

Presidential Immunity from Criminal Prosecution in *Trump v. United States*

July 5, 2024

On July 1, the Supreme Court issued a divided 6-3 opinion in *Trump v. United States* addressing, for the first time, the existence and scope of a constitutionally based presidential immunity from criminal indictment and prosecution. The decision, which held that the Constitution provides former President Donald Trump with “some immunity” from criminal liability for acts taken while in office, appears to establish a three-tiered framework in which Presidents receive absolute immunity for actions that relate to “core” or “exclusive” presidential powers, at least presumptive immunity for all other “official acts,” and no immunity for “unofficial” acts.

The Court reached only two specific determinations on the particular criminal charges brought by Special Counsel Jack Smith against former President Trump for allegedly attempting to overturn the results of the 2020 election. The former President, the Court [concluded](#), is absolutely immune from prosecution for any “alleged conduct involving his discussions with Justice Department officials,” actions the Court viewed as touching on core presidential powers.

The Court also [determined](#) that the former President is “at least” presumptively immune from prosecution for allegedly pressuring the Vice President to decertify the 2020 election, actions the Court viewed as “official.” Mr. Trump will therefore be immune from prosecution for such conduct unless the trial court determines that the Special Counsel can rebut the presumed immunity by showing, as described below, that enforcement of the criminal law in that instance would not intrude on the powers of the presidency.

The fate of the [remaining charges](#)—including those relating to the former President’s interactions with state election officials, and other private parties—was left unresolved. The Court remanded the case to the trial court with instructions to assess each charge individually and determine whether the underlying and allegedly unlawful conduct constituted an “official act” for which the former President enjoys at least presumptive immunity, or an unofficial act, for which the former President enjoys no protections.

This Sidebar summarizes the *Trump* majority opinion and briefly addresses the decision’s possible effect on the various criminal cases pending against the former President.

Congressional Research Service

<https://crsreports.congress.gov>

LSB11194

Background

The criminal [indictment](#) obtained by Special Counsel Jack Smith against former President Donald Trump for allegedly attempting to overturn the results of the 2020 election focused on five categories of actions or schemes: (1) attempting to influence state officials to “subvert the legitimate election results”; (2) organizing “fraudulent slates of electors”; (3) using the Department of Justice (DOJ) to “conduct sham election criminal investigations”; (4) knowingly and fraudulently attempting to influence the Vice President’s role in certifying electoral votes; and (5) utilizing the events of January 6, 2021, to “levy false claims of election fraud and convince members of Congress” to delay the certification. President Trump characterized many of these acts as “official” conduct and asserted that under the separation of powers, he was fully and absolutely immune from criminal prosecution.

The assertion of immunity was [rejected](#) by a federal district court and later a [unanimous](#) U.S. Court of Appeals for the District of Columbia Circuit, both of which held that the former President enjoyed no immunity from criminal liability. The Supreme Court then [granted certiorari](#) on the question of whether “a former President enjoys presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office.”

Prior to *Trump*, the Supreme Court had never considered whether Presidents (sitting or former) enjoyed criminal immunity for their official acts.

In *Nixon v Fitzgerald*, the Court held that Presidents are absolutely immune from *civil* suits for acts taken “within the ‘outer perimeter’” of their official responsibilities. This official act immunity, the Court reasoned, was a “functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers” and justified on the notion that a President must be free to “deal fearlessly and impartially with the duties of his office” without a concern for liability that could “render [the President] unduly cautious in the discharge of his official duties.” In *Clinton v Jones*, the Supreme Court later clarified that Presidents do *not* enjoy immunity from civil suits predicated on *unofficial* acts, explaining that *Fitzgerald*’s concern that civil liability could render the President “unduly cautious in the discharge of his official duties” had no application to potential liability for the manner in which the President engaged in unofficial acts. These cases, and presidential immunity generally, are discussed in greater detail in a previous [Sidebar](#).

Although the judiciary had never considered the question, the executive branch has taken the [position](#) that *sitting* Presidents do possess absolute immunity from criminal prosecution for any act, official or unofficial, at least while they hold office. That position, the executive branch asserts, is based in the separation of powers under the reasoning that imprisoning, prosecuting, or even indicting a sitting President for either official or unofficial acts would “unduly interfere” with the President’s ability to “perform his constitutionally assigned duties.” The Executive has [acknowledged](#) however, that a President’s immunity from criminal indictment and prosecution is “temporary” and ends when a President leaves office.

The criminal immunity at issue in *Trump* was, therefore, a question of first impression for the Court.

The *Trump* Majority Opinion’s Three-Tiered Framework

Chief Justice John Roberts’s [majority opinion](#) in *Trump* was rooted in principles of presidential exceptionalism. The President, as the Court has observed, “occupies a unique position in the constitutional scheme.” He is vested with powers of “unrivaled gravity and breadth” that include “responsibilities of utmost discretion and sensitivity” and that must, according to the Chief Justice, be exercised “fearlessly,” independently, and with “bold and unhesitating action.” Under the majority’s [reasoning](#), the “hesitation” that could “result when a President is making decisions under ‘a pall of potential prosecution,’” would both constrain the “energy” and “vigor” with which the Framers expected

the President to act and threaten not only the functioning of the executive branch, but the entire government. Some immunity, the Court concluded, is therefore [necessary](#) “to safeguard the independence” of the executive branch “and to enable the President to carry out his constitutional duties without undue caution.” The scope and strength of that immunity, however, depends on the nature of the presidential action involved.

Exclusive Presidential Powers

According to the majority opinion in *Trump*, the President enjoys absolute criminal immunity when acting within the scope of his “[exclusive constitutional authority](#).” Among these “core constitutional functions,” according to the Court, are the pardon power, the power to remove subordinate executive branch officials, the power to recognize a foreign nation, and the “investigation and prosecution of crimes.” The Court concluded that because these select powers are both “[conclusive and preclusive](#),” Congress “may not criminalize the President’s actions” and the judiciary may not “adjudicate a criminal prosecution that examines such presidential actions.” When acting within these areas of authority, the President is completely and absolutely immune from criminal liability for any act. This leaves elections and impeachment as remaining forms of accountability under the Constitution.

The majority opinion did not extensively address the parameters of these “core” functions. The conclusion that the “investigation and prosecution of crimes” is a “preclusive and exclusive” presidential power, for example, could be interpreted to be in tension with [Morrison v. Olson](#), which upheld enactment of the Independent Counsel statute against a separation of powers challenge, and perhaps cases like [McGrain v. Daugherty](#), which upheld the validity of a congressional investigation into the DOJ’s failure to prosecute certain individuals following the Teapot Dome scandal as “plainly” involving a subject “on which legislation could be had.” Still, the Court in *Trump* did not indicate that it was calling into question any of its earlier pronouncements on Congress’s authority on these matters.

Other Official Acts

The President retains “at least a [presumptive immunity](#)” for other “official acts” that do not relate to a core presidential power, according to the Court in *Trump*. The *Trump* majority opinion adopted language from both *Fitzgerald* and a recent D.C. Circuit decision to define “official acts” as those that occur “within the outer perimeter of his official responsibility” that are not “[manifestly or palpably](#) beyond [the President’s] authority.” Once an action is deemed to be within the outer perimeter of a President’s official duties, the President is presumptively immune from criminal liability unless [the prosecutor](#) “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 the Court described its decision as creating a “[limited](#)” immunity, the official act immunity envisioned in *Trump* appears to be extensive.

As described by the Court, official acts appear to include not only the President’s exercise of his statutory and constitutional powers, [but also](#) “speaking to and on behalf of the American people” or using the “‘bully pulpit’ to persuade Americans . . . in ways that the President believes would advance the public interest.” As a result, the majority opinion observed that “most of a President’s public communications are likely to fall comfortably within” the umbrella of official acts for which the President enjoys at least presumptive immunity.

The scope of this described immunity becomes apparent when compared to the much narrower [immunity enjoyed by Members of Congress](#)—an immunity that, unlike the President’s immunity, derives directly from constitutional text. Members of Congress do not enjoy immunity for all “official acts.” Instead, the Supreme Court has said that congressional immunity extends only to those “[legislative acts](#)” that form “an integral part of the deliberative and communicative processes by which Members participate in committee

and House proceedings.” The D.C. Circuit, for example, has plainly [stated](#) that “the Speech or Debate Clause does not immunize every official act performed by a member of Congress.” Moreover, the Supreme Court has [explicitly held](#) that a Member’s communications with the public, even when seeking “to inform the public and other Members” of matters of national importance, are “not a part of the legislative function” and are therefore not legislative acts.

Unofficial Acts

If an act that supports a criminal indictment is deemed “unofficial,” then the President enjoys no immunity under *Trump*. The justifications that demand criminal immunity for official presidential acts do not attach to unofficial acts. As [described](#) by the Court:

Although Presidential immunity is required for *official* actions to ensure that the President’s decisionmaking is not distorted by the threat of future litigation stemming from those actions, that concern does not support immunity for *unofficial* conduct.

This is because the immunity established in *Trump* exists to protect the functioning of the office of the Presidency, not to insulate the personal actions of the President.

While it appears clear that actions occurring either before or after the President’s tenure of office must be unofficial acts, the *Trump* opinion [acknowledged](#) that during a President’s tenure of office, “[d]istinguishing the President’s official actions from his unofficial ones can be difficult.” As described above, in order to be considered unofficial, a presidential action must be adequately divorced from an exercise of Presidential authority. The only [illustration](#) the Court gave of such an action was to suggest that speaking as “a candidate for office or party leader” might be considered unofficial conduct. Moreover, proving that presidential conduct should be categorized as “unofficial” appears to be no easy task, as the Court made [clear](#) that in distinguishing official from unofficial conduct, courts may neither “inquire into the President’s motives” nor “deem an action unofficial merely because it allegedly violates a generally applicable law.”

What Immunity Includes

The immunity described in *Trump* does not only protect a President from criminal prosecution. The majority opinion also insulates a President from indictment and, according to a [majority of five Justices](#), prevents a jury from considering “official act” evidence even when pursuing allegations of “unofficial” criminal wrongdoing. A prosecutor is therefore barred from using evidence of official acts in prosecuting unofficial acts—meaning that the *Trump* opinion’s “official act” immunity may also make it more difficult for prosecutors to seek accountability for otherwise unprotected unofficial acts. For example, the majority [suggested](#) that in a criminal prosecution for bribery in relation to an official act, prosecutors may “point to the public record to show” that the official act was performed, and introduce “evidence of what the President demanded, received, accepted, or agreed to accept or receive” in exchange for performing the official act. However, prosecutors could not “admit testimony or private records of the President or his advisers probing the official act itself.”

The result of the immunity described in *Trump* is that, at least for now, a prosecutor is free to pursue a prosecution of a former President only if the underlying conduct does not relate to a core or exclusive presidential power, and either (1) the allegedly criminal act is “manifestly” outside the “outer perimeter” of a President’s official activity; or (2) if it is within that outer perimeter, the prosecutor is able to prove, without recourse to presidential motive or the use of evidence reflecting official actions, that the prosecution “would pose no ‘dangers of intrusion on the authority and functions of the Executive Branch.’” Although the majority definitely concluded that the President is absolutely immune from criminal prosecution for official acts involving core constitutional functions, the opinion seems to envision that the operation of the immunity framework it announced—including whether absolute

immunity might extend to at least some non-core presidential actions—would be clarified only through subsequent developments. Echoing a statement made in an earlier case about presidential powers, the majority [declared](#) that it would be inappropriate, in the first ever case of its kind before the Court, “to definitively and comprehensively determine the President’s scope of immunity from criminal prosecution.”

Effect on the Special Counsel’s 2020 Election Prosecution and Other Cases

The *Trump* majority opinion’s precise impact on Special Counsel Smith’s election-related [prosecution](#) will largely depend, in the first instance, on how the trial court applies and interprets the above framework. As the Supreme Court [acknowledged](#), application of its framework and analysis of whether a given presidential action qualifies for immunity is “fact specific,” “may prove to be challenging,” and may take significant time.

The majority opinion in *Trump* did make clear that the former President is entitled to [absolute immunity](#) and cannot be prosecuted for “the alleged conduct involving his discussions with Justice Department officials.” This includes threats to remove the Acting Attorney General after that official allegedly refused to announce what the indictment referred to as “sham” investigations into electoral fraud.

With respect to allegations that the President pressured the Vice President to decertify the 2020 election, the Court determined that those actions were official and entitled at least to presumptive immunity. Counting electoral votes, the Court [concluded](#), “is a constitutional and statutory authority of the Vice President,” and “whenever the President and Vice President discuss their official responsibilities they engage in official conduct.” Whether the government can rebut that presumption is a question left for the trial court.

With respect to other allegations described in the indictment, whether the former President enjoys immunity will depend on whether the trial court categorizes the acts in question as official, and if so, whether the Special Counsel can prove that applying the criminal law to those acts presents “no dangers of intrusion on the authority and functions of the Executive Branch.” The Court offered [limited guidance](#) for this endeavor. For example, in addressing the official or unofficial nature of the indictment’s allegations that the former President had conspired with state officials and private parties to provide Congress with “fraudulent electoral ballots,” the majority opinion outlined the arguments made by both sides for the President’s authority (or lack thereof) over federal elections. Ultimately, however, the opinion concluded that since the “alleged conduct cannot be neatly categorized as falling within a particular presidential function,” determining which side’s “characterization may be correct” would require a “close,” “extensive,” and “fact specific” assessment of the allegations by the trial court.

The *Trump* majority opinion’s impact on other pending criminal prosecutions is similarly difficult to predict, but at the very least, it appears likely that courts in [New York](#), [Georgia](#), and [Florida](#) that are presiding over criminal proceedings against the former President will need to determine whether and how the *Trump* decision applies to their specific cases. The *Trump* majority opinion’s guidance on whether the President’s discussions with state officials could be considered official action would appear to have application to the case in Georgia, which revolves around a similar fact pattern.

The *Trump* opinion would seem to have less application to the conviction in New York, as that case appears to primarily involve unofficial acts that either occurred before Mr. Trump’s tenure in office, or relate to personal financial activities that occurred while he was President. The former President’s attorneys, however, have [argued](#) that evidence of official acts was provided to the jury in that case, which could implicate the majority opinion’s limitation on the use of official act evidence to assist in the

prosecution of unofficial conduct. The New York trial judge has [delayed](#) the former President's sentencing hearing in order to consider the *Trump* opinion's impact.

The opinion's impact on the Special Counsel's prosecution of the former President in Florida for the retention of classified documents will likely depend, in the first instance, on how the district judge in that case categorizes the underlying conduct. While that case appears to largely involve unofficial acts that occurred after President Trump left office, the former President has [argued](#) that the "charges stem directly from official acts by President Trump while in office," such as his decision to designate records as "personal." If the court were to accept that argument, the former President would be "at least presumptively immune" from prosecution. Still, even if the conduct at issue in the Florida prosecution is deemed unofficial, as indicated above the *Trump* decision would likely still play a role in limiting the evidence available when a President is prosecuted for an unofficial act.

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