Institute for
Constitutional Advocacy and Protection
GEORGETOWN LAW

Hearing before the Senate Judiciary Committee

"When the President Does It, that Means It's Not Illegal": The Supreme Court's Unprecedented Immunity Decision

Mary B. McCord
Executive Director, Institute for Constitutional Advocacy and Protection
Visiting Professor of Law, Georgetown University Law Center

September 24, 2024

Distinguished members of the Committee, thank you for inviting me to testify about the potential consequences of the Supreme Court's decision in *Trump v. United States* to government functions and our constitutional order.

I am currently the Executive Director of the non-partisan Institute for Constitutional Advocacy and Protection (ICAP) and a Visiting Professor of Law at Georgetown Law. In this role, I lead a team that uses strategic legal advocacy to defend constitutional rights and values while working to restore confidence in the integrity of our governmental institutions. Through litigation, public education, and policy work, ICAP seeks to safeguard rights to free expression, assembly, and democratic participation; combat threats of political violence; fight against criminal justice system overreach; defend the rights of young people and marginalized communities; and preserve fundamental separation-of-powers principles. ICAP's work includes representing former law enforcement and national security officials across the political spectrum, as well as providing advice to current government officials from both sides of the aisle on how to protect public safety while preserving constitutional rights.

Before launching ICAP in mid-2017, I spent nearly 25 years in the Executive Branch, most of it in the Department of Justice. I was an Assistant United States Attorney in the District of Columbia from 1994 through 2014, serving under both Republican and Democratic administrations. In 2014, I moved to main Justice, where I served in a career capacity as the Principal Deputy Assistant Attorney General for National Security before becoming the Acting Assistant Attorney General for National Security in 2016. I served through transition into the Trump Administration, leaving in May of 2017.

Introduction

The Supreme Court's opinion in *Trump v. United States* goes well beyond what was necessary to decide whether the former President is immune from prosecution for his role in efforts to overturn the results of the 2020 presidential election. When the Court granted certiorari, it announced its intent to decide a question that was broader than the narrow issue presented in the case: "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." Writing "a rule for the ages," as Justice Gorsuch said during oral argument,[1] the majority answered its own expansive question by declaring that presidents are "absolutely immune" for exercising "core constitutional powers," and *at least* "presumptively immune" for other official acts. According to the majority, this is necessary to ensure that the President is "energetic" and "vigorous" in exercising presidential powers and is not enfeebled by the prospect of criminal prosecution.

[1] Transcript of Oral Argument at 140, *Trump v United States*, 144 S. Ct. 2312 (2024) (No. 23-939).

The majority's opinion not only seriously impedes the ability to hold accountable a President who abuses official power, it also deals a blow to the separation of powers that the Framers embedded in our Constitution. My testimony proceeds in three parts: first, a brief overview of the Supreme Court's holding; second, a discussion of the potentially dire consequences of the decision to the proper functioning of government; and third, a warning about the downstream impacts of the decision on accountability for subordinates of a rogue President.

I. The Rule Announced in *Trump v. United States*

a. The Majority Opinion

The majority's opinion divides acts that a President may take into three categories. First, the President enjoys no immunity for "unofficial acts," also referred to as personal acts. Second, the President is absolutely immune for actions taken in the exercise of his "core constitutional powers." And third, for other official acts that do not involve "core" powers, the President is entitled to *at least* presumptive immunity, leaving for another day whether that immunity should actually be absolute. Although Chief Justice John Roberts, writing for the majority, claims that "[t]he President is not above the law," the opinion elevates the President, which the majority repeatedly refers to as "a branch of government," above the other two co-equal branches.

In determining into which category a President's acts fall, the majority begins by capaciously defining the President's "core constitutional powers" to include far more than the powers explicit in the Constitution or recognized throughout our nation's history, such as the power to grant pardons, veto legislation, and recognize foreign governments. The Special Counsel had agreed at argument that the exercise of those core constitutional powers could not be subject

to prosecution.[2] But the majority adds to that list the President's responsibility to "take Care that the Laws be faithfully executed" as well as his "responsibility for the actions of the many departments and agencies within the Executive Branch." Concluding that the investigation and prosecution of crimes is a "quintessentially executive function," the majority holds that the allegations that former President Trump attempted to leverage the Department of Justice to announce sham investigations into election fraud and pressure certain states to replace their legitimate electors with fraudulent Trump electors are within this core constitutional power. For this and all other exercises of core constitutional power, the President's authority is "conclusive and preclusive," meaning that Congress is disabled from acting upon it, nor may the courts examine it.

For all other acts of the President that fall outside of his "core constitutional powers," courts must distinguish official acts, for which the President is presumptively immune, from unofficial acts, for which he is not. Borrowing from *Nixon v. Fitzgerald*¸ 475 U.S. 731, 755 (1982), a case involving presidential immunity from civil liability for official acts, the majority first defines official-act immunity to extend to the "outer perimeter" of a President's official responsibilities. Next, despite the fact that the case before it involved alleged *criminal* conduct that requires the government to prove mens rea—a culpable mental state—the majority instructs that "[i]n dividing official from unofficial conduct, courts may not inquire into the President's motives." Finally, if the conduct is determined to be within the outer perimeter of official responsibilities, the presumption of immunity kicks in, which the government may rebut only if it "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.'" Although

[2] Transcript of Oral Argument, *supra*, n.1, at 86-87.

the majority again relies on *Fitzgerald*, it quotes only half of the balancing test outlined in that case: "a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." 475 U.S. at 754. This is perhaps unsurprising, as the majority had already concluded that the danger that a President "would be chilled from taking the 'bold and unhesitating action' required of an independent Executive" is "far greater" from facing potential criminal prosecution than from facing civil liability. The public interest in fair and effective enforcement of criminal laws does not make it onto the scale in the majority's view.

In a final blow to accountability, the majority—minus Justice Amy Coney Barrett, who dissents from this portion of the opinion—holds that the government may not use official acts (for example, making an ambassadorial appointment) as evidence in a prosecution for unofficial, purely personal conduct (for example, receiving a bribe for the appointment).[3]

Other than holding that former President Trump is "absolutely immune from prosecution for the alleged conduct involving his discussions with Justice Department officials" because it involves conduct within his core and exclusive constitutional authority, the majority does not apply its newly announced rule to

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[3] The majority attempts to blunt the impact of this holding by explaining in a footnote that, in the case of a bribery prosecution, the government "may point to the public record" to show the fact of the ambassadorial appointment, and may "admit evidence of what the President allegedly demanded, received, accepted, or agreed to receive or accept in return for being influenced" in the appointment, but the government may not "admit testimony or private records of the President or his advisers probing the official act itself." But as Justice Barrett points out, "[t]o make sense of charges alleging a *quid pro quo*, the jury must be allowed to hear about both the *quid* and the *quo*, even if the *quo*, standing alone, could not be a basis for the President's criminal liability."

the other allegations of the indictment. Instead, it remands for the lower courts to make the determination in the first instance.

b. Justice Barrett's Partial Concurrence

Although Justice Barrett concurs in most of the majority's opinion, her partial concurring opinion reads much more narrowly and presents a workable path forward to maintain the separation of powers and ensure that the President is not above the law. First, she takes a more limited view of the President's core constitutional powers, recognizing that "Congress has concurrent authority over many Government functions, and it may sometimes use that authority to regulate the President's official conduct, including by criminal statute." Thus, she explains, not all exercises of the Take Care Clause fall within the President's core executive powers. To the extent the majority's opinion holds otherwise, Justice Barrett agrees with the dissent "that the Constitution does not justify such an expansive view."

Second, she notes that "sorting private from official conduct" will not always be difficult. Because the President has no role in the appointment of electors by the states, for example, she views the allegations regarding former President Trump's attempt to organize fraudulent slates of electors as "private and therefore not entitled to protection."[4] For official conduct, she posits that rebutting the presumption of immunity also will not always be difficult: because the President has no authority over state legislatures or their leadership, "it is hard to

[4] At oral argument, former President Trump's lawyer conceded that allegations that the former President and a co-conspirator attorney directed others to help "implement a plan to submit fraudulent slates of presidential electors to obstruct the certification proceeding" was private conduct. Transcript of Oral Argument, *supra*, n.1, at 29-30. Even with this concession, the majority was apparently unwilling to declare the conduct unofficial.

see how prosecuting him for crimes committed when dealing with the Arizona House Speaker would unconstitutionally intrude on executive power."

Finally, breaking with the majority, Justice Barrett dissents from the holding that the Constitution bars introduction of official acts as evidence in a criminal prosecution of the President for unofficial acts. She writes succinctly that "[t]he Constitution does not require blinding juries to the circumstances surrounding conduct for which Presidents *can* be held liable." Instead, in Justice Barrett's view, the rules of evidence can be applied to address any concerns about undue prejudice.

II. The Decision's Consequences for Government Functions

The majority relied on Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579, 634 (1952), for its holding that exercises of the President's core constitutional powers are "conclusive and preclusive," meaning that "Congress cannot act on, and courts cannot examine" them. It is worth examining Justice Jackson's use of that language in full:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

343 U.S. at 637-38 (footnote omitted). The expansive reading of core constitutional powers apparently adopted by the majority is difficult to square with Justice Jackson's caution in this area, and could have dire ramifications for our system of checks and balances going forward.

The reasoning of the majority's opinion for dispensing absolute immunity for all communications between the President and his Department of Justice is unclear, but seems to be based at least in part on the Take Care Clause. This constitutional provision, by its own terms, requires the President to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. Taking Justice Jackson at his word, the President's power under this clause is limited by Congress's power to enact the very laws that the President is tasked with enforcing. It is hard to understand how the language of the Take Care Clause disables Congress from doing the very thing the clause presumes that Congress will do. Justice Barrett seemed to recognize Congress's shared responsibility here, but the majority's opinion does not appear to give an inch.

Consider first the Department of Justice. If the President's authority is "conclusive and preclusive," is Congress now disabled from tying the appropriation of funds to certain areas of law enforcement? From enacting legislation that governs Department organization and functions? From conducting oversight, including requesting records and testimony from Department and FBI leadership? Could the Department simply defy those requests, at the President's direction, because the investigation and prosecution of crimes is an exclusive executive function?

The potential for abuse is enormous. By disabling Congress from using its Article I powers, and the courts from reviewing a President's "conduct involving his discussions with Justice Department officials," there is nothing stopping a President from directing the investigation of his political enemies, journalists, or activists, even where there is no basis for doing so. The majority said, after all, that "[t]he indictment's allegations that the requested investigations were 'sham[s]' or proposed for an improper purpose do not divest the President of exclusive

authority over the investigative and prosecutorial functions of the Justice Department and its officials."

Could that sham investigation include directing the FBI to engage in unlawful surveillance? Or to bypass seeking a warrant to search a home or workplace? Or to target individuals or groups based on race or religion? Although the victim of such unlawful measures might have legal recourse, especially if prosecuted, the President would be protected from liability by the cloak of absolute immunity. And there would be nothing stopping the President from pardoning any officials who were involved in the misconduct.

The same is true if the President were to use his powers as head of the Executive Branch for his own financial benefit. If the President were to bring a civil suit against the Department of Justice, say, for conducting a search of his private property, could he order the Department to settle the case for millions of dollars even if the suit itself were baseless?

The majority doesn't grapple with any of these questions, nor those raised by the dissent that would extend beyond the Department of Justice. If the Take Care Clause is the basis for the majority's decision, its rationale would appear to apply to all Departments and Agencies. No potential criminal prosecution would prevent the President from directing the IRS to launch baseless investigations. Likewise, no potential criminal prosecution would prevent the President from using the CIA for domestic operations. Nor would potential criminal prosecution prevent an order to the CIA to engage private paramilitary groups to shoot and kill migrants at the southern border, as some CIA veterans have posited.[5] The reforms enacted by

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[5] James Petrila & John Sipher, Opinion, *How the Supreme Court's Immunity Ruling Could Really Backfire*, Wash. Post (July 25, 2024), https://www.washingtonpost.com/opinions/2024/07/25/supreme-court-immunity-ruling-cia/.

Congress in the wake of past abuses would be impotent in the face of a President unconcerned about adhering to the rule of law.

The majority dismisses as "fear mongering" the dissent's hypotheticals—including whether the President could order the Navy's Seal Team 6 to assassinate a political rival—but refuses to propose any limiting principle to its own reasoning. Perhaps there are some. For example, it could be that absolute immunity for interactions with the Department of Justice is unique due to the Executive Branch's exclusive authority to investigate and prosecute crimes, and would not extend to other situations involving other Departments or Agencies. But if that is the case, the majority easily could have said so. And even limited to the Department of Justice, the damage is profound. The majority's decision itself explicitly immunizes former President Trump for actions he took to pressure officials within the Department of Justice to take measures to overturn his election loss *and allow him to unlawfully maintain power*—a scenario that might have seemed hyperbolic before the 2020 presidential election.

III. The Downstream Impacts on Presidential Subordinates

It is possible that the threat of abuse of this newly granted conclusive and preclusive authority by a President may be mitigated by his subordinates—both political and career—whose cooperation would be necessary to engage in the type of political weaponization of the Executive Branch discussed above. Having spent almost 25 years as a career Executive Branch official—most of that at the Department of Justice under both Republican and Democratic administrations—I know that the vast majority of civil servants believe in and abide by the rule of law. It is likely that some, perhaps most, would resign rather than carry out what they would view as unlawful orders. And it is likely that they would be concerned about their own criminal culpability were they to engage in illegal acts at the

direction of the President. But it remains an open question whether the President's immunity would extend to them. The majority does not answer that question.

The majority grounds its opinion on the need for an "energetic" and "vigorous" President who can act fearlessly without concern about facing future criminal prosecution. Indeed, this seems to be the reason that the majority held that official acts cannot be used as evidence in a prosecution for purely personal acts: "Use of evidence about such conduct, even when an indictment alleges only unofficial conduct, would thereby heighten the prospect that the President's official decisionmaking will be distorted." Disregarding concern for the potential abuses of presidential power, the majority instead justifies its expansive immunity on what it sees as "the more likely prospect of an Executive Branch that cannibalizes itself, with each successive President free to prosecute his predecessors, yet unable to boldly and fearlessly carry out his duties for fear that he may be next." Although there is no indication in more than 200 years of the nation's history that Presidents have been cowed in the exercise of their duties by the prospect of criminal prosecution (which they clearly thought existed, as evidenced by the offer to and acceptance of a pardon by former President Richard Nixon for "any charges which might be brought against me for actions taken during the time I was President of the United States"[6]), the majority nevertheless makes this fear a cornerstone of its opinion: "The enfeebling of the Presidency and our Government that would result from such a cycle of factional strife is exactly what the Framers intended to avoid."

Given this emphasis, subordinates of former President Trump are already attempting to take advantage of the immunity decision in legal proceedings against them. Former Chief of Staff Mark Meadows has petitioned the Supreme Court to

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[6] Statement by Former President Richard Nixon, Sept. 8, 1974, *available at* https://www.fordlibrarymuseum.gov/sites/default/files/pdf_documents/library/document/0019/4520706.pdf.

review the denial of removal to federal court of his Georgia state prosecution, arguing that the Court's immunity decision supports his argument that "immunity protection for former officers is critical to ensuring that current and future officers are not deterred from enthusiastic service" and that federal court review is needed "now that [the Supreme Court] has recognized that federal immunity impacts what evidence can be considered."[7] Former Justice Department official Jeffrey Clark has sought to have disbarment proceedings in the District of Columbia dismissed based on the Court's immunity decision, arguing that "[t]he allegations against Mr. Clark here are squarely within the scope of the President's absolute immunity . . . [that] extends to Mr. Clark."[8]

Extending presidential immunity to subordinates would not only remove a deterrent to engaging in unlawful abuse of power at the President's direction, it would also effectively negate Congress's criminal contempt authority, ending congressional oversight of the Executive Branch as we know it. And even if presidential immunity does not extend directly to subordinates, the limitation on the admission of evidence of official acts, if applied beyond the prosecution of the President, could severely hamstring efforts to hold the President's subordinates accountable. The potential for a future President to promise pardons to those who follow orders to commit illegal acts could nullify such efforts completely. Without the guardrails erected by law-abiding Executive Branch officials, the criminal law is weakened as a mechanism for accountability.

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[7] Petition for Writ of Certiorari at 3, *Meadows v. Georgia*, No. 24-97 (U.S. July 26, 2024).

[8] Jeffrey B. Clark's Supplemental Brief at 3, *In re Jeffrey B. Clark*, No. 2021-D193 (D.C. Bd. of Prof. Resp. July 15, 2024), *available at* https://statesunited.org/wp-content/uploads/2024/07/2024-07-15-Jeffrey-B.-Clarks-Supplemental-Brief.pdf.

Conclusion

Shortly after the Supreme Court handed down its decision in *Trump v. United States*, I suggested that the Department of Justice, through the Special Counsel, consider filing a petition for rehearing so that it could explain the potential consequences of the majority's opinion on government functions and urge clarification along the lines of Justice Barrett's opinion.[9] In the likely event that decisions made on remand will lead to some elements of the case returning to the Supreme Court for review, the Court should take the opportunity to correct its opinion to ensure the historic balance between the three branches of government and avoid the dangerous potential consequences of failing to do so.

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[9] Mary McCord, *Barrett's Writing on Immunity Provides Another Path to Rehearing*, Bloomberg Law (July 11, 2024), https://news.bloomberglaw.com/us-law-week/barretts-writing-on-immunity-provides-another-path-on-rehearing.