

The US Supreme Court Outs the Imperial Presidency

By [Dr. Binoy Kampmark](#)

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The US Supreme Court has much to answer for. In the genius of republican government, it operates as overseer and balancer to the executive and legislature. Of late, the judges have seemingly confused that role.

In contrast to its other Anglophone counterparts, the highest tribunal in the US professes an open brand of politics, with its occupants blatantly expressing views that openly conform to one side of the political aisle or the other. Not that the idea of a conservative or liberal judge necessarily translates into opposite rulings. Agreement and common ground can be reached, however difficult the exercise might be. Justice should, at the very least, be seen to be done.

The current crop, however, shows little in the way of identifying, let alone reaching common ground. Firm lines, even yawning chasms, have grown. The latest decision on presidential immunity from criminal prosecution is one such case. On July 1, the majority of the court [held](#) by six to three that a US president, including former occupants of the office, "may not be prosecuted for exercising his core constitutional powers, and he is entitled, to a minimum, to a presumptive immunity from prosecution for all his official acts."

Throughout the sequence of decisions, which began before the trial judge, Tanya Chutkan, Donald Trump has argued that he should be immune from prosecution, notably regarding federal charges of subverting the results of the 2020 election. Those actions, he claims, formed part of his official duties. Furthermore, as he suffered no conviction or either impeachment, [he could not be tried](#) in a criminal court.

The decision offers a grocery basket of elastic terms that will delight future litigants. The total immunity, the decision states, covers "core constitutional powers". The president, former or sitting, further had "presumptive immunity from criminal prosecution" regarding all discharged official acts as a function of the separation of powers. Falling for giddy circularity, the majority opinion goes on to remark that the immunity "extends to the outer

perimeter of the President's official responsibilities, covering actions so long as they are not manifestly or palpably beyond his authority." It does not, however, extend to "unofficial acts" or "unofficial conduct".

The majority was also of the view that no court should inquire into the President's motives when distinguishing official from official conduct. "Such an enquiry would risk exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose, thereby intruding on the Article II interests that immunity seeks to protect." This shielding does have a remarkable effect, granting the president uncomfortably wide powers regarding decisions that can involve breaching the very laws the office is intended to protect.

The decision magnifies the scope of presidential power. One might say it invests that power with imperial, distinctly anti-republican attributes. For decades, it had been assumed that presidents would be spared civil suits to, in the words of the majority, "undertake his constitutionally designated functions effectively, free from undue pressures or distortions." To take the immunity to cover breaches of laws the executive is bound to be faithful in executing is a quite different creature. To suggest that would be to echo, as indeed US District Court Judge Chutkan opined in December 2023, of a "divine right of kings to evade criminal responsibility."

The three liberal justices [violently disagreed](#) with the majority in a judgment authored by Justice Sonia Sotomayor. "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." The dissent excoriates, not merely the reasoning of the court but the man whose actions it will benefit. "Because our Constitution does not shield a former President from answering for criminal and treasonous acts, I dissent."

According to the lashing words of Sotomayor, the majority had invented "an atextual, ahistorical, and unjustifiable immunity that puts the President above the law." From the outset, it was unnecessary to make any finding on absolute immunity on the exercise of "core constitutional powers" given the facts outlined in the indictment. This was further "eclipsed" by the decision "to create expansive immunity for all 'official act[s]'." Whatever the terminology used - presumptive or absolute - "under the majority's rule, a President's use of any official power for any purpose, even the most corrupt, is immune from prosecution."

With withering ire, Sotomayor also thought it "nonsensical" that "evidence concerning acts for which the President is immune can play no role in any criminal prosecution against him". It would make it impossible for the government to use the President's official acts to prove knowledge or show intent in prosecuting private offences.

Despite the broad sweep of the judgment regarding immunity, there are pressing questions on whether Trump's own conduct regarding claims of election subversion would fall within the ambit of the ruling. The multiple lawsuits filed challenging the 2020 election result were peppered with admissions on his part that he was doing so [in the personal capacity](#) of a candidate rather than that of an office holder performing official functions. Since then, he has had a change of heart, taking the rather primitive [view articulated](#) by that other advocate of an imperial executive, President Richard Nixon, who claimed that, "When the

president does it, that means that it is not illegal.”

The Supreme Court has remanded the questions on whether absolute immunity applies to such acts as pressuring state election officials and conduct around the events of January 6 to the lower courts. But the consequences of the decision have been immediate in the context of the hush money case, for which Trump was found guilty of 34 felony counts of falsifying business records. His lawyers have already asked that the July 11 sentencing be delayed while also applying to set aside the conviction. Thus, do shadowy motives, personal conduct and the official blur.

Much ink, resources and litigation, is bound to be expended over the next few years over what falls within official, as opposed to unofficial acts, that attach to the office of the US president. Along the way, a few laws may well be broken. With a delicious sense of irony, the Supreme Court ruling will also shield President Joe Biden from vengeful prosecutions planned by Trump and his courtiers. The law can, every so often, be fantastically double-edged.

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Dr. Binoy Kampmark was a Commonwealth Scholar at Selwyn College, Cambridge. He currently lectures at RMIT University. He is a Research Associate of the Centre for Research on Globalization (CRG). Email: bkampmark@gmail.com

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