



Testimony of Danielle Brian, Executive Director and President
Project On Government Oversight
for the Senate Committee on the Judiciary
on “‘When the President Does It, that Means It’s Not Illegal’:
The Supreme Court’s Unprecedented Immunity Decision”

September 24, 2024

Dear Chairman Durbin, Ranking Member Graham, and members of the Committee:

The Project On Government Oversight (POGO) respectfully submits this letter for entry into the record for your September 24, 2024, hearing on the ramifications of the Supreme Court’s ruling in *Trump v. United States*.

POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

The Supreme Court’s decision to grant a former president expansive immunity represents an utter failure to safeguard against the worst kinds of abuses of executive power. It is therefore incumbent upon Congress to advance reforms that will bring balance to our constitutional order, both by addressing the substance of the immunity ruling and the structure of the court itself.

The Supreme Court has paved the way for an authoritarian president to wield the incredible power of the federal government against citizens and against the institutions of democracy themselves, as long they have an “official” pretext to do so. By ruling that presidents cannot face criminal charges for actions within the exclusive power of the presidency and that they enjoy “presumptive” immunity for all “official” conduct in office, the court has created an artificial distinction that will embolden future presidents to use the power of their office to commit crimes that would land the rest of us in prison. This is a perversion of the maxim that in the United States, nobody is above the law.

The court’s choice to distinguish between “official” and “unofficial” conduct does not count for much, given the enormous power presidents wield. Indeed, the court has for decades worked to expand the scope of presidential power, prioritizing deference to the executive branch regardless of the damage to our system of checks and balances.¹ The breathtaking power of modern

¹ See, e.g., Kira Wakeam, Christopher Intagliata, and Ari Shapiro, “Immunity ruling continues a trend of expanding presidential power, scholar says.” NPR, July 2, 2024, <https://www.npr.org/2024/07/02/nx-s1-5026545/new-presidential-immunity-ruling-supreme-court-constitutional-scholar>.

presidents makes it *more* important to hold them accountable for criminal conduct carried out while in office, not less.

The potential — even likelihood — of shocking abuses of presidential power in the wake of this decision is rightfully the subject of the committee’s attention in this hearing. However, it is also essential to recognize that the ruling which prompted this hearing underscores the importance of reforms to the Supreme Court itself.

Neither Justice Clarence Thomas nor Justice Samuel Alito should have heard this case in light of serious concerns about their impartiality.² Their unethical participation in this decision is a stain that cannot be removed, and it underscores the need for meaningful recusal processes at the court.

More broadly, just as no president should enjoy the kind of impunity that *Trump v. U.S.* grants, no group of nine jurists should wield the amount of power, for the length of time, that Supreme Court justices currently do.

Myriad reforms are needed, both to reverse this dangerous decision and to prevent such miscarriages of justice in the future. In addition to ensuring that no president is above the law, we urge the committee and Congress to respond to this crisis by reevaluating how justices are selected, how power is distributed during their tenure, and how long they serve, and by ensuring that justices adhere to the highest ethical standards.

This moment calls for a considered response by the first branch to shore up our constitutional system of checks and balances. We call on Congress to consider multifaceted and holistic reform, including

- carefully considering the options for undoing the effects of the immunity ruling, including constitutional and legislative responses, and enacting the strongest reform possible;
- enacting meaningful ethics reform for the Supreme Court, including enforceable recusal standards that will prevent justices from participating in cases in which they have conflicts of interest;
- providing meaningful oversight of the judiciary through investigations of unethical misconduct;
- imposing structural reforms to ensure that the court does not vest so much power in so few people for so long, and to better equip all three branches to engage in constitutional dialogue. These may include term limits, mechanisms to randomize which justices hear any given case, and streamlined processes for legislation that responds to statutory decisions by the court; and

² Gloria Oladipo, “Clarence Thomas pressured to recuse himself from Trump immunity case,” *Guardian*, December 13, 2023, <https://www.theguardian.com/us-news/2023/dec/13/clarence-thomas-trump-immunity-case-conflict-of-interest>; John Fritze, “Alito tells lawmakers he will not recuse from Supreme Court cases despite flag controversy,” CNN, May 29, 2024, <https://www.cnn.com/2024/05/29/politics/alito-flag-controversy-response-supreme-court/index.html>.

- For senators who recommend potential nominees for the Supreme Court, relying on merit-based selection processes to ensure that a justice possesses the necessary qualifications. POGO’s Task Force on Federal Judicial Selection identify these as “legal expertise, significant experience as lawyers, an even-keeled approach indicative of judicial temperament, a commitment to public service, and demonstrable adherence to the bar’s ethical standards.”³

The immunity ruling is a failure of constitutional governance. We urge the committee, and all of Congress, to right this wrong both by restoring accountability for the presidency and by building a Supreme Court more worthy of the public’s trust.

We at POGO appreciate the opportunity to submit this statement, and are ready to assist the committee however we can.

Sincerely,



Danielle Brian
Executive Director and President

³ Task Force on Federal Judicial Selection, Project On Government Oversight, *Above the Fray: Changing the Stakes of Supreme Court Selection and Enhancing Legitimacy*, (July 8, 2021), 8, [https://s3.amazonaws.com/docs.pogo.org/report/2021/Above the Fray Report 2021-07-08.pdf](https://s3.amazonaws.com/docs.pogo.org/report/2021/Above%20the%20Fray%20Report%202021-07-08.pdf).