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Defining the Scope of Presidential Immunity: Trump v. U.S. and Its Far-Reaching, Yet Unknowable, Future Impact

Trump v. United States, 144 S. Ct. 2312 (July 1, 2024)

In its 2023-2024 term, the U.S. Supreme Court issued numerous momentous decisions. But while the court's decision in *Loper Bright Enterprises v. Raimondo* to overrule the *Chevron* doctrine will likely yield the most immediate impact on American business, its *Trump v. United States* decision has arguably garnered much more attention—and commentary—than any other case decided during this term. Though the political ramifications of the opinion are the most apparent, the Supreme Court's expansive view of presidential immunity could ultimately have a ripple effect on commerce and industry, should a future president seek to test the limits.

In *Trump v. United States*, the Supreme Court faced the question of whether, and to what extent, a former president enjoys immunity from prosecution for allegedly criminal conduct involving official acts during the president's time in office. With this ruling, the Court established a broad immunity for most, if not all, presidential actions that are done within the course of performing the functions of the Executive Branch, while also leaving open the potential for criminal liability for "unofficial actions" taken by a president.

On August 1, 2023, a federal grand jury indicted former President Donald Trump on four counts related to actions he took during his presidency to allegedly interfere with the results of the November 2020 election. Trump filed a motion to dismiss the indictments, arguing that a president is guaranteed absolute immunity from criminal prosecution for actions taken within the scope of his official responsibilities. The motion was denied by the federal district court, and the U.S. Court of Appeals for the D.C. Circuit affirmed that decision. The Supreme Court granted certiorari on the

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limited issue of whether former presidents possess any immunity against criminal prosecution for official acts taken during their tenure.

In a 6-3 decision divided on ideological lines, the Supreme Court held that former presidents are entitled to absolute immunity for actions that are within the president's "core constitutional powers." A former president is therefore entitled to a presumption of immunity for all official acts, with no immunity conferred for unofficial acts.

Writing for the majority, Chief Justice Roberts recognized that a president has absolute immunity for actions taken in exercise of his "core constitutional powers." Acknowledging that the authority vested within the office of the presidency is broad and unmatched by the other branches of government, the majority identified some of these core powers, such as commanding the armed forces, granting pardons, and dealing with foreign relations. To this end, the Supreme Court noted that it is not proper for Congress or the courts to criminalize or adjudicate a criminal prosecution for a president's actions that are within his exclusive power under Article II of the Constitution.

The Supreme Court further noted, however, that not all actions taken by a president are enumerated in the Constitution, and for these actions—where the president's constitutional authority to act is shared with Congress—a president does not enjoy absolute immunity. In such a situation, the Court held that because of the great interest in protecting the ability of the Executive Branch to freely govern, actions taken by a president that are "within the outer perimeter of his official responsibility" are protected by "at least a presumptive immunity." The Court outlined a test to overcome this presumptive immunity requiring the government to show that criminalizing an official action poses no "dangers of intrusion on the authority and functions of the Executive Branch."

Finally, the Supreme Court held that a president's unofficial actions are not entitled to immunity of any kind. The majority reasoned that pursuing criminal prosecution against a former president for actions that were not taken in his official capacity as president would not affect the future operation of the Executive Branch.

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As a result, the critical question that must be answered when applying the Supreme Court's opinion is whether the president's actions in question were official or unofficial. The court somewhat briefly considered the division between official and unofficial actions and noted that a president's constitutional authority and discretionary responsibilities is vast. It ultimately held that the immunity discussed above extends to all actions related to a president's official responsibilities that are "not manifestly or palpably beyond [his] authority." Importantly, courts may not look to a president's possible motives in classifying whether conduct was official or unofficial.

Writing in dissent, Justice Sotomayor criticized the majority's unwillingness to identify the limits of what constitutes an "official act" of the presidency, and for "creat[ing] a law-free zone around the President," while identifying acts that likely now carry immunity, including receiving a bribe in exchange for a pardon. Justice Sotomayor further cautioned that, under the majority's opinion, the potential for misuse of "official power for personal gain" is great, as "the criminal law that the rest of us must abide will not provide a backstop." Echoing this sentiment in her own dissent, Justice Jackson stated that the majority "has now declared for the first time in history that the most powerful official in the United States can (under circumstances yet to be fully determined) become a law unto himself."

It is just such a scenario that gives rise to potential future impacts on business, markets, and the economy. Could future business leaders, for instance, choose to operate their companies in a criminally reckless manner, despite potentially harmful impacts on shareholders or others, knowing that a substantial payment to the sitting president would result in a pardon for any federal criminal conviction for their actions? This, and innumerable other possibilities, could be the end-result of *Trump v. United States*, though only time will truly tell.

Key Takeaways

- A president cannot be prosecuted for actions taken in furtherance of his core constitutional powers.

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- A president is entitled to presumptive immunity from prosecution for all official actions.
- A president has no immunity from prosecution for any unofficial actions.
- What remains to be seen is how lower courts will apply this framework in determining whether a former president's allegedly criminal actions were within the scope of "core constitutional powers," "within the outer perimeter" of presidential responsibility, or wholly "unofficial" acts.
- The Supreme Court's broad grant of immunity creates the possibility for a president to purposely use the powers of the office in ways that have traditionally been shunned, which could indirectly or directly affect the country's markets and economy.

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