

Trump v. United States Ultimately Shows Us Why Character Has to Matter Most

How We View History Matters

History

History matters. Our daily decisions are based on what we know about the past. When deciding where to eat, what do we do? We check the reviews of local restaurants based on their history, on the word of people who have been there. Visiting a medical doctor for the first time? You must complete a form titled “Medical History.” Why? Because your past ailments can affect your present treatment plans and your future well-being. History is inescapable.

Same History, Different Interpretations

History not only affects us at a micro-level in our daily lives but also at a macro-level in decisions that affect us from a distance. Take the Supreme Court’s recent decision on presidential immunity in *Trump v. United States*, for example. In that case, two justices—one supposedly an originalist (Chief Justice John Roberts), and another justice, widely considered to not be an originalist (Justice Sonia Sotomayor) came to different conclusions about presidential immunity after examining the same history. But how?

Roberts considered how the framers of the Constitution designed the presidency. Roberts also considered the Court’s prior cases, which are a type of history, but not the sort of history that originalism contemplates. Roberts’ opinion, then, emphasized precedent—a type of history—over original understanding, which is a different sort of history, more aligned with originalism as an interpretive theory. Sotomayor was more originalist in her dissenting opinion. Pointing to the

Federalist Papers, Sotomayor argued that the Constitution's authors thought that a former president could be prosecuted for crimes after leaving office. She points to Alexander Hamilton, who wrote that former Presidents would be "liable to prosecution and punishment in the ordinary course of law." According to Hamilton, the President, unlike a king, "would be amenable to personal punishment and disgrace."

Again, how do two Supreme Court justices view presidential immunity so differently? The answer is that they are emphasizing different aspects of the same history to support their respective decisions. Sotomayor put it this way, writing of Roberts's opinion that "It seems history matters to this Court only when it is convenient." Roberts says something similar about Sotomayor's opinion. Interpretation is never clear-cut. Which history matters? Which originalism? Will the real originalist please stand up?

Real-Word Impact



Interpretive questions aside, what are the real-world consequences for the criminal prosecutions against former President Trump? First, the hush-money case for which he has been convicted of 34 felonies in New York will likely remain intact. Trump's lawyers will argue that because evidence of official acts was introduced against him at trial—his tweets, and his conversations with Hope Hicks, his communications director—the case should be dismissed. This claim is likely unsuccessful, because even if that evidence is excluded, there is still enough

evidence independent of it to support the conviction against Trump. This is known as the "harmless error" rule, and Trump's conviction in New York will likely remain intact on presidential immunity grounds. Trump's lawyers will make other arguments on appeal if and when Trump is sentenced.

Second, the Georgia case against Trump, which is now in legal limbo because of an appeal over the conflict of interest claims of Trump's defense team, may be in jeopardy, but it is too early to tell. Trump's lawyers will probably argue that what he did in pressuring Georgia officials for votes, was an "official act."

Third, the classified documents case against Trump in Florida will probably remain intact because the alleged criminal conduct in that case occurred

after Trump was no longer president.

Finally, the indictment against Trump for his actions on January 6th, 2021 will likely survive. The Supreme Court sent the case back to Judge Tanya Chutkan, who must now determine which of Trump's alleged actions in the indictment are "official," and which are "unofficial." Trump's use of private lawyers, among other factors, will likely result in many of Trump's actions in the indictment to be considered "unofficial," leaving the case against him intact, with prosecutors making some adjustments.

Individual President, Institutional Implications, and Character

Being in the middle of a presidential election season can eclipse the full import of *Trump v. United States*. We must not fail to appreciate that *Trump v. United States* applies not just to Trump the individual but also to the presidency as an institution. Although it remains to be seen just how much the presidency as an institution will change as a result of *Trump v. United States*, one thing is certain: the power the President wields because of *Trump v. United States* makes the president's moral character more important now than ever before.