# Presidential Immunity From the Founding to Today

**Thursday, July 11, 2024**

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**[00:00:00.5] Jeffrey Rosen:** On July 1st, the Supreme Court handed down a 6-3 ruling in the landmark case, Trump v. United States, finding that the president is entitled to presumptive immunity from prosecution for all official acts.

**[00:00:16.6] Jeffrey Rosen:** Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a non-partisan non-profit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode, we delve into the Supreme Court's immunity decision and explore the constitutional history of presidential power with two of America's leading experts on executive power and constitutional history. Michael McConnell is the Richard and Frances Mallory Professor and Director of the Constitutional Law Center at Stanford Law School and a Senior Fellow at the Hoover Institution. His most recent book is *The President Who Would Not Be King, Executive Power Under the Constitution*. Michael, it is wonderful to welcome you back to We the People.

**[00:01:05.8] Michael McConnell:** Thank you, Jeff.

**[00:01:06.4] Jeffrey Rosen:** And Sai Prakash is James Monroe Distinguished Professor of Law at the University of Virginia School of Law. His most recent book is *The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers*. He's also the author of *Imperial from the Beginning: The Constitution of the Original Executive*. Sai, it's wonderful to welcome you to We the People.

**[00:01:27.4] Sai Prakash:** Great to be with you, Jeff.

**[00:01:28.2] Jeffrey Rosen:** Dear We the People friends, as you can tell from the titles of Professors McConnell and Prakash's books, they are ideally well-suited to answer the question that we're going to explore today. And, Michael, let me begin by asking you. Is the Trump immunity decision consistent with the original understanding of the Constitution or not?

**[00:01:48.8] Michael McConnell:** Well, I think it's consistent, but it isn't based upon the original understanding. There's nothing in the original understanding that speaks to the question one way or the other. The history of constitutional immunities for various officers has taken place over the last several hundred years and is not really rooted in either the text or the original history.

**[00:02:11.8] Jeffrey Rosen:** Thank you for that. Sai Prakash, same question to you. Is the decision consistent with the original understanding or not?

**[00:02:18.0] Sai Prakash:** I think it's mostly inconsistent. I think there are early debates, Jeff, about presidential immunity, both with respect to executive privilege but also with respect to immunity from judicial process. And there are people in Congress who say the president can't be served judicial process, and no court can call the president before the court. But I think that's a minority view. I think more people had the view that the president had no privileges. And of course, the Constitution doesn't lay any out for the president, even though it does lay out some for Congress. And of course, this decision actually creates a great immunity for the president, at least in the sense that it wasn't obvious that it existed beforehand.

**[00:03:02.6] Jeffrey Rosen:** Many thanks for that. Well, let's dig into this crucially important question for another beat, if we may. Michael McConnell, the founders said different things, both about executive privilege and about immunity from judicial process. The Trump immunity decision itself quotes Alexander Hamilton and disagrees about whether or not he thought that people were amenable to criminal prosecution, only after impeachment or in general. Can you walk us through the positions of the various founders on the question of executive immunity and immunity from judicial process?

**[00:03:38.6] Michael McConnell:** Well, I don't think anyone thought that former presidents are immune from all criminal prosecution. And of course, the Supreme Court didn't hold that. What the Supreme Court held was that former presidents are immune from prosecution for certain of their official acts. And even then, the court took a middle-of-the-road position. It's actually quite interesting how the reactions to this decision went off in two extremes. Mr. Trump wanted to immediately announce what a huge vindication it was, and he had won. But that is completely false. Most of what he's being charged with in the various prosecutions are private acts, so he's greatly exaggerating what the Supreme Court said. But then on the left, you might expect people to correct him and say, "Oh, no, Mr. Trump, the Supreme Court did no such thing." But instead, they pile on because they want to make the Supreme Court look as unreasonable as they possibly can. That seems to be the political wins on the left side of the spectrum. But in fact, what the court said was that private acts can be prosecuted, and indeed even official acts, most of them, not the ones that are in the core exclusive power of the president.

**[00:05:00.3] Michael McConnell:** But that's a very small number of things. That's a very small category. But for most official acts, the president only has provisional immunity. So, what that really means is that future courts will have to decide immunity in any particular case involving official conduct. My guess is there won't be very many such cases. They haven't come up much in the past. And so, this decision really is not as momentous as I think most people think it was.

**[00:05:35.4] Jeffrey Rosen:** Sai Prakash, I scoured your book Imperial From the Beginning, and in Chapter 9, you identify three positions on the question of whether or not presidents were beyond judicial reach. You say Vice President John Adams and Ellsworth thought that presidents were beyond judicial reach, others like Hamilton seem to leave the question open, and a third group read the Constitution as conveying no immunity. Help us understand those various positions and what the significance of that debate is.

**[00:06:05.9] Sai Prakash:** Well, most of what's going on is a discussion of incumbent presidents and whether they are subject to judicial process. I agree with Michael that there's no early discussion of whether former presidents are immune from prosecution for their official acts. There's just no discussion of that. What you're citing is whether the presidents are subject to judicial process at all while they are president, and not whether they're prosecutable after the fact. And so, I don't think there's any discussion of that. And, of course, if there was such a discussion, the court would have cited it. Instead, the court is reaching its result on the basis of some extrapolations from some cases in the 1970s and '80s and '90s having to do with immunities, all of which are granted on a public policy conception of the office, where they say the president's not able to function if he's subject to these sorts of lawsuits. And we ought to recognise some sort of immunity to allow the president to function without regard to the possibility of a private lawsuit. And then in this case, they're extending it to a public prosecution, in particular a criminal prosecution brought by, in this case, the federal government, but presumably also by state governments.

**[00:07:18.7] Jeffrey Rosen:** Michael, do you agree with Sai that this is mostly extrapolating from cases from the '70s involving public policy, Nixon against Fitzgerald, and the fear of the president being chilled? And the title of your book is, The President Who Would Not Be King. The question of not creating an unaccountable monarch was the central question in the debates over the presidency, as you discuss. Is there anything more in pre-1970s constitutional history that would justify the criminal immunity that the court found in Trump versus US?

**[00:07:53.0] Michael McConnell:** Well, the reason the framers repeatedly said that the president was not king was because of impeachment. The king was immune from impeachment. He could not be impeached, and the president can be impeached. And that was, to them, the major distinction. Now, whether a sitting president is subject to process has been a dispute. It was a dispute back then, and it remains a dispute. Well, actually, it doesn't today because the Department of Justice under both Republican and Democratic leadership has taken the position that while a person is president, that the criminal prosecution can't be brought. It has to wait until he leaves office. And that's even for private acts. So the key question is public acts. And yes, that's primarily based. The leading precedent here is Nixon against Fitzgerald arising from the Nixon era, obviously in 1982, a decision having to do with civil liability as private people suing the president for official acts, and the court held that the president is immune from that. Interestingly, neither side in the recent litigation disagreed. They both embraced Nixon against Fitzgerald. So, that was a precedent from which both sides argued.

**[00:09:29.3] Michael McConnell:** And the real question for the Supreme Court now was whether criminal prosecution is different from civil liability. Some of the dissenters took the position that civil liability is in some sense worse for the president than criminal, largely because there are potentially millions of civil litigants, whereas the criminal prosecutions can only be brought by professional prosecutors, to which the majority responded, and I think quite persuasively, the threat of criminal liability is far worse for the president, both because the consequences of criminal prosecution are so large. Think of Mr. Trump sitting there in the courtroom every day in the New York trial. So the consequences are actually far worse. But also, prosecutions in the future are going to be brought, very likely, by the political opposition. Now,

once upon a time, when people were a little bit more restrained on both sides, that may not have been a big thing. But in the hyper partisan times that we are now in, it is not unlikely that each president will be subject to prosecution from their predecessors. And the big winner from a recognition of immunity was actually Joe Biden, because if Donald Trump is elected president, I don't expect him to exercise self restraint.

**[00:11:11.4] Michael McConnell:** And Joe Biden ought to be sitting there thinking, "Oh, this is very good, because I was worried that I'd spend the rest of my days fighting criminal prosecution." And it seems to me that the court rescued him from that. And in the future, it's just not a good idea to have succeeding administrations prosecuting their predecessors on matters that have to do with the official decisions of presidents.

**[00:11:45.2] Jeffrey Rosen:** Sai, you wrote a piece in 2021, 'Prosecuting and Punishing Our Presidents.' And in it, you argue that, for a host of reasons, the presidency lacks immunities from criminal process and prosecution, and you look at the founding era practice to support that conclusion. Tell us about your argument in that paper and whether or not you think that suggests that Trump was wrong.

**[00:12:11.3] Sai Prakash:** Yeah, that paper is primarily focused on incumbent presidents, and it's arguing against the DOJ position, the Office of Legal Counsel position, that sitting presidents are immune from criminal prosecution on the grounds that it would so distract them from carrying out their duties that it would be a violation of the separation of powers. And the piece argues that impeachment is not a sufficient remedy for presidential wrongdoing. So I give the hypothetical, what if a president rounds up all the representatives and/or senators or even a supermajority of the senators, there's no quorum, and then you can't have an impeachment trial? And so impeachment can't be the sole means of incapacitating a president. I also argue that there were state constitutions that granted express immunity at the time of the founding. Madison did point out at the convention that there wasn't any express immunity for the president and that there were many people who said not a single privilege or immunity is attached to the President, including James Wilson.

**[00:13:13.7] Sai Prakash:** And so I argued that there's no reason to infer this sort of immunity from the structure of the Constitution. And I further suggested that if the president is incapacitated either by indictment or prosecution or punishment, there's a remedy in the Constitution, and it's called the Vice President. And if there is this easy remedy, there's no reason to infer a structural immunity from criminal prosecution while president. I obviously thought at the time that there was no bar to prosecution afterwards. And I still don't think that. Now, the court's decision, I think I agree with Michael, it's a little more nuanced than people are saying. And in fact, everybody agrees that the president has some immunity from prosecution in the majority and in the dissent, and including the government. But I would add that the government is constrained. The Special Counsel has to follow DOJ positions.

**[00:14:12.9] Sai Prakash:** And so if the DOJ believes that Nixon versus Fitzgerald's right, and I think the DOJ does believe that, the Special Counsel can't argue against it. So the Special Counsel, whatever the Special Counsel actually thinks, he's got his hand tied behind his back because he has to adopt a position that the US government has already taken with respect to

these immunities. But I will also say that dissent doesn't deny that the president has immunities for some official acts in a way that I think was actually wrong. I think it's one thing to say that the Congress can't make it a crime to pardon someone.

**[00:14:49.2] Sai Prakash:** I think that makes sense. I think Congress probably could enact the following statute: "It is a crime to pardon someone for corrupt reasons," and that's not the same statute as the first statute. And I think everyone who was a litigant in the case kind of conceded the first point without thinking about the second point. And I would argue that a statute that makes it a crime to issue a pardon for corrupt reasons is permissible notwithstanding the pardon power.

**[00:15:17.5] Jeffrey Rosen:** Michael, you, I think, have some questions about the evidentiary ruling of the majority. Tell us what your questions are.

**[00:15:27.7] Michael McConnell:** Yes, although I thought the majority opinion was largely correct, there was one aspect of it that concerns me and I think was probably incorrect, and that is the court said that not only is the president immune from prosecution for certain official acts, but those acts cannot be introduced into evidence in another prosecution for private acts. And that both strikes me as wrong. I could explain why. I think the bribery example is the clearest, where you need to show why the president received the money that he did, and that's gonna be because of an official act. So I think that's a very improbable, implausible conclusion. But most of all, I don't understand why the Supreme Court was even opining on this. It wasn't part of the case, and it is usual practice, in fact I would have said almost invariant practice for evidentiary rulings. You don't decide these things in the abstract. You have an actual evidentiary ruling which then gets appealed. There was no actual evidentiary ruling, and I think the court had no business talking about it. Note that it is this aspect of the opinion that is now causing the New York prosecution, the business records falsification prosecution in Manhattan to be postponed, the sentencing to be postponed.

**[00:17:08.5] Michael McConnell:** There's no doubt that what he was accused of in that case is private, but for reasons that were, I think, quite mysterious, the judge allowed the prosecution to introduce prejudicial evidence having to do with unseemly things that Mr. Trump did in his official capacity. And that is wrong, according to the Supreme Court's ruling.

**[00:17:39.2] Jeffrey Rosen:** Maybe another question on evidence. The Nixon tapes case involved recordings of President Nixon ordering break-ins. Under the new ruling, could those recordings be introduced to prove evidence of criminality or not?

**[00:17:54.9] Michael McConnell:** I would just say, I think Watergate was a private act. It was an order of burglary. That is not an official function of the president, and the tapes are not evidence of an official act, they're evidence of a private act. And I don't think this opinion affects that at all.

**[00:18:15.8] Jeffrey Rosen:** Sai, do you agree with the reasoning of the dissent or Justice Barrett? In your view, how should an originalist decide the Trump immunity case?

**[00:18:26.0] Sai Prakash:** I think I would have approached it the way that maybe Justice Barrett thought about it, but reached a different result. I do think the first question is, do these statutes apply to official acts? And I would not automatically read them as applying to official acts of government officials or to, in particular, presidential acts. There are many cases where the court has said, we're not going to construe a general statute to apply to the president, at least three prominent cases where the court has said that, and they don't engage in that kind of analysis at all. And I think it's worth thinking about whether these statutes should apply to the president's constitutional acts. And then you're essentially deciding a statutory question rather than a constitutional one. And then I think if you get to the constitutional question, I would have said, does the president have the power to use constitutional powers for corrupt reasons? And I think there's a good argument that maybe the powers that are given to the president cannot be exercised in that way. And when the president does it, it's not an official act at all.

**[00:19:30.0] Sai Prakash:** Alternatively, you might say, look, even if it can be construed as a presidential act or a constitutional act, Congress can come in and Congress has authority to pass necessary and proper laws. And why can't it, again, make it a crime for a president to use his constitutional or statutory powers for corrupt reasons? And so my friend John Harrison, my colleague here asked the question, what if the president says to the troops, "Stand down, don't fight the enemy," and he's doing so for treasonous reasons. He's giving aid and comfort to the enemy. I don't know why that couldn't be prosecutable. I don't know why the Constitution requires that that act be non-prosecutable because it involves an official act. Now, the court doesn't say that the commander-in-chief power is a core power. It kind of leaves open that question. But it does say it's clearly an official power, and it does leave open the possibility that it might be absolutely immune. I just don't see why that's necessary.

**[00:20:28.7] Sai Prakash:** I would say, of course, the president has various powers, pardon power, commander-in-chief power, but I don't think any of them go so far as to say that he can exercise any of them for corrupt or wrongful reasons. And where the allegation is that there are corrupt and wrongful reasons and where we believe the statute means to reach presidential official conduct, then I think the Congress has authority under the necessary and proper clause to reach that conduct. And none of the justices quite say that, because the dissent itself concedes that maybe something like the pardon power or whatever can be made officially immune. And I think actually, in some sense, that concession goes perhaps a bit too far.

**[00:21:09.2] Jeffrey Rosen:** Michael, Justice Barrett suggests a narrower, more textually-based holding would have asked two questions. First, does the statute apply to the president? And second, does it unduly intrude on executive branch functions? She suggests the broader ruling is based on pragmatic considerations that are not well-rooted in text and original understanding. What's your defense of the broader ruling?

**[00:21:34.4] Michael McConnell:** I think the pragmatic point here is that, in order to answer the kinds of questions that she is posing, you would have to already have the proceeding underway. It's a criminal proceeding, right? And so, there would have to have been an arraignment. You would have to have the trial begin. There would then be arguments over whether particular acts are criminal or not and what the president's motives were, and so forth. You're already three quarters of the way there in terms of the damage which is done. Most immunities actually take

place like this; they take place at the very beginning, and they spare the person who enjoys the immunity, not just from conviction, but also from having to go through the process of trial. That's true of double jeopardy, that's true of the speech and debate clause immunity for Congress, and it's true in a number of civil contexts, for example, under the religion clauses where churches cannot be hurled into court for their ecclesiastical decisions. That's usually the way immunity works.

**[00:22:58.0] Michael McConnell:** Jeff, could I comment on the idea that it's okay to prosecute for official acts done for corrupt reasons? I strongly disagree with Sai that there's no problem with this. Corrupt reasons is an extremely broad category in the law, and it really comes down to whether the president acted sincerely for the public good or in his own interest. But in the real world, presidents often act out of political reasons. They do things, yes, because they think they'll promote the public good, but also because they think it's going to advance their chances for re-election or help their party or do any number of other things that can be easily described as corrupt. And so if the president says to the troops, "Stand down," in every single case, there are going to be good foreign policy reasons for ordering them to stand down. And then there's going to be some evidence that the president also had corrupt motives for it.

**[00:24:03.3] Michael McConnell:** And if it goes to the jury, essentially what you're being asked, the jury is going to decide whether the president was right, whether it was in the public interest to stand down or not. The decision as to whether to stand down is not entrusted to juries. It's entrusted to the president. And if we create a process in which the president's decisions on matters of that sort are subject to re-examination by juries, we have created an entirely different constitutional structure. Then the problem here is not just that the president is distracted, it's that the powers of his office have been taken away from him and given to juries. And that's just not our system.

**[00:24:49.5] Sai Prakash:** Can I respond to that just real quick, Jeff?

**[00:24:52.0] Jeffrey Rosen:** Please do.

**[00:24:53.8] Sai Prakash:** Michael's clearly right that if you send this to juries and you have my view, then you have this problem of presidents worrying about being prosecuted. But I don't think it's ever been said that a president can take any act without regard to the treason statute, because what? It's an official act. That seems to be Michael's position. Michael's position, I think, and the court's position is ultimately a public policy position. It seems to be grounded on the sense that if we do this, all hell will break loose. I share Michael's concern and the court's, I think, all but clear concern that all hell already has broken loose in the sense that some of these prosecutions against Trump reflect partisan considerations and not even-handed application of the law. I think I actually share that view. But if the question is, does the Constitution say that you can take an official act for corrupt reasons and not be second guessed after the fact? I don't think it says that. And I think it's not that it couldn't say that. It's not that reasonable people couldn't want that in the Constitution. I just don't think it's there. And I think Michael's answer suggests that, yeah, even if there are widespread concerns that the president has betrayed his country, you don't get to prosecute him because the president can say, "I took an official act," and that can't form the basis of the prosecution.

**[00:26:14.2] Sai Prakash:** I wouldn't have read the Constitution that way before this case. I share Michael's concerns or certainly the court's implicit concerns that the prosecutorial power is being abused in some ways against Trump and that it will be abused against Biden going forward. I think that's all true. I think Michael's exactly right that we do run this risk. That doesn't necessarily answer the question of whether the Constitution requires any of that.

**[00:26:40.6] Jeffrey Rosen:** Michael, how much does the majority opinion rest on the belief that all hell has broken loose and that the prosecutions against President Trump are political and have to be stopped, and future presidents have to be protected against political prosecutions? It's a particularly dark view of these prosecutions. Do you have to embrace it to agree with the majority?

**[00:27:01.3] Michael McConnell:** I don't think you do. The end of the opinion really does look to the future and to the importance of protecting the presidency as an office into the future. And the dissent dwells a good bit on how terrible they think Mr. Trump is, but the majority opinion does not talk about the potentially abusive character of the prosecutions that have taken place. But I think it's highly likely that this was in the back of their minds. The government argued in this case that you can trust prosecutors not to abuse their office. It was one of the two reasons why the government gave for distinguishing Nixon against Fitzgerald. Well, I think it's pretty clear from recent events that that was a high-minded misconception that you simply cannot trust prosecutors. That certainly is true of state-level prosecutors who are elected, but I think it's now clear from some of the things that Jack Smith has done that you can't trust federal prosecutors either.

**[00:28:15.8] Jeffrey Rosen:** Thank you for that. And Sai, on the other side, the dissent, in particular Justice Jackson says the practical consequences of today's paradigm shift are a five-alarm fire that threatens to consume democratic self-governance and the normal operations of our government. And Justice Sotomayor is similarly stark in warning that the basic accountability of the president has been transformed. Do you agree or not?

**[00:28:42.2] Sai Prakash:** Well, I think thankfully most presidents haven't been going around doing illegal criminal acts in the past. And I would hope that going forward, that's not an everyday event for our presidents. And so if it isn't, then this opinion has less implications than she might suggest. I would further point out that the opinion isn't as broad as she suggests, going back to Michael's point earlier. She says the president as commander-in-chief can do any number of things and not be prosecuted. The court does not say that that's a core presidential act that's completely immune, that's "exclusive and preclusive." They don't say that. It is an official act, but they say that's just a presumptive immunity. It might be absolute, depending on the circumstances. But of course, everyone understands, everyone should understand that Congress has tremendous authority over the military.

**[00:29:36.1] Sai Prakash:** It's not an exclusive authority over the military. The president just doesn't have that, despite being commander-in-chief. And so I think some of our examples assume a conclusion to legal questions the court just hasn't decided. And they didn't do so purposely. They could have said that it covers all of Article 2. They didn't say that. Whether you

think it has dire consequences, I think, turns in part on your sense of the proclivity of future presidents to violate criminal statutes or take acts that allegedly violate criminal statutes, and Michael's sense and the court's sense that prosecutors are out of control.

**[00:30:15.9] Sai Prakash:** This isn't responding to anything you said, but counterfactually, imagine that the only prosecution brought against Trump was out of Florida for the official records. I don't know if the court will reach this result because I don't know if the court fears that presidents are going to be the targets of vindictive partisan prosecutions going forward. Because that prosecution, to me, looks very different from the New York prosecution and even the DC and the Georgia prosecutions.

**[00:30:46.6] Jeffrey Rosen:** Let's cast this in historical context, 'cause the two of you are uniquely well-suited to do that. Michael, you've argued in your book, The President Who Would Not Be King, and in your other writings, that the office has expanded over time and that Democratic and Republican administrations have consolidated power in the executive. Give us a broad overview of the expansion of executive authority. What are the landmarks, particularly in the 20th century, in the post-Watergate era? And to what degree is this decision part of that trend?

**[00:31:19.5] Michael McConnell:** I think it's an unmistakable trend. Things like presidents now take us into wars without authorization from Congress, prior to the Korean War, that really didn't happen. Presidents now announce whole regulatory programs with only the thinnest connection to any delegated power from Congress. This is an increasing problem, and it's in both parties. I don't actually think this decision has much to do with that. The reason this is not so dire and the reason I believe that the dissenters were quite off-base in predicting these terrible consequences is that the real restraints on the president have never been from the threat of prosecution. That has not even been on the table, for the most part.

**[00:32:23.5] Michael McConnell:** We've now had four presidents, former presidents, in one case a current president, involved with criminal prosecutions. Every one was for private acts. The extension to public acts has no historical basis to it. The restraint on the president comes from elsewhere. The most important and immediate restraint has to do with the fact that he has to act through other people, through his other officers. And they too have been appointed, usually with the advice and consent of the Senate, and they do not go along. American history has numerous examples of the officers appointed by presidents not going along with improper orders.

**[00:33:14.9] Michael McConnell:** And when you look at Trump's attempt to overturn the results of the 2020 election, why didn't he succeed? Well, his attorney general was against him and wouldn't go along with it. His White House counsel was against it. Every single lawyer in the Justice Department was, I believe, the one exception of someone from a different department that had nothing to do with it, lined up against him. When he threatened to fire the attorney general, virtually huge numbers of lawyers in the Justice Department were going to resign. Not a single Republican state legislature went along with the scheme. He was stymied. Not a single court went along with it. They filed, I think, 42 different lawsuits. They lost every single one. A

number of those were in front of judges who had been appointed by President Trump, and they didn't go along with it.

**[00:34:14.7] Michael McConnell:** This is the most important and immediate constraint on a president. Presidents do not get away with dastardly, terrible, dire things because the people around them are not going to go along with it. And if they did, then impeachment is an ever-present possibility, not for trivial stuff, but if the dire consequences that the dissenters are so concerned about actually happen, the consequences for the president would be immediate. Criminal prosecution is the least of it.

**[00:34:53.2] Jeffrey Rosen:** Sai, in your book, The Living Presidency: An Originalist Argument against Its Ever-Expanding Powers, you note a series of landmark expansions as the president has moved from constitutional defender to constitutional amender, from first general to declarer of wars, from chief diplomat to sole master of foreign affairs, and from dutiful servant of the laws to secondary lawmakers. Give us a sense of the landmarks, the most significant expansions in presidential power in the post-Watergate era? And to what degree have they contributed to this decision?

**[00:35:25.7] Sai Prakash:** Well, Michael already mentioned war power. I think Korea was a watershed and it's been replicated in smaller ways ever since. And presidents and their lawyers now insist that they have the power to start at least small wars. But they believe that the Korean War was constitutional, and that was a big war. So would it imply that they could do another Korea, which was, of course, a massive ground conflict involving hundreds of thousands of American troops and millions of enemy troops? That's a huge transformation of the Constitution, a fundamental change to it. Michael talked about misreading statutes. The first problem, I think, is that Congress is delegating vast amounts of legislative power to the executive. And then on top of that is the misreading of the statutes to grab further authority, and I think an utter inattention to the idea that the president should be a faithful executor of the laws, as opposed to what? As opposed to a policymaker in his or her own right.

**[00:36:26.3] Sai Prakash:** Presidents run on a policy platform, and then when they get into office, they go to Congress. But if Congress refuses, they do it by this sort of administrative law trick. Remember Obama saying, "I can't do anything with respect to the dreamers," and then doing something? And then Trump negotiates a billion dollars for his fence and then simultaneously, on the same day, transfers five billion dollars. He's both working the system the way it's supposed to work and then doing something, I think, that's improper.

**[00:36:56.1] Sai Prakash:** So those two changes are transformational, 'cause the president's now, again, a secondary lawmaker. Our conception of the presidency has changed. Presidents weren't running on a policy platform in the 18th and much of the 19th century. People think it's corrupt to make promises as president. And now, it would be odd for a president or a candidate to say, "I'm not going to tell you what I'll do when I'm president. You should pick me based on my resume." Well, that just has consequences for what we think the president's bailiwick is. The president's bailiwick seems to be to solve all our problems, either through legislation or through unilateral presidential action.

**[00:37:35.7] Sai Prakash:** And then I do think that the office now comes studded with a host of immunities with respect to papers and documents and suits of the sort that didn't exist in the past. And then there are extra constitutional things, like being party leader. Michael talked about impeachment. I think impeachment is a paper tiger. I don't really think that you will get it to constrain a president. I think if they had tried to impeach and convict Trump right after January 6th, they might have succeeded. But we saw what happened with the passage of time. All the anger directed at him for not doing something more soon on January 6th completely dissipated because Republicans understand that he's their party leader, and they're loathe to go against him because they're afraid of losing their jobs, just like Democrats today are loathe to point out that President Biden is perhaps too old to run again for president. It's now a device to censure a president. It's not a device to remove a president. I don't know what the president would have to do in order to be convicted, but it seems it would have to be utterly extraordinary.

**[00:38:45.3] Jeffrey Rosen:** Michael, both of you have mentioned the fact that Congress now delegates power to the presidency and the president ruling by executive orders as an expansion of executive authority. To what degree does the Loper Bright decision overturning Chevron contribute to the constraint or the empowering of the presidency? It empowered judges, certainly, but is it consistent with the ruling in Trump or not?

**[00:39:12.8] Michael McConnell:** So I think the Loper Bright decision is a small move away from executive unilateralism. One of the main ways in which presidents have expanded their power is through highly creative reinterpretation of statutes. And the Chevron Doctrine required courts to defer to those interpretations unless they were utterly unreasonable. At least if Loper Bright works out the way it's supposed to, we'll have a return to a system in which the most plausible interpretation of the congressional statute will apply. So I think that's a move in that direction. I think there have been several specific cases in which the court has cut back on adventurous executive unilateralism. The student loan case is an example of that. There have been some environmentally-related cases of that nature as well. So I think there's some hope that the court is in fact dialing back some of the more expansive extremes of executive unilateralism.

**[00:40:30.3] Jeffrey Rosen:** Sai, do you agree with that or not? And in your books, you recommend a series of possible reforms for constraining the executive. In light of original understanding, do you think the court is moving in that direction or in the opposite direction?

**[00:40:44.6] Sai Prakash:** I agree with Michael that Loper Bright was a welcome change. I think it will, on the margins, affect what executive branch officials, what information they convey to the president or other executive branch decision makers. I think the problem in the executive branch, I think, is partly a crisis of legality. I think there are certain people in the executive branch that don't care whether the measure is legal or not. They're trying to fix a problem or they're trying to play to a base, one or both. And losing is not a problem, losing just shows that you tried. And there's no shame in losing, and then there's no shame in trying again. And that incentive doesn't change with getting rid of Chevron. You'll continue to push the boundaries. You'll just lose, but at least you tried. And then you'll try again, right? Which is what we've seen with the Biden student loans, right? He lost and then he just tried again. And I don't know enough about the second challenge to know whether those were legal or not. But I think the point is that presidents are trying to fulfill their promises, trying to play to their bases, trying

to show that they're getting things done. That incentive is undiminished. Getting rid of Chevron just doesn't change that fundamental incentive that shows only signs of getting stronger, not weaker.

**[00:42:05.5] Jeffrey Rosen:** Michael, back to constitutional history, the majority disagrees about what Hamilton would have thought about immunity. And both sides quote Federalist 77, in which Hamilton says that the president will have an incapacity to serve in any other office after impeachment and will be subject to the forfeiture of life and estate by subsequent prosecutions in the common course of law. In that passage in Federalist 77, is he saying that the president has to be impeached first before he can be subject to prosecution in the common course of law? The majority and the dissent seem to disagree about that. And what would Hamilton have thought about the Trump v. US immunity decision?

**[00:42:50.3] Michael McConnell:** I don't think we know what Hamilton would have thought. I think we can guess that he would probably approve of it, but it's just purely historical speculation. It's not what he's talking about here. What he's talking about here is impeachment. And I think that our framers thought that impeachment was going to be a much more significant aspect of our constitutional system than it has turned out to be. And it's interesting, one of the things that Trump's lawyers argued in the immunity case was that he can't be prosecuted after the fact, unless he was impeached for it first and convicted for it first. I think that that is wrong. When you squint at what Hamilton said, it's not a completely preposterous way to read his words, even though it doesn't seem like a very sensible way to read the words of the constitution.

**[00:43:49.9] Jeffrey Rosen:** Sai, do you have a sense of what Hamilton would have thought of immunity? And you contrast Hamilton with Jefferson who, in some ways, seems to take an even broader view about the president's immunity from criminal prosecution. Is there a Hamilton-Jefferson divide about weak versus strong executive power, or is it more complicated? And what would both of them have thought about this decision?

**[00:44:12.1] Sai Prakash:** I think in the early years, there's a struggle between those who regarded the presidency as a regal institution and wanted to infer all kinds of additional immunities. And some of them have to do with the judicial process, both civil and criminal. You can't touch a hair of the president's head. And that's what John Adams says, and that's what others say in the Senate. And then there are other people who say, "There's no immunity for the president. There's just no immunity at all. And he can be proceeded against as an ordinary person." And that plays out across a number of dimensions, not just immunity, but things like, should process be issued in the president's name from judicial courts? And they decide not to put that in the statute, but the court actually orders courts to use the president's name as the judicial process goes out. So when you get a summons from a court, it's from the President of the United States, not from, at least in the early days, it's not from the court. I think it's fair to say that Jefferson's view of executive power expanded once he was President. He viewed himself as a Republican and Hamilton as a monarchist, and he viewed the debates in the Washington administration in that dimension, and so did Madison. But it's fair to say that their views changed a bit, I think at least a little bit, once President Jefferson became President Jefferson.

**[00:45:33.3] Jeffrey Rosen:** Michael, that charge of the Jeffersonians that the Hamiltonians were monarchists and were the leading of a party, the Federalist, that was a cabal to restore monarchy, has defined much of our politics and constitutional debate ever since. Can you say more about the differing views of the founders, the Hamiltonians and Jeffersonians, about the nature of the presidency? And does that difference still prevail in our debates or not?

**[00:46:00.5] Michael McConnell:** I don't know. I think the charge of monarchism was always highly political and not very accurate. Just to throw in in addition to the examples that Sai just gave, Madison's position is very interesting on this point because at one point at the constitutional convention, Charles Pinckney moved to empower each house of Congress to have the privilege, meaning what Parliament had, and could punish non-members. And that was voted down. But first, Madison said, "Oh, but wait a minute. If Congress is given the power to punish the President, we will have to create a privilege on the part of the President." And so, Madison is often quoted as saying, "Well, the President doesn't have any privilege," which is sort of true. But the reason he didn't have privilege is because Congress didn't have the power to go after him, to begin with. And Madison thought that if Congress did have that power, he needed to have a corresponding privilege.

**[00:47:08.4] Jeffrey Rosen:** Sai, you discuss Madison's views and also the competing views of Hamilton, Jefferson, Madison, and others on the role of federal courts. And, of course, the Federalists believe in the supremacy of the federal courts and the Jeffersonians think the President has the ability to ignore federal court decisions with which he disagrees. Help us understand the divisions there.

**[00:47:30.4] Sai Prakash:** Well, I don't know if the Jeffersonians quite believed what you said. My sense is they believe that the courts decide cases, and in the course of deciding cases, they say things about the law. And maybe those things about the law should guide what lower courts should do with respect to similar cases. But I think they had a departmentalist view that what the court said did not bind the President in future cases. And so, take a case like Marbury v. Madison, Jefferson's administration never really conceded any of the points that were in dispute in Marbury v. Madison after the fact. So the court talks about mandamusing an officer, and I think the attorney general writes an opinion saying that's not permissible without referencing Marbury v. Madison. Their view was that Marbury v. Madison was entirely dicta, and so not only could they ignore it even if it were an actual case properly issued, an opinion or judgment properly issued, but it was dicta, so it was wrong substantively and wrong as a matter of the exercise of judicial power. And, of course, Jefferson later on said that Marshall was wrong about when an appointment vests. He thinks it's like a deed, and it vests with delivery. At least, he wrote that in various letters.

**[00:48:54.8] Sai Prakash:** The President wasn't gonna bend the knee to the court. And, of course, that's partly a function of the court's standing at the time. People don't think of the court at the time the way we think of the court today, as this institution that finally resolves all disputes and to which we all bend the knee or acknowledge its supremacy in this regard.

**[00:49:18.1] Jeffrey Rosen:** It's time for closing arguments in this deep, illuminating, and meaningful discussion. First to you, Michael, is Trump v. US consistent with original understanding or not?

**[00:49:31.5] Michael McConnell:** I think Trump v. US is consistent with it, but it isn't actually based on it. It's actually based upon pragmatic considerations that have been recognised in previous Supreme Court decisions for quite some time. One thing we haven't mentioned is the fact that there are a number of other constitutional officers who have immunity from both civil and criminal prosecution, including the Supreme Court justices themselves. That is nowhere in the Constitution and nowhere mentioned by any of the framers, and yet it is pretty thoroughly recognised as well. There are a lot of people who would say that some Supreme Court decisions are corrupt and would like to bring prosecutions. In fact, an impeachment proceeding was just requested in the case of two of our justices. But if we're going to have a Supreme Court, you can't have other bodies deciding that they made their decisions incorrectly on the basis of motive. And the same thing goes for the President. For his official acts, we elect the President to decide these things, such as whether the troops should engage in a particular action. And to transfer authorities, second guessing that after the fact to somebody else, would diminish the powers of the office.

**[00:50:57.3] Jeffrey Rosen:** Sai Prakash, the last word is to you. Please, sum up for We the People listeners whether or not you think Trump v. US is consistent with the original understanding of the Constitution.

**[00:51:08.7] Sai Prakash:** I think the Constitution doesn't grant the President any immunity from criminal prosecution for acts arising out of his constitutional acts, much less his statutory acts. There are reasons why you might want to have such an immunity, and I think Congress perhaps could grant it, but I don't think the Constitution itself grants it. I can see why the court found such an immunity, having found immunities in the past that are adjacent. They just felt like they were slightly expanding it. But I think some of those cases, or those cases as well, are misbegotten. I would leave this to Congress and statutory immunities of various sorts. I don't think the Constitution gives the President a panoply of immunities from civil or criminal suits. And so, that's why I think the court got it wrong. Thankfully, I'm not sure that the consequences are as dire as some people are suggesting, because the court's opinion isn't perhaps as broad as the dissent suggests. So, even while I think the dissent is right, ultimately, I think they paint a darker picture than is necessary.

**[00:52:11.7] Jeffrey Rosen:** Thank you so much, Michael McConnell and Sai Prakash, for a deep, illuminating, and meaningful discussion of original understanding in presidential immunity. Michael, Sai, thank you so much for joining.

**[00:52:23.6] Sai Prakash:** Thanks again for having me, Jeff.

**[00:52:25.4] Michael McConnell:** Thank you, Jeff. Always good to be on National Constitution Center programs.

**[00:52:35.8] Jeffrey Rosen:** Today's episode was produced by Lana Ulrich, Samson Mostashari, and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Cooper Smith and Yara Daraiseh. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional illumination, historical elucidation, and general learning, because that's what we do on We the People. And I'm so grateful to all of you for joining. Sign up for the newsletter at constitutioncenter.org/connect. And always remember that the Constitution Center is a private nonprofit. We rely on the generosity, the passion, the engagement, the devotion and the excitement about lifelong learning that all of you share. Thank you so much for being part of our community of lifelong learners. Please support the mission by becoming a member at constitutioncenter.org/membership or give a donation of any amount to support our work, including the podcast, at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.