

MONITOR

DEMOCRACY

„Trump versus United States“

An interview about the consequences for the USA following the Supreme Court ruling of July 1, 2024 with

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Various criminal proceedings are underway against former US President Donald Trump. In one case, Trump's possible involvement in the riot on January 6, 2021 which sought to disrupt the certification of the election results – the storming of the US Capitol in Washington – is to be clarified. In that case Trump argued that, as a former president, he is immune from criminal prosecution. When the first-instance court disagreed with him, Trump appealed the issue to the Supreme Court. Professor Miller, what exactly did the Supreme Court decide on July 1, 2024?

Miller: The 6:3 conservative majority of the Court ruled that the former president enjoys some immunity against criminal prosecution. Chief Justice John Roberts wrote the leading opinion in the case explaining the scope of that immunity. First, the majority found that the President has absolute immunity from criminal prosecution for conduct related to his core constitutional competences. Second, the majority found that the President benefits from a presumption of immunity for all other conduct that lies within the outer perimeter of his “official” role. Finally, the majority ruled that the president has no immunity from prosecution for “unofficial” or “private” acts. Chief Justice Roberts then sought to apply these principles to the federal criminal indictment

related to Trump's refusal to accept the results of the 2020 election. Some of the actions covered by the indictment were expressions of the president's core competences and the former president cannot be prosecuted for them. The majority suggested that other actions covered by the indictment seemed to be "official acts" for which there would be a presumption against charging the president. But the majority tasked the lower trial court with more fully developing the facts needed to decide whether these actions were "official" and whether the prosecutor might nevertheless be able to overcome the presumption of immunity for that conduct. Finally, the Court explained that a number of actions covered by the indictment might be "private" and would therefore be subject to prosecution. But, again, the lower trial court was ordered to develop the facts relevant to these actions. In the end, the majority announced some new and dramatic constitutional principles, struck some of the January 6 charges as unconstitutional under those principles, and asked the lower court to try to apply the new principles to the remaining charges in the indictment. For their part, the three liberal justices strongly dissented. They worry that the ruling erodes the rule of law by placing the president beyond the scope of the criminal law.

The Supreme Court has now created these three categories. Does the judgment also provide criteria for the allocation to one of the categories?

Miller: A little, yes. But it is important to remember that the Supreme Court does not typically issue concrete, complete, abstract, and systematically coherent statements of the law. Our common law is a dynamic process that requires lower courts to try to apply the general principles announced by the Supreme Court to the facts present in any particular case. Those rulings will then be reviewed on appeal, maybe all the way to the Supreme Court again, in an ongoing process of clarification and precision. Still, the Court offered some insight into the three categories of presidential immunity.

The core constitutional competences for which the president is owed absolute immunity, the Court explained, involve constitutionally assigned powers that belong "conclusively and preclusively" to the president alone. This category of presidential power was first conceived in an important case from the 1950s. In fact, it's possible to attribute this category to the Supreme Court's famous *Marbury v. Madison* case from 1803. Neither Congress nor the courts exercise any power at all over these core presidential competences. This might be thought of as the range of executive powers that strictly involve the president's political discretion. Up to this point we would have said this is a very, very narrow range of powers, including presidential oversight of his cabinet departments and a limited set of foreign affairs responsibilities.

Surprisingly, however, in the Trump case the Court offered a new example. The majority said that the president's pardon authority should also be counted as one of these rare, core competences. Considering all the discussion about whether Trump might pardon himself if he is convicted and then later re-elected, this new example was subtle but meaningful. In the case at hand, the Court explained that then-President Trump's engagement with the Department of Justice – even as it related to the indefensible and unjustified investigation of election fraud – belongs to this category of core competences. As part of his oversight of that cabinet department, the Court reasoned, the president has conclusive and preclusive authority and is immune from prosecution for those actions. It is not a well-thought-out comparison. But, as I read the Court's explanation of this core constitutional competence, I wondered if it had any

similarities to the chancellor's *Richtlinienkompetenz* in Germany, which involves his or her absolute authority to determine the policy pursued by the federal ministries.

In some degree the second and third categories depend on one another for their delimitation. The president's "official acts," for which he is owed a presumption of immunity, are not "private acts," for which he has no immunity. But maybe that's not very helpful. The majority noted that past caselaw is not helpful in mapping this boundary because there is so little of it available. This is, after all, the first time in history a former president has been charged with a crime. Instead, the Court used a mix of teleological and structural interpretation to clarify things. Leaning toward the controversial "unitary executive" theory of presidential power, the conservative justices in the majority found that the constitution establishes a uniquely powerful presidency that envisions a strong, stable, and effective executive branch. The "vigorous and energetic" presidency conceived by the constitution, the Court said, requires that the president remain effective and capable of governing. Exposing the president to criminal prosecution for the conduct of his office would allow the Congress (by enacting criminal laws) and the courts (by hosting criminal investigations and trials) to undermine the president's constitutionally mandated power and effectiveness. For the majority, this raises alarming separation of powers concerns. With this explanation in mind, the Court offered a kind of negative definition of "official conduct." If a criminal prosecution would impede the president – would prevent him from "fearlessly and fairly" performing his duties – then the conduct involved should be regarded as "official" and benefit from a presumption of immunity. The Court took a similar approach to defining private conduct, for which the president enjoys no criminal immunity. If you prosecuted the president for some conduct and it would have no effect on his ability to effectively govern, then it must be a "private action."

The Court offered some examples to illustrate the second and third categories. On one hand, the majority believed that then-President Trump's conversations with then-Vice President Pence about certifying the election results belonged to the president's "official conduct." The president, they reasoned, would be less able to effectively govern if he had to worry about possible criminal prosecution resulting from his interactions with his closest advisers. On the other hand, the majority wondered if Trump's speech and Tweets on January 6 should be treated as "private conduct" because they were more closely linked to his role as a candidate or the head of a political party, and not to his service as the president. As I noted earlier, the Court called on the lower trial court to develop the facts needed to assign the conduct covered by the indictment to one or the other category so that it can then be determined if it involved immunized conduct.

The fact that heads of state enjoy immunity is not an American invention, but can be found in many legal systems. What is the Supreme Court's ruling based on? Are there any provisions on this in the US Constitution?

Miller: I think this is an important insight, especially as there is a lot of intense disagreement with the Court's opinion. In fact, there are some sensible reasons for some carefully calibrated and strictly limited forms of immunity for a head of state or a head of government. And, as you suggest, a form of that logic operates in many domestic legal orders as well as in some parts of international law. The Supreme Court's majority didn't rely on comparison as a basis for its decision.

But the majority's ruling does rest on debateable constitutional reasoning. I say that because the text of the constitution doesn't explicitly grant immunity to the president. In fact, the constitution's impeachment clause clearly anticipates criminal liability after an impeachment process is concluded. I also wonder about the constitutional footing of the ruling because the very limited caselaw that existed on related questions pointed in two directions. One case from the 1980s (Fitzgerald) found that the president enjoys absolute immunity from civil lawsuits. But another case from the 1970s (Nixon) held that the president didn't enjoy an absolute constitutional privilege from having to respond to demands for evidence in a criminal proceeding. One justification for the latter ruling was the Supreme Court's conviction that criminal law proceedings are so significant for a society that a president should not be able to undermine them by invoking a privilege against providing evidence. This means that the Court's conservative majority could not rely on textualism, precedent, or history as interpretive bases for their ruling. Instead, they rely much more on structure and practical concerns for the rule announced. They said the structure of the branches of government – and their separation from one another – called for insulating the president in this way. And practical worries about the effectiveness of the president demanded the immunity the Court granted. But these interpretive conclusions are less concrete and objective. They are open to differing views.

I did however, find one of the practical justifications raised by the majority to be compelling. The dissenters criticized the Court for eroding the rule of law by placing the president beyond the authority of the criminal law in many cases. The majority, however, was worried about the risk that politics would “cannibalize” the presidency if the president enjoyed no immunity. This concern refers to the ever-more-common rhetoric in American politics calling for the criminal prosecution of the opposition, especially including past presidents. Trump popularized this dynamic by promoting calls to lock up “crooked Hillary.” And now the Biden administration, or at least prosecutors in the orbit of the Democratic Party, is pursuing these charges against Trump. Not to be outdone, a major plank in Trump's campaign for the election in 2024 is the promise that he will investigate and prosecute the “corrupt Biden family.” The Supreme Court's opinion strikes a clear blow against that spiralling rhetoric. That makes good political sense to me, even if it might not be a logically sound constitutional conclusion.

What consequences does the ruling have for the ongoing proceedings?

Miller: Some of the conduct forming the basis of the January 6 indictment is now absolutely immune. Any of the charges that depend extensively on that conduct will have to be dropped from the indictment. The lower trial court also will have to consider the facts in the case to try to identify which acts are “official” and which acts are “private.” The “official” conduct also cannot serve as the basis for charges in the criminal indictment, unless the prosecutor can overcome the presumption that the relevant “official” conduct is owed immunity. If he cannot make that argument, then those charges will also have to be dropped. It's possible that the whole January 6 case against Trump could dissolve as a result of the Supreme Court's ruling. But even if some part of it survives, the process of sorting out these new, complex factual and legal questions will take a lot of time and might even involve another appeal to the Supreme Court. Trump has certainly succeeded in delaying the case for the foreseeable future. And, as the Supreme Court suggested, if he can get himself re-elected, he might use his “conclusive and preclusive” – unreviewable – power to pardon

himself and end the cases. What are the consequences of the case? It's a big win for Trump.

One would hope for a unanimous decision in rulings of this magnitude. However, the decision was 6:3. What do the dissenting opinions say?

Miller: I understand your impulse when suggesting that weighty decisions might benefit from a unanimous ruling by the Court. But I have to say that Americans can live with, and jurisprudentially manage, a world in which the law is contested and therefore not wholly settled. In some admirable way that makes us the participants in a continuing, living debate about the law that governs us. We understand the law in much more discursive and procedural terms. Not in the scientific, systematic, and objective way that the law is imagined in the German legal culture. In our system, as the history of abortion rights and the *Roe v. Wade* decision demonstrated, the Court's ruling on a controversial matter might be only the beginning in a big legal-policy debate. I don't think a unanimous court on the abortion issue would have quieted that debate in the United States. And, as you point out, we have a strong and robust dissent in the case from three justices. Their dissent required Chief Justice Roberts, when writing for the majority, to account for and react to their objections. Without those strident "no" votes, we might have had an opinion that granted even more immunity and power to the president?

The dissenters noted that the limited caselaw, including the Nixon case from the 1970s, might have pointed towards refusing to grant immunity. They also insisted that the text of the constitution doesn't demand presidential immunity. In fact, as I mentioned earlier, the impeachment clause anticipates criminal liability for the president. But primarily the dissenters argued that history and pragmatism undermine the Court's decision. They point out that the founding fathers, having fought a war to free themselves from the power of an absolute monarch, could not have envisioned placing the president beyond the reach of the criminal law. Pragmatically, they express deep concern for the harm the Court's ruling does to a core tenant of the rule of law: that no man is above the law.

Three of the judges who now voted in favor of immunity were appointed by Trump. Do you think that had an impact?

Miller: I do not believe that the justices appointed by Trump joined the majority due to personal or partisan loyalty. That is, I don't accept that they are "Trump" judges in the sense that we understand that judges in Hungary are appointed to serve the concrete interests of Fidesz or Viktor Orbán. But, Trump did appoint them because these jurists were strongly aligned with conservative politics and conservative constitutional jurisprudence. That happens to include the view that the president should be given greater authority under our constitutional scheme. To the degree that the majority opinion advances that theory of the presidency – often called the "unitary executive" theory – then Trump's appointees to the Court were certainly pleased to see it. As it turns out, that also benefitted Trump practically and politically in this case. But I have no trouble imagining this majority of the Court issuing the same opinion, which significantly aggrandizes the president, if the case had involved a Democratic president under indictment. I'm not sure the opposite would be the case for the three dissenting justices who have been appointed by Democratic presidents. That hypothetical raises two thoughts for me.

First, it should be noted that Trump is aware that his appointees hold this view about a very strong, autonomous presidency. It is certainly possible that, by having loaded the Court with jurists who hold that view, Trump has been willing to push the envelope regarding his conduct in the confidence that a majority of the Court's justices will at least be sympathetic to presidential power. In that sense, it may not be that the majority consists of "Trump justices," but that Trump serves as this conservative majority's kind of president.

Second, although the Republicans seem to have taken the lead on the issue in the last generation, it is fair to say that presidential power has been a bi-partisan issue. Both political parties find themselves in the White House often enough to understand that, in their turn, they might also want expansive presidential authority. That's been especially true for crisis-era or war-time presidents of both parties. It will be interesting to see if the Democrats actually reject, or work to reverse, any gains in presidential power secured by Trump under these conservative constitutional theories. In any case, one person who will benefit from the Court's ruling is the Democratic President Joe Biden. Trump's threats to investigate and prosecute Biden, should Trump be re-elected, are now moot.

The ruling is often described as historic. Do you agree with this?

Miller: Yes. This is a historic judgement from the Supreme Court. It makes a totally new claim about the power of the political figure many people still refer to as "the most powerful person in the world." It does that on the basis of a nearly blank slate as far as precedent is concerned. And the Court announced its controversial ruling in relation to one of the most controversial and galvanizing political figures in American history. All of this unfolded amidst the 2024 presidential campaign. This is a dramatic constitutional context involving the biggest constitutional stakes. Even discounting for American's habit of sensationalizing things or our fondness for melodrama, it has to be said that this is a major decision from the Court. This is the kind of stuff that makes studying constitutional law so compelling and exciting!

Professor Miller, thank you very much for this interview!

The questions were posed by Dr. Franziska Rinke, policy advisor for rule of law and international law at the Konrad Adenauer Foundation.

Imprint

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