating a cover up to hide what he had done. Under heavy pressure from the Republican leadership in Congress, Nixon resigned.²¹

Shortly thereafter, newly sworn in President Gerald Ford pardoned Nixon for “all offenses against the United States” he may have com-

mitted during his truncated second term.²² Nixon accepted the pardon.²³ There would have been no need to pardon the former president or for him to accept it unless there was a threat of his prosecution. Indeed, no one at the time thought the former president was immune from criminal prosecution for what he had done. Since then, nine presidents over five decades have served with the explicit threat of prosecution for crimes they may have committed while in office hanging over their heads. Yet not one of them was dissuaded from zealously discharging his presidential duties.

Trump v. United States essentially reversed a 235-year old shared assumption in our federal government that our presidents are not above the law. Only time will tell how our future presidents will use their increased power. **CL**



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NOTES

1. *Trump v. United States*, 603 U.S. 593 (2004).
2. Indictment, *United States v. Trump*, No. 1:23-cr-257, 2023 U.S. Dist. LEXIS 143249 (D.D.C. Aug. 1, 2023) (Doc. 1).
3. *Id.* at 38–39.
4. *Id.* at 1.
5. *United States v. Trump*, 704 F.Supp.3d 196 (D.D.C. 2023).
6. *United States v. Trump*, 91 F.4th 1173 (D.C.Cir. 2024).
7. *Trump v. United States*, 603 U.S. 593, 605 (2024).
8. *Id.* at 606.
9. *Id.*
10. *Id.*
11. *Id.* at 620, 621.
12. *Id.* at 614, 618 (quoting *Blassingame v. Trump*, 87 4th 1, 13 (D.C.Cir. 2023) and citing *Nixon v. Fitzgerald*, 457 U.S. 731, 755–56 (1982)).
13. *Id.* at 642.
14. *Id.* at 615 (quoting *Fitzgerald*, 457 U.S. at 754).
15. *Id.* at 619.
16. Government’s Motion to Dismiss, *United States v. Trump*, 2023 U.S. Dist. LEXIS 143249

- (Nov. 25, 2024) (Doc. 281).
17. *Trump v. United States*, 603 U.S. at 686 (Jackson, J. dissenting) (citing *Black’s Law Dictionary* 898 (11th ed. 2019); *Hopkins v. Clemson*, 221 U.S. 636, 643 (1911); *Clinton v. Jones*, 520 U.S. 681, 697 n.24 (1997); and *United States v. Burr*, 25 F.Cas. 30 (C.C.Va. 1807)).
18. Rossiter, ed., *The Federalist Papers* 414–15 (Signet Classics 2003). See also *The Federalist No. 65* (Alexander Hamilton), *id.* at 394–99.
19. Memorandum of Assistant Att’y Gen. Robert G. Dixon, Jr., OLC, DOJ, “Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office” (Sept. 24, 1973). The memorandum was later updated. See memorandum of Assistant Att’y Gen. Randolph D. Moss, OLC, DOJ, “A Sitting President’s Amenability to Indictment and Criminal Prosecution” (Oct. 16, 2000).
20. See memoranda cited *supra* note 19.
21. See generally Barker, *The Impeachment Quagmire* 110–50 (History Publishing Company 2019).
22. *Id.* at 149–50.
23. Former President Nixon, Pardon Statement 1 (Sept. 8, 1974), <https://perma.cc/WV43-6E69>.