**Tuesday, April 23, 2024 / Florida man wants immunity**

**[HALF SECOND OF SILENCE]**

**[BILLBOARD]**

SCORING IN <The Meddler (b) - APM>

NOEL: Donald Trump is in court in New York City again today. He’s charged with falsifying his business records but believe it or not, defendant Trump also has a case before the Supreme Court this week.

NOEL: This one involves his actions after the 2020 election. Charges include conspiracy to defraud the United States - which had popularly voted for his opponent - and conspiracy to obstruct an official proceeding, related to his actions on January 6th, 2021.

NOEL: Trump’s argument is simple. He was president at the time, so he should be immune from prosecution, and that is what his lawyers will argue on Thursday.

*<*[*CLIP*](https://www.c-span.org/video/?532581-1/district-columbia-circuit-court-oral-arguments-president-trumps-immunity-claims)*> D. John Sauer: Could George W Bush be prosecuted for obstruction of an official proceeding for allegedly giving false information to Congress to induce the nation to go to war in Iraq under false pretenses? Could President Obama be potentially charged with murder for allegedly authorizing drone strikes targeting U.S. citizens located abroad?*

NOEL: Trump on trial, coming up on Today, Explained, yet again.

**[THEME]**

*BUMPER <Trump - bing bong bing>*

NOEL: It’s *Today, Explained*, I’m Noel King, here with Vox’s Ian Millhiser. He covers the Supreme Court, and he’s been reporting on an important question that the justices will be considering this week.

IAN: So the question is whether former presidents are immune from prosecution for anything that falls within their official duties. Donald Trump argued in the lower court that his immunity is so broad that he could order SEAL Team Six to assassinate a political rival, and he could not be prosecuted for it unless he were first impeached and convicted.

*<*[*CLIP*](https://www.youtube.com/watch?v=KFppEuJRTO4)*> Judge Florence Y. Pan: Could a president who ordered SEAL Team Six to assassinate a political rival who was not impeached, could he be subject to criminal prosecution?*

*Trump attorney John Sauer: If he were impeached and convicted first.*

*Judge Pan: So your answer is no.*

*Trump attorney John Sauer: My answer is qualified yes.*

NOEL: Okay, so the question is, are former presidents immune from prosecution. What is Donald Trump being prosecuted for?

IAN: He's being prosecuted for essentially trying to steal the 2020 election. There isn't a statute which says it is a crime to steal an election at the federal level. So, like the actual statutes deal with things like fraud, like, you know, trying to obstruct an official proceeding. But the underlying facts are, all of the charges against him arise out of his efforts to, you know, get fake electors appointed, to block the congressional proceeding where President Biden's victory was certified, or to otherwise, you know, try to cancel the result of that 2020 election.

NOEL: So Donald Trump's arguing that he's immune. What's the argument that he's actually making?

IAN: So every government official has some degree of immunity from civil lawsuits. You know, if you followed the debates over police reform, you've probably heard the term qualified immunity. Qualified immunity is the term that the federal courts use for immunity from civil litigation that virtually all government officials enjoy, including cops. There are a handful of government officials – judges, prosecutors, and the president – who have what is called absolute immunity. So they have virtually limitless immunity from civil lawsuits, not from criminal proceedings. Judges and prosecutors are prosecuted all the time if they take a bribe or if they, you know, otherwise do something that violates the criminal law. As far as I know, no one has ever seriously claimed before Donald Trump that this immunity extends to criminal proceedings, but he is essentially trying to take this preexisting immunity from civil lawsuits and expand it so he's allowed to do crimes as well.

NOEL: So Donald Trump is in court this week in New York City, a whole different set of issues there. But one of the things about the New York trial is that he does need to be in the courtroom. When this goes before the justices, who is arguing for Trump? Who's there on his behalf?

IAN: He's hired this guy John Sauer, who's a former solicitor general of the state of Missouri, clerked for Justice Scalia. A guy who just has the sort of traditional background you see from people who are arguing cases in appeals courts.

*<*[*CLIP*](https://www.youtube.com/watch?v=KFppEuJRTO4)*> Trump attorney John Sauer: To authorize the prosecution of a president for his official acts would open a Pandora's box from which this nation may never recover.*

NOEL: And then, who's arguing against granting Trump immunity?

IAN: So the prosecution is led by Jack Smith, the special prosecutor.

*<*[*CLIP*](https://www.youtube.com/watch?v=kEjO3QYa4B0)*> Special Counsel Jack Smith: Today an indictment was unsealed, charging Donald J. Trump with conspiring to defraud the United States, conspiring to disenfranchise voters, and conspiring and attempting to obstruct an official proceeding.*

IAN: Special prosecutors are appointed often when there is a potential conflict of interest or, you know, some sort of extraordinary reason to try to remove the decision making about a case from the ordinary political process within the Department of Justice. And of course, since this is not just, you know, a former president, but a candidate for president who's a member of the opposite party, that of the party that controls the White House and the Justice Department right now, there's a very strong case for making sure that there was some degree of remove.

NOEL: So we've got Jack Smith versus Donald Trump's lawyers. Can you walk us through the timeline of this particular case? Like, not everything ends up before the Supreme Court. How did this?

IAN: Yeah. So the most important thing about this case is the timeline. You know, again, Trump is making some pretty ludicrous arguments here. I do not think that even this Supreme Court is going to say that the president of the United States is allowed to send the military to assassinate his political rivals. But what Trump is trying to do is not necessarily win this case. He is trying to delay his criminal trial as long as possible.

SCORING IN <Binoculars and Bushes (a) - APM>

IAN: There's a rule in the federal courts, generally speaking, only one federal court can have jurisdiction over a case at a time. And so when Trump made this immunity argument, he lost it in the trial court. He then immediately appealed it. And once he appealed it, Judge Tanya Chutkan, the judge who's supposed to hear his criminal trial, lost her power to hold that trial until this appeal is resolved.

*<*[*CLIP*](https://www.youtube.com/watch?v=GgnGPpHgzoo)*> MSNBC: Judge Tanya Chutkan of the D.C. Court has granted Donald Trump's request for a stay of all proceedings in his D.C. criminal case, writing that Trump's appeal on presidential immunity grounds has forced her hand. All pending deadlines and court dates in that case will be stayed but not vacated.*

IAN: The most important fight in this case isn't over this stupid immunity issue. Because, again, I don't think the Supreme Court is going to say that the president is allowed to do crimes. The most important issue in this case is how fast the court is going to move. Jack Smith has been pushing the court to expedite it. Trump has been pushing for delay. And the Supreme Court has largely sided with Trump. So, you know, whatever happens on Thursday, it's kind of a sideshow. Trump has already won.

SCORING OUT

NOEL: Explain a little bit more, because it's only April. The Supreme Court has taken this on. And then the election is in November. So why does Trump win?

IAN: Yeah.

NOEL: How does Trump win?

IAN: So it was always going to be difficult, you know, assuming that Trump didn't engineer this delay, to hold the trial and bring it to completion before the election to begin with. And there's a lot of reasons for that. I mean, one is that Chutkan, out of fairness to Trump, said, “look, you have to have enough time to prepare a defense. I'll give you seven months in which to prepare your defense.” And that was going to have to be seven months where she actually has jurisdiction over the case, because she needs to be able to rule on the various motions that the lawyers on both sides are going to file in this case. And then, now that the Supreme Court has delayed it, it's April now, but they typically don't hand down their opinions in the biggest decisions until late June. So Chutkan might not get the case back until July. And then we've got to run out what remains in the clock of those seven months. And then we've got to do jury selection. There's got to be the actual trial. And I think the likelihood that we're going to get to a verdict before the election happens now is very, very small because the Supreme Court has played along with Trump's effort to string this out as long as possible.

NOEL: How do you think the Supreme Court might rule here?

IAN: I would be astonished if the court says that presidents are allowed to do crimes, especially because of the breadth of Trump's argument. There's been some speculation that maybe they won't say that Trump is immune, but they'll say that presidents enjoy some limited amount of immunity. Some liberal scholars have argued, well, maybe it would be good if the justices announced some limited immunity to prevent, say, Trump from getting into office and bringing a frivolous prosecution against President Biden. I don't know how much a precedent establishing some rule of immunity is really worth, because this isn't a Supreme Court that cares very much about precedent, you know? Just ask about Roe v Wade. So, like, Supreme Court precedents aren't worth what they used to be, and whatever grand framework they come up with will only be followed if there's five justices who agree with it in the future.

SCORING IN <A Brush With The Law - APM>

NOEL: Ian Millhiser, Vox, Supreme Court.

Now, you may recall that hundreds of people in addition to Donald Trump took part in the insurrectionist-ish events of January 6th. One of the charges that many face is obstruction of justice. Yes. Fine. However. A lawyer for one of the January 6th defendants says that CHARGE is dangerous government overreach and could eventually lead to even PEACEFUL protests being banned. We’re gonna hear his argument, coming up on *Today, Explained*.

**[BREAK]**

**[BUMPER]**

*BUMPER <“This is Today, Explained”>*

JEFF: My name is Jeffrey T. Green. I'm an attorney with my own firm, Green Law Chartered, LLC.

NOEL: What kind of work do you do mostly?

JEFF: I do criminal defense work. A lot of trouble. I like to say, I enjoy getting people out of trouble.

NOEL: <laughs> You enjoy getting people out of trouble, and you're representing one of the January 6th defendants, yeah?

JEFF: That's correct. Mr. Joseph Fisher.

NOEL: Mr. Joseph Fischer is a former police officer from Pennsylvania. On January 6th, he did indeed storm the U.S. Capitol. And federal prosecutors have charged him with several crimes. Now, given that he is representing Fischer, you may be wondering what Jeffrey Green thinks about the events of January 6th. Here’s what he has to say.

JEFF: I was busy working away, and my daughter came up to my home office and said, you need to turn on the television right now.

*<*[*CLIP*](https://www.youtube.com/watch?v=tVPSYr-xG6s)*> Fox News: The members are being told to get the gas masks that are under their seats. The other big question is where is the vice president? We were told…*

JEFF: It all took a while to process, but certainly, what we saw was horrific. The Capitol hadn't been invaded since 1812, and so it was absolutely shocking.

NOEL: So your client, Joseph Fisher, was at the Capitol on January 6th. What is he charged with doing?

*<*[*CLIP*](https://www.nbcnews.com/video/videos-show-joseph-fischer-s-involvement-in-the-jan-6-capitol-riot-208923205918)*> Footage of Jan. 6 protest where Jeffrey Fischer was*

JEFF: So Mr. Fisher is charged with seven different crimes, three of which are felonies, four of which are misdemeanors. The felonies have to do with interfering with a police officer who is engaged in his or her duties. There are two such charges. One of which involves an alleged assault on the police officer. There is also the charge that was at issue last Tuesday, the obstruction charge. And then there are four charges related to civil disturbance in a restricted space and civil disturbance within the United States Capitol itself.

*FADE OUT JAN. 6 FOOTAGE*

NOEL: Okay. Now tell me what your client’s version of events is. What does he say he did that day?

JEFF: Well, he hasn't been tried yet, Noel. And so there are only allegations against him. He's presumed innocent right now and has pled not guilty. He doesn't deny having been there. We do vehemently dispute the way the government casts the facts.

NOEL: We're talking today about one of the charges, which is obstructing, right, an obstruction charge. Can you tell me what the obstruction charge is and what you're arguing on behalf of Mr. Fisher?

SCORING IN <Parallels - APM>

JEFF: The obstruction charge comes out of a statute that came into being as a result of the Sarbanes-Oxley Act and the Enron financial meltdown and the destruction of documents by their accountant.

*<*[*CLIP*](https://www.c-span.org/video/?192730-1/enron-verdict)*> Paul McNulty, deputy attorney general: At a time when the company was foundering, these defendants perpetrated a lie: that Enron was a robust and growing company in the strongest financial condition it had ever been in.*

JEFF: The government's theory is that the civil disturbances at the Capitol caused Congress to stop counting the electoral ballots, and that that was a form of evidence tampering.

*<*[*CLIP*](https://www.oyez.org/cases/2023/23-5572)*> Elizabeth B. Prelogar: Did Petitioner obstruct, influence, or impede the joint session of Congress? The answer is equally straightforward. Yes, he obstructed that official proceeding. The terms of the statute unambiguously encompass his conduct.*

JEFF: We take a much different position as to what that statute means. We think the statute means that you actually have to tamper with evidence. That's pretty much what it says.

SCORING OUT

NOEL: But if your client was there that day, I mean, we all saw what happened, right? The congressional proceeding that was supposed to happen didn't happen because of the men and women who charged the Capitol on January 6th. Wouldn't that mean that your client was one of many who did, in fact, obstruct a congressional proceeding?

JEFF: Well, again, the controversy is over what obstruction means. And, our position is very firmly that obstruction means that you actually have to do something. So it would be a much closer case if an individual had charged into the House chamber, grabbed the ballots and ripped them up or set them on fire or something like that. But we all know that that's not what happened. Nothing happened to the ballots. The only thing that happened was that there was a delay in the counting of the ballots. Now, that's not to say that that's not a serious event. But that does not a 20 year maximum felony make.

NOEL: The people who charged the Capitol on January 6th – it seems to me that there is a whole host of things that you could charge those individuals with. If a smart lawyer could argue this obstruction charge is meant to apply to physical evidence, guys, and my, my client didn't rip up any documents or rip up any ballots. Why would the government charge him under this particular statute?

JEFF: The government, as you say, Noel, I just want to underscore, has an awful lot of what we call *in terrorem* tools to use. And, you know, the fact that Mr. Fisher has been charged with seven different crimes, six of them not obstruction, demonstrates that their quiver of arrows is quite full. But with respect to why they charged him with this and why they have charged other January 6th defendants with this. I'll say two things. One is, this statute has a 20 year maximum penalty. That gives the government very significant leverage at the plea bargaining stage. If, for example, and as I said to the court, you enter a restricted space, which is defined by there being the presence of someone that the Secret Service protects. So if you entered restricted space and you assaulted someone and caused serious bodily injury, that particular crime has a ten year maximum. So you can imagine that the government wants the leverage.

NOEL: There are other people who were at the Capitol that day who have been charged with obstruction. And has that charge stuck? Have they been successfully prosecuted?

JEFF: So a number of the January 6th defendants, a significant number, approximately 300, have been charged with it. My understanding is that there's approximately 100 convictions for obstruction, whether by guilty plea or by trial, whether before a jury or before the judge. That's the defendant's option. And those convictions, if we are successful, would be overturned.

NOEL: Oh, I see. So some of the, if you argue successfully in front of the Supreme Court, some of the January 6th defendants who have already been successfully prosecuted would be, not necessarily let out of prison, right, because many of them, I assume, were facing other charges?

JEFF: That's correct. Most all of them, like Mr. Fisher, even people who didn't go into the Capitol at all, are facing a number of different charges. No, I don't think it's the case that anybody would be let out of prison because of other charges for which they were found guilty. And, you know, the government even concedes that. They say they don't believe that the obstruction charge had a significant impact on the amount of incarceration that the January 6th defendants have received. We dispute that because of the way sentencing works in the United States. But that would tell you that, at least in the government's mind, there may be a significant impact in terms of convictions being overturned, but there wouldn't be a significant impact in terms of people being let out of prison, or for that matter, having their records cleared.

NOEL: Donald Trump was also charged under this obstruction statute, right. So your argument, the argument that you're making in front of the Supreme Court would apply to him as well?

JEFF: It would apply to his case, yes, because he is charged with a 1512 (c2) crime. And that's the crime that Mr. Fisher was charged with. I will say that the prosecutor in that case, Jack Smith, has already gone on the public record and said that he thinks that our position, if it were to prevail, would not require him to drop that charge against Donald Trump because he has a separate theory as to why the statute fits, the former president's actions.

NOEL: So, the prosecution's theory for prosecuting these people to the max is: “we do not want this to ever happen again, right. We need to punish this attempt to stop Congress from counting the votes for president and vice president, so nobody ever, ever, ever does this again.” Now you're a lawyer. I assume you believe that convicting people does prevent crimes from occurring again. Right. But if you disagree with me, let me know. But what do you think about the fact that if you get your client off on this particular obstruction charge and others, then are, you know, released from the charge, that what you're doing is you're emboldening people to go and do this kind of nonsense yet again.

JEFF: Well, respectfully, Noel, I'm going to disagree with that. We could spend the whole time talking about whether the criminal law actually functions as a deterrent, but let's assume…

NOEL: Oh! <laughs>

JEFF: …let's assume that it does, the problem that we pointed out to the court, and I would emphasize to you and your listeners, is that, the government's position is that anyone who, knowing that they're doing something wrong, interrupts, obstructs, influences or impedes an official proceeding, would have to be a federal proceeding, I guess, but, would potentially be subject to charge under this 20 year maximum penalty. So let's think about, not just about January 6th, but let's think about what might happen in the future. Let's think about protests of all sorts. And, you know, the government was forced to admit, during the course of the argument, that people could be charged with this crime even if they engaged in a peaceful protest knowing that, you know, there was no permit or no permission to do it, or they shouldn't have been doing it where they did it. The government says, well, we won't prosecute that. But administrations change.

SCORING IN <Intrigue - APM>

JEFF: Let's talk about the Black Lives Matter protests. And let's put aside some of the destruction and violence that occurred during those protests and just assume that the people who took to the streets following George Floyd's death didn't do anything other than interrupt what was going on in a federal courthouse or a federal building. Let's also think about the protesters at the Hatfield Courthouse in Portland, Oregon. Under the government's theory, if the courthouse had been operating at the time, that is, there were judges there and there were proceedings going on. If those proceedings were interrupted, those people who were protesting outside, whether because judges couldn't get out or couldn't get in or couldn't hear, would be subject to a charge that has a 20 year maximum penalty. So we need to think carefully about the scope of this statute, because if it is given the full scope that the government wants, it is a terrible weapon in the hands of prosecutors.

SCORING BUMP

NOEL: Attorney at law, Jeffrey Green. He’s defending January 6 participant Joseph Fischer before the Supreme Court this week.

Today’s show was produced by Avishay Artsy and edited by Matt Collette. Anouck Dussaud is our fact-checker and Patrick Boyd engineered. I’m Noel King. It’s *Today, Explained*.

**[10 SECONDS OF SILENCE]**