

Supreme Court hearing on Trump immunity claim debates how far US president can go in committing crimes

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In its final day of oral argument for its current session, the US Supreme Court questioned attorneys for the fascist ex-President Donald Trump and for the Biden Justice Department over Trump's claim of absolute immunity from prosecution for all actions taken during his presidency.

If the court upholds the claim, the federal case brought against Trump by Special Prosecutor Jack Smith, as well as the case over conspiracy to overturn the election in Georgia brought by Fulton County Prosecutor Fani Willis, would be thrown out. The court will have guaranteed that no president can be held accountable for his actions in the White House once he leaves office.

More likely, at least as indicated by the questioning, is that the court will send the case back to the federal district court with instructions to distinguish between Trump's private actions and his actions as president, based on a tendentious distinction embraced by most of the conservative justices, who hold a 6-3 majority.

As outlined by Chief Justice John Roberts, in prosecuting Trump for conspiracy to overturn the 2020 elections, the special prosecutor could only target actions involving private lawyers and campaign operatives.

They could not include actions involving Trump's communications with government officials, such as his effort to get the Justice Department to send out letters to battleground states saying that there were serious questions about their certification that Democrat Joe Biden had won their electoral votes. Nor could Trump be prosecuted for pressuring Vice President Mike Pence to block the certification of electoral votes by Congress.

It was unclear whether a majority would even allow evidence of these actions to be introduced to show Trump's intent and the context of the conspiracy with private lawyers and political operatives to create slates of

fake electors to be submitted to Congress as though they were genuine.

The oral arguments began with an extraordinary warning by Trump's attorney, John Sauer, that if Trump were to be subject to criminal prosecution, the same fate would await George W. Bush, Barack Obama and President Biden once he leaves office.

"Without presidential immunity from criminal prosecution, there can be no presidency as we know it," he said. "For 234 years of American history, no president was ever prosecuted for his official acts."

He continued: "The implications of the Court's decision here extend far beyond the facts of this case. Could President George W. Bush have been sent to prison for obstructing an official proceeding or allegedly lying to Congress to induce war in Iraq? Could President Obama be charged with murder for killing US citizens abroad by drone strike?"

Sauer raised these examples as though just posing the question would win support on the court, as of course it will. But he was playing with fire. The response of working people throughout the world is likely to be, "These presidents are criminals, and they *should* be sent to prison." The same with Trump, the instigator of the coup attempt of January 6, 2021, and Biden, the instigator of war with Russia in Ukraine and the enabler of Israel's genocide in Gaza.

The hearing lasted for two hours, and the transcript extends for nearly 180 pages. We will have more to say about the legal and constitutional issues raised. But several points must be reviewed even in a preliminary assessment of the proceeding.

The attorneys on both sides, and all nine justices, discussed the case within the framework of upholding the power of the president and his right, as commander-in-

chief, to order the most far-reaching and bloody measures against whatever target he selects.

Justice Department lawyer Michael Dreeben was at pains to preserve the power of the president to take whatever actions he pleases under the rubric of national security, rejecting the suggestion that Obama could have been prosecuted, since he had legal advice from the Department of Justice that drone missile assassinations, even of US citizens, were legal.

The same argument would apply to decisions by George W. Bush to invade and occupy Iraq, and to authorize the torture of prisoners alleged to be terrorists at secret CIA prisons in Europe and Asia, and at the US naval base/prison at Guantanamo Bay, Cuba.

The hypothetical examples introduced by the justices, and particularly the three liberals, Sonia Sotomayor, Elena Kagan and Ketanji Brown Jackson, suggest the depth of the political crisis wracking the US ruling elite.

Justice Kagan asked, “How about if a president orders the military to stage a coup?”

Sauer replied, “I think that, as the Chief Justice pointed out earlier, where there’s a whole series of, you know, sort of guidelines against that, so to speak, like the UCMJ [Uniform Code of Military Justice] prohibits the military from following a plainly unlawful order ...”

He then concluded, “I think it would depend on the circumstances whether it was an official act. If it were an official act, again, he would have to be impeached and convicted.”

Sauer did not spell out what circumstances would make an attempted military coup a legitimate exercise of presidential power, nor did Kagan pursue the question.

Kagan pointed out that there was no presidential immunity clause in the Constitution, although several states had such clauses in their constitutions for their governors at the time the Constitution was adopted. “And, you know, not so surprising, they were reacting against a monarch who claimed to be above the law. Wasn’t the whole point that the president was not a monarch, and the president was not supposed to be above the law?”

The more right-wing justices weighed in on the side of Trump’s appeal, suggesting that the president would be deterred by the threat of prosecution from “bold, decisive action” (Samuel Alito), that presidents would be driven to pardon themselves on their way out of office (Neil Gorsuch), or that executive immunity could be inferred from the Constitution in the same way that the court created “executive privilege” (Brett Kavanaugh).

When the Justice Department attorney Dreeben spoke in

support of the special prosecutor, he undermined his own position by agreeing with the suggestion of Chief Justice Roberts that the appeals court decision, which Trump is challenging, was based on a circular argument.

Roberts continued, “If it’s tautological and those are the only protections that the court of appeals below gave and that is no longer your position, you’re not defending that position, why shouldn’t we either send it back to the court of appeals or issue an opinion making clear that that’s not the law?”

Roberts then declared that the court of appeals opinion was not a basis for “taking away any official immunity,” but Dreeben pointed out, “There is no immunity that is in the Constitution, unless this Court creates it today. There certainly is no textual immunity.”

In a remarkable exchange, Gorsuch gave Dreeben a hypothetical—clearly modeled on a sanitized version of January 6—where the president leads a civil rights protest, “mostly peaceful,” which briefly disrupts congressional consideration of legislation.

“Now, under 1512(c)(2), that might be corruptly impeding a proceeding, an official proceeding.” Was that subject to prosecution, he asked. Gorsuch did not mention, although all the justices were aware, that this is precisely the issue raised by those members of the January 6 mob who were prosecuted for disrupting the congressional certification of the Electoral College vote.

This argument clearly suggests that the high court majority is prepared to strike down these prosecutions, leaving most of these January 6 defendants facing only misdemeanor trespassing and disorderly conduct charges, rather than the far more serious felony of which they were convicted.

A final decision on the case is likely to be issued in late June, making an actual trial of Trump on the charges related to January 6 impossible until after he accepts the Republican presidential nomination and highly unlikely before the November 5 election.



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