POLITICS

Something Has Gone Deeply Wrong at the Supreme Court

Jurists who preach fidelity to the Constitution are making decisions that flatly contradict our founding document's text and ideals.

By Akhil Reed Amar

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FORGET DONALD TRUMP. Forget Joe Biden. Think instead about the Constitution. What does this document, the supreme law of our land, actually say about lawsuits against ex-presidents?

Nothing remotely resembling what Chief Justice John Roberts and five associate justices declared in yesterday's disappointing *Trump v. United States* decision. The Court's curious and convoluted majority opinion turns the Constitution's text and structure inside out and upside down, saying things that are flatly contradicted by the document's unambiguous letter and obvious spirit.

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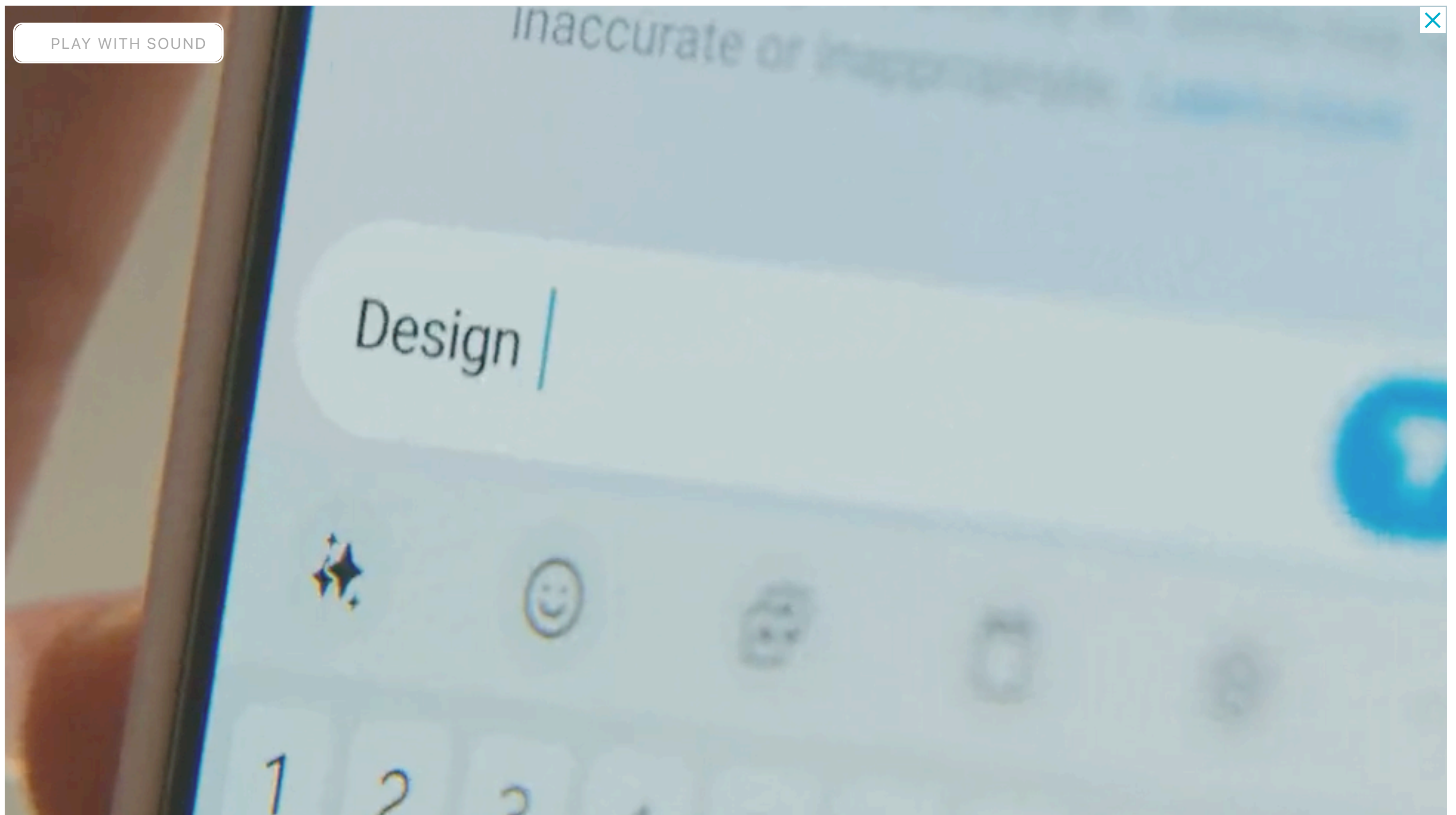

Imagine a simple hypothetical designed to highlight the key constitutional clauses that should have been the Court's starting point: In the year 2050, when Trump and Biden are presumably long gone, David Dealer commits serious drug crimes and then bribes President Jane Jones to pardon him.

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Is Jones acting as president, in her official capacity, when she pardons Dealer? Of course. She is pardoning qua president. No one else can issue such a pardon. The Constitution expressly vests this power in the president: "The President … shall have Power to grant Reprieves and Pardons for Offenses against the United States."

But the Constitution also contains express language that a president who takes a bribe can be impeached for bribery and then booted from office: “The President … shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors.” And once our hypothetical President Jones has been thus removed and is now ex-President Jones, the Constitution’s plain text says that she is subject to ordinary criminal prosecution, just like anyone else: “In cases of Impeachment … the Party convicted shall … be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”

Obviously, in Jones’s impeachment trial in the Senate, all sorts of evidence is admissible to prove not just *that* she issued the pardon but also *why* she did this—to prove that she had an unconstitutional motive, to prove that she pardoned Dealer because she was bribed to do so. Just as obviously, in the ensuing criminal case, all of this evidence surely must be allowed to come in.

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But the *Trump* majority opinion, written by Roberts, says otherwise, proclaim ing that "courts may not inquire into the President's motives." In a later footnote all about bribery, the Roberts opinion says that criminal-trial courts are not allowed to "admit testimony or private records of the President or his advisers probing the official act itself. Allowing that sort of evidence would invite the jury to inspect the President's motivations for his official actions and to second-guess their propriety."

But such an inspection is exactly what the Constitution itself plainly calls for. An impeachment court and, later, a criminal court would have to determine whether Jones pardoned Dealer because she thought he was innocent,

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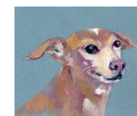

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or because she thought he had already suffered enough, or because he put money in her pocket for the very purpose of procuring the pardon. The smoking gun may well be in Jones's diary—her "private records"—or in a recorded Oval Office conversation with Jones's "advisers," as was the case in the Watergate scandal. Essentially, the Court in *Trump v. United States* is declaring the Constitution itself unconstitutional. Instead of properly starting with the Constitution's text and structure, the Court has ended up repealing them.

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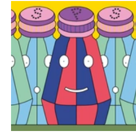

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In a quid-pro-quo bribery case—money for a pardon—Roberts apparently would allow evidence of the quid (the money transfer) and evidence of the quo (the fact of a later pardon) but not evidence of the pro: evidence that the pardon was given *because of* the money, that the pardon was *motivated by* the money. This is absurd.

In the oral argument this past April, one of the Court's best jurists posed the issue well: "Giving somebody money isn't bribery unless you get something in exchange, and if what you get in exchange is [an] official act … how does [the case] go forward?" The answer, of course, is by allowing evidence of all three legs of the bribery stool—the quid (the money), the quo (the official act), and the pro (the unconstitutional and vicious motive). Yet Roberts's majority opinion entirely misses the thrust of this oral-argument episode.

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This is astonishing, because the impressive jurist who shone in this oral exchange was none other than the chief justice himself. John Roberts, meet John Roberts.

And please meet the John Roberts who has long believed that the judiciary shouldn't be partisan. Over the course of his career, Roberts has repeatedly said that there are no Republican justices or Democratic justices, no Trump justices or Obama justices or Biden justices—there are just justices, period. Yet the Court in *Trump v. United States* split along sharply partisan lines—six Republican appointees, three of whom were named to the Court by Trump himself, versus three Democratic appointees. Roberts failed to pull these sides together.

This is precisely the opposite of what happened in the celebrated decision *United States v. Nixon*, also known as the Nixon-tapes case, in which the Court—including three justices appointed by Richard Nixon himself—issued a unanimous no-man-is-above-the-law ruling against the president. (A fourth Nixon appointee—William Rehnquist, for whom a young Roberts later clerked—recused himself.) The opinion also made clear that presidential conversations with top aides are indeed admissible when part of a criminal conspiracy.

Yesterday's liberal dissenters came much closer to the constitutional mark, but they, too, made mistakes. Their biggest blunder in *Trump* was relying on a 1982 case, *Nixon v. Fitzgerald*, that simply invented out of whole cloth broad immunity for ex-presidents in *civil* cases. If liberal precedents lacking strong roots in the Constitution, such as *Roe v. Wade*, are fair game for conservatives,

then mistaken conservative precedents ought to be fair game for liberals. *Fitzgerald* made stuff up, and the liberals should have said so.

No one is above the law—or, at least, no one should be. Not presidents, not ex-presidents, and not justices either. Because the Constitution itself is our highest law, jurists across the spectrum must prioritize that document's letter and spirit above all else. In *Trump v. United States*, the Court failed to do this and also failed to live up to America's highest ideals: nonpartisan justice and the rule of law.

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