

# DONALD TRUMP'S IMMUNITY REVISITED: ~~THE KING CAN DO NO WRONG~~

*Ian J. Kolb, Staff Editor, Vol. 32<sup>1</sup>*

*“No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.”<sup>2</sup>*

## I. INTRODUCTION

In *Marbury v. Madison*, Chief Justice John Marshall stated, “[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the [E]xecutive, or executive officers, perform duties in which they have a discretion.”<sup>3</sup> SCOTUS followed this precedent in *Trump v. United States* by remanding key issues regarding Trump's immunity from criminal charges to the district court.<sup>4</sup> The Court held that the President has (1) absolute immunity against criminal prosecution for actions that fall within core presidential powers granted by the Constitution, (2) presumed immunity for actions conducted in an official capacity, and (3) no immunity for unofficial actions.<sup>5</sup> Through its ruling, the Court reaffirmed, “[o]urs is a court of final review and not first view.”<sup>6</sup> Despite returning a superseding indictment, Jack Smith, former Special Counsel to the Justice Department (“Special Counsel”), moved to have the case dismissed after the reelection of Donald Trump in November of 2024.<sup>7</sup> This article will explore in the alternative what could have happened had the Court, instead of remanding, considered (1)

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<sup>2</sup> *United States v. Lee*, 106 U.S. 196, 220 (1882).

<sup>3</sup> *Marbury v. Madison*, 5 U.S. 137, 170 (1803).

<sup>4</sup> *Trump v. United States*, 603 U.S. 593, 598 (2024).

<sup>5</sup> *Id.* at 593.

<sup>6</sup> *Id.* at 617 (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)).

<sup>7</sup> *United States v. Trump*, 757 F. Supp. 3d 82, 83 (D.D.C. 2024).

whether the President enjoys absolute or presumptive immunity from Special Counsel’s election interference charge<sup>8</sup> (“Count Four”), and (2) whether Count Four falls within the exception to presumed immunity established in *Nixon v. Fitzgerald*, allowing the criminal prosecution of President Trump.<sup>9</sup>

## II. ONLY PRESUMPTIVE IMMUNITY APPLIES TO COUNT FOUR

The President’s conduct under Count Four would have presumed immunity because it would be considered an official act, outside of the authority granted by the Constitution.<sup>10</sup> First, when determining whether conduct is official or unofficial, the courts may not consider the motives of the President, or find conduct unofficial simply because it may violate a law.<sup>11</sup> In 2023, a man was convicted under the same law as Count Four, 18 U.S.C. §241, for spreading disinformation online to suppress the presidential vote.<sup>12</sup> In the instant case, Special Counsel likely wanted to target the President’s communications and spread of disinformation.<sup>13</sup> But, “the President possesses extraordinary power to speak to his fellow citizens,” and therefore, this conduct would fall within his official capacities.<sup>14</sup> Accordingly, the conduct charged under Count Four would be considered an official act.

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<sup>8</sup> Indictment at 45, *United States v. Trump*, 704 F. Supp. 3d 196 (D.D.C. 2023) (No. 1:23-cr-00257) (“Defendant, [Donald J. Trump], did knowingly combine, conspire, confederate, and agree with co-conspirators, known and unknown to the Grand Jury, to injure, oppress, threaten, and intimidate one or more persons in the free exercise and enjoyment of a right and privilege secured to them by the Constitution and laws of the United States—that is, the right to vote, and to have one’s vote counted.”).

<sup>9</sup> See *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

<sup>10</sup> See generally *Trump v. United States*, 603 U.S. 593 (2024) (examining in what circumstances a president’s actions can be criminally prosecuted).

<sup>11</sup> *Trump*, 603 U.S. at 596.

<sup>12</sup> Peter G. Berris, *Overview of the Indictment of Former President Trump Related to the 2020 Election*, CONGRESS.GOV (Aug. 3, 2023), <https://www.congress.gov/crs-product/LSB11016>.

<sup>13</sup> See Quinta Jurecic, *The Last Time the Justice Department Prosecuted Election Interference Under Section 241*, LAWFARE (Jul. 21, 2023), <https://www.lawfaremedia.org/article/the-last-time-the-justice-department-prosecuted-election-interference-under-section-241>.

<sup>14</sup> *Trump*, 603 U.S. at 629 (quoting *Trump v. Hawaii*, 585 U.S. 667, 701 (2018)).

Next, the President’s conduct falls outside of the authority of the Constitution and therefore, would only be protected by presumptive immunity.<sup>15</sup> The majority in *Trump* held that the President enjoys absolute immunity from criminal prosecution for powers prescribed by the Constitution.<sup>16</sup> These powers, such as the power to pardon, are “exclusive and conclusive,”<sup>17</sup> meaning neither Congress nor the Judiciary can infringe upon them.<sup>18</sup> However, under the Constitution, the President has a very limited role in federal elections.<sup>19</sup> Furthermore, the Constitution commands the President to “take Care that the Laws be faithfully executed,”<sup>20</sup> but the Court concludes that the President is not a lawmaker.<sup>21</sup>

In this case, the Court held the President only has presumptive immunity from criminal prosecution for official acts outside the powers granted by the Constitution, because *even the President is not above the law*.<sup>22</sup> The Court’s holding is far narrower than Trump’s original argument that all official acts should be protected by absolute immunity, “unless a statute expressly stated otherwise.”<sup>23</sup> Under Count Four, the President is charged with interfering with one or more person’s free exercise and enjoyment of the right to vote and to have one’s vote counted, which falls outside of the Executive’s constitutional authority.<sup>24</sup> Accordingly, the

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<sup>15</sup> See generally *Trump*, 603 U.S. at 678-79 (Sotomayor, J., dissenting) (arguing that President Trump’s conduct is not protected as a core constitutional power).

<sup>16</sup> *Trump*, 603 U.S. at 606.

<sup>17</sup> *Id.* at 608 (internal quotation omitted).

<sup>18</sup> *Id.* at 608.

<sup>19</sup> *Id.* at 627.

<sup>20</sup> U.S. CONST. art. II, §§ 1, 3.

<sup>21</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

<sup>22</sup> See *Trump*, 603 U.S. at 600, 615.

<sup>23</sup> See Brief of Petitioner at 37-40, *Trump v. United States*, 603 U.S. 593 (2024) (No. 23-939) (“Congress must speak clearly to apply a statute against the President or his official acts.” “None of the statutes clearly authorizes the criminalization of the President’s official acts, let alone the strained interpretations advanced here”).

<sup>24</sup> See generally *Trump*, 603 U.S. at 678-79 (Sotomayor, J., dissenting) (arguing that President Trump’s conduct is not protected as a core constitutional power).

conduct would be deemed an official act and the President would be entitled only to presumptive immunity from Count Four.

### III. THE EXCEPTION

Under the exception in *Fitzgerald*, the President’s presumed immunity from Count Four is rebuttable. In *Fitzgerald*, the Court stated that before a court exercises jurisdiction over the President, it “must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch.”<sup>25</sup> Here, the Court would first evaluate the constitutional weight of the interest to be served, which under Count Four, is protecting the right to vote.<sup>26</sup> This Court has stated the right to vote is a fundamental matter in a free and democratic society.<sup>27</sup> Although the Constitution addresses federal elections, it did not originally enshrine the right to vote.<sup>28</sup> But, later Constitutional amendments prohibit someone from not being able to vote based on race, sex and age.<sup>29</sup> Accordingly, the right to vote has been implied in the Constitution since its ratification and is therefore, of great constitutional weight.<sup>30</sup>

Next, under *Fitzgerald*, the Court would evaluate the dangers of intrusion on the authority and function of the executive branch from the criminal prosecution of a President.<sup>31</sup> The Court argues there are two distinct dangers to the executive branch that could result.<sup>32</sup> The first danger is the “vigorous” and “energetic” Executive envisioned by the Framers would, if subjected to

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<sup>25</sup> *Nixon*, 457 U.S. at 754.

<sup>26</sup> Indictment at 45, *United States v. Trump*, 704 F. Supp. 3d 196 (D.D.C. 2023) (No. 1:23-cr-00257).

<sup>27</sup> *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

<sup>28</sup> U.S. CONST. amend. XV, XIX, XVI.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *See generally* *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

<sup>32</sup> *Trump v. United States*, 603 U.S. 593, 611-14 (2024).

criminal penalties, become “unduly cautious in the discharge of his official duties,” resulting in the President opting for a path contrary to the public’s interest.<sup>33</sup> However, that reasoning is unfounded.

First, the President, even as a criminal defendant, would receive all of the safeguards of an average citizen, and likely more.<sup>34</sup> A grand jury would ensure that the charges are well-founded.<sup>35</sup> A jury of the President’s peers would need to arrive at a unanimous verdict, and on appeal, the Supreme Court would likely grant certiorari review.<sup>36</sup> Second, if the Nixon pardon is any indication, former Presidents already believed they were susceptible to criminal prosecution, and therefore, the status quo would not change.<sup>37</sup> Third, the public has a great interest in criminal proceedings against the President, because afterall, criminal laws seek to redress harm to society, not just individuals.<sup>38</sup> Therefore, criminal prosecution of the President does not interfere with the Framers’ vision of a “vigorous and energetic” Executive.<sup>39</sup>

The second distinct danger, the Court argues, is that the prosecution of one President would lead future Presidents to prosecute their predecessors, effectively cannibalizing the office.<sup>40</sup> But, as Justice Sotomayor explained in her dissenting opinion, the threat of criminal prosecution has always existed for the President and yet there has never been a federal prosecution of a president, until now.<sup>41</sup> Furthermore, the President is afforded a large, in-house

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 671.

<sup>35</sup> *Trump*, 603 U.S. at 671.

<sup>36</sup> *Id.* at 672.

<sup>37</sup> *Id.* at 664-65.

<sup>38</sup> *Huntington v. Attrill*, 146 U.S. 657, 668 (1892).

<sup>39</sup> *Trump*, 603 U.S. at 610.

<sup>40</sup> *Id.* at 640.

<sup>41</sup> *Id.* at 673.

legal team who is responsible for advising the President.<sup>42</sup> Accordingly, criminal prosecution of the President under Count Four, would not cannibalize the executive branch.

Therefore, in this scenario, the constitutional weight of protecting the right to vote would outweigh the danger of intruding on the authority and function of the executive branch. This would allow the criminal prosecution of Donald Trump to proceed under the *Fitzgerald* exception.

#### IV. THE RESULT

The Framers purposely did not give the Executive immunity.<sup>43</sup> Here, if the Supreme Court wanted to act on Count Four, it could have applied *Fitzgerald*'s test resulting in the first ever criminal prosecution of a former President.<sup>44</sup> However, even if Donald Trump was criminally prosecuted under Count Four, he likely would evade a conviction. First, proof beyond a reasonable doubt—the highest burden of proof—would have to be met.<sup>45</sup> Second, with almost two-thirds of Republican voters believing there was some level of voter fraud in the 2020 election,<sup>46</sup> finding the President guilty beyond a reasonable doubt becomes even more challenging. Whether the majority's decision was the correct one remains to be seen, but our current President has now been empowered to believe he can do no wrong.

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<sup>42</sup> *Id.* at 670.

<sup>43</sup> *Trump v. United States*, 603 U.S. 593, 661 (2024) (citing U.S. CONST. art. I, § 6, cl. 1.).

<sup>44</sup> *See generally Trump*, 603 U.S. 593.

<sup>45</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000).

<sup>46</sup> *Most Say Fundamental Rights Under Threat*, MONMOUTH U. (Jun. 20, 2023) [https://www.monmouth.edu/polling-institute/reports/monmouthpoll\\_US\\_062023/](https://www.monmouth.edu/polling-institute/reports/monmouthpoll_US_062023/).