

# Presidential Immunity

# Trump v. United States

United States Supreme Court

(9 - 0)

1997

Jack Smith  
(born 1969)



Jack Smith

# Donald J. Trump

(born 1946)



Donald J. Trump

# John Roberts

(born 1955)



John Roberts



# Maybe a Different Question; Maybe a Different Answer

Are the actions which a former President is alleged to have taken during his term of office official actions for which a president enjoys presidential immunity? (a choice between official and unofficial acts)

or

Does presidential immunity protect a president from criminal liability when official acts are also criminal acts? (an examination of different kinds of official acts)

# Note

President Trump was a defendant in a criminal case. Unlike the previous two cases, this was not a civil proceeding.

The events on which the suit was based took place while Trump was president.



# Basic Facts

- Former President Donald Trump was indicted in August 2023 on four counts arising from Special Counsel Jack Smith's investigation into the January 6, 2021 attacks on the U.S. Capitol.
- It was alleged by Special Counsel Jack Smith that, while in office in January, 2020, incited the Capitol riot, tried to change voting results and pressured the Vice President to act contrary to his Constitutional duty.
- Trump claimed that neither a president nor a former president can be prosecuted for his official acts as president unless he has first been impeached by the House and convicted by the Senate.

# From the Majority Decision

Presidential immunities and privileges [are] rooted in the constitutional tradition of the separation of powers and supported by our history.

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.

# From the Majority Decision

The Framers “sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many.” *Clinton v. Jones*, [520 U.S. 681](#), 712 (1997) (Breyer, J., concurring in judgment).

# From the Majority Decision

They “deemed an energetic executive essential to ‘the protection of the community against foreign attacks,’ ‘the steady administration of the laws,’ ‘the protection of property,’ and ‘the security of liberty.’ ” *Seila Law*, 591 U. S., at 223–224 (quoting *The Federalist* No. 70, p. 471 (J. Cooke ed. 1961) (A. Hamilton)).

The purpose of a “vigorous” and “energetic” Executive, they thought, was to ensure “good government,” for a “feeble executive implies a feeble execution of the government.” *Id.*, at 471–472.

# From the Majority Decision

The President has duties of unrivaled gravity and breadth.  
[There are] 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...

# From the Majority Decision

If the President claims authority to act but in fact exercises mere “individual will” and “authority without law,” the courts may say so.

But once it is determined that the President acted within the scope of his exclusive authority, his discretion in exercising such authority cannot be subject to further judicial examination.

# From the Majority Decision

The Court thus concludes that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority.

# From the Majority Decision

As for a President's unofficial acts, there is no immunity.

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



# From the Majority Decision

The first step in deciding whether a former President is entitled to immunity from a particular prosecution is to distinguish his official from unofficial actions.

In dividing official from unofficial conduct, courts may not inquire into the President's motives.

Such a highly intrusive inquiry would risk exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose.

# From the Majority Decision

The indictment alleges that... Trump and his co-conspirators attempted to [improperly] leverage the Justice Department's power and authority to convince certain States to replace their legitimate electors with Trump's fraudulent slates of electors.

[Because the Constitution gives the President] exclusive authority over... the Justice Department... Trump is absolutely immune for... his discussions with Justice Department officials [regardless of the alleged purpose of such conversations].

# From the Majority Decision

Whenever the President and Vice President discuss their official responsibilities, they engage in official conduct. Presiding over the January 6th certification proceeding at which Members of Congress count the electoral votes is a constitutional and statutory duty of the Vice President.

# From the Majority Decision

The indictment's allegations that Trump attempted to pressure the Vice President to take particular acts in connection with his role at the certification proceeding thus involve official conduct, and Trump is at least presumptively immune from prosecution for such conduct.

[Presumptive immunity can be rebutted if the prosecution can show that continuing with case would not] pose any dangers of intrusion on the authority and functions of the Executive Branch.

# Justice Barrett's Concurrence



Amy Conant Barrett

# From Barrett's Concurrence

Properly conceived, the President's constitutional protection from prosecution is narrow.

The Court leaves open the possibility that the Constitution forbids prosecuting the President for *any* official conduct, instructing the lower courts to address that question in the first instance. I would have answered it now.

Though I agree that a President cannot be held criminally liable for conduct within his “conclusive and preclusive” authority and closely related acts... the Constitution does not vest every exercise of executive power in the President's sole discretion.

# From Barrett's Concurrence

The... question is whether the relevant criminal statute reaches the President's official conduct. Not every... statute does.

Some of th[e] allegations [against Trump] raise unsettled questions about the scope of Article II power, but others do not.

For example, the indictment alleges that the President “asked the Arizona House Speaker to call the legislature into session to hold a hearing” about election fraud claims.

The President has no authority over state legislatures or their leadership, so it is hard to see how prosecuting him for crimes committed when dealing with the Arizona House Speaker would unconstitutionally intrude on executive power.

# From Thomas' Concurrence

Few things would threaten our constitutional order more than criminally prosecuting a former President for his official acts.

[T]he Framers “deemed an energetic executive essential to . . . the security of liberty,” and our “system of separated powers” accordingly insulates the President from prosecution for his official acts.

To conclude otherwise would hamstring the vigorous Executive that our Constitution envisions.



# Justice Sotomayor's Dissent



Sonia Sotomayor

# From Sotomayor's Dissent

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 majority today endorses an expansive vision of Presidential immunity that was never recognized by the Founders... Settled understandings of the Constitution are of little use to the majority in this case, and so it ignores them.

# From Sotomayor's Dissent

This official-acts immunity has no firm grounding in constitutional text, history, or precedent. No matter how you look at it, the majority's official-acts immunity is utterly indefensible.

The Constitution's text contains no provision for immunity from criminal prosecution for former Presidents.

[The] Framers clearly knew how to provide for immunity from prosecution. They did provide a narrow immunity for legislators in the Constitution] "in all Cases, except Treason, Felony and Breach of the Peace". They did not extend the same or similar immunity to Presidents.

# Justice Jackson's Dissent



Ketanji Brown Jackson

# From Jackson's Dissent

[T]he Court has unilaterally altered the balance of power between the three coordinate branches of our Government as it relates to the Rule of Law, aggrandizing power in the Judiciary and the Executive, to the detriment of Congress.

[The Court's ruling today] undermines the constraints of the law as a deterrent for future Presidents who might otherwise abuse their power, to the detriment of us all.

# Takeaways – Presidential Liability for Criminal Acts

- Absolute immunity from criminal prosecution for any official act authorized by the Constitution, even if the act violates the law.
- Absolute immunity from criminal prosecution for any official act authorized by the legislation, even if the act violates the law, if prosecution of the crime will intrude on the president's exercise of his power and authority.

# From Jackson's Dissent

[T]he majority does not—and likely cannot—supply any useful or administrable definition of the scope of that “core.”

Nor does the majority explain how to consistently distinguish between official and unofficial acts.

After today’s ruling, the President must still “take Care that the Laws be faithfully executed,” Art. II, §3; yet, when acting in his official capacity, he has no obligation to follow those same laws himself.

## Takeaways (cont.)

- No immunity from criminal prosecution for official acts authorized by legislation if the action violates the law and the prosecution can be conducted without intruding on the president's power and authority.
- No immunity from criminal prosecution for unofficial acts (i.e. acts neither authorized by the Constitution nor legislation) that violate the law.



# World of Presidential Acts

Actions authorized by Constitution – no criminal liability

Actions authorized by legislation where criminal prosecution intrudes on Presidential power – no criminal liability

Actions authorized by legislation where criminal prosecution does not intrude on Presidential power – criminal liability

Other Presidential actions – criminal liability

