

The *Trump* Immunity Decision Versus the *Dobbs* Abortion Decision: The Principled Reasoning of the Supreme Court is Contradictory

By John Trebon

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Introduction

Two of the most monumental decisions by the U.S. Supreme Court in the last two years were the *Dobbs* “abortion” decision and the *Trump* presidential immunity decision. Rather than take issue with either decision on the merits, I write to briefly examine and explain the principles applied to decide *Dobbs* (2022), which were seemingly abandoned in the *Trump* case. It is the contradiction of principles that raises concerns for the integrity of the Supreme Court.

I. *Dobbs v. Mississippi Department of Health* (June 24, 2022)

The Decision striking down a woman’s right to choose an abortion, including concurring and dissenting opinions, is about 241 pages and rarely read by most lawyers, let alone citizens. I write now to summarize not only *Dobbs* and the *Trump* presidential immunity case; but to explain the diverse, perhaps contradictory reasoning of the Court.

Both the District Court in Mississippi and the Court of Appeals for the Fifth Circuit upheld *Roe v. Wade* (woman’s right to choose an abortion) and struck down Mississippi’s abortion ban after 15 weeks of pregnancy. The Supreme Court upheld the Mississippi law and used the *Dobbs* case to strike down *Roe v. Wade*. The reasoning is primarily based upon strict construction of the Constitution.

The author of *Dobbs*, Justice Alito, stressed that “the Constitution makes no mention of abortion” and that the decision allowing abortion in *Roe v. Wade* established “a set of rules much like those that might be found in a statute by a legislature.” In other words, the decision in *Roe v. Wade* was little more than the unfettered “exercise of raw judicial power” and the “unrestrained imposition of the [Court’s] own extraconstitutional value preferences.”

Although lengthy, the *Dobbs* decision, which overturned a woman’s right to choose an abortion, was primarily based upon the

principle that the U.S. Constitution should be more strictly construed. Justice Alito declared that, “Constitutional analysis must begin with the language of the instrument.” Although the 4th Amendment protects the right of people to be “secure in their persons”; leading over decades to a broadly supported “right to privacy”, Justice Alito and the majority opinion in *Dobbs* (joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett, while Chief Justice Roberts concurred in the judgment), found that an individual woman’s right to choose an abortion was not included because it was not expressly covered by the text of the Constitution. The decision was also buttressed by a lack of “relevant historical evidence” that such a right has in the past existed in the United States. In short, if the “right” was not historically supported and was not expressly stated in the Constitution, it does not exist and judges can’t just manufacture it. The Court should instead “restrain” itself and allow the legislative branches to pass new laws.

Finally, the majority opinion stressed that standards set in *Roe v. Wade* (first trimester entails the right to privacy; but state regulation is allowed during subsequent trimesters, etc.) go well beyond the type of decision that judges should render. Instead, the legislative branch should fashion complex sets of rules. Otherwise, the Court would, in essence “exceed the scope of [its] authority.” Although the majority opinion is 79 pages in length and discussed prior decisions (the power of precedent) and other issues; the essence of its Constitutional analysis can be summarized more briefly: the express language of the Constitution controls, historical analysis complements the wording of the Constitution and the Courts should stay in their lane by interpreting laws rather than creating them.

The reasoning of the Supreme Court was logical, whether one liked or detested its outcome. The principles of judicial interpretation versus judicial activism seemed

clear. Would the salutary principles endure? Well, that leads us to a brief discussion of our second case. *Trump v. United States* (2024), decided by the same Court.

II. *Trump v. United States* (July 1, 2024)

The Supreme Court considered whether a former President may be prosecuted for alleged crimes he committed while President. In other words, are presidents immune from prosecution for criminal acts simply because of the stature of their office or are they subject to criminal prosecution similar to other citizens or political leaders. The opinion in the *Trump* case was authored by Chief Justice Roberts, who authored a split decision supported, in part, by five other Justices with three Justices dissenting. (The majority opinion was joined by Justices Thomas, Alito (the author in *Dobbs*), Gorsuch, Kavanaugh, and Barrett (in part)).

Both the District Court in Washington, D.C., and the Court of Appeals ruled that a former president is not immune from criminal prosecution. Indeed, the president takes an oath to uphold the laws of the nation. It would seem odd that he could violate them with no consequence. The majority of the Supreme Court rejected both lower court decisions.

The Supreme Court began by noting that Presidential powers must “necessarily stem” from the Constitution itself or an act of Congress. The Court reviewed the Constitution for express authority of immunity granted by the Constitution; but admittedly no grant of any immunity from prosecution was found.

The Supreme Court identified the following grants of power from the Constitution for the Office of the Presidency:

1. Power to grant reprieves and pardons – Art II, §2, d. 1;
2. Commanding the Armed Forces – Art. II, §2;

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3. Appointing public ministers & consuls, Justices of the Supreme Court – Art. 2, §2;
4. Foreign Relations: Making treaties, appointing ambassadors, international diplomacy, handling matters of terrorism trade & immigration. Art. II, §§2, 3.
5. Domestically: Take care that the laws be faithfully executed. Art. II, §3.
6. Manage agencies and departments of Executive Branch; Recommending laws to Congress, and the power of veto. Art. I, § 7 and Art. II, § 3.

None of the enumerated powers mentions immunity. To the contrary, the President is required to faithfully execute laws of the United States. In turn, Congress has passed no law granting immunity to the president who may violate criminal laws. Nevertheless, the opinion by Chief Justice Roberts then concluded that the President “is absolutely immune from criminal prosecution for conduct within the exclusive sphere of his constitutional authority.”

In prior cases, the president was found by the Court to be immune from civil lawsuits.

The Court reasoned from those cases that absolute immunity from criminal prosecution must exist as well. Otherwise, the President – the Court states – would be apprehensive about taking decisive action while President.

The Court then goes further and proclaims that a former president has presumptive immunity from criminal prosecution for “acts within the outer perimeter of his official responsibility” as well. Finally, the majority opinion states that the President has no immunity for unofficial acts.

The Opinion purports to leave decisions regarding what constitutes “official acts,” “unofficial acts” to lower courts, but actually engaged in an extensive discussion branding most actions of former President Trump as “official acts,” including acts relating to the January 6th riot. The Court actually reviewed the indictment against Trump and applied immunity to the vast majority of allegations. The Court, perhaps surprisingly, stated that the motive of a President was irrelevant and that actual malice while engaged in official acts was protected as well. In other words, very broad immunity was granted. Even if the President attempted to pressure the

Vice President not to certify the election results because of evil intent to thwart the valid election results, Trump is “at least presumptively immune from prosecution.”

Then, the Court went one step further and stated that no evidence of Trump’s official acts – which are broadly defined beyond the enumerated powers expressly included in the Constitution – cannot be used as evidence in any criminal case even if the case does not relate to his official acts as President – a type of evidentiary immunity, as well.

The Dissenters, led by Justice Sotomayor, noted that the Constitution itself provides no support for the Courts’ Opinion. Her dissenting opinion argued that the decision by Chief Justice Roberts placed the President above the law, even if his motive was evil and corrupt.

This official-acts immunity has no firm grounding in Constitutional text, history, or precedent. (quoting from *Dobbs & Jackson Women’s Health Organization Decision* by the Supreme Court).

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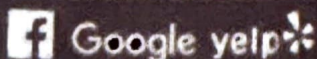
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Justice Sotomayor pointed to significant historical documents suggesting that no such immunity was contemplated for the President and, to the contrary, that immunity was rejected by the drafters of the Constitution.

The majority Opinion expressly ruled that even if Trump's claims about the election fraud results were knowingly false; the evidence could never be used against him in any kind of case. (Justice Barrett did not concur in this part of the majority opinion). In short, the 6-3 majority of the Court created a very broad doctrine of immunity that is not based upon any express provision of the U.S. Constitution nor grant of power from Congress. Perhaps, the Court was prudent and came up with a well-reasoned view of immunity; but it was clearly not compelled by any provision of the Constitution and perhaps was expressly rejected by the drafters of the Constitution. Justice Sotomayor complained that the breadth of "official acts" is so broad that little is left as unofficial. Justice Sotomayor's dissent observed that "the majority engaged in judicial activism, not judicial restraint."

This new official-acts immunity

now "lies about like a loaded weapon for any President that wishes to place his own interests, his own political survival, or his own financial gain, above the interests of the Nation.

If the President ordered the Navy Seals Team Six to assassinate a political rival, Justice Sotomayor noted, he would be immune. The same result if he ordered a political coup to hang on to power, Justice Sotomayor concluded "with fear for our democracy, I dissent."

In response to dissenters, Chief Justice Roberts stated:

"A specific textual bases has not been considered a prerequisite to the recognition of immunity." (cite omitted)...True, there is no "Presidential immunity clause" in the Constitution, but there is no "separation of powers clause" either. Yet that doctrine is undoubtedly carved into the Constitution's text by its three articles separating powers and vesting the executive power solely in the President.

What happened to the doctrine "judicial restraint", preached by the Court

so adamantly just two years before in the *Dobbs* decision? The *Trump* decision does not and cannot rely upon express language from the text of the Constitution itself; it is not supported by the historical record creating a grant of presidential immunity from criminal prosecution, and the Opinion creates a far-reaching set of rules that would normally be crafted in a statute by legislative bodies, rather than courts. Instead, the *Trump* decision – good or bad – appears to be an exercise of "raw judicial power" that represents an "unrestrained imposition of the [majority's] own extraconstitutional value preferences."

The *Trump* decision appears to be based on an outright contradiction of the stated principles of judicial interpretation and integrity that was employed in *Dobbs*. Judicial doctrines of Constitutional interpretation and application should be consistent. If raw judicial power and personal value preferences are inappropriate in one context, they should not be employed in another area of the law without constraint. The principled reasoning in *Dobbs* and *Trump* is contradictory, which undermines the integrity of the Judiciary. ■

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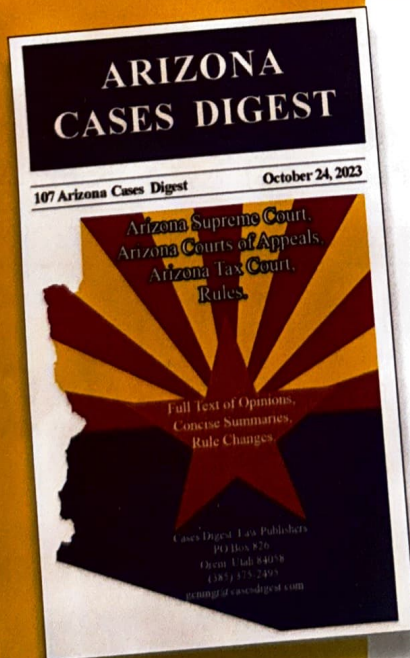
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