

Bennett Nuss (BN): Hello, and welcome to another episode of A Hard Look, an administrative law podcast brought to you by the Administrative Law Review, Washington College of Law and the American Bar Association. My name is Bennett Nuss, the Senior Technology Editor of the Review, and supporting me in the booth is the singular Anthony Aviza, our technology editor.

Before we begin, I'd like to remind our audience that the opinions expressed by any of the speakers on this show are representative of themselves alone and cannot be fairly attributed to the administrative law review, Washington College of Law, nor the American Bar Association also as it is important in this instance.

This episode was recorded on March 22nd, 2024, so the law may have changed by the time that you hear this episode, although we hope that it remains somewhat current.

Presidential immunity is a subcategory of a set of immunities of governmental officers. These immunities include judicial, congressional and executive, from civil liability. While some of these immunities have clear constitutional basis such as the Speech and Debate Clause protecting members of Congress, the legal basis for other immunities such as judicial and especially executive is less clear.

The question of presidential immunity from criminal prosecution for acts engaged while being the president has been thrust into the limelight again, with the present cases against former President Donald Trump's potentially criminal actions on January 6th, 2021. The Supreme Court is docketed to hear this case, *Trump v. United States* on April 22nd, 2024.

In order to get a better understanding of this rather unique and contentious area of law, we're going to look through the doctrines surrounding immunities for government officials in both civil and criminal context before doing some brief prognostication as to the potential results of the former president's legal woes. And here to discuss this topic with us is Professor Mark Rotenberg.

Professor Mark Rotenberg is currently an adjunct professor at the American University Washington College of Law, and for many years has taught a class on the constitutional powers of the president at American University and other law schools. After graduating from Columbia Law School, Professor Rotenberg clerked for the Honorable Patricia M. Wald on the DC Circuit Court of Appeals. After this clerkship, Professor Rotenberg worked for several years in the justice department Office of Legal Counsel which is responsible for advising the White House and the executive branch on questions related to the constitutional powers of the presidency.

After working in the Justice department, Rotenberg had a diverse legal career in both higher education and private practice, serving as a general counsel for the University of Minnesota and also Johns Hopkins University special counsel at Wilmer Hale, a litigation partner at Dorsey & Whitney and is currently vice president and general counsel at Hillel International, an organization supporting Jewish students at universities across the world.

Professor Rotenberg has argued and won cases in the US Supreme Court and numerous other judicial forums, and has published and spoken widely on topics related to constitutional law and higher education.

Professor Rotenberg, thank you so much for joining us.

Mark Rotenberg (MR) Well, thank you, Bennett. I'm very pleased to be here today.

BN: I'd like to start off by asking you to place the question of the moment, presidential immunity from criminal prosecution in the broader context of government official's immunities more generally. Can you describe them kind of branch by branch and tell us where they come from and why they exist?

MR: Yes. So the urgent question, as you said, Bennett, is the Trump claim that he is absolutely immune from criminal prosecution in various allegations that have been made by grand juries against him. But it's important as you noted to contextualize what this particular claim of absolute immunity means in the context in the broader context of immunities of government officials.

Generally, this is a very broad and complex area of constitutional law and federal common law, but I'll try to just outline some of these immunities. Briefly, let's start with the clearest constitutional text that relates to these kinds of immunities, which is the legislative immunities that are found in the speech and debate clause.

In Article I of the constitution, the speech and debate clause provides an absolute immunity for members of the legislative branch, the senators and House members themselves, for their actual debates on the floor, for committee reports that they issue for resolutions, and voting, and as the Supreme Court has said, things generally done in a session of the House in relation to the business before it.

So what the Supreme Court has said in a series of cases is that people in the legislative branch in Article I, officials have an absolute immunity for things that are generally done in relation to the business of the Congress.

And the basic purpose that the Supreme Court has outlined for this immunity, which is constitutionally, which is textually, based on the constitution is to protect members from intimidation and distractions in the performance of their legislative duties. But it's important in the context of this current issue regarding the President's alleged immunity from criminal prosecution that the Supreme Court has clearly said in regard to the textually based immunity in, for article one, officials that members of Congress are not exempt from the operation of ordinary criminal laws.

I'm now quoting in *Paul v. McCormick*. "Legislators ought not to stand above the law they create but ought generally to be bound by it as our ordinary persons." And in that respect, in that quotation, the Supreme Court cited Thomas Jefferson, and later cases have affirmed this idea that that members of Congress and not just their staff, but members themselves may be criminally prosecuted while in office for offenses against the, the ordinary criminal law and gravel in the United States elucidates that even while their staff may share some of that immunity, their staff has no immunity or criminal prosecution while they're serving as, as staff to a senator or a Congressman.

Now let's turn briefly to judicial immunities. Article III officials have been entitled for, for well over 100 years according to the Supreme Court decisions, to absolute immunity for their official acts. And this includes not just judges themselves but prosecutors and the reason for such absolute immunity, which is based in English common law, it is not textually found in the Constitution, is so that these judicial officers will be able to fearlessly perform their duties without concern that the people that they're being that, that come before them will sue them, harass them, make claims against them in a judicial forum.

So as long as the judicial officers in here, as I said again, we're talking about not just the Article III officials, the judges themselves, but the prosecutors and state, the equivalent, state officials, state judges and state prosecutors, as long as they're operating within the outer perimeter of their work of their official duties, they are absolutely immune from, civil and criminal prosecution.

Now, the most difficult area and the, and the area in which there's been a lot of judicial decision making is the question of immunity for executive officials. And the Supreme Court in *Nixon v. Fitzgerald*, which is the landmark case here in this area, has said that while there is qualified immunity or civil wrongs of subordinate executive officials, qualified immunity, something will come back to I'm sure, in a few minutes, while there's qualified immunity for civil wrongs for subordinate executive officials, President Nixon is entitled to absolute immunity from regular civil liability, regular civil liability. In that case, not a, a lawsuit by a, a disgruntled former federal employee for being fired. He's absolutely immune from regular civil liability for any acts within the outer perimeter of his authority.

And the Court discusses the English common law there that immunized executives generally, of course, is limited ability to refer to English Common laws. As the chief executive in the United States was described in Article II to be not a king, right? The Founders of course rejected the any, any correspondence between the chief executive under Article II of our constitution and the King of England.

But they referenced English common law with regard to the immunities for subordinate executive official. So the qualified immunity that other officials have and the absolute immunity that Nixon against Fitzgerald says the president has for regular civil liability is grounded in a basic piece of guidance. And this is where we'll, we'll get eventually to the next to the, to the Trump case.

And that guidance is this, that the scope of immunity that executive officials have here, we're talking really about civil civil litigation must be related closely to the immunity justifying purpose, right?

So the reason why subordinate executive officials are entitled to qualified immunity and this also, by the way applies to state officials and under section 1983 actions, The reason they're, they're entitled to qualified immunity is so that they can carry out their business, right?

If every time a Postmaster or somebody involved in adjudicating social security benefits or Medicare benefits was to be fearful that she would be sued if, if she didn't side with the a party that she's worried about the judgment, the neutral judgment and the efficient functioning of these

executive functions would be frustrated and would be biased by these fears So the, that's the justification for providing qualified immunity.

When it comes to the president, the Supreme Court evaluated at great length. And there was, there was some excellent dissenting and concurring opinions in Fitzgerald that need to be read to understand all of this.

The Court went into great length about what kind of immunity does the president need in order to be able similarly fearlessly carry out his purpose, which is to faithfully execute the laws and all the other functions that are uniquely placed in this one person. Right?

Keep in mind, Article II is unique in giving one person the authority of the entire branch of government. That's not true in Article III for judges or the judiciary. And that's obviously not true in article one for the legislature. But in Article II, we have this unique situation where a person is vested with all of these responsibilities.

And so the court went into a lot of detail and concluded that in order to enable, to facilitate this one person, being able to neutrally fearlessly carry out these functions, he couldn't be sued civilly in, in, in regular civil cases.

So I'll stop there, but that's just a, a whirlwind tour through the textually grounded, constitutionally, textually grounded immunities and common law immunities that that attach to judicial, legislative and executive officials.

BN: Right, and you've touched on this multiple times throughout your previous discussion, that the objective of many of these immunities is to prevent harassment and to protect the kind of procedural conduct of officials within their, kind of, official duties. Does this constitute in your mind a hole in public policy where we privilege the government for potential bad acts or are these immunities necessary for the proper functioning of government?

MR: Well, you put your finger on that question, on the central concern of this legal area, which is: how do we balance, how do we evaluate that claim that: look, the president can't do his job? By the way, I use male pronouns here because we've only had men as president that we will hopefully be able to, to use other pronouns in the future.

He's got to do a very important set of functions, national security, figuring out when to deploy armed forces abroad, regulating the various executive departments and providing rules and norms and policies for all of the executive agencies, nominate and appoint with the advice and consent of the Senate all officers of the United States including judges on the Supreme Court.

I mean, the president has innumerable important functions and if any time, day or night, this person was fearing that, well, if I don't do this, someone will sue me. You would really find distorted government decision making in the Oval Office, and I agree with that.

I served in the office of Legal Counsel and would be responsible for providing advice to the White House for several years, and I can tell you that if the executive officials, the attorney general, the head of the Office of Legal Council or the White House Counsel and the various people that I work with, imagine that their decisions would be contested every, every day by

somebody who decides to sue them, it would, impose a impossible burden on them unless they were very, very wealthy people.

So, and even then, the harassing nature of these cases would provide a burden such that you wouldn't find many individuals willing to volunteer for these offices. So, on a subordinate level, meaning individuals below the level of the president himself and with regard to the presidency as an institution, I think there's a lot to be said for this argument.

On the other hand, as you pointed out, it may be the case, and of course, voters need to decide whether, you know, this is the case that we have had a president who is now running again for office, who is alleged for the first time in American history since George Washington, who have engaged in innumerable, many dozens of criminal activities. This has never happened before in our history if that's the case, if we're going to have presidents in office and running again for office, who are alleged to have committed very serious crimes, felonies.

We have now a situation where we have to balance all of the things that the Supreme Court has said. And that I tried briefly to summarize against the idea that we could have a chief executive who is a criminal. And how do we accommodate our system of separated powers to that reality?

Well, one easy answer you might say is, well, then impeach him. The Founders had a process and that's that he should be impeached by the House and tried by the Senate and that's the solution. Well, texturally, of course, that's a very strong argument. That is what the Founders embodied in our Constitution.

But the, the concern we now have is that for various partisan reasons, it may be the case and people have alleged that the impeachment process is, has been so heavily politicized and turned into a partisan issue and that, that people vote on issues of impeachment in the House and in the Senate strictly based on party affiliation, which was not part of the founder's conception. There's no doubt about that.

The Founders did not appreciate the, the highly partisan nature in which these kinds of activities, governmental activities would be undertaken. That impeachment doesn't work anymore, that that tool is not sufficient and that we need some other tool to take care of this problem of a president who is alleged to have engaged in many serious federal crimes.

BN: All right. So turning from the criminal more to the civil context before we go into the specifics of the Trump case; throughout the course of the latter half of the 20th century, we had this evolving doctrine of looking at presidential immunity for civil wrongs, and not necessarily immunity from criminal prosecution, which is a separate issue. If you can, can you really quickly run through this line of precedent and see how the doctrine has kind of evolved as we've seen contentious presidents be impeached like Nixon, Clinton, and now Trump.

MR: Yes, so very quickly. And I've already discussed a little bit about Fitzgerald, but in Fitzgerald in 1982 case, the Supreme Court said based on common law principles, right? Because there's no text here dealing with article two officers that the public interest required an absolute immunity from civil, the litigation. And it was, it justified it on the basis, as I said before that the public interest requires bold and unhesitating action from the president.

And so it was a really quite conventional public policy argument that the court used not textually grounded in the constitution. Although the claim of course is that the by subsequent commentators is that Nixon against Fitzgerald is a constitutional case and, and is not subject to subsequent legislation by the Congress.

That's a, an open issue in an, in another lead case involving civil liability Clinton v. Jones. That case involved a claim by a woman for civil wrongs committed by President Clinton before he entered office.

Right, the Supreme Court held that, Clinton could be sued, and the litigation could proceed so the litigation could proceed even while he was president of the United States. And of course, as we know, or many of us remember, Clinton's deposition in that civil case involving a Miss Jones, resulted in his impeachment because he was accused of lying in his deposition in that civil case. By the way, he Clinton won that case, on summary judgment that settled it later for, for several hundreds of thousands of dollars.

In any event, both of those cases taken together say that while the president is absolutely immune for claims related to the actions he takes as president, he's nevertheless subject to legal process while he's president.

He can be forced to sit for a deposition. He can be forced to engage in civil litigation. But those claims in that civil litigation have to be based on facts that precede and do not include references to his official act.

Ok, and then in, Trump v. Mazars, the Supreme Court held that President Trump's documents could be subject to civil litigation, and that he does not have a privilege to withhold them. So here we see a set of cases that broadly protect the president in his official acts but do not entirely immunize him in any way really from the court system, at least in respect to civil activity, civil judicial activity.

So that's again a whirlwind tour through some of the cases that exist at the present time that that govern presidential immunities.

BN: And we will be sure to include all of those cases within the notes for this episode. But turning to, kind of the question of immunity as we've run through the basic immunities present in the legislative, judicial and now the executive branches. Is there a reason why we privilege the president so strongly against civil suit in comparison to different government officials, even lower officials within the executive branch?

MR: Again, a terrific question here because as I said a few minutes ago, that the, the issue at hand here and the reason why we so strongly provide absolute immunity to the president and only qualified immunities to subordinates is because of the conception, the idea, the notion that the president is a uniquely qualified designated person in our constitutional structure, that person alone has the entire branch of government weighing on his shoulders and the Court is very, very reluctant to allow the judicial process to destroy or significantly impair the capacity of that one person to carry out those functions.

People have a vague understanding of what the presidency is all about, but those of us who are privileged to have had some exposure to the normal functionings, the regular functionings of the White House and have been in The Oval Office and, and been in the West Wing, understand that what goes on there is some very, very grave responsibilities and I've had the privilege of working there and working in a judge's chambers for a year on the DC circuit and also working in some legislators offices and, you know, on The Hill.

And I can tell you that especially with respect to national security and foreign policy, the presidency is weighed down by responsibilities and ultimately for the president himself to make decisions about that have no real comparison in the chambers of a judge or in the offices of a senator or member of the House. They're simply more immediate, they raise more grave consequences, life and death.

And if there were to be a whole array of, of litigation based attacks on the capacity of the president to make decisions, you would have a hobbled strained presidency. That's, I think the sort of the orthodoxy of the doctrine that's kind of the normative rationale for the doctrine.

But as we touched upon a minute ago and we're gonna get there soon, I think the, the, these, these principles, these norms that underlie decisions of the Supreme Court interpretations of, of immunities and, and so on, come into real sharp conflict with the common sense notion embodied in our legal traditions that no person is above the law.

And if the president for the first time in American history is alleged by a grand jury of lay people who vote up bills of indictment, asserting that the president has engaged in very grave felonies, criminal wrongdoing. There must be a way to deal with that. That's the problem we face now and the issue that will be discussed in, in, in the Supreme Court, courtroom, in the next 30 days.

BN: Right. So moving to kind of the question at the center of this, which is presidential immunity from criminal prosecution, which is now, as you said before, the Supreme Court. They're asking and I quote, "whether and, 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?"

Now, the only place in the constitution which seems to speak to this point is Article I, Section III, clause VII, which states that "a party which is impeached shall nonetheless be liable and subject to indictment, trial, judgment and punishment according to the law."

However, it doesn't exactly say much about specifically criminal liability for actions taken by a president, especially during his term, so if there's a constitutional basis for criminally going after a then sitting president, what would that be?

MR: Yes. So this is the question of the hour and drum roll for that. We've never had this issue come up in American history. The DC circuit which ruled on this issue. And is the subject, and whose judgment is the, is the subject of the appeal.

Now, before the Supreme Court said numbers of times, this is a question of first impression. The constitution is not entirely clear texturally on this question. It's, it's fairly clear, right? Some

things are fairly clear that the section you just quoted out article one section three clause seven, that it does make it a rule of constitutional law that after an impeachment, the executive official who is impeached and convicted shall nevertheless be subject to additional a criminal process, indictment and, and punishment according to law is language in the Constitution. And that clause was intended to reach a somewhat different question, right? The intention of that language was intended to reach the question.

Well, after somebody is, is removed from office, is impeached and convicted and they nevertheless be punished for their criminal activity. And because the Founders knew and there's virtually no dispute about this, that there could be impeachable offenses, even though they called them high crimes and misdemeanors.

In a different section, there could be impeachable offenses that were not crimes that were not conventional crimes. The, the history of the impeachment clause that this section is referencing demonstrates in England, innumerable instances where the crime, the high misdemeanor that is referenced in the text, really is a reference to derogations, right? Offenses against the public interest, executive officials who betray the trust of their country and, and those offenses against the sort of the higher politics of their job that demean their role and derogate from the responsibilities of the public interest sometimes might not be crimes.

Sometimes they are crimes like a straight up bribery claim, right? Or treason, which is also referenced in this other section of the constitution.

So the Founders were trying to deal with a somewhat different issue here, which is after they're done impeaching him and trying him and convicting him or not. What happens to that person?

And this text says, yes, the person is subject to the normal criminal law. The question we're faced now and the question you raised a moment ago is whether a president can be subject to criminal prosecution without regard to whether he's been impeached or convicted in the Senate.

Now, one of the claims that was raised in before the DC Circuit, was that either the double jeopardy clause, or the impeachment clause bar, Smith's prosecutions here right now and, and I, we won't go into, the Trump lawyer. The Trump legal team just submitted its briefs in the Supreme Court, its opening brief in the Supreme Court in the past 48 hours, and I've not had time to go through that, but I know what the argument was in the DC Circuit which was rejected unanimously by the court, which is that this clause, the impeachment judgment clause, which is what you read out, does permit former presidents to be federally criminally prosecuted without requiring that they first be impeached and convicted for the same conduct.

So there, there is a holding by the DC Circuit here, which is going to be reviewed by the Supreme Court that the language you referenced, does not require that the person be first impeached for the same conduct.

The Court said that the Justice Department can and a grand jury can indict a former president or offenses that were not first impeached and convicted.



The double jeopardy clause argument, which in my opinion was very weak, but was alleged in a, was asserted in front of the DC Circuit, basically said that because the Senate did not convict Mr. Trump for the offenses that were listed in the impeachment by the house, how Trump couldn't be subjected to a subsequent prosecution.

This was rejected pretty firmly. And I think the bases for the rejection that were described by the DC Circuit are quite solid that leaves us with the, with the, the, the basic, the basic question here.

BN: So moving to kind of the policy question involved in this, in 1973 the Department of Justice's Office of Legal Counsel issued a memorandum which concluded that it would be inappropriate to prosecute a sitting president.

Specifically, they stated that quote, "The president is the symbolic head of the nation. To wound him by a criminal proceeding is to hamstring the operation of the whole governmental affairs. The spectacle of an indicted president still trying to serve as chief executive boggles the imagination." Close quote.

This analysis tends to indicate that the OLC's disposition of avoiding criminal indictment is predicated more on institutional stability rather than any clause in the constitution.

What do you make of this analysis, and do you think it goes wrong in its conclusion?

So I, as you mentioned earlier in this conversation, but I'm an alum of the office of Legal Counsel. I was not involved in writing that, that opinion, which preceded me by several years.

But the, the opinion of OLC, which is that a president cannot be criminally prosecuted while in office has been maintained for, for over 50 years and form the basis of the decisions during the Trump administration to decline prosecution of the president.

And the basis as you read it out there is that the hamstringing of the president by a criminal case and the spectacle of, of trying to prosecute the President of the United States by his own justice department, would wound him as they say, and cause a severe derogation, right, a decline in the capacity of the president to do his job.

And that's the basis of the OLC opinion and, and it hasn't been challenged since, I think that the opinion which was written in the early seventies after Nixon. But with the experience of the Nixon administration where, where the president essentially was engaged in a conspiracy to burglarize the Democratic National Committee headquarters here in DC, a routine and despicable kind of crime weighed heavily on the authors of the opinion.

But in the end, they believe the OLC attorneys believe that prosecuting the underlings, prosecuting the other people who engaged in the attempted burglary would suffice, and that the presidency itself should not be wounded by bringing the president into a criminal prosecution.

I think that in the, what we would say the normal course of presidential activities, this is a in a responsible opinion and a good one. Whether the Supreme Court will actually agree with it, of course, is still up in the air.

Most OLC opinions are simply the law of the executive branch, right? Because they're not subject to overruling by the Supreme Court, except that if a particular case implicates those, those opinions. But most of the time these OLC opinions are basically like Supreme Court decisions because they, there's nobody in the executive branch to overrule them.

In this case, you will see a Supreme Court that will inevitably reference this OLC opinion. The DC circuit referenced this opinion many times. I think if it is questioned here, it's going to only be indirectly, right?

Because the opinion deals with whether a sitting president right can be indicted and prosecuted and the wounding and the hamstringing that would attend the prosecution of a sitting president, the claims of Mr Trump and before the DC circuit that were rejected and are now on appeal,, relate to whether he can be criminally prosecuted now.

Right, and of course, as we know the Florida case, the Florida criminal case which involves allegations of criminal wrongdoing and the taking and withholding of highly classified documents doesn't even raise these issues, right?

Because it's not only that the president in that case is being prosecuted after he left office, but the offenses that he's alleged to have, have engaged in are themselves acts that took place after he left office after January 20 these boxes of documents, right, that are allegedly found in his bathroom and other places at his country club,, are all things that occurred outside of his presidential tenure in office.

So, I think this opinion of the OLC will be referenced, but it'll only be referenced tangentially and if it is questioned, I think it'll be questioned based on the severity of the activity here that's alleged to be engaged in by former President Trump.

This is not a routine kind of felony burglary type of thing as despicable as a burglary may be. This alleges very serious issues, inciting a riot to stop the certification of a presidential election.

I mean, it's a difference in degree that it represents a difference in kind of the allegations that were, that are made here as opposed to the, the Watergate burglary allegations.

So I think the Supreme Court will recognize that and, and of course, the DC Circuit did as well.

BN: Yeah. And you kind of just led perfectly into my next set of questions regarding specifically the *Trump v United States* case.

So, the DC Circuit ruled in February in *United States v. Trump*, which is the case that you've been referring to out of the DC Circuit, that the separation of powers doctrine as expounded in *Marbury* and its progeny necessarily permits the judiciary to oversee the federal criminal prosecution of a former president for his official acts, because of the fact of the prosecution means that the former president has allegedly acted in defiance of the Congress's laws.

What do you make of the opinion in *United States v. Trump* and the quality of its legal argumentation?

MR: The DC Circuit opinion, unanimous panel opinion, I think is probably an, A- decision.

It's a, it's well written, it's well-reasoned. It's quite persuasive and many commentators, thought that the DC Circuit opinion would not be taken up by the Supreme Court. It's thorough, it's lengthy, it runs many dozens of pages and it's unanimous. And there isn't a circuit split.

So for a whole bunch of reasons, there was, there was thought that actually this case would not be heard by the, by the court especially in an election year to intercede the court's hands in another case, right?

They've already, they've already decided one case dealing with the 14th amendment insurrection clause to again face issues about this president, former president's capacity to serve in office and whether he can be convicted of these crimes and so on was seen by many commentators is not appropriate for the court's review, but the court did take it which suggests that they may have some issues with the DC Circuit opinion.

I would say, first of all, we, we need to outline the core holdings of the case.

You, you read out, I think the, the most important holding of the, of the DC Circuit case that according that based on separation of powers and *Marbury* and, and progeny and so on that, that the judiciary must be able to oversee federal criminal prosecutions, even of a former president and determine the scope of whether his official acts in some way immunize him from criminal liability that, that the court must have jurisdiction to be able to proceed there.

The Court reasons based on a simple syllogism, right then if the, the allegations against the former president is that he acted in defiance of the laws of Congress even while in office, it can't be that nobody can, can review that claim.

The issues of hamstringing and so on are of decidedly less importance. Now, the court also held that the reason for the court's having to have the having this jurisdiction is functional, meaning it's there are functional considerations here rooted in the government's structure that are rooted in separation of powers, ideas that essentially come down to the fundamental point that no person is above the law that if the president engages in crimes while in office, it can't be that no other organ of government can review that president's criminal activity.

And because the founders said, and we just discussed this a few minutes ago, right? The founders said that impeachment does not end the inquiry when it comes to crimes, right?

The founders clearly textually said that irrespective of what happens in the impeachment and trial before the House and the Senate respectively, there can be a follow on criminal prosecution. They use the word punishment after all.

Textually because of that, it can't be the case that when the president leaves office, the judiciary, the article I branch is deprived of capacity to review whether the president engaged in crimes while in office.

So, I think it's a strong opinion, I would say it's even a very strong opinion if I had to quibble at all, I mean, people who are experts and study Presidential authority for years and years might say that their handling of some of the legal history of the presidency would have been nuanced a little bit better. I think they could have built out a bit more on the consequences of a contrary

holding, given the extraordinary nature of the allegations here against the former president, I think that would have given the opinion a bit more strength, but perhaps they didn't want to go into all of the blood and guts, so to speak of the allegations here because it might seem to be too partisan. I don't know.

Or it may have been those one or more of the three panel members, didn't want to go into that. I think that might have strengthened the opinion. However, but in general, I would say it's a strong opinion on this important separation of powers question.

BN: The former president has expended a great deal of treasure on acquiring legal defenses for his various criminal charges and civil controversies. And so with that expenditure, you would assume that his lawyers are trying to put together the best case that he is actually immune from these prosecutions and trying to dig holes in the opinion of the DC circuit. So if you had to put on your "representing Trump" hat for a second, what do you think that these holes in argumentation are in the opinion, and how do you think that they're going to present that before the Supreme Court?

MR: Yes. It's a great question.

I think the, I think the most powerful argument that the Trump lawyers have is that if the founders wanted to include criminal liability for activities that are part of the president's term of office they would have said so the founders instead included an impeachment process. A political process where the People's House, the House of Representatives would vote on an impeachment of the President and the Senate would determine whether to remove him. And that's a very carefully structured process. It's not something that the founders just, you know, kind of dashed in there.

They had a great familiarity with the impeachment history of England, and they would have included criminal liability or wrongdoing during term of office as a term in the constitution.

If they wanted that to supplement the impeachment process, I think that's probably the strongest argument because as you know, the Supreme Court now is very preoccupied with legal history. The Supreme Court has become, you know, legal historians like to sort of make jokes about armchair historians in the, in the, in the, in black robes.

16:56because most, most, not all jurists are not historians and most of them aren't even history majors, let alone, professional historians. And so to ground opinions in legal history is sometimes a risky business.

But the court now has gone into that in a major way of, I would say the dominant mode of interpretation of the second amendment is now a question of legal history right under the Thomas opinion in New York case. Legal history is the linchpin for analysis.

So I think it would be a good idea for the Trump lawyers to in to integrate into their argument. A heavy dose of legal history and emphasize, as I mentioned a few minutes ago, this idea that the founder familiarity with the impeachment process was embodied in the constitution, and if they

wanted to make it explicit, if they wanted to see the president subjected to criminal case viability, right, they would have said so and they chose not to say so.

So, you know, again, you asked me for the best argument. So, I offered one, I'm a litigator, but I'm not saying that that's in the end, a winning argument. The DC circuit opinion as you know, contains a good deal of legal history too and suggests in some very persuasive sections.

As I said, they could have done a little better nuanced job of some of this, if you're an expert in sort of presidential history. But they did a pretty good job, I would say, a range if I'm giving them a grade which I'm not qualified to do, but it gave a pretty good defense using legal history tools for why there's no bar to criminal prosecution.

But I think that if you're asking me what's the best approach for the Trump lawyers? I think that would be effective, especially with some of the Conservatives. Justices Alito and Thomas, I think would be very interested in arguments rooted in legal history.

BN: So turning a little bit from the historical to the practical. An issue that could easily occur and a result from this case is that there could end up being a persistent inquiry into actions taken by presidents while they're in office, trying to see if they're operating within their official role as president every waking moment, which could result in the office being under continual illegal assault by the, by the president's political opponents for every action taken in their presidency, whether it's with clearly within the bounds of their responsibilities or a little bit on the edge.

Do you think that this is a fair concern that the court should take into account during its deliberations? Or is it misplaced or overstated?

MR: I think there is a concern there, Bennett and I think the court will have to navigate that concern very carefully in its language we don't want in again, in a normal presidential administration to have routine litigation about whether the President's here or there or somewhere else is subject to criminal liability. That that would be very detrimental to the conduct of the President's article I Responsibilities.

So I think the court will have to carefully articulate what it means if it should hold, jumping ahead to the, you know, the, the surprise judgment of Rotenberg, J., in this case, right? If the C Court rules that the former president is subject to criminal liability, it's gonna have to carefully describe and delineate the boundaries for that kind of exposure.

One way of saying of, of protecting the president would be to say we're only deciding the issue of criminal liability of a former president. That would be one boundary. So the president at least doesn't have to worry about criminal exposure during his term of office, which is the OLC opinion, right? So they wouldn't be overruling... I shouldn't say overruling, it's just an opinion. They wouldn't be contradicting the OLC opinion.

But a more important way for the court to, to take account of this concern that you raised, which is a very important one would be to really narrow and circumscribe the, the ways in which a president could be legally, you know, accountable for crime.

And, and I haven't given a lot of thought of how I would craft that nobody's asked me to write a draft opinion. But, I think that's where the heavy lifting will be in, in the chambers of the justices and the clerks.

BN: So the central question in the DC case and to some extent, the ongoing litigation in Georgia is whether or not the courts will hold that the president's actions on January 6th and the lead up to January 6th fall within the realm of his executive duties as president,, which is kind of the limit that we're testing when we're looking at immunity. Do you think that they do? And if so or if not, why?

MR: Yeah. So now we're really getting to the, to the root bottom line questions here.

Yes, I have listened to the president's speech on January 6th that he gave in the ellipse behind the lighthouse and those clips that have been repeated time and time again. Which to some extent,, the, there some of those clips,, distort the whole context of what he said there.

But if you listen to the whole speech,, it seems to me as, as someone who's, you know, studied Article II Powers and, and taught this area for many, many years that the speech is an incitement to violence. And it seems to me that the speech is,, is designed to provoke a mass of people, to go to the Capitol and take steps, you know, he didn't specify precisely what kinds of steps but take steps to stop the steal.

And I, I believe that a majority of the Supreme Court would hold that, that kind of inflammatory speech is outside of the outer perimeter of the President's role under article two. I believe that a majority of the court will likely say that that kind of activity is not immunized by the separation of powers principles and by Article II. So that doesn't mean of course, that the court will say that he did it.

It will simply say that on those facts, the case can proceed to a, to a criminal trial. It's of course for a jury to decide not for the Supreme Court to decide, at least in the first instance, whether Trump committed the criminal acts alleged in the indictment.

But as to the legal question about whether a, a set of statements like those issued in the back of the White House on the Ellipse on January 6th are part of the outer perimeter of the President's duties under Article II. I think a majority of the court would say that that it's not, I don't think it's very difficult ultimately, at the end of the day, in my view to claim that inciting individuals who go to the Capitol and commit whatever undetermined acts, they were led to believe he wanted them to engage in, is part of the president's duties faithfully to execute the laws. It's a stretch too far in my opinion.

BN: And so as making legal predictions is famously a fantastic pastime that never renders you looking well uninformed in hindsight, how do you think the court will ultimately rule in this case? And what effect do you think it's going to have on presidential conduct going forward?

I'm reminded that when you asked that question of a, a very famous lawyer who will remain unnamed here, but his name appears in stone, literally carved in stone in Washington DC. When I was a law clerk, he was a very senior Supreme court litigator and he came to entertain the law

clerks and explained that he had just argued a case in the Supreme Court and it could go 5-4 this way, it could go 5-4 that way.

It's a very difficult case. It's really uncertain. And he went through, you know, as good Supreme Court litigators, do you know all nine justices and how they thought about the cases and so on and so forth. And then several months later, of course, after we had finished our summer clerking, the case comes down 9-0. And this is a person who had lived and breathed that case for y for, for months and years and so on. So you're absolutely right.

This is a... it's a great pastime to predict the Supreme court cases and, and most of the time, the people who do that kind of sport are humiliated. I nevertheless, and with that, with that long wind up, I'll give you the pitch.

I think that the court will affirm the DC Circuit judgment,, perhaps using other reasoning but will affirm the DC Circuit's judgment, that the doctrine of separation of powers does not bar federal criminal prosecution of a former president, and and I think that will stabilize the law.

I think it will not result in a serious impairment of presidential functions as long as of course the court, those limitations and, and and, and helps the people who have to interpret the president's powers, the people in the justice department, the people in the White House and so on going forward, gives them the guardrails and parameters that, that enable the presidency to function.

I don't credit the fear that has been written in the briefs by president, former president Trump's attorneys. That decision of the DC Circuit alters the presidency forever. I don't find that to be terribly persuasive as someone who has studied this area for a very long time.

BN: So, and kind of wrapping up here having a president or a former president under continuous kind of criminal inquiry is something unprecedented in American politics. And so, is there anything ongoing in these numerous series of litigations that especially interests or concerns you outside of what we've previously discussed regarding immunity?

MR: Yes, I'll, I'll note one thing,, Bennett, that is troubling and outside of the scope of what we just talked about and that is the rhetoric and intention of, of former President Trump,, to engage in a very aggressive assault on our federal government on many levels. President, former president Trump has insulted federal judges using ethnic slurs and false allegations about their heritage.

His lawyers have specifically named jurists on the Supreme Court who they think owe President Trump, Former President Trump, a pass. They have attacked executive officials including some officials that have been appointed by former President Trump in very aggressive, highly personal ways and have explicitly engaged in criticisms of basic fundamental basic and fundamental governmental norms and constitutional norms and have created substantial public support by the way for these condemnations and criticism of the, of the ways in which our federal government operates. And of course, as we know, Trump has never acknowledged that President Biden won the election by several million votes, and that the Congress of the United States properly selected him under the terms of the constitution and, and federal law to be the next president.

So he's never conceded that.

So the failure to, to acknowledge the normal functionings of our government in all three branches and the aggressive attacks on the functioning of our federal system by the former president, I think needs to be dealt with.

I won't say how but it needs to be dealt with in a way that hopefully restores the confidence of, of, of the vast majority of the American people in the way in which our democracy functions. And I think that the question of presidential immunity from criminal prosecution is a piece right of this larger concern.

BN: Well, its something that we're definitely going to have to keep our eye on. Thank you so much, Professor Rotenberg for coming on with us today.

MR: Thank you, Bennett. Thank you for this opportunity.

BN: All right, and recommended reading regarding this topic is going to be in the episode description.

At the end of this episode, it is with some solemnity that I announced that this will be the last episode I record during my tenure as ALR's Senior Technology Editor.

It's been a great capstone to my law school career and I'm incredibly thankful for the opportunity to have spoken to so many great guests. Firstly, I'd like to thank my predecessors, Sarah Knarzer, Steven Valentino and Alex Naum for beginning this ever-growing project and providing us with a great foundation to keep building on.

I'd also like to thank last year's editorial board and especially former EIC Jacob Wohl for entrusting me with this position, and I hope that I've done you proud. I'd also like to thank ALR's current Editor-in-Chief Madison Gestheir for her stalwart friendship and ever-present support over the course of this year, it is appreciated more than you can know. And most importantly, my silent partner on this podcast, Anthony Aviza, without whose help, this would have been impossible.

Next year is going to be a very big one for administrative law and to navigate these tumultuous times, I leave you in the very capable hands of Sophia Navarro-Quinones, our incumbent Senior Technology Editor, to whom I wish the best of luck.

And to you dear listener, I wish you a fond farewell.

This is Bennett Nuss, signing off, and we'll see you next time.