

# Far-reaching anti-democratic implications of US Supreme Court hearing on Trump's legal immunity claim

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At last week's arguments in the Supreme Court on Donald Trump's claim that he is immune from any criminal liability for acts he committed while in office, the four most right-wing justices cited uncharged war crimes linked to US imperialism and mass civil rights violations to justify a new rule that US presidents cannot be prosecuted after leaving office.

Comments by the nine justices make relatively clear that the unanimous decision of the District of Columbia Circuit Court of Appeals, which included a judge nominated by Ronald Reagan, rejecting Trump's claim of "absolute immunity," will not be affirmed. Instead, a combination of justices adding up at least to the five needed for a majority will likely rule that the lower courts must review the indictment in light of a newly minted presidential immunity rule based on picayune distinctions between "official" and "private" acts, which may or may not include allegations arising from Trump's attempt to overthrow the government on January 6, 2021, after having lost the 2020 election.

The exact parameters of the new presidential immunity rule will be spelled out in one or more written opinions expected shortly before the summer recess—traditionally the end of June—no doubt accompanied by one or more dissents.

Regardless of the outcome, the Supreme Court intervention has already thrown a monkey wrench into the federal prosecution of Trump for his unlawful attempts to overturn his 2020 defeat, most likely postponing trial until after the presidential election in November, which Trump is presently slightly favored to win.

The ruling could also derail the state prosecution brought by Fulton County District Attorney Fani Willis against Trump for his efforts to overturn Joe Biden's narrow electoral victory in Georgia, a criminal liability for which Trump could not pardon himself.

While nominally posing "questions" to the attorneys—John Sauer for Trump and Michael Dreeben for Special Counsel Jack Smith, who brought the five-count indictment—the

justices were, in fact, arguing among themselves over whether allowing prosecutions of ex-presidents would, as right-winger Neil Gorsuch said, place presidents "under fear that their successors would criminally prosecute them for their acts in office," such as "drone strikes"—a none too veiled reference to Democrat Barack Obama's Middle East assassination program.

Sonia Sotomayor—the senior "liberal" following the 2020 death of Ruth Bader Ginsburg—raised the hypothetical made famous in the DC Circuit—whether a president could be prosecuted for ordering the assassination of his political rival. When Trump's lawyer said that could be an official act, Sotomayor clarified her hypothetical: "He's not doing it like President Obama... to protect the country from a terrorist, he's doing it for personal gain."

In fact, as a matter of international and US law, Obama should be prosecuted for authorizing 542 drone strikes while president. At least 3,800 people, including US citizens and over 300 civilians, were blown to bits without a semblance of due process. Obama reportedly told senior aides in 2011: "Turns out I'm really good at killing people. Didn't know that was gonna be a strong suit of mine."

In any event, Sotomayor's comment shows that whatever the differences among the justices, they are unified on protecting the executive branch's ability to use violence and other extreme, anti-democratic measures to further imperialist interests.

Clarence Thomas, the senior and most openly corrupt justice, said that "certain presidents have engaged in various activity, coups or operations like Operation Mongoose when I was a teenager, and yet there were no prosecutions."

President John Kennedy authorized "Operation Mongoose" after the failure of the Bay of Pigs invasion, to remove the Castro government from power in Cuba, by assassination if necessary. The CIA "Mongoose" program incorporated organized crime figures who had lost concessions in Havana, and were subsequently implicated in

Kennedy's November 22, 1963 assassination.

Right-wing justice Brett Kavanaugh cited Democrat Lyndon Johnson's false "statements about the Vietnam War" during his presidency as a possible basis for prosecution, were immunity not granted.

Extreme right-wing justice Samuel Alito worried that "a defeated president" will not "be able to go off into a peaceful retirement" if he or she "may be criminally prosecuted by a bitter political opponent," leading "into a cycle that destabilizes the functioning of our country as a democracy."

Rejecting Dreeben's response that there should be reliance on the "good faith" of incoming Justice Department officials, Alito cited Mitchell Palmer, whom Democrat Woodrow Wilson appointed Attorney General in 1919. Alito said Palmer is "widely regarded as having abused the power of his office," alluding to his infamous use of mass deportations and other authoritarian measures to suppress the revolutionary upsurge in the US working class that followed the Russian Revolution and end of the first World War.

Alito then asked Dreeben whether "President Franklin D. Roosevelt's decision to intern Japanese Americans during World War II" could be charged as a "conspiracy against civil rights." In *Korematsu v. United States*, the Supreme Court upheld the constitutionality of that noxious program in an opinion written by Justice William O. Douglas, who would later become a liberal icon.

Alito floated a hypothetical immunity rule that "a former president cannot be prosecuted for official acts unless no plausible justification could be imagined for what the president did," an absurdly deferential standard that prosecutors could never overcome.

Alito wrote the infamous majority opinion in *Dobbs v. Jackson Women's Health Organization* that eliminated the constitutional right to abortion access, despite 50 years of Supreme Court precedent, ostensibly because he could not find it in the Constitution's text. Yet he now proposes that the Supreme Court invent an entirely new rule without any reference to a constitutional, statutory or common-law source.

Sotomayor, responding directly to Alito, said the majority "might as well give absolute immunity" because "anybody could argue plausibility," adding rhetorically:

What is plausible about the president insisting on and creating a fraudulent slate of electoral candidates, knowing that the slate is fake, that they weren't actually elected, that they weren't certified by the state?

While at least four justices seem clearly in favor of broad, if not absolute, presidential immunity, the six justices forming the right-wing bloc might not be unified. Chief Justice John Roberts, who sometimes looks for resolutions to protect the standing of the Supreme Court as an institution, raised the possibility of prosecuting an ex-president for accepting a bribe in exchange for an appointment as an ambassador. Ignoring the specific allegations in the indictment, Roberts said that "the court of appeals did not get into a focused consideration of what acts we're talking about."

Trump appointee Amy Coney Barrett appeared to disagree. She asked Sauer pointed questions based precisely on those allegations, including that Trump "turned to a private attorney... willing to spread knowingly false claims of election fraud to spearhead his challenges to the election results," that Trump "conspired with another private attorney who caused the filing in court of a verification... that contained false allegations," and that Trump directed "a plan to submit fraudulent slates of presidential electors to obstruct the certification proceeding."

Sauer conceded that those acts would be "private," and therefore not subject to immunity being claimed.

Elena Kagan described the allegations against Trump as "attempting to overthrow an election," and then asked Sauer whether selling "nuclear secrets to a foreign adversary" or ordering "the military to stage a coup" would be an official act immune from prosecution. Trump's attorney was unable to give a straight answer.

Ketanji Brown Jackson said the obvious: That granting Trump the broad immunity he seeks could turn "the Oval Office into the seat of criminal activity."

Ironically, the oral arguments revealed that this has been the case for decades.



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