

Opinion: 'Some immunity' in Trump v. United States. The facts, without the politics

By Anthony Michael Sabino
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The recent Supreme Court decision granting "some immunity" to a president — any president — for "official acts" has outraged some, gladdened others. However, if you put aside emotion and partisan politics, and calmly and dispassionately view *Trump v. United States* through the prism of that wondrous document, the Constitution, you will see that it is neither horrible nor wonderful; but it is, in fact, good for American liberty.

Why immunity? As the Court stated, immunity maximizes the ability of the president to "fearlessly and impartially" fulfill the duties of office, without concern of being prosecuted at every turn. But more important, immunity protects the will of the people.

When we elect a president, we command that individual to uphold the law. Without at least "some immunity," others in government could nullify our votes by interfering with the chief executive We the People elected. The Court correctly noted that immunity "safeguard[s] the independence and effective functioning" of the president. Yet its real accomplishment is honoring the choice We the People make every four years.

Does anyone else have immunity? Sure, lots of folks. Congress has "legislative immunity," the right to be left alone to make the laws the People want. This prevents anyone, even the president, from preventing Congress from doing its job. More importantly, this "legislative immunity" likewise honors the choice We the People make in electing the lawmakers we think best serve our interests.

Then there is "judicial immunity," embodied in the simple fact that you cannot sue the judge if you lose in court (of course, you can appeal). "Some immunity" of that kind gives judges the freedom to do their job, which is, quite simply, to judge the cases before them.

Thus, "some immunity" for presidents, as articulated in *Trump v. United States*, isn't new; it is just a branch of a mighty tree that is over 200 years old.

With "some immunity," what's to stop a president from doing wrong? At least three things. One is impeachment, which the Court



The U.S. Supreme Court.

AP file photo by Charles Dharapak

acknowledged "is a political process by which Congress can remove a president," and which operates independently of "some immunity" — probably why the Founders put it in the Constitution in the first place.

Two, the ballot box. What does every first-term president want? A second term. "Some immunity" will not protect a president from losing re-election. And don't worry about a second-term president either; political forces and the aforementioned impeachment will keep a second-term in line.

But the third protection is really the best.

Does "some immunity" override "separation of powers" and "checks and balances"? No. Remember the president is really not that powerful. As chief executive, the president's sole job is to "execute" the laws that Congress makes, not make law or judge the law, better known as "separation of powers" and "checks and balances."

Presidents cannot act until Congress makes a law to enforce. If We the People don't want the president to do something, we tell Congress (who we also elect) not to make a law (or amend

an existing law) on that subject. "Some immunity" does not change the fact that if Congress does not legislate, then the president is powerless (which explains why Congress comes first in the Constitution). By "separating" the "law-making" power from the "enforcing" power, we keep the president in "check and balance."

Federal courts also maintain "separation of powers" and "checks and balances." In *United States v. Nixon* (1974), President Nixon had to turn over the so-called "White House tapes" in order to ensure a fair trial for the Watergate defendants. And in *Clinton v. Jones* (1997), the Court supported that plaintiff's constitutional right to take President Clinton's sworn deposition. Each time, presidential authority was "checked and balanced." And in neither landmark could the president stop the presiding judges from fulfilling their constitutional duties; that's "separation of powers."

"Separation of powers" and "checks and balances" are not just words. These axioms ensure that we have a president, not a king or a dictator. "Some immunity" does not change those bedrock principles.

What about the president's other powers, like commander in chief? While the Constitution grants the president certain "enumerated powers," including appointing Cabinet members, and acting as commander in chief, the president does not hold these powers alone. The Senate must approve presidential nominations, and Congress controls the military budget. These "checks and balances" upon presidential power remain unchanged by "some immunity."

Which presidents are protected by "some immunity"? All of them. The Court's final decree was that this immunity "applies equally to all occupants of the Oval Office, regardless of politics, policy, or party;" otherwise "prosecutions of ex-presidents could quickly become routine." So presidents you like as much as presidents you dislike will be protected by "some immunity," and the choice We the People make on Election Day shall be honored.

What are "official acts" that have "some immunity"? Common sense usually answers that question. The president ordering the Justice Department to enforce an anti-pollution law, duly enacted by Congress and upheld by the Supreme Court, is a constitutional "official act." The president running you over with a golf cart is "unofficial." Pretty simple. But what about when it is not so clear-cut?

How do we distinguish "official acts" from "unofficial" ones? The Court explained that "not everything the president does is official," and making such distinctions can be difficult. It requires a "factbound analysis," something the lower courts failed to do here. That is why the Supreme Court is sending this case back for further proceedings.

Quite simply, we don't have all the answers yet, and it would be unwise to speculate. Rather, let the courts, in keeping with America's best constitutional traditions, sort out all those questions, when and if it becomes necessary. Most of all, let us have faith in our system of "separation of powers," "checks and balances," and, above all, the power of the ballot box on Election Day.

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