

Do Donald Trump’s actions on January 6, 2021 qualify for ANY presidential immunity under the USSCT’s Immunity Decision (why or why not)?

The fundamental threshold issue that remains unresolved from the Supreme Court’s decision in *Trump v. United States* is how to distinguish whether the nature of a sitting president’s actions are official or unofficial. 603 U.S. ___, 16 (2024). In the 6-3 opinion authored by Chief Justice John Roberts, the Court declared this distinction to be “[t]he first step.” *Id.* However, much like the district and circuit courts prior, the Court declined to give any binding ruling on how to make such a distinction “in general or with respect to the conduct alleged in particular.” *Id.* Although the Court found that presidential immunity does exist categorically, both absolute and presumptive with respect to the “outer perimeter” of a president’s official responsibilities, it clearly acknowledged that neither party briefed the issue of what constitutes an official or unofficial presidential act under the Constitution and the limits of presidential authority therewith.

However, the Court offered the following guidance. A President’s conversations with the Attorney General are shielded by absolute immunity. A President’s interaction with the Vice President and even state election officials is presumptively immune. But a President’s interactions with private parties (including known campaign officials) is not an official act nor a responsibility of the President and, as such, is not immune. Everything in between presents “more difficult questions,” as the Court noted. *Id.* at 17. Thus, a number of Trump’s actions do not qualify for immunity.

First, I argue that any and all of President Trump’s actions as it relates to the disruption and disinformation with intent to undermine or overturn the results of a federal election are beyond the “constitutional and statutory authority” of the Office of the President. *Id.* Neither the U.S. Constitution (Art. II) nor any amendments having to deal with the election of president and vice-president (12th and 23rd Amends.) confer any authority for presidential participation in the process. Congress created statutory duties for the President of the Senate during the transmission and counting of electoral votes under 3 U.S.C.A. § Ch. 1. The absence of any role or duty authorized “conclusively and preclusively” by the Constitution—nor subsequently by Congress—affirms that any interference by the President with the certification of a presidential election shall not qualify as an official act.

Lastly, I follow the Court’s reasoning that any and all communication with campaign officials must fail to be considered an official presidential act. Absent binding precedent, I find federal circuit court determinations of scope regarding the boundaries of presidential communications privilege instructive. Also known as “executive privilege,” this doctrine protects from disclosure “documents or other materials that reflect presidential decisionmaking and deliberations” that the President believes confidential and essential to the position. *Trump v. Thompson*, 20 F.4th 10 (2021). The D.C. Circuit

court found that this privilege extends to Senior staff for the administration of presidential duties and not to campaign staff. Thus serving as a bright line for determinations of official conduct in the present case.

Yes, under *Trump v. U.S.*, 144 S. Ct. 2312 (2024), Trump's actions on January 6, 2021, do qualify for presidential immunity from criminal prosecution. Yet, the level of immunity his actions receive varies based on its official nature. A President's actions within their "exclusive sphere of constitutional authority" are official and have absolute immunity, whereas actions on the "outer perimeter" of official responsibilities have presumptive immunity and can be rebutted by showing that criminal prohibition of such conduct poses no "dangers of intrusion" on the authority of the Executive Branch. A President's unofficial acts have no immunity. When differentiating between official and unofficial acts, the court must consider the President's authority to take such action, yet it may not consider the President's motives. *Id.* 2328-34.

In *Trump*, the former President's January 6, 2021, actions, were divided into four categories based on whom he interacted: (1) DOJ members, (2) Vice President Pence, (3) persons outside the Executive, and (4) the public. The Court reviewed the categories and found either immunity or potential for immunity existed for each as explained below.

The first category involving Trump's interactions with DOJ members regarding election fraud is squarely within the realm of official conduct because it involved investigating a crime, an exclusive constitutional duty of the Executive. Also, any potentially improper purpose for the conduct does not remove it from being official. Therefore, this conduct has absolute immunity. *Id.* 2334-5.

The second category involving Trump's discussions with Pence as President of the Senate regarding the certification process is closer to the perimeter of official conduct because Pence served outside of the Executive when certifying votes in Congress. Yet, because the VP serves at the will and as a representative of the President, any discussion between the President and VP about official responsibilities is official conduct. Therefore, this conduct has at least presumptive immunity. And such a presumption seems unlikely to be rebutted as a prohibition of this conduct would very likely pose a danger of intruding on the Executive. *Id.* 2335-7.

The nature of the third category involving Trump's communications with mainly state officials regarding electors and election fraud is unclear at this point due to insufficient facts. While Art. II gives states authority over appointing electors that the federal government plays no role in, the President can discuss federal elections with states and has a duty to carry out the law. Therefore, the conduct here could be official with potential for presumptive immunity. *Id.* 2337-9.

Lastly, the nature of the fourth category involving Trump's public address is similarly unclear and requires "content, form, and context" analysis. The President can address the public to generate support for certain public interests, an act generally understood to be on the outer perimeter of official responsibilities. However, the President can address the public unofficially if he speaks as a candidate for office or party leader. Thus, immunity here is uncertain but not ruled out. *Id.* 2339-41.

In sum, Trump's January 6, 2021, actions, do have some presidential immunity.

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Re: Did Donald Trump's actions on January 6, 2021 qualify for ANY presidential immunity under the USSCT's Immunity Decision?

A sitting president is not prohibited from engaging in unpopular, controversial, or even morally questionable actions. President Clinton was impeached not for his sexual activity with an aide, but for lying under oath and obstruction of justice. Similarly, while President Trump's pardoning of disgraced General Michael Flynn was viewed as unjust, its legality was not questioned. However, Trump's actions on January 6, 2021, raise a more complex issue regarding presidential immunity. In a world in which the truth is becoming ever more subjective and evasive, providing a clear answer to the question of whether Donald Trump's actions on January 6, 2021 qualify for ANY presidential immunity under the USSCT's Immunity Decision is, while difficult, essential.

In 1982, the Supreme Court in **Nixon v. Fitzgerald** established that a sitting president is immune from civil litigation for actions taken while in office, provided those actions are within the scope of official duties. This principle was further clarified in **Clinton v. Jones** (1997), which specified that while presidents are immune from civil suits related to official duties, they are not immune from suits involving personal conduct. The Constitution does not prevent government branches from exercising authority over one another.

On January 6, Trump addressed a crowd at a rally, urging them to "fight like hell" against the 2020 presidential election results. This rhetoric preceded a violent breach of the U.S. Capitol by his supporters. The crucial question is whether Trump's actions that day were part of his official duties or constituted personal conduct.

Presidential immunity hinges on the context of actions. In **Nixon v. Fitzgerald**, the Court emphasized that immunity covers actions intimately connected to official duties. Conversely, **Clinton v. Jones** made clear that immunity does not extend to personal misconduct. Trump's speech on January 6, while argued to be official, was clearly a political rally, not a presidential duty. This distinction is vital.

Though Trump and his supporters may claim that his actions on January 6 were part of his official duties, the evidence does not support this. While he was the sitting president speaking from a podium with the presidential seal, several factors undermine this argument. Other speakers, such as Rudy Giuliani, John Eastman, and Mo Brooks, shared the stage but operated from a different perspective. Additionally, the rally featured a banner reading "Save America March," a campaign slogan, indicating a political rather than an official event. The crowd itself is a significant factor. Many attendees waved "Trump 2020" and "MAGA" flags, signaling engagement in a political movement rather than a formal presidential duty.

Ultimately, the rally and subsequent events, though associated with Trump's role as a political leader, were not actions taken as part of his official responsibilities as President. They were tied to his personal political ambitions and efforts to challenge the election outcome. Thus, Trump's actions on January 6 fall outside the protections established by **Nixon v. Fitzgerald** and **Clinton v. Jones**, meaning he does not qualify for any presidential immunity under the Supreme Court's Immunity Decision.