Trump v. United States July 1, 2024

The majority decision in today's Presidential Immunity case.

I had anticipated that the majority decision in this case would (1) conclude that there was no merit to Trump's argument that criminal proceeding against a former President are only possible when he has been impeached by the House and as a result thereof found guilty by the Senate and (2) simply remand the matter to the District Court for a determination of which of Trump's illegal activities were official (and for which immunity existed) and which were private (for which no immunity existed.) The court in its decision has gone a good deal beyond my expectations seemingly to Trump's benefit.

Writing for the 6-3 majority Justice Roberts, concludes that

1. There is no merit to Trump's argument that criminal proceeding against a former President are only possible when he has been impeached by the House and as a result thereof found guilty by the Senate

2. The President… may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum [1]to a presumptive immunity from prosecution for all of his official acts.

[1] I found that the majority opinion on at least several occasions used words or phraseology that suggest the lack of impartiality in this matter. To the extent that I have noted them they have been highlighted

On this basis, the majority concludes more specifically that

1. The President has absolute immunity with respect to his exercise of his core constitutional powers
   - These include the powers spelled out in the constitution----commanding the armed forces of the United States, granting reprieves and pardons, and appointing public ministers.

2. The President is also absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority

3. For other official acts, based on competing considerations including separation of powers principles, the President is presumptively immune from criminal prosecution "unless the Government can show that applying a criminal prohibition to that act would pose no 'dangers of intrusion on the authority and function of the executive branch '

   " .. This case does not require us to decide whether this immunity is presumptive or absolute"

4. A former President can be subject to criminal prosecution for unofficial acts committed while in office. However, in this regard, the Court established some

surprising rules applicable to the process of deciding if an act is official or unofficial conduct

- No court can deem an action "unofficial" merely because it violated generally applicable law

-The Government may not rely on the President's motives

e.g. where retaliation has been alleged, why the President chose to dismiss a particular Air Force office.

This would seemingly also apply to situations such as where the President solicited or accepted a bribe for performing an official act. However. as the Court says, in a very interesting footnote, while the Government cannot rely on the President's motive, i.e. present testimony or private records of the President or his advisors probing the official act itself, it can point to the public record to show that the President performed the official act and present evidence of what the President allegedly demanded, received, accepted, or agreed to in return for performing the act.

Applying the above to the Indictment

I. Trump's meeting with the Acting Attorney General and others to discuss sending a letter from the Department of Justice to certain states regarding a fictitious finding of election fraud

The Court found:

1. There is no dispute that this involved Trump's use of official power

2. the executive branch has exclusive authority and absolute discretion to decide which crimes to investigate and prosecute

3. That these acts involved shams or for an improper purpose does not divest the President of exclusive authority over the investigation and prosecutorial functions of the Justice Department and its officials

4. **Trump is therefore absolutely immune from prosecution**

II. Trump's attempt to enlist Mike Pence into using his ceremonial role at the January 6th certification proceedings to fraudulently alter the election results.

The Court found:

1. Given the long recognized role of the Vice President as one of the President's closest advisors, there is support to characterize the conduct in question as official

2. **There is therefore a <u>rebuttable presumption</u> that Trump is immune from prosecution for such conduct**

3. The issue is remanded to the District Court for it to assess "with appropriate input from the parties, whether the prosecution on this ground would pose any dangers of intrusion on the authority and functions of the executive branch.

4. The decision of the District Court will be reviewable

(In my view, the Government will be able to show that applying a criminal prohibition to trying to get VP Pence to accept fraudulent electors would pose no dangers of intrusion on the authority and function of the executive branch. and Trump will not be found to have any immunity for this.)

III. Trump's attempt to convince state officials that election fraud had tainted the popular vote count in their states and thus that electoral votes for Trump's opponent needed to be changed to electoral votes for Trump. Followed by his plan to create fraudulent electors

The Court found:

1. That at oral argument Trump appeared to concede that at least some of these acts involve private conduct. However he subsequently seemed to take a different position

2. Unlike discussions with DOJ or the VP, the alleged conduct cannot neatly be categorized as falling within a particular presidential function

3. Determining if this conduct was official or private "requires a close analysis of the indictments extensive and interrelated allegations.

4. A factual analysis requiring assessment of numerous alleged interactions is needed

5. **The matter is remanded to the District Court to determine with the benefit of briefing whether Trump's conduct in this area qualifies as official or unofficial**

   (In my view, the Government will be able to establish at a hearing on the facts that Trump's conduct was not official.)

6. The decision of the District Court will be reviewable

IV. Trump's urging his followers to travel to Washington DC and directing them to the capital to pressure the Vice President not to certify the electoral votes from certain states

The Court found:

1. Most of a president's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities

2. there may however be [2]contexts in which the president notwithstanding the prominence of his position speaks in an unofficial capacity---perhaps as a candidate for office or party leader

3. a fact specific determination must be made as to the full text and context of all relevant tweets and speeches

4. That determination " may prove to be challenging."

5. **The matter is remanded to the District Court to determine with the benefit of briefing whether Trump's conduct qualifies as official or unofficial**

6. The decision of the District Court will be reviewable

(In my view, the Government will be able to establish at a hearing on the facts that Trump's conduct was not official. This conclusion could have a tough time when it comes back to the Supreme Court.)

V. Remaining allegations in the indictment

The Court found:

1. **That on remand the District Court must carefully analyze these allegations to determine whether they too involve conduct for which a president must be immune from prosecution**

MISCELLANEOUS ADDITIONAL POINTS

a. The majority was clearly obsessed with not having the possibility of criminal proceedings against a former president negatively affect the way that sitting presidents perform their executive duties. They went so far as to say that "The Constitution does not tolerate…

[2] Should have said " **there are** contexts in which…"

impediments to' the effective functioning of government,'" and that the President had a unique position in the constitutional scheme.

b. They also buy into the Trumpian "belief" that without immunity future Presidents will feel free to prosecute his predecessors, yet be unable to fearlessly carry out his duties for fear he may be next. This far-fetched scenario is in the Majority's view has profound consequences for our

c. Such being the case, they rejected the notion that traditional means to assure impartial enforcement of the law such as grand juries, a defendants procedural rights at trial, and the requirement for the government to prove its case beyond a reasonable doubt were sufficient where dealing with actions taken by a President while he was in office.

d. The Government had argued that while Trump could not be held criminally liable for certain official acts, that a jury could consider evidence concerning those acts for limited and specific purposes, for example Trump's knowledge or notice of the falsity of his election fraud claims. In this regard the majority seems to go out of its way to preclude juries from using evidence of official acts in determining Trump's guilt or innocence with regard to unofficial conduct. And rejecting the Government's position that problems of this sort could be resolved by the District Court use of evidentiary rulings and jury instructions, the Court said that although such tools may suffice to protect the constitutional rights of individual criminal defendants the interests that underlie presidential immunity seek to protect not the President himself, but the institution of the Presidency

e. The majority admits that it did not simply decide the case before it when it said that " …we cannot afford to fixate exclusively, or even primarily. on the present exigencies. In a case like this one, focusing on transient results may have a profound consequence for the separation of powers and for the future of our Republic.".

f. There are still lots of little points on how things will fit within these rules

What's next?

I think that the District court will in short order hold an extensive evidentiary hearing on whether various of Trump's acts were official (and, if so, whether prosecuting him on those grounds would pose any dangers of intrusion on the authority and functions of the executive branch) or were unofficial.) I think that the District Court will conclude that most of them were unofficial and state that, even if that finding were incorrect, prosecution on that ground would not interfere with the functioning of the Executive Branch.