Monday, July 1, 2024 / Once again, immunity is back up for grabs

[HALF SECOND OF SILENCE]

[BILLBOARD]

SCORING <BMC – HYPERDRIVE (aggressive)>

SEAN RAMESWARAM (host): The Supreme Court of the United States has had a big term. They’ve issued decisions on homeless encampments, abortion pills, bump stocks, and the power of federal agencies. But they were arguably saving the biggest decision for last: Presidential immunity. The decision was a bit of a head scratcher:

ANDREW PROKOP (Vox reporter): They said that a former president of the United States should have a good deal of immunity from prosecution for acts he undertook while in office that had something to do with his job as president of the United States.

SEAN: But the Court also punted this case back down.

ANDREW: It was a decision that, practically, is fantastic for Trump because it essentially requires that the indictment of Trump be re-reviewed and that all of these various factual issues be argued again at the lower level before eventually – likely – coming back up to the Supreme Court at a later date.

SEAN: Everything you need to know, coming up on *Today, Explained*.

[THEME]

SEAN: *Today, Explained*. Sean Rameswaram. Here with Andrew Prokop to talk about former president, convicted felon, old men debate winner Donald Trump.

ANDREW: So Trump was indicted last year by special counsel Jack Smith, essentially for trying to steal the 2020 election.

*<CLIP> 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. <fade under>*

ANDREW: But the specifics of that indictment were complicated because this is a complicated case. Nothing like it had ever really happened before in American presidential history. And there were a lot of uncertainties about, you know, constitutional issues, what the Supreme Court would think, and so on. So Jack Smith charged a kind of complex case. They charged him specifically with conspiracy and obstruction. That Trump was conspiring to get various others to do something illegal in trying to overturn the election results and that he was trying to illegally stop the legal process of certifying those results. And so he threw a bunch of different things into that indictment. He threw into – ‘Oh, Trump tried to tell his Justice Department officials to pressure the states to not certify certain results because of the lie that there was voter fraud.’ And various other things that he, that were basically all thrown into this indictment as part of this overarching conspiracy or attempt to obstruct the certification of the election. That case has been moving forward at the district court level in Washington, DC. But Trump appealed, saying, ‘You can't prosecute me for this because, um, this all happened while I was president and the president should have absolute immunity from prosecution.

*<CLIP> FORMER PRESIDENT DONALD TRUMP: A president has to have immunity. You don’t have a president – or at most you could say, it would be a ceremonial president. That’s not what the founders had in mind. They’re not talking about ceremonial - we want presidents that can get things done and bring people together. <fade under>*

ANDREW: He claimed that all of that fell under his presidential powers and that, um, it would be a terrible precedent to prosecute a former president for official things he did while in office. It would limit that the freedom and the authority of the president to govern later on. And basically the Supreme Court – the majority of the Supreme Court, I should say, the six conservatives – very strongly agreed with that analysis. They rejected the judgments of the district court and the D.C. circuit court that the president is not – fully not above the law, that he has no official immunity from prosecution. That basically, if prosecutors argue that certain acts are corrupt, then he can be prosecuted for them. The Supreme Court said no. They said that the president does enjoy in certain areas absolute immunity from prosecution. But they laid out a three part test. They said that any time you try to indict a former president, you need to analyze which of these three categories the conduct being indicted falls into.

SCORING <All Thumbs>

ANDREW: So category number one is core constitutional powers. They say you cannot ever indict a president for anything that relates to his core constitutional powers. He enjoys absolute and total immunity from prosecution for anything like that.

SCORING BUMP

ANDREW: The second category is official acts. Official acts are stuff that the president does that have to do with the presidency and being president, but are not necessarily his specifically- granted constitutional powers. And so the Supreme Court said that in official acts, they're not entirely deciding how immune the president is yet. They say that he is presumptively immune from prosecution for official acts. He might be absolutely immune, they're saying, but – but we're not totally sure yet. And they say that, um, at the very least, he gets the benefit of the doubt. And it's really up to whoever's prosecuting to make the case that prosecuting a former president for official acts would not cause, you know, serious impositions on the power of the presidency.

SCORING BUMP

ANDREW: And the third category is unofficial acts. They say there's no immunity at all for unofficial acts. And, of course, the catch is, how do you decide what falls into each of these categories? And they basically say, ‘We're not totally sure yet, and we're going to send it back down to the lower courts and let them come up with some answers. Do some fact and then eventually it'll come back up to us. Probably.’

SCORING OUT

SEAN: Did this decision today fundamentally change our understanding of the presidency, or did we already know the president is immune when doing certain official things, and probably not immune when doing certain unofficial things?

ANDREW: This isn't a new and novel decision. There were some precedents that could have been pointed to. But if you look at the dissents from the liberal justices like Sonia Sotomayor, they are extremely worried about this decision. Justice Sotomayor writes, “The relationship between the president and the power he serves has shifted irrevocably,” ….  
  
SEAN: Hm!  
  
ANDREW: “ … In every use of official power, the president is now a king above the law.” Sotomayor is arguing, “When the president uses his official powers in any way under the majority's reasoning, he now will be insulated from criminal prosecution. Orders the Navy Seal team six to assassinate a political rival? Immune. Organizes a military coup to hold on to power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune. Immune. Immune.”

SEAN: And is that a fair characterization of the majority’s opinion today? Are they saying Joe Biden could go out and, I don't know, shoot Donald Trump today and it would be okay?

ANDREW: Well, that's where you get to the vagueness in the majority opinion, because they lay out these three categories of core constitutional powers, official acts, unofficial acts. But they leave it very vague as to what falls in each category. The, um, the only straightforward answer that they gave was that the president talking to his Justice Department about certain things – prosecutions and so on – he should be absolutely immune from any prosecution based on that. But everything else, including a ton of the stuff that was charged in the Trump indictment, they say, ‘We're not deciding on this yet. We're going to send it back down and let other people think.’ So. I don't think it's fair to say that, you know, they fully gave a green light for, you know, assassinations and coups and all those sort of things. They just simply… they gave the president more immunity, and they're leaving it somewhat vague into [sic] what falls into each specific category they laid out.

SEAN: It seems like if the country was waiting for some clarity on whether Donald Trump is guilty of a crime around his actions after the 2020 election, we didn't really get that clarity, that answer today. Instead, we got some sort of affirmations about presidential immunity and a punt back to the lower courts. Why did that take so long, Andrew? Couldn't we have used this information, like, months ago? Because obviously this might have implications for our forthcoming election.

PROKOP: One thing that shines through in the majority opinion, written by Chief Justice Roberts, is that the conservative justices are very skeptical about the arguments that, ‘Oh, we need to settle this quickly or be totally clear on this before the 2024 election.’ They included certain digs at that because their position is that, ‘This is a core issue about presidential power. It's bigger than Donald Trump. It's bigger than 2024. It could resonate for decades or more. And that we need to figure out the answer to this question, not just make up our minds based on whether we think Donald Trump is good or bad. Or, should we kind of rush a decision before the 2024 election?’ They were concerned about the expedition of this case, the lack of factual analysis by the lower courts, the absence of pertinent briefings by the parties. That's basically a message of, ‘Slow down this effort to, you know, hold Trump accountable before the 2024 election.’ They don't buy it.

SCORING <The Sky Darkens>

ANDREW: If I were to read into it, I would say that they probably agree with some of the arguments that this is a politicized prosecution, though they don't outright say that. But, um, they are at least open to that possibility. And are not – they are not buying the prosecutor’s and, you know, the Democratic establishment's narrative that this is, that it's tremendously important for the rule of law and the future of the country to have all these issues settled before the 2024 election.

SCORING BUMP

SEAN: What this means for the rule of law and the future of the country when we're back with Andrew on *Today, Explained*.

[BREAK]

*<CLIP> “SURVIVOR”, JEFF PROBST: Once again, immunity is back up for grabs.*

SEAN: *Today, Explained* is back with Vox's Andrew Prokop. Andrew, the president had some good news last week with his debate performance or Joe Biden's lack of a debate performance. Is this even more good news for the former president, when it comes to the 2024 election?

ANDREW: Yes. This decision is pretty clearly great news for Donald Trump. Uh, practically, it will have the impact of delaying his trial, um, regarding trying to steal the election, into next year and probably several years. That would be my guess. Then there's the case that, you know, he did win a little bit. Not entirely. He didn't get everything he wanted, but he got some recognition from the court, some agreement from the court with his claim that prosecutors went too far, in some respects, and charged things that should not have been charged. But again, the vast majority of the indictment has not been thrown out or rejected, but instead it has this cloud of ambiguity hanging over it because the court has laid out this new test and said that, you know, we’ll – we'll decide what falls into the category of official acts or not, at a later date.

SEAN: Why would the Supreme Court sort of outsource the rubric here, or whatever it might be, to lower courts? Why not do it themselves? They're the biggest justices. They're the big deal.

ANDREW: Well, they created the rubric or what it would be called a test. Like on, on questions like these – big constitutional questions – the Supreme Court often tries to, you know, lay out some big, bold principles that they want all of the other, lower courts to follow. So in this case, they created this three-part test. They said, this is how you apply the law. And then for the specifics, you guys got to go down and apply it. They said that there has not been enough factual arguments and, and briefings on all of the various complicated behavior by Trump that was alleged in the indictment. And so they said that they are simply not prepared to rule on whether a lot of the conduct alleged in the indictment – whether it qualifies as immune from prosecution or not. So they said, ‘We need more facts. We want you guys at the lower court to, to figure this out. And, and then it'll come up to us.’ And in the abstract, I don't think there's anything too unusual about that. But again, the practical consequence is that it will slow down this process of bringing Trump to trial pretty dramatically.

SEAN: The former president is famously dealing with a number of prosecutions right now, including one in Georgia that's stalled. And since you're saying that, you know, there is this delineation between official and unofficial business, the president, of course, was making phone calls trying to influence the election there in Georgia. I wonder, do we have a sense of how this decision today might impact the other prosecutions he's facing?

SCORING <Infinite Whack-A-Mole>

ANDREW: So Trump was already convicted in the hush money case in New York earlier this year. We've talked about the election stealing case in DC, which is now going to be, you know, have all these other issues to deal with. So then there is the other prosecution, which is a state prosecution brought by the Fulton County district attorney in Georgia related to trying to steal the election. And, you know, that is a prosecution being brought under state law. Now are there constitutional claims being made in this new Supreme Court decision that would override, in an attempted state prosecution? I'm not sure, but it's certainly possible, I think, that that could be another issue that that prosecution has to deal with going forward. That prosecution was already delayed for logistical and complexity reasons as well as a scandal involving the prosecutor, Fani Willis, and her personal conduct. Then you have the classified documents case that was brought against Trump in Florida. That case has also been bogged down because there's a judge overseeing it who was appointed by Trump. She's an inexperienced judge, and she has been ruling often in his favor and often very slowly. So that trial was already very delayed. Whether this affects that, I'm sure Trump will try to make the claim that, you know, his choice to bring certain documents with him out of the presidency fell under an official act in some way. And, I don't know whether it would fly, but, you know, it's just yet another legal complication that would probably delay all this further.

SCORING OUT

SEAN: And if the former president, if Donald Trump wins reelection in November, is all of this kind of moot anyway? Because all of these cases are delayed another four years, and even more if he decides he's, he's over presidential terms?

ANDREW: If Trump wins the election, he's clearly going to kill the federal prosecutions that are aimed at him. No ambiguity about that. And the Supreme Court decision today makes it even clearer that he'll be able to get away with doing that. The Georgia state law prosecution, that's a different question. But I think there would be practical and logistical concerns with a state prosecutor prosecuting a sitting president. So effectively that would likely be delayed another four years, or until he leaves office.

SEAN: Did this decision today change your understanding of the presidency, Andrew?

ANDREW: Well, it depends basically on who you believe. Justice Sotomayor wrote in dissent that “It has shifted the relationship between the president and the people he serves irrevocably, and that in every use of official power, the president is now a king above the law.” Chief Justice Roberts said, “The dissents strike a tone of chilling doom that is wholly disproportionate to what the court actually does today.” Roberts says that, ‘All we did was basically conclude that immunity extends to official discussions between the president and his attorney general, and that lower courts now have to decide whether Trump's other conduct is entitled to immunity. That's all we did.’ They're saying, ‘No big deal. We didn't do very much at all. And so don't get so upset about it.’ I do think it's, it's pretty clear that this is a decision that is very good for presidential power beyond, you know, the specifics of Trump himself.

SEAN: I think one thing this prosecution and this escalation up to the Supreme Court has proved is that it takes a very long time to figure out the legality of executive action in a situation like this with, you know, potentially Donald Trump reentering office or potentially our president being, you know, an octogenarian. What do you think this, this means for future presidents?

ANDREW: Well, here's a point that I hesitantly make in semi defense of the court's ruling, which is that the Biden Justice Department itself was not immediately sure that what Trump did was illegal. They spent a year in 2021 not really doing much about it. Like, no – none of them said immediately, oh, what Trump did in plain sight regarding trying to steal the 2020 election was illegal, and he should be prosecuted for it. Instead, they had this long, meandering investigation that focused on, you know, the people who broke into the Capitol and then only later did they start looking more into Trump and developing these ideas of, ‘Okay, well, you know…’ I think intuitively it makes sense to everybody that the president trying to steal the election should be illegal. But in specifics, they had to kind of come up with a new theory about why that would be the case. And it's not necessarily obvious that everyone would agree with that theory going forward, especially conservative Supreme Court justices who have a big majority and perhaps a very different view of the law and presidential powers.

SCORING <Waiting Around Corners (BMC)>

SEAN: Andrew Prokop. You can read his work at Vox dot com.

Our episode today was produced by Amanda Lewellyn and Miles Bryan. They had help from Matthew Collette, Laura Bullard, Victoria Chamberlin, Patrick Boyd, Andrea Kristinsdottir, and Rob Byers. The rest of the team includes Haleema Shah, Avishay Artsy, Hady Mawajdeh, Denise Guerra, and Peter Balonon-Rosen.

Amina Al-Sadi is a supervising editor. Miranda Kennedy is our executive producer. And Noel King is our Supreme King. We use music by Breakmaster Cylinder.

I’m Sean Rameswaram.

<< For radio:>> *Today, Explained* is distributed by WNYC. The show is a part of Vox.

<< For podcast:>> *Today, Explained* is distributed by WNYC. This show is a part of Vox, which is totally free thanks in part to contributions from our listeners. Join us at vox.com/give.

[10 SECONDS OF SILENCE]