



Is President Trump Immune From Prosecution?

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[00:00:00.1] Jeffrey Rosen: The Supreme Court this week heard arguments in Trump V. United States, a case which asks whether the former president enjoys presidential immunity from criminal prosecution for conduct alleged to involve official acts while he was in office.

[00:00:17.4] Jeffrey Rosen: Hello, friends, I'm Jeffrey Rosen, President and CEO of the National Constitution Center. And welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode, we'll discuss the founders' views on Executive immunity, the text of the Impeachment Judgment clause and more. Joining me to guide this important discussion are two leading constitutional scholars. John Yoo is the Emanuel Heller Professor of Law at the University of California at Berkeley. He's also non-resident senior fellow at the American Enterprise Institute, and a visiting fellow at the Hoover Institution. His 10th book, *Defender in Chief: Trump's Fight for Presidential Power* was published by St. Martin's Press in 2020. John, it's wonderful to welcome you back to We the People.

[00:01:07.1] John Yoo: Jeff, it's great to be back. And the worst thing about this podcast is I can't actually be in Philadelphia with you where I belong and where I grew up.

[00:01:15.2] Jeffrey Rosen: We love your plugs for Philly and you're always welcome back at the Center and on the podcast. And Smita Ghosh is an Appellate Counsel at the Constitutional Accountability Center. She served as a Supreme Court fellow at the US Sentencing Commission and a law clerk for Judge Victor Bolden on the US District Court for the District of Connecticut. Smita joined in the brief of the Scholars of Constitutional Law in support of the respondent. Smita, it is wonderful to welcome you to We the People.

[00:01:43.2] Smita Ghosh: Thanks so much for having me. And I'll echo the regret that we're not in Philly. I went to law school and graduate school at UPenn, and I love the city.

[00:01:52.4] Jeffrey Rosen: Superb. Next year in Philadelphia, as we say around Passover time. Let's begin with President Trump's arguments for presidential immunity in Trump V. US. Just so we understand them, John, what is President Trump arguing is the scope of presidential immunity?

[00:02:11.7] John Yoo: Trump argues that he has absolute immunity from federal criminal prosecution for anything he did while he was president up to and including the phrases, the outer perimeters, outer perimeter of the authorities of his office. And he basically makes three claims. One is that the constitutional text gives him this immunity, and he builds this on a, I would say, not wholly persuasive reading of the Impeachment clause. Then he says he has a functional argument, which is, well, presidents are already absolutely immune from being sued by private people for damages actions, so I should have that same kind of immunity from being prosecuted for criminal actions.

[00:02:58.7] John Yoo: And then his third claim is, I think it's really a bunch of what I would say, policy arguments. Wouldn't it be a terrible thing if in the United States we went down the road of the examples of other countries where people who win the presidency turned right around and prosecute their predecessors, wouldn't that lead to a decline in the rule of law, stability in our country? We don't want to be a banana republic. I would classify all that as, sort of these are constitutional policy rather than text, structure or history.

[00:03:33.4] Jeffrey Rosen: Thank you very much. Smita, how would you describe President Trump's arguments with regard to text, history and structure?

[00:03:43.3] Smita Ghosh: Well, I completely agree with that characterization. I'll just add he has a couple of, quite a few arguments. So I'll add another thing I noticed, which was an argument that he is immune from prosecution because courts don't have the power to control presidential discretion. He's acting as a president and courts can't review presidential actions. He is basing that on a line of cases starting with Marbury versus Madison. He also added another argument, and I say added 'cause I don't think I recognized it from the lower court proceedings, about federal statutes not applying to the president unless it's explicitly stated that they do. So I'll be interested to hear how the court deals with that at the first instance.

[00:04:31.8] Jeffrey Rosen: Thank you so much. Well, now let's dig into President Trump's arguments. John, you signaled that you did not find the textual argument about the Impeachment clause convincing. Maybe you can give us a sense at greater length about why it is that you think that the text and history of the Impeachment clause do not create broad presidential immunity.

[00:04:53.9] John Yoo: Yeah. Let me start by saying I'm no shrinking violet in defending the presidency and its constitutional prerogatives, but it's not clear to me that absolute immunity is one of those prerogatives. So what Trump says, if you look at Article 1, Section 3, this is the part of the constitution that discusses impeachment and how this specific clause is about the House impeaching, the Senate undertaking it's trial, and then it says, "Judgment and cases of impeachment shall not extend further than to removal from office, disqualification under the United States." And it says, "But the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment according to law." Now, the first thing we should take from that clause is that clearly indicates there's no immunity because it says after you leave office, you are subject to indictment, trial, judgment and punishment according to law.

[00:05:55.8] John Yoo: But what the Trump team takes from this is you can only be prosecuted if you have been removed from office for impeachment. Now, the reason I don't think this is persuasive is because, and you have to read this in the context of The Federalist Papers' discussion of this provision, which is provided by Alexander Hamilton. What the founders I think are trying to do here is to say impeachment is not criminal. Nothing you do in the impeachment trial has any effect on any subsequent prosecution. Impeachment is just the way we remove people from office from the Executive branch. And so no matter what happens, if you're removed or not removed, there's no kind of double jeopardy, there's no kind of, I guess the fancy phrase would be *res judicata*. The impeachment trial, what happens in it doesn't bind or affect any kind of prosecution afterwards. I think that's the better reading of the text and is consistent with what the founders said when they were justifying the Impeachment clause.

[00:07:05.6] John Yoo: It's actually interesting, there wasn't a huge amount, but there was some good discussion of the Impeachment clause in The Federalist Papers and the Anti-Federalists Papers because the founders were worried, what would you do if you had to remove a president or remove a cabinet officer? And they really wanted to make clear, this is really different than what happened in England, where impeachment really was kind of a criminal proceeding. If you were convicted of impeachment, you could be executed or thrown in jail. And so the founders wanted to make clear, no, we're downgrading impeachment from that kind of criminal punishment that the British used, even though we're borrowing the whole idea of impeachment from the British, it's just the removal of people from office and criminal law is still gonna exist separately and independently.

[00:07:53.4] Jeffrey Rosen: Thank you very much for that, and for calling our attention to Alexander Hamilton in your piece in Newsweek, The Trump Immunity Case Is Weak, But He Doesn't Need It To Prevail. You also cite Hamilton in Federalist 65, emphasizing that impeachment was not a criminal proceeding, but only one to remove an executive officer from office. Smita, in your brief for the Constitutional Accountability Center, you note that scholars across the ideological spectrum have rejected the broad claim of presidential criminal immunity. Tell us more about the history that has led those scholars to reach that consensus, which you discuss in your brief.

[00:08:40.1] Smita Ghosh: Yeah. There's a lot of great historical evidence to support the argument against immunity. So first, considering the constitutional text, I know we were just talking about the Impeachment Judgment clause as a kind of textual argument that Trump is presenting, but I might even push back on that just because the text of that clause deals with what happens to the party convicted by impeachment. It provides that they, that party can still be subject to prosecution. It doesn't address the party is not convicted, and Trump reads into that a negative implication, because the party's not convicted, then they must not be subject to prosecution. So, and I agree with Professor Yoo's reading that it just doesn't really speak to that because it was meant to emphasize that these are two separate types of proceedings.

[00:09:34.5] Smita Ghosh: And a conviction in one with the limited kind of punishments that a Senate can impose doesn't lead to the same limits in the criminal system. Another thing to point out is that there's no textual grant of immunity for presidents, unlike the grant of immunity to legislators in the Speech or Debate clause. The Constitution specifically provides that legislators

are immune from arrest during proceedings and in the history of the drafting of the Constitution, we do know that James Madison at one point suggested that the convention consider what privilege ought to be accorded to the Executive, and then according to Farrand's records, it's just crickets. There's no response. The convention adjourns for the day, and they don't take that up.

[00:10:26.5] Smita Ghosh: So, especially when reading against the explicit protection for legislators, it makes me think that that is somewhat intentional, this was part of the design. And the context for that which we can, you can see through the ratification debates, is that the framers of the Constitution didn't want to create a system where the Executive was inviolable. They wanted a leader who was very different from the British King, who could do no wrong and could not be held accountable by law. The framers said, and pamphlets supporting the Constitution and defending this new way of government that the president would be kind of held accountable and subject to, in the words of James Iredell, not exempt from a trial if he should be guilty or suppose guilty. So these are things that the framers were kind of engaging with and a part of the system that they created.

[00:11:27.4] Jeffrey Rosen: Thank you so much for that. And that was such an interesting part of your brief where you noted the crickets that followed Madison's suggestion of broad immunity and linked that to the president's desire not to be a king in the view of the framers. John, more about the history which you've studied extensively, to what degree was that concern that the president not be a king linked to the rejection of broad immunity? And then take us next to the functional arguments. There are some precedents in this case, including Nixon and Fitzgerald, which holds that the president does enjoy absolute civil immunity for official actions while in office, Clinton and Jones, which says the president doesn't enjoy civil immunity while in office for actions taken before office, but the court has never before answered if the president enjoys criminal immunity for official actions taken while in office, and tell us why you think functional reasons to not support that broad immunity.

[00:12:23.7] John Yoo: A lot of the discussion and argument we have had doctrinally and historically has been about whether sitting presidents could be prosecuted. Jeff and I, we cut our teeth in the '90s in Washington DC, I don't know if we should admit that we're that old on the podcast but, right? We remember Ken Starr going after Bill Clinton in the Whitewater investigation and what should be impeachable, right? He's ultimately impeach versus what should be subject to justice department prosecution. And the Justice Department has taken the position, at least since the Nixon years, that a sitting president could not be prosecuted by the federal government, although that's easy to solve because the president is the head of the law enforcement for the Executive branch. He could just order prosecutors not to prosecute him. So you don't really need an immunity provision.

[00:13:11.4] John Yoo: But that's where most of the arguments have been. And, I think I find a lot of the authorities that President Trump draws from are actually about that question, about should the sitting presidents be. And you see, there, I think you can have a very interesting division of opinion, but I think most everyone has said that, but that's about sitting presidents. Once you're out of office, and I think this is Justice Department's opinion too in past memos has been those precedents don't apply to once you're out of office, 'cause all the things you would be worried about, like interfering with the president executing his or her constitutional duties aren't

at issue anymore. And that's, I think, also the segue into how to think about the, I would say functional or policy arguments. As you said, Jeff, there are precedents on point about whether a president can be sued civilly in these cases from Nixon versus Fitzgerald is the leading case.

[00:14:10.5] John Yoo: In those opinions, which are I think very much a part of the Burger, sort of this transition from the Warren to the Burger Courts, the court does not undertake a careful textual or historical analysis. It's almost just the court sort of says, oh, it would be a good idea if presidents were not subject to suit for these three reasons, that it would interfere with the president's duties, presidents would be worried all the time about being sued when they make decisions. It could actually be time consuming. You don't want presidents always being thinking about litigation as they're doing their jobs. I think that approach would not make sense to the current Justices of the court who have said on, not just separation of powers cases where they have said this, but all kinds of other cases where they have said, we start with the text and history.

[00:14:57.0] John Yoo: If you were to say you used the approach to constitutional interpretation which the court set out in Dobbs, for example, you start with the text, the original understanding, and then the historical practice around the time. The court says, has tried to say we're not interested in following this kind of policy-based approach that the Warren and Burger courts followed. So I actually would be surprised if Nixon versus Fitzgerald had been never decided, and you brought that case to the court today, should presidents have absolute immunity from civil lawsuit, they would not write an opinion that looks anything like Nixon versus Fitzgerald, I think, it would be completely different. So, but to the extent these policy arguments are important, what Trump is saying is my criminal immunity should basically match, it should follow the outlines of my civil immunity.

[00:15:50.4] John Yoo: There's no actually sort of functional reason why that ought to be true. You could, there are plenty of cases where civil liability, criminal liability are different. I think the functional arguments that Trump is making are really, I would say, are those that ought to be in the minds of presidents and prosecutors when they decide whether to use their awesome power against former government officials. Which is, are we doing something that would damage the Office of the Presidency so much that it would interfere with, handicap in some way, the ability of future presidents? I think this is a good policy argument in that it's saying, think about the incentives we're creating now with this litigation for the way future presidents do their job. I think what the Trump brief does not answer, which is why is immunity the answer to that problem?

[00:16:45.8] John Yoo: Why isn't it just the current president would worry about that too, and so if they're ever gonna take this step, I mean, I do think it's kind of crossing a Rubicon in terms of practice, is if you're gonna cross a Rubicon and say, we are gonna criminally prosecute a president, then I would think the current president is really gonna worry, what is the effect of that on the future? What is the effect of that on future presidents? Why a court should be able to consider that and think about that when it decides on immunity, that's the thing I think the Trump brief doesn't answer.

[00:17:14.9] Jeffrey Rosen: Very interesting suggestion that those are considerations for presidential prosecutions and not for immunity. Smita, you'd mentioned one other text and history argument that President Trump makes. He looks to the executive vesting clause and argues that Chief Justice Marshall in Marbury versus Madison interpreted it to apply absolute Executive immunity. But Jack Smith refutes the argument saying that Marshall never intended to extend the logic to former presidents. Tell us about what President Trump's argument is about Marbury and whether or not you find it persuasive.

[00:17:48.3] Smita Ghosh: So president Trump argues from Marbury that courts can't sit in judgment of presidential actions. And you mentioned Jack Smith's kind of rebuttal to that, which is that it applies to current versus former presidents, which is certainly one way to approach it. Another way was offered by the court below, which was to point out that that line from Marbury really focuses on discretionary actions that presidents take. And following a law isn't really a type of discretionary action the court was looking at. This is what the Marbury court called a ministerial duty, that you have to follow the law. So if the allegations against the president are true, they involve violations of law, not the type of discretionary action, whether or not to institute a policy or something like that where we could imagine the type of rule that Marbury articulated.

[00:18:48.6] Jeffrey Rosen: So interesting. John, the question of whether the president's responsibility under the Take Care clause immunizes him from criminal prosecution based on stuff that is related to his official action is one that you say is better adjudicated under separation of powers concerns than immunity. This is complicated but important. Tell us how you think the president should in some circumstances be able to say that he can't be prosecuted without invoking immunity.

[00:19:20.8] John Yoo: Yeah. So actually, there's two interesting things here. One is, I should have mentioned earlier, it goes to your point, Jeff, is that the court could actually say, there may be immunity, there may not be immunity, Trump still loses, because what he did was not official. And there's a related case going on in DC involving a civil lawsuit against President Trump by the Capitol police officers who were harmed in the January 6th attack. And they say, even if Trump has absolute immunity from lawsuits for damages, which he clearly does under precedent, they would say, and the DC Circuit agreed, that immunity does not cover things you do as president when you're acting in your private capacity, when you're not exercising the powers of your office.

[00:20:13.2] John Yoo: And so the DC Circuit opinion, this case is called Blassingame, said, well, one thing we know that you're not acting in an official capacity is when you're running for office, when you're running for re-election. They always say like, almost by definition, you have to be a private person because if you weren't, you would be abusing the powers of your office to help yourself get re-elected. And so that's one thing that the court could say here is even if we accepted everything Trump argues, the facts of January 6th are all outside the powers of the presidency. They were what Trump was doing to get re-elected, he was a candidate, and so he loses on that. That's one possible thing we didn't discuss that might appeal actually to someone like Chief Justice Roberts who is trying to find some moderate ground and also keep the court out of having to make anything, any too controversial decisions.

[00:21:08.1] John Yoo: But your point about taking care, which is the president's responsibility to enforce the law, is still important and still could be the way that Trump gets out of this, even if he doesn't have immunity. And I think actually that's why I could see the court actually having a fairly high level of agreement on Trump not having immunity and then putting off for another day, I think, which is really the important question then, is the same question as Blassingame, is, does the president, does President Trump have a defense to the charges based on the claim that he was carrying out his constitutional duties? And if he's carrying out his constitutional duties, Congress can't use the criminal law to try to cabin them in a way. So he could say, for example, he didn't really say this in the beginning. He's been saying it, I think, actually more rhetorically or politically than in the legal papers.

[00:22:04.5] John Yoo: He could say, everything I did on January 6th and the days before were not really trying to question the election results. I was trying to make sure the election laws were being followed. You know, I thought there was fraud, I believed it as president. It's my job to investigate whether there's fraud and not to allow fraudulent electoral votes to be sent to Congress and counted. That would raise this kind of, is a criminal law being used here to actually infringe on my authority as president? But again, he hasn't made that argument really that clearly in this level of the proceedings. And even if he loses the immunity case issue, then the case goes back down to the trial court to Judge Chutkan, and he's got the opportunity to make that argument. Immunity doesn't actually tell us one way or the other whether he's right about that.

[00:22:56.2] Jeffrey Rosen: Smita, what do you think of John's suggestion that an alternative argument for President Trump might be that the president might have a defense on the claim that he was carrying out his constitutional duties, and if so, separation of powers concerns prevent Congress from using the criminal law to cabin them. Many people think the court may look for a holding short of saying that the president is completely amenable to criminal law, what's your evaluation of that separation of powers argument?

[00:23:31.3] Smita Ghosh: Well, we, meaning the Constitutional Accountability Center, filed a brief in the Blassingame case, and he did make that argument more explicitly. And of course, the allegations involved were slightly different, but they still involved these post-election actions. And the point that the district court in that case and also my organization and our scholars briefed me was just that there's a very limited role constitutionally that the president has over making sure that there is no fraud in the presidential election. That is by design a role that's given to Congress and the founders actually created the Electoral College system partially to insulate the results of the presidential election from Executive control.

[00:24:22.4] Smita Ghosh: I think that's a point made in that there's a historian's brief in this case that makes that point pretty persuasively. So I think that exit ramp would be a little difficult for Trump to use because the court would hopefully contend with that exact point. And certainly there's some elements of, at the broadest level of generality, the president is kinda communicating with advisers and doing some things that sound kind of presidential. But that particular interest in ensuring that there's no election fraud is actually something that's not really delegated to the president.

[00:25:02.8] Jeffrey Rosen: John, President Trump also in his brief argues that he proposes a backup ruling and says even if the court rejects absolute Executive immunity, they could require an express statement by Congress before assuming that any given criminal statute applies to the president. Is that a different separation of powers argument than the one that you just made? And what do you think is the likelihood the court might be sympathetic to it?

[00:25:27.3] John Yoo: I think so, Jeff. This is basically what we call clear statement rule. It's not really a constitutional rule, instead, what the Trump team is saying is there are these Supreme Court cases in administrative law. I apologize to the listeners to raising this question of administrative law, the most boring field of law ever created, but somehow extremely important to the Supreme Court these days. So these cases, like there's a case called Franklin versus Massachusetts, I think is the most well-known one. And so those cases say we generally will not read a statute to include the president in its coverage unless it says president in the statute. This argument was also interestingly raised in Trump versus Anderson by President Trump. Remember, this is the disqualification clause question under the 14th Amendment. And some others argued that, well, if it doesn't say, including me, I said the 14th Amendment should mention the presidency as an office for which you can't run if you committed insurrection. But it doesn't say that.

[00:26:29.5] John Yoo: It says electors to the president and vice president and officers of the United States. I'm not sure whether this principle of a statutory interpretation would apply to criminal laws. It never has been. It's mostly been applied in administrative law. And so you would have to have an argument, it seems to me, to defend the clear statement rule here by saying it's really protecting a constitutional principle. I don't think that's really where Trump's gonna succeed. I can't see the court creating this sort of general principle that none of the criminal laws apply to the president unless they say so. And here I think the court might be persuaded by practice. Of course, we've not had any presidents actually charged, but we've had plenty of presidents investigated.

[00:27:22.2] John Yoo: We've had Watergate, I mean, even before Watergate, but the most famous, Watergate and President Clinton. None of those special counsel investigations would have made any sense at all if you had to put the word president in the federal criminal laws, because there were no federal criminal laws in those cases that specifically mentioned the word president. Instead, I think, and I should talk about this in a minute, instead, I think President Trump's most likely grounds to beat this would be by saying none of the charges in the indictment actually fit what happened on January 6th. It's not that they don't mention the word president, it's that the Supreme Court has actually given rather narrow interpretations, or might this term give a narrow interpretations to the criminal laws that the special counsel has chosen to use rather than quite, I think it's a mistake. The special counsel did not charge Trump with insurrection or sedition.

[00:28:24.8] Jeffrey Rosen: Smita, President Trump argues in the alternative that he should be able to take advantage of qualified immunity, which requires a violation of clearly established law by a defendant. Is that qualified immunity argument a version of what John just said? And might President Trump argue because the statutes under which he's charged don't clearly cover

his conduct, therefore the law isn't clearly established and he should get qualified immunity, and what are the odds that the court might go for that argument?

[00:29:00.4] Smita Ghosh: I would think that it would take a little more to say that this isn't a clearly established law, given that there's not any text saying that it doesn't apply to the president and that there's all this historical practice going the other way. But again, I guess, you know, I haven't thought too much about the qualified immunity parallel because our brief didn't address it. So I'm speaking a little off the cuff here. The court hasn't really addressed qualified immunity for a president. That's a doctrine that applies to other actors, but hasn't applied to the president yet. And the reasons for it are always kind of a balance of accountability principles versus protecting that particular position and the ability to do their job. So I think it would come down to a similar kind of set of policy concerns. I'm curious what Professor Yoo would think, but about the role of the president and the impact of prosecution on that ability to carry out.

[00:30:18.5] Jeffrey Rosen: Absolutely. John, what do you think of qualified immunity? Might the court go for that? Or if they're converging on another position for President Trump, is it more likely to be what you just said, which is that the charges are poor fits for his alleged conduct? I'm just trying to map out the possible approaches the court may take.

[00:30:38.9] John Yoo: I don't think that they would go down the qualified immunity route. All the arguments that we've been discussing, and if this is a court that really does believe in text structure and history, they are going to feel some allergy towards this just blatantly policy-driven approach that you see, particularly in the qualified immunity context. Also, I generally think these immunities, it's very hard to understand whether they're constitutional at all. In the qualified immunity context, I think that a better argument is, you know, they're usually used in cases where a state officer is being prosecuted or sued under something that derives from the 14th Amendment and the Reconstruction Amendment in terms of violation of an individual's constitutional rights. And so the claim, I think, best claim these days for qualified immunity is that it's something that Congress implicitly provided when it enacted the implementing statutes like the Civil Rights Act and so on.

[00:31:37.8] John Yoo: And so it doesn't really make sense, I would say, to think, well, when Congress passed the federal criminal laws that are a issue here, like the Fraud Statute, Voting Rights Act, the, I assume we'll talk about it, the Sarbanes-Oxley document obstruction charge, did they really implicitly think they were gonna give qualified immunity when they passed those statutes to government officers? I doubt it. And I haven't seen any proof or evidence of that. And I would think this court, if it were going to expand qualified immunity from its existing boundaries, it would want to see the kind of evidence they've demanded in other areas rather than just sort of, I think President Trump's claim is more like, oh, this just makes the legal system more harmonious or fits better for presidents to have this just on policy grounds.

[00:32:29.6] Smita Ghosh: And this would be such an odd time to expand the qualified immunity doctrine because it seems like courts are becoming a bit more skeptical of it and again, trying to tether it to the intentions of Congress when passing the civil rights statutes rather than these free-floating protections. So I think that's another reason why I wouldn't expect that result.

[00:32:55.4] Jeffrey Rosen: Well, John, now let's turn to the argument you make in your Newsweek piece that even after a Supreme Court loss on immunity, Trump will be able to claim that the prosecution violates his constitutional rights or powers or the charges legally don't fit his conduct on January 6th, you raise the issue of the claim that a vengeful successor shouldn't be able to prosecute a president for valid constitutional authority like drone strikes, and you say even without absolute immunity, Trump could defend on the ground the charge violates his constitutional authority as Commander-in-Chief. Just so I understand the structure of that, that's a separate case that would happen and it would be a separation of powers defense? Tell us about how President Trump could raise these defenses.

[00:33:42.8] John Yoo: I think it comes up in two ways. One is he could make a broader claim. Again, we don't have the facts. I don't know what he would say at trial if he had to produce evidence of this. But he could say, I was executing federal law when I was doing what I was doing in the period between the election and January 6th. Or the speech I gave wasn't trying to incite anyone, I was questioning what I thought under federal law is my duty to question the legitimacy of certain electoral votes from certain states. Personally, on the facts, I think he's wrong about this. I mean, I don't think there was fraud. I mean, I go with Attorney General Barr. I don't think there's any fraud sufficient to change the outcome of the election. But he might say that. So he would have some kind of constitutional defense that any kind of federal prosecutions were an effort to interfere with his duty to enforce the law. And so I raise as an example, an analogy, what if future presidents wanted to prosecute President Biden saying you caused too many civilian casualties and drone strikes when you ordered withdrawal from Afghanistan?

[00:34:55.3] John Yoo: President Biden would make the same argument, I was executing my constitutional authorities here, the Commander-in-Chief power, so you can't use a criminal statute passed by Congress. It is the same argument that presidents have made before. I mean, Andrew Johnson made the same argument when he was being prosecuted for firing his Secretary of War, which Congress had made an illegal act. And I think that's the view that Chief Justice Taft, your buddy, Jeff, Chief Justice Taft, adopted in the famous Myers case, that if it really is a presidential power, Congress can't criminalize it. It's exercise. I think instead what Trump will do in his defense, he'll say, you know, if you look at the three charges, fraud on the United States, how was what I was doing fraud on the United States? Because the Supreme Court, and just like a year, two terms ago and last term, it has been steadily narrowing the use of the fraud statute against politicians. They in particular have said, we want to see politicians doing something to gain control of money or property.

[00:36:01.4] John Yoo: Whatever Trump was doing here wasn't money and property involved. Then the second charge is the one that's before the court right now with regard to the other January 6th defendants, which is there's a statute passed a part of Sarbanes-Oxley law back in 2001, 2002, which makes it a crime to obstruct a Congressional proceeding. And the question is, is that really limited to the production of documents before a Congressional investigation, or is the phrase in the statute broader? Trump's gonna say, look, whatever I was doing, it wasn't trying to impede a Congressional investigation by destroying documents or tampering with them or tampering with witnesses, something like that. And then the third claim, I think the third claim I think is actually the weakest one, is if Trump succeeded, this would interfere with the voting

rights of all Americans who voted for president. I don't think that's quite right. He didn't block access to the ballot, he didn't really dilute the votes the way people have tried in the past.

[00:37:05.1] John Yoo: He was trying to get electoral votes stopped from being counted or paused in their counting. But I don't think that's violating the individual right of voters to cast their vote. So I think he has actually pretty good claim that the charges are really, and you could say, look, none of these laws were really written with something like January 6th in mind because no one ever foresaw something like January 6th. I actually don't understand why he didn't charge Trump instead with insurrection or with sedition, 'cause that really, to me, actually fits better the kind of claims that they're making about the facts of January 6th. And President Biden's out there, you know, saying Trump did commit insurrection, and he says it on the campaign trail. So charging him with these sort of white-collar crime laws, I think they're going to run into trouble at the Supreme Court, given the way the court's been moving on these laws for the last few years.

[00:38:01.4] Jeffrey Rosen: Thank you for that. Smita, let's focus on the obstruction charge. As John mentioned, the court in the Fisher case, which it heard recently, is deciding whether or not that statute, which was passed after the Sarbanes-Oxley financial crisis, applies to January 6th. Is the Supreme Court likely to take up that question with regard to President Trump in a separate case or might it, in this case, *US v. Trump*, signal whether or not it thinks the obstruction statute applies to his conduct or not?

[00:38:36.4] Smita Ghosh: I mean, first, zooming out, I think that this really thoughtful set of kind of rebuttals to the individual charges that Trump faces kind of like proves the overall point that this isn't, this conversation shouldn't be about this broad-reaching claim of immunity. The criminal process should be kind of allowed to work out so that the president could, like any other defendant, raise objections to the particular charges that he faces, including constitutional objections, or, in the case of the Sarbanes-Oxley Act, objections based on the statutory text. So getting to that level, I think, would mean rejecting the broad immunity claim. And then you asked whether I thought the court would go there, in the oral arguments on Thursday, I don't think so and in the decision, I don't imagine so.

[00:39:37.9] Smita Ghosh: I mean, this is an issue that seemed to, at least from the arguments last week, divide the court about how exactly to read that portion of the Sarbanes-Oxley Act. And I think there's a good argument, or at least a defensible one, that this statute should be read broadly because there's no explicit textual limitation in it. So I'm not sure that it's something that would come up unless it really has to in the court's opinion. But again, I think that's exactly why the court should reject the broad immunity claim and allow the kind of individual charge based objections to go forward.

[00:40:24.4] Jeffrey Rosen: Thank you for that. John, as Smita said, both the US Supreme Court and the DC Circuit were divided about whether to read the Sarbanes-Oxley obstruction provision broadly or narrowly. The broader judges, Judge Penn and Judge Walker, saw it as a general obstruction provision, and Judge Katsas, in dissent, thought it was about obstructing specific documents and might not apply to the January 6th conduct. Do you have thoughts about

whose reading is more persuasive, the broader, narrow one, and do you expect this debate to show up in *US v. Trump* or not?

[00:41:03.0] John Yoo: That's a tough question 'cause you're asking me for a prediction, Jeff. And Yogi Berra said predictions are really hard, especially about the future. So especially in these cases, it's hard to predict what judges are gonna say. All I can do is sort of project based on what the court's been doing in related cases. So I don't know if you had a podcast on this, an episode on this, Jeff, there was a case a few years ago about not exactly the same law, but a similar law where the government caught a guy who was catching fish that he wasn't supposed to catch under federal law. And so he, when he saw the federal investigators come, he threw the fish back in the ocean. And so the question was, does that tantamount to destroying evidence? Is that obstruction? And many of the justices now in the conservative majority think it was not obstruction. That the statute that's written really about documents and so on really shouldn't be read to be that broad.

[00:42:07.8] John Yoo: So putting aside whether the technical reading of the statute, I think you could have good views on either side, whether the statute should be read broad or narrowly, I think you've seen this court steadily narrowing the scope of white collar criminal law. They did it in the idea of fraud, they've done it in this, what is a congressional proceeding? What is obstruction? Now, I will say that the judge here, Judge Carl Nichols, who's given in this Fisher case, the statute, this narrow reading, he is the only judge who has found it has this narrow reading. Judge Nichols said., "So the way the statute works, it says you can't do A, you can't be doing B, you can't be doing C, which are all about destroying evidence. And then it says, and then anything else. And so the question is, is the anything else clause like just trying to capture other kinds of destroying documents, or is it actually a catch all that's much broader, that includes any kinds of obstruction?"

[00:43:08.1] John Yoo: I would guess that the court, if I had to guess, I would bet that this court, given the way it's been going, it would probably give the statute the narrow reading. Now, I think this is going to concern Chief Justice Roberts because he doesn't want to be seen as someone who, like, turned the key and let out all the January 6 defendants simultaneously. But I actually, I haven't looked at all the cases, but my understanding is there's lots of other charges that have been successfully brought against the January 6 protesters or rioters or whatever you want to call, insurrectionists, if you want to call them that, whatever you want to call them. So this would not be the equivalent of letting them all out. It would, I think, in many cases, reduce their sentences. So I think that's, if I had to bet money, I think that's how I would bet the court going.

[00:43:53.4] Jeffrey Rosen: Thank you for that. Smita, if the court does read the obstruction statute narrowly in Fischer, what do you think the effect both on January 6 prosecutions would be and on the prosecution of President Trump?

[00:44:05.4] Smita Ghosh: My sense is the same as Professor Yoo, there's other crimes at issue for most of the January 6 related prosecutions, and there are with President Trump as well. But it would be a kind of disheartening result, I think, to use this as a moment to limit this particular statute. It is a pretty unique one-off situation. But this is also an important act or important law

that Congress passed in order to hold people accountable for disrupting proceedings. So I think without a strong textual reason not to read it in a broad way, it would be really disappointing for the court to kind of take this opportunity and then leave the Sarbanes-Oxley Act without the breadth that it deserves. And in the Yates case as well, another case of white collar crime where the reading was based more on Congressional intent rather than the statutory text, it just seems like two circumstances where the court limits white collar criminal prosecutions, even in these instances where the particular case doesn't involve that.

[00:45:34.5] Jeffrey Rosen: Well, John, you end your Newsweek piece by saying that none of the defenses that President Trump may have against the substantive charges will turn on whether he acted on January 6th as president or a candidate for office and a private citizen. Instead, you say they'll likely succeed 'cause Smith's overreach and inappropriately expanding white collar criminal law to cover January 6th, combined with his timidity not to charge Trump with insurrection or sedition. As we wrap up this great discussion, does that mean you think that the US Supreme Court will completely reject his immunity arguments and wait for the subsequent cases for him to raise the defenses, or is there some narrowing or intermediate position that the court might converge around to reject a sweeping immunity claim, but lay open the possibility that some prosecutions might be not permitted?

[00:46:36.4] John Yoo: Yeah, that's a tough question, Jeff, because I think what you're saying is, is the court going to follow the law as it best interprets it, or is it going to take statesmanship into account? So to me, if I was trying to think the way Chief Justice Roberts would be thinking as an institutional leader of the court, is, he does not want the court to make any decision, I think, that could plausibly be said later to have decided the 2024 election. So if I was thinking the way I think he would think, I think he doesn't mind these cases delaying trials, because I think what he's really worried about is a federal court. He doesn't have the power of the state courts, but over federal court finding Trump guilty of a crime before the election in a way that then, at that point, you can't tell. I think something like 10% of people who say they would vote for Trump right now say they might change their mind if he was convicted of a felony. I think that really worries the Chief Justice.

[00:47:40.5] John Yoo: And so actually finding immunity, I think, would be a step too far because that would permanently prevent any prosecution of any former president for anything. So that's why I think I could see him saying there's no immunity, but there's still the litigation of all these substantive charges that have to come after that. Immunity doesn't tell you one way or the other whether Trump's correct and is a criticism of the substance of the charges. So immunity just means it goes back down to the trial judge. And I could see, I'm not sure, but I could see the court saying maybe the trial judge should make some legal rulings on the sufficiency of these legal charges before rushing into the trial. That's totally within the discretion of the trial judge. I think a lot of people are missing that who are commenting in the world, is Judge Chutkan could say, I'm gonna hold off the proceedings, as she has with the immunity case, and say, I'm gonna decide these legal questions. Because if Trump wins on those legal questions, there's no need to have a trial.

[00:48:41.0] John Yoo: That would really slow down the proceedings and push, I think, a final verdict past November. Or Judge Chutkan could say, and this is, I think, the attitude of most trial

judges, let's have the trial, let's get going. And if Trump gets acquitted, then I don't need to make any rulings on any of these legal questions. You see that attitude amongst the trial judges in some of the other Trump cases. And I think that's what most trial judges would do. That, I think, that outcome would worry I think John Roberts the most from a statesmanship level, because he's, again, he doesn't want the federal courts to do something that would decide the election. So for him, I don't think he minds any step like no immunity, but turn your attention to the legal claims that Trump is raising. I don't think that bothers John Roberts so much. It might bother people who really want to see Trump prosecuted, convicted, but I think Roberts, if that's going to happen, Roberts would rather that happen after November 2024.

[00:49:40.1] Jeffrey Rosen: Very interesting. Smita, as you think about what Chief Justice Roberts and the court might do, what are the possibilities you envision short of simply rejecting the absolute immunity claim and leaving it at that?

[00:49:53.4] Smita Ghosh: I mean, I agree with that characterization. The way he might be thinking about it. I do think that it's a pity that that delay is what is seen as kind of not impacting the election. I feel like either result, I mean, this is a case that involves a presidential candidate. So no matter what happens, there's an impact on the presidential election. And in other cases where a presidential election was at stake, the Supreme Court has acted quickly just to come up with a resolution. And like I'm thinking of Bush versus Gore, even the case about Trump's disqualification, we got an answer relatively quickly.

[00:50:39.5] Smita Ghosh: So I think there's that, I agree with that kind of tactical perspective that it might look like the court is the least interventionist if there's a result that kind of sends the decision back down, sends the case back down to the district court to resolve some more thorny constitutional issues and take its time to do so, but that's really too bad as a way to think about it, because I think either way, there's an impact on the presidential election in this case, and there's a strong argument that the people have the right to see this case resolved before they make a decision to vote for or not vote for the president.

[00:51:25.1] Jeffrey Rosen: Thank you so much for a nuanced, thoughtful, and really illuminating discussion of one of the highest stakes cases of the year, Trump versus US. John, Smita, thank you so much for joining.

[00:51:38.4] John Yoo: Thanks, Jeff.

[00:51:39.6] Smita Ghosh: Thanks so much for having us.

[00:51:44.5] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith and Yara Daraiseh. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional education and debate. Sign up for the newsletter at constitutioncenter.org/connect and always remember during your waking and sleeping hours that the National Constitution Center is a private nonprofit. Despite our inspiring congressional charter, we receive basically no government funds and rely

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