

# [***Trump's Fainthearted SCOTUS Picks Could Doom Him in DC Election Case | Opinion***](https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:6BFM-K041-JBR6-91YV-00000-00&context=1516831)

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**Highlight:** The best Trump can reasonably hope for is a mixed opinion.

**Body**

One of the more underappreciated recent trends in American law and ***politics***, obscured by a few high-profile conservative victories at the [*Supreme Court*](https://www.newsweek.com/topic/supreme-court?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) and thus noticed by few other than dyed-in-the-wool legal conservatives, is that former President [*Donald Trump*](https://www.newsweek.com/topic/donald-trump?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships)'s three picks for the high court are soft and undependable.

The truth is that none of the Trump-era triumvirate of Justices [*Neil Gorsuch*](https://www.newsweek.com/topic/neil-gorsuch?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships), [*Brett Kavanaugh*](https://www.newsweek.com/topic/brett-kavanaugh?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships), and [*Amy Coney Barrett*](https://www.newsweek.com/topic/amy-coney-barrett?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) can hold a candle to their two reliably conservative senior colleagues [*Clarence Thomas*](https://www.newsweek.com/topic/clarence-thomas?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) and [*Samuel Alito*](https://www.newsweek.com/topic/samuel-alito?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships). Kavanaugh and Barrett are pragmatic center-right judges, eager to avoid wading into hot-button "cultural" topics such as religious liberty and often disappointing when it comes to issues as wide-ranging as COVID restrictions, immigration, and congressional redistricting. Gorsuch has the strongest libertarian streak on the court; he adamantly rejected COVID tyranny, but he has proven a disaster on many other issues, such as gender ideology, Indian rights, and criminal law.

If Trump secures a second presidential term, conservatives must ensure he makes better high court selections. It is nothing short of a Hollywood script-worthy twist of fate, then, that Trump's own Supreme Court picks will now play an outsize role in determining whether such a second term materializes.

On Wednesday, the Supreme Court agreed to expedite a hearing in the case of *Donald J. Trump v. United States*, in which the justices will decide "whether and if so to what extent does a former president enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office." The resolution of this threshold question is necessary before determining whether special counsel [*Jack Smith*](https://www.newsweek.com/topic/jack-smith?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships)'s prosecution of the 45th president for his conduct pertaining to the 2020 election can proceed. If the court holds that a former president *is* fully immune from such future criminal prosecutions, then Smith's case in Washington, D.C. dies.

For the Biden Regime and the broader Democrat-lawfare complex, shaken by the incumbent's horrific [*swing-state polling*](https://x.com/IAPolls2022/status/1763163483355410500?s=20) and motivated to derail Trump by any means necessary, the stakes couldn't be any higher. With the Georgia prosecution on similar election-related grounds collapsing in real time due to Fulton County District Attorney [*Fani Willis*](https://www.newsweek.com/topic/fani-willis?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships)' extramarital scandal and public corruption, the Regime has put all its eggs in Jack Smith's D.C. basket. And Smith will leave no stone unturned in his quest to secure a guilty verdict in Judge [*Tanya Chutkan*](https://www.newsweek.com/topic/tanya-chutkan?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships)'s trial court before the November election.

It's going to be a race against the clock for both sides.

It is well-established [*Department of Justice policy*](https://www.justice.gov/file/146241-0/dl?inline) that a *sitting* president cannot be criminally indicted, but whether a *former* president can be criminally indicted for actions he took while serving as president is a novel legal question. It should be obvious that at least some presidential actions—those implicating "core" Article II functions and presidential powers—must be immunized from future criminal prosecution. After all, do [*Democrats*](https://www.newsweek.com/topic/democrats?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) really think former President [*Barack Obama*](https://www.newsweek.com/topic/barack-obama?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) should be subject to prosecution, now that he is no longer the active president, for the 2011 drone assassination in Yemen that killed al-Qaeda operative and U.S. citizen Anwar al-Awlaki? It would set a horrible precedent if the court permits post-presidency criminal prosecution for such "core" Article II functions—for tense, split-second decisions made in the White House Situation Room, for instance.

But where to draw the line? And if there is no possible line between "core" and ancillary presidential functions that can be drawn, then is it best to do as Trump requests—immunize the entirety of a president's conduct while actively serving from future criminal prosecution?

Justices Thomas and Alito, who tend to be more supportive of broad presidential power claims, might accept Trump's argument in its entirety. But after them, it is not clear where Trump's argument might attract more votes. Justice Kavanaugh's separation-of-powers jurisprudence is also more pro-Article II, but his "don't rock the boat" disposition will make him wary of seeming too "Trumpy." Chief Justice [*John Roberts*](https://www.newsweek.com/topic/john-roberts?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) has at times also shown sympathy for broad presidential power claims, but his seething personal animus for Trump is well known. And it is very difficult to see either Justice Gorsuch or Justice Barrett going along for the "full immunity" ride.

The best Trump can reasonably hope for is a mixed opinion wherein the justices accept the premise that only "core" Article II functions are immunized from future prosecution and remand to a lower court to ascertain whether the specific conduct alleged in Smith's indictment fits the bill. Such a mixed result is certainly plausible.

But if Trump loses outright on the immunity issue, he will have himself to blame. He had the opportunity to nominate three Thomas/Alito-esque stalwarts. He whiffed.

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**Graphic**

Pedestrians walk in front of the U.S.

Robert Nickelsberg/Getty Images

Pedestrians walk in front of the U.S. Supreme Court February 29, 2024 in Washington, D.C. The Supreme Court decided to take up former President Donald Trump's claim that he is immune from prosecution for actions he took in office.

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