CONSTITUTIONAL ACCOUNTABILITY CENTER

Statement of the Constitutional Accountability Center

Full Committee Hearing, *'When the President Does It, that Means It's Not Illegal': The Supreme Court's Unprecedented Immunity Decision*

Committee on the Judiciary
United States Senate
September 24, 2024

The Constitutional Accountability Center (CAC) is a non-partisan think tank and public interest law firm dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. We work in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees.

In *Trump v. United States*, the U.S. Supreme Court considered whether former President Donald Trump was immune from criminal prosecution for actions taken during his presidency. CAC filed an amici curiae brief in this case on behalf of six leading scholars of constitutional law: Frank O. Bowman, III, Michael J. Gerhardt, Brian C. Kalt, Peter M. Shane, Laurence H. Tribe, and Keith E. Whittington.[1] While these scholars may differ in their partisan affiliations—and certainly differ in their approaches to the constitutional questions raised by the prosecution of a *sitting* president—they all agreed that a *former* president enjoys no immunity from criminal prosecution. Justice Sotomayor quoted this brief in her dissent in the case.[2]

As our brief explained, neither the Constitution's text nor the history of its drafting provides any support for the proposition that a former president enjoys immunity from federal prosecution. A president's liability to criminal prosecution after office is one of the many mechanisms that the Framers created to ensure presidential accountability. When they created our political system, the founders of this country and Framers of the Constitution sought to distinguish the American system from Britain's hereditary monarchy. Rejecting immunity would ensure, as one statesman explained at the Connecticut ratifying convention, that "[o]ur president is not a King."[3]

In reaching its decision recognizing some immunity from criminal prosecution for former presidents, the Supreme Court's conservative majority failed to engage with this text and history. It relied on its own vision of presidential power, rather than the one that the Framers laid out for us. This level of engagement was particularly disappointing for justices who purport to care deeply about the Constitution's text and history. All in

[1] Br. of Scholars of Constitutional Law as *Amici Curiae* Supporting Respondent, *Trump v. United States*, 144 S. Ct. 2312 (2024) (No. 23-939), 2024 WL 1586765, https://www.theusconstitution.org/wp-content/uploads/2024/02/Trump-v-US-CAC-Scholars-Brief-Merits.pdf.

[2] *Trump v. United States*, 144 S. Ct. 2312, 2358 (2024) (Sotomayor, J., dissenting). This testimony draws substantially from the brief.

[3] 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 200 (Jonathan Elliot ed., 1836) (Richard Law) [hereinafter Elliot's Debates].

all, the decision undermines the system of presidential accountability that the Framers created and the fundamental principle that no one is above the law.

I. The Constitution's Text Contains No Provision for Immunity of Former Presidents from Federal Prosecution

As an initial matter, there is no textual basis for the former president's claim of immunity from criminal prosecution. This is especially significant because some state constitutions at the time of the Framing specifically provided "express criminal immunities" to sitting governors.[4] And the Framers themselves expressly stipulated in the Constitution that legislators would be "privileged from Arrest during their Attendance at the Session of their respective Houses" and would "not be questioned" for "any Speech or Debate in either House."[5]

In other words, if the Framers wanted to provide specific immunities or protections to the president, they had the tools available to do so explicitly. As Professor Ronald Rotunda explained in a 1998 Memorandum to Kenneth Starr, if the Framers "wanted to create some constitutional privilege to shield the President … from criminal indictment," they "could have drafted such a privilege."[6] They did not.

Instead, the Framers in the Impeachment Judgment Clause made clear their assumption that a former president could face criminal prosecution. That Clause states that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification … but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."[7] As the Department of Justice's Office of Legal Counsel concluded over twenty years ago, the Clause's second sentence makes clear that officers impeached and convicted could still face "further punishments" in court, no matter what punishment the Senate imposed after impeachment.[8] The Clause, in other words, "clearly contemplates that a former President may be subject to criminal prosecution."[9]

II. History Confirms that Former Presidents Enjoy No Immunity From Prosecution

A. *Framing-Era History*

Although there was relatively little discussion of presidential immunity at the Constitutional Convention, what discussion there was provides no support for the proposition that former presidents are immune from federal prosecution. In September of 1787, James Madison invited the Convention to draft explicit presidential immunity provisions into the nation's founding document.[10] His request was met with silence: the members of the Convention adjourned without addressing it.

Charles Pinckney, another delegate, later recalled that the decision to ignore Madison's request was intentional. "It was the design of the Constitution," Pinckney explained during an 1800 Senate Debate,

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[4] Saikrishna Bangalore Prakash, *Prosecuting and Punishing Our Presidents*, 100 Tex. L. Rev. 55, 69 (2021); *see, e.g.,* Del. Const. of 1776, art. XXIII (providing that the governor is "impeachable" only "when he is out of office, and within eighteen months thereafter" and making impeachment the process for imposing "pains and penalties"); Va. Const. of 1776 ("The Governor, *when he is out of office* … shall be impeachable by the House of Delegates." (emphasis added)); Prakash, *supra*, at 70 (adding that "some foreign constitutions likewise granted textual immunities").

[5] U.S. Const. art. I, § 6.

[6] Memorandum from Ronald Rotunda to Kenneth Starr re: Indictability of the President 18 (May 13, 1998).

[7] U.S. Const. art. I, § 3, cl. 7.

[8] Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. 110, 126 (Aug. 18, 2000).

[9] *Trump*, 144 S. Ct. at 2345 (quoting *Trump*, 144 S. Ct. at 2358 (Sotomayor, J., dissenting)).

[10] 2 *The Records of the Federal Convention of 1787*, at 503 (Max Farrand ed., 1911) (proposing that the Convention "consider[] what privileges ought to be allowed to the Executive") [hereinafter *Farrand's Records*].

elaborating "that it never was intended to give Congress, or either branch, any but specified, and those very limited, privileges indeed."[11]

Some participants in the ratification debates also stressed the executive's liability to criminal prosecution. At the North Carolina ratifying convention, James Iredell, a prominent Framer and future Supreme Court justice, explicitly noted that the president, like anyone else, was "punishable by the laws of his country," and could "in capital cases … be deprived of his life."[12] In a later pamphlet, Iredell observed that the president "is not exempt from a trial, if he should be guilty or supposed guilty, of [treason] or any other offence."[13]

Other prominent supporters of the Constitution underscored that the president could be "tried for his crimes,"[14] and was "liable … to be indicted if the case should require it."[15] Liability to criminal prosecution, these individuals made clear, would ensure that the president was accountable to law.[16] As James Wilson, another future Supreme Court justice and one of the principal architects of the structure of the Executive Branch, told the Pennsylvania ratifying convention, the president was "far from being above the laws," and "not a *single privilege* [wa]s annexed to his character."[17] In a September 1787 essay, Tench Coxe likewise emphasized that the president could be "proceeded against like any other man in the ordinary course of law."[18] A few months later, another federalist advocate of the Constitution reiterated that while the British king was "above the reach of all Courts of law," this "prerogative[]" would not be "vested in the President."[19]

B. *Post-Enactment History*

Since the ratification of the Constitution, the actions of political leaders—including presidents, vice presidents, and even Trump himself—have consistently reflected the view that former presidents are susceptible to criminal prosecution after they leave office. This long history belies the Supreme Court's suggestion that a president would hesitate to "execute the duties of his office fearlessly and fairly" if the Court fully rejected Trump's immunity claim.[20] To the contrary, presidents have been executing the duties of their office fearlessly and fairly, even in the absence of immunity, for over 200 years. What the conservative majority described as a "dangerous course" is in fact the state of affairs that existed before the Court issued its decision this July.[21]

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[11] 3 Farrand's Records 384-85.

[12] 4 Elliot's Debates 108-10.

[13] *Answers to Mr. Mason's Objections to the New Constitution recommended by the late Convention of Philadelphia, in* Griffith John McRee, 2 *Life and Correspondence of James Iredell* 186, 200 (1858); *see generally* Pauline Maier, *Ratification: The People Debate the Constitution*, 1787-1788, at 416 (2010) (noting that Iredell's remarks "remain among the best glosses on the Constitution").

[14] Publicola: An Address to the Freemen of North Carolina, State Gazette of N.C. (Mar. 27, 1788), *reprinted in* 30 The Documentary History of Ratification Digital Edition 113, 116 (Kaminski et al. eds., 2009) [hereinafter Documentary History of Ratification].

[15] A Freeholder, Va. Indep. Chron. (Apr. 9, 1788), *reprinted in* 9 Documentary History of Ratification 719, 723.

[16] Prakash, *supra*, at 72.

[17] 2 Elliot's Debates 480; Michael W. McConnell, *James Wilson's Contributions to the Construction of Article II*, 17 Geo. J. L. & Pub. Pol'y 23 (2019).

[18] *An American Citizen I*, Indep. Gazetteer (Philadelphia, Pa.) (Sept. 26, 1787), *reprinted in* 2 *Documentary History of Ratification* 138, 141.

[19] *Americanus II*, N.Y. Daily Advertiser (Nov. 23, 1787), *reprinted in* 19 *Documentary History of Ratification* 287, 288-89.

[20] *Trump*, 144 S. Ct. at 2331; *see id.* at 2347 (Thomas, J., concurring) (describing a "threat [to] our constitutional order").

[21] *Id.*

For example, in 1974, then-President Gerald Ford pardoned former President Nixon, seemingly acknowledging Nixon's "liab[ility] to possible indictment and trial for offenses against the United States."[22] In 2001, then-President Bill Clinton reached a deal with independent counsel Robert Ray ensuring that he would "avoid indictment" for misleading statements about Monica Lewinsky that he made while in office.[23] And as Justice Sotomayor noted in her dissenting opinion, executive officials similarly acknowledged the liability of a past president to prosecution when investigating President Reagan's involvement in the Iran-Contra affair.[24]

Finally, when Trump faced impeachment in 2021, his counsel argued that he was not subject to impeachment as a *former* president, but reiterated that he could be subject to criminal prosecution. He explained that his argument would not leave "[a] President who left office … in any way above the law," because a former president "is like any other citizen and can be tried in a court of law."[25] Many Senators repeated this premise when voting to acquit Trump.[26]

Scholars and legal experts have also taken the position that former presidents are not immune from criminal prosecution. Constitutional scholars—even those who support presidential immunity from prosecution for *sitting* presidents—have always assumed that such immunity would not exist after a president leaves office.[27] Likewise, the executive branch has consistently noted that a president's immunity from criminal prosecution, if it exists at all, exists only for a president "still in office."[28]

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[22] Proclamation No. 4311, 88 Stat. 2502 (1974).

[23] John F. Harris & Bill Miller, *In a Deal, Clinton Avoids Indictment*, Wash. Post (Jan. 20, 2001).

[24] *Trump*, 144 S. Ct. at 2360 (Sotomayor, J., dissenting) (citing 1 L. Walsh, Final Report of the Independent Counsel for Iran/Contra Matters: Investigations and Prosecutions 445 (1993)).

[25] *See, e.g., Trial Memorandum of Donald J. Trump*, at 35, *in* Proceedings of the U.S. Senate in the Impeachment Trial of Donald John Trump, Part II, S. Doc. 117-2 (1st Sess. 2021).

[26] *See, e.g*., 1 *Proceedings of the U.S. Senate in the Impeachment Trial of Donald J. Trump*, S. Doc. 117-3 (1st Sess. 2021), at 796 (Sen. McConnell) (noting that "President Trump is still liable for everything he did while he was in office, as an ordinary citizen," and that "[w]e have a criminal justice system in this country … and former Presidents are not immune from being accountable"); *id*. at 809 (Sen. Rubio) (stating that he would let "the courts judge the events of the past").

[27] *See* Brian C. Kalt, *Criminal Immunity and Schrodinger's President: A Response to* Prosecuting and Punishing Our Presidents, 100 Texas L. Rev. Online 79, 83 (2021) ("[B]oth sides in the immunity debate agree that presidents are unregally subject to criminal prosecution. The question is simply one of timing."); Akhil R. Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, Nexus (Spring 1997) ("[T]he privilege we assert says that, if the President does it, he can be held responsible for it after he leaves office." (footnote and quotation marks omitted)); Charles L. Black, Jr. & Philip Bobbitt, *Impeachment: A Handbook* 37 (2018) (arguing that "the simple and obvious solution" to the immunity of a sitting president would be to delay trial or indictment until after his term has expired).

[28] *See* In re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew, Vice President of the United States, No. 73 Civ. 965 (D. Md. Oct. 5, 1973) (Memorandum of Robert Bork), at 16 ("The Framers could not have contemplated prosecution of an incumbent President…." (emphasis added)); A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 255 (Oct. 16, 2000) ("Recognizing an immunity from prosecution for a sitting President would not preclude such prosecution once the President's term is over or he is otherwise removed from office by resignation or impeachment"); Assistant Attorney General Robert G. Dixon, Jr., Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office 32 & n.25 (Sept. 24, 1973) (unpublished memo), *available at* https://irp.fas.org/agency/doj/olc/092473.pdf?ref=amer icanpurpose.com (suggesting that a sitting president cannot be indicted, but recommending that Congress pass a statute tolling the running of criminal statutes of limitations for crimes presidents commit while in office in order to preserve the prospect of prosecuting a former president).

III. The *Trump v. United States* Decision

In *Trump*, the Court's conservative majority rejected the broadest iteration of the former president's claimed immunity.[29] Importantly, for example, it dismissed Trump's argument that the Impeachment Judgment Clause means that former presidents are *only* liable to prosecution if they have been impeached and convicted.[30] But it also held that a former president is "absolutely immune" from prosecution for actions on subjects within his "conclusive and preclusive" constitutional authority,[31] and enjoys "at least a *presumptive* immunity" from prosecution for other official actions.[32] In reaching this result, the Court's conservative majority departed from constitutional text and history, as well as Supreme Court precedent.[33]

A. The Majority in *Trump* Failed to Engage with Constitutional Text and History

To start, the Court dismissed both text and history as "unhelpful," taking the view that neither addresses "whether a former President may … be prosecuted for his *official* conduct in particular."[34] But this objection ignores the fundamental point underlying the historical evidence against immunity: the absence of presidential immunities was a key component in the Framers' plan to distinguish our new system of government from the British monarchy. Providing the former president with unwritten immunity from prosecution for any conduct—official or not—undermines that goal. As James Iredell explained before the North Carolina ratifying convention: The king was not "personally responsible" for any "act of government" in the British system. "Under our constitution we are much happier," Iredell explained, because "[i]f the President does a single act by which the people are prejudiced," he is "punishable himself," and by the "laws of his country."[35] Iredell's statement makes clear that the decision to deny former presidents immunity was not limited to private, unofficial actions, but any actions that would prejudice the citizenry. If a president could escape accountability by using official actions to commit misdeeds, how could the Constitution fulfill Iredell's promise that "no man [would be] better than his fellow-citizens" in the new political system?[36]

B. The Majority in *Trump* Improperly Extended Supreme Court Precedent

Ignoring the Constitution's text and history, the majority instead reasoned from Supreme Court precedent on the separation of powers. But the majority extended and distorted that precedent, creating a new immunity that is at odds with the rationales underlying those earlier decisions.

While the Court recognized a former president's immunity from civil damages liability for acts within the 'outer perimeter' of his official responsibility" in *Nixon v. Fitzgerald*, it made clear in that opinion that criminal prosecution raised different concerns.[37] The majority in that case explicitly remarked that the "interest to be served" by exposing the president to criminal liability would be much greater than the "public interest in actions for civil damages."[38] In addition, the "procedural guarantees normally associated with criminal prosecutions" limit the possibility of harassment by criminal indictment much more than they do in the civil context.[39] As Chief

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[29] *Trump*, 144 S. Ct. at 2341-42.

[30] *Id*. at 2342.

[31] *Id.* at 2328.

[32] *Id.* at 2331.

[33] *Id*. at 2344 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 750 n. 31 (1982)) (rejecting the "specific textual basis" as a "prerequisite" for immunity).

[34] *Id.* at 2345.

[35] 4 Elliot's Debates 108-10.

[36] *Id*. at 109.

[37] *Nixon*, 457 U.S. at 756.

[38] *Id.* at n.37.

[39] *United States v. Ward*, 448 U.S. 242, 253 (1980).

Justice Roberts observed in *Vance*, "grand juries are prohibited from engaging in 'arbitrary fishing expeditions' and initiating investigations 'out of malice or an intent to harass,"' and "federal courts have the tools to deter and, where necessary, dismiss" improper indictments against former presidents.[40] Moreover, while many actions a president might take in the exercise of his official duties could create the risk of civil litigation, far fewer, if any, will raise the risk of criminal prosecution.

Finally, the Constitution itself provides a solution for a president whose energies are sapped by the possibility of criminal prosecution: if the president is unable to "discharge the Powers and Duties" of the Office, those duties devolve on the Vice President.[41] As Professor Saikrishna Prakash observed in an article rejecting the premise of presidential immunity even for sitting presidents, presidents "do not enjoy a constitutional right to be free from distractions."[42]

The majority extended presidential immunity far beyond existing precedent by carving out areas of presidential action that are "absolutely" and "presumptively" immune from criminal prosecution. And the majority's understanding of which presidential acts are "official," and which of those official acts fall under the president's "conclusive and preclusive" authority, is also unmoored from both previous cases and constitutional text.[43]

IV. Conclusion

By providing former presidents some degree of immunity from criminal accountability, the majority opinion in *Trump v. United States* undermines the system of accountability envisioned by the Framers of the Constitution. The Framers envisioned a president answerable to the governed, not a king who is above the law.

[40] *Trump v. Vance*, 140 S. Ct. 2412, 2428 (2020) (quoting *United States v. R. Enters., Inc.*, 498 U.S. 292, 299 (1991)).

[41] U.S. Const. art. II, § 1, cl. 6.

[42] Prakash, *supra*, at 91.

[43] *Trump*, 144 S. Ct. at 2333 ("Some presidential conduct—for example, speaking to and on behalf of the American people—certainly can qualify as official even when not obviously connected to a particular constitutional or statutory provision.") (internal citation omitted).