

THE LOOMING CLASH BETWEEN THE RULE OF LAW AND THE EXIGENCIES OF THE PRESIDENTIAL CAMPAIGN TRAIL

In more normal circumstances, December 1 would have been a red-letter day for the rule of law and accountability. But we regrettably find ourselves in anything but normal circumstances when it comes to the 2024 election. And if ever there were a “developing story,” this is it.

On that Friday, US District Court Judge Tanya S. Chutkan [rejected](#) four-times indicted former president Donald Trump’s motion to dismiss his four-count January 6th indictment based on his claim of absolute immunity and on other constitutional grounds. Earlier that day, the US Court of Appeals for the DC Circuit had [ruled](#) that Trump does not have absolute immunity in a [civil suit](#) brought in March 2021 by US Capitol Police officers over injuries sustained during the January 6th insurrection at the Capitol. That civil suit has been [consolidated](#) with two other cases, [one](#) brought by Congressman Bennie Thompson under the Klu Klux Klan Act of 1871 (42 U.S.C. § 1985(1)) and [one](#) by Congressman Eric Swalwell (under 42 U.S.C. § 1986).

The immunity claim in the civil suit was viewed as the stronger claim. In short, Trump has no absolute immunity from criminal or civil charges arising from his efforts to remain in power after his 2020 loss at the polls. The cases likely head to the Supreme Court.

By way of reminder, Trump faces indictments in four criminal cases:

- The January 6th federal election interference [case](#) – 2 felony counts of obstructing an official proceeding (18 U.S.C. § 1512), one felony count of conspiracy to defraud the United States (18 U.S.C. § 371) and one felony count of conspiracy against rights (18 U.S.C. § 241)
- The Georgia State election interference [case](#) – 13 counts against Trump; altogether 19 defendants were named, and to date three (all legal counsel) have pleaded guilty
- The Mar-a-Lago classified documents [case](#) – 32 felony counts of violating the Espionage Act, six felony counts of obstruction-related crimes (18 U.S.C. §§ 1512 and 1519) and two felony counts of false statements (18 U.S.C. § 1001)
- The Manhattan DA hush money [case](#) – 34 felony counts of falsifying business records

Trump also faces a state civil lawsuit brought by NYAG Letitia James in 2022 arising out of fraud in property valuations to lower his tax exposure or improve the terms of loans he was seeking. In September, the judge in the case ruled against Trump and the other defendants, concluding many of the claims made were fraudulent. The ensuing (and ongoing) trial is to determine damages.

Trump faces a second defamation action brought by magazine columnist E. Jean Carroll arising out of statements Trump repeated after he lost the first defamation action last. In July, the DoJ [announced](#) it would not stand in the way of the second trial on the basis that Trump was acting within the scope of his office when he made the statements that form the basis of the defamation claim. There are also the three consolidated cases noted above.

In March 2022, Trump [sued](#) Hillary Clinton, the DNC and a host of others (31 altogether) alleging that he was the victim of a massive conspiracy to tie his campaign to Russia. He alleged the defendants had orchestrated a malicious conspiracy to disseminate false and

injurious information about his and his campaign to destroy his life and political career and rig the election against him. The case was [dismissed](#) in its entirety in September 2022, and Trump, his attorney Alina Habba and her firm [were ordered](#) in January 2023 to jointly pay nearly \$938,000 in sanctions to cover defendants' legal costs on the ground that the "lawsuit should never have been filed," was "completely frivolous" (both factually and legally), and was filed and prosecuted in "bad faith for an improper purpose." The judge called out Trump as "the mastermind of strategic abuse of the judicial process."

A comprehensive [calendar](#) of cases and pending motions and a broader [clearinghouse](#) of trial information is available on Just Security.

Immunity in the January 6th Criminal Case

Jennifer Rubin, writing in the Washington Post ("[Trump's biggest loss yet: No immunity](#)") characterized Judge Chutkan's immunity ruling as possibly the "most consequential legal defeat yet for Trump and quite possibly a decisive turning point in the 2024 presidential election." In addressing Trump's claim of "absolute immunity from criminal prosecution for actions performed within the 'outer perimeter' of his official responsibility," Judge Chutkan found:

"The Constitution's text, structure, and history do not support that contention. No court – or any other branch of government – has ever accepted it. And this court will not so hold. Whatever immunities a sitting President may enjoy, the United States has only one Chief Executive at a time, and that position does not confer a lifelong 'get-out-of-jail-free' pass. Former Presidents enjoy no special conditions on their federal criminal liability. Defendant may be subject to federal investigation, indictment, prosecution, conviction, and punishment for any criminal acts undertaken while in office."

She continued, "Defendant's four-year service as Commander in Chief did not bestow on him the divine right of kings to evade the criminal accountability that governs his fellow citizens."

Judge Chutkan also dispensed with Trump's constitutional claims, including the First Amendment, confirming, for example, that "speech in furtherance of criminal conduct does not receive *any* First Amendment protection" (emphasis in the original) and that, while Trump is free to challenge at trial allegations that he knew the election was stolen, "his claim that his belief was reasonable does not implicate the First Amendment." Trump, the court found "is not being prosecuted simply for making false statements but rather for knowingly making false statements in furtherance of a criminal conspiracy and obstructing the electoral process. Consequently, there is no danger of a slippery slope in which inadvertent false statements alone are alleged to be the basis for criminal prosecution." She similarly dispensed with Trump's claim that his prosecution violates double jeopardy principles and the Impeachment Judgment Clause, or due process.

Judge Chutkan noted that Trump has less of a claim in immunity in a criminal case than he would were he still a sitting president facing civil charges (based on the Supreme Court holding in [Nixon v. Fitzgerald](#), to the effect that a president "is entitled to absolute immunity from damages predicated on his official acts). In the present case, there is no concern that

prosecution would interfere with official duties.” This was a case of first impression, as former presidents have never before been charged with crimes.

Judge Chutkan dispensed with Trump’s argument, “against the weight of history,” that because no other former president had been criminally prosecuted, it would be unconstitutional to start now. She noted that while the prosecution is unprecedented, “so too are the allegations” that Trump committed crimes with which he is charged. The Supreme Court, she wrote, “has never immunized Presidents – much less former Presidents – from judicial process merely because it was the first time that process had been necessary.” “In any event, Defendant’s reasoning turns the relevant historical analysis on its head.”

The DC Circuit appellate ruling in the US Capitol police/Democratic lawmakers civil case (*see below*) suggests that when Judge Chutkan’s decision on immunity in Jack Smith’s criminal case is heard (Trump has filed a notice of appeal, as well as a [motion](#) to stay proceedings pending resolution of all the “issues” raised in his immunity motion), the appellate court is likely to affirm her ruling.

Today, the Special Counsel filed its [opposition](#) to Trump’s motion to stay proceedings pending appeal.

In a separate filing submitted to the court yesterday (with the innocuous title “[Government’s Opposition to Defendant’s Discovery Motions](#)”) opposing an effort by Trump to access classified information that he claims justified his fears that the 2020 election was tainted because foreign governments may have changed votes, the Special Counsel addresses both “foreign interference” and “foreign influence” (which the filing states Trump has improperly conflated), and sets out the unanimous conclusion of senior intelligence officials from the Trump administration that there was no evidence of foreign penetration of voting systems. Among other conclusions, the Special Counsel notes “the defendant’s discovery motions contain inaccurate information about foreign interference in the 2020 election, discuss irrelevant foreign influence in an attempt to blame others for his own conduct, and fails (*sic*) entirely to establish the materiality of any information he demands beyond that which he already has been provided.” The filing evidences a sprawling investigation that extends far into the senior levels of the former Trump administration and is replete with stinging rebukes, including the following:

“[T]he defendant’s effort to blame law enforcement for the riot of which they were victims fares no better than the attempt of a bank robber to blame security guards who failed to stop his crime. Ultimately, law enforcement’s inability to prevent the Capitol siege has no bearing on the allegations, pled in the indictment, that the defendant fuelled his supporters with knowingly false election-fraud claims, directed an angry crowd to the Capitol, did not try to stop or quell the crowd when it violently breached the Capitol building and halted the Congressional certification proceeding, and sought to leverage the resulting delay in proceedings.”

If Trump loses before a three-judge panel, he could seek to have his appeal heard by the full appellate court. These decisions will likely end up before the Supreme Court – the existential question is when, and how judges (assuming the immunity rulings are affirmed) will then address calendar issues as we (and the legal proceedings) get closer to election day.

The Special Counsel's office in early November [called out](#) Trump's tactic of trying to "delay and disrupt" the trial schedule "for maximum disruptive effect," the latest effort being the [motion to stay proceedings](#) so as to push out the currently scheduled March 4 start date (recall the opening gambit being a proposed trial date of April 2026). The Special Counsel called on the court to "promptly resolve the defendant's presidential immunity and double jeopardy motions [the latter has yet to be raised] to minimize future delays."

Civil Immunity

In the civil case (in which the lower court had largely rejected Trump's claim of immunity), the court of necessity had three principles to consider, which flow from *Fitzgerald* as well as *Clinton v. Jones*: presidents are entitled to official immunity from civil damages liability based on actions within the "outer perimeter" official presidential responsibility, presidents are subject to civil damages based on actions taken in an unofficial, private capacity to the same extent as any other private person, and presidents' actions do not fall beyond the outer perimeter of official responsibility merely because they are unlawful or taken for a forbidden purpose. Trump had claimed that his action leading up to and on January 6th fell within the "outer perimeter," either because they amounted to speech on matters of public concern or, in the alternative, came within his constitutional duty under the "take care" clause (that the laws be faithfully executed).

The court was unpersuaded, and found that while Trump could enjoy immunity for official actions he took as president (official-act immunity), having opted to run for a second term, "his campaign to win re-election is not an official presidential act." He was "acting as an office-seeker, not an office-holder."

Gag Order in Election Interference Case Largely Upheld

On December 8, a three-judge panel of the Court of Appeals for the DC Circuit largely [upheld](#) the gag order [issued](#) by Judge Chutkan in the January 6th case two months ago, finding that "some aspects of Mr. Trump's public statements pose a significant and imminent threat to the fair and orderly adjudication of the ongoing criminal proceeding, which justified protective action by the district court." Trump and his counsel may not attack known or reasonably foreseeable witnesses concerning their potential participation in the investigation or the criminal proceedings, as well as court staff, the staff of the Special Counsel and family members of court staff and Special Counsel staff. Trump may continue to assert the prosecution is politically motivated and to criticize Judge Chutkan, the Special Counsel, President Biden and the DoJ.

The court concluded incidentally,

"We do not allow such an order lightly. Mr. Trump is a former President and current candidate for the presidency, and there is a strong public interest in what he has to say. But Mr. Trump is also an indicted criminal defendant, and he must stand trial in a courtroom under the same procedures that govern all other criminal defendants. That is what the rule of law means."

The gag order was in addition to restrictions on communications with witnesses, set out in his [conditions of release](#). Trump has indicated he will appeal the narrowed order. This evening,

a few press reports have questioned whether statements made by Trump Saturday night about Bill Barr (to the extent he could be a potential witness) violate the narrowed gag order.

A separate gag order was imposed on Trump in the New York fraud trial that covers statements about members of the court staff, which was upheld on appeal and which Trump has violated twice. A separate [protective order](#) was imposed in the Manhattan criminal case, and the terms of Trump's bond agreement in the Georgia case prevent him from communicating with or intimidating co-defendants or potential witnesses.

Kristy Parker of Protect Democracy has prepared a useful overview ("[Trump 'gag' order: More at stake than the First Amendment](#)") of what is at stake when Trump is left free to undermine the justice system, why it is important to pushback against Trump's claims that his opponents are engaging in "election interference" by seeking to curtail his speech and disrupt his campaign, and why courts are obligated to protect not only Trump's First Amendment rights but also the legal process and administration of justice. As Parker notes, and as chronicled elsewhere, Trump's rhetoric has had an unmistakable chilling impact on key actors in our democracy – from journalists, to agents of the FBI and officials at DoJ, election administrators and workers, members of Congress, and prosecutors, judges, clerks and potential witnesses, as well as the families of many of the foregoing.

Disqualification Cases

As I have previously commented upon (see [November 1](#) briefing note and [August 15](#) briefing note), there are cases pending in a number of states that challenge the inclusion of Trump on the 2024 ballot (actually, both primary and general election ballots) on the basis of Section 3 of the 14th Amendment.

On December 6, the Colorado Supreme Court heard oral arguments in the challenge to Trump's being included on the Colorado primary/general ballots. A Federal District judge had [ruled](#) in November that the events on and around January 6th "easily satisfy the definition of insurrection," Trump "incited an insurrection on January 6, 2021 and therefore 'engaged' in insurrection" within the meaning of Section 3 and "the First Amendment does not protect Trump's speech." However, the court found that Trump should nonetheless not be excluded from the primary ballot as he would not be an "officer of the United States" for purposes of Section 3. The original plaintiffs (four Republicans and two unaffiliated voters, supported by CREW) appealed the holding, while Trump appealed the finding of insurrection.

In Michigan, a judge [ruled](#) on November 14 in a declaratory action brought by Trump against the Michigan Secretary of State that the Secretary of State cannot remove Trump from the primary ballot (on the ground that the case presents a "political question that is nonjusticiable at this time"). The judge declined to rule on whether Trump is qualified or disqualified to appear on the general election ballot (on the ground that "the question is not ripe for adjudication at this time").

In Minnesota, the Minnesota Supreme Court on November 8 [cleared](#) the way for Trump to appear on the primary ballot, but declined to address whether or not Trump should be included on the general election ballot. In contrast to the Colorado decision, this court focused on the purpose of the primary nomination process (it is an internal political party matter, and there is no state law that prevents a political party from placing on the primary

ballot, or sending delegates to a nominating convention, a candidate who is ineligible to hold office), and sidestepped any of the elements of Section 3 of the 14th Amendment.

Concluding Thoughts

Trump has one objective – to prevent any court from hearing the merits of his cases (to avoid losing on the merits and to avoid getting bogged down in courtroom proceedings when he would rather be on the campaign trail). To do so, his only path is to delay through cumulative appeals. The first key to date to watch is the scheduled start date for the election interference case (March 4), and the first key variable will be whether the DC Circuit fast tracks Trump’s appeal on the issue of immunity. Some legal experts expect that one way or the other a jury will begin hearing the election interference case before election day and potentially before the start of the GOP convention in July. There is a fair chance the judge in the federal documents case would push back the May 2024 start date for that trial. And even if Trump is convicted, there will be a lag time before he is sentenced.

If Trump were to win the presidency, he could install leaders at DoJ to shut down the two federal cases or he might seek to pardon himself (an open legal question as to whether he can). And of course, the bedrock of our judicial system is the presumption of innocence in any criminal proceeding.

We will likely see the clash between the rule of law and the campaign trail play out outside the DC courtroom, with a publicity imbalance strongly favoring Trump. While prosecutors will be constrained in what they can say publicly under ethics rules (and can be expected to remain silent), Trump will have few constraints in attacking the trials as political witch hunts, and no constraints on lying. That said, the reporting from the trial by news outlets (even assuming that the trial, as expected, is not televised) will likely be damning, starting with Trump’s own legal counsel and advisors, as well as other witnesses, who will testify under penalties of perjury that Trump had been told repeatedly and authoritatively that he had lost the 2020 election.

If the past two weeks are any indication, there will be a steady flow of legal developments and manoeuvring even before the trials commence, the potential release of more information gleaned by prosecutors in their investigations, countless appeals and endless news headlines. As noted – overused, but apt: we have embarked (or more appropriately, we have been forced to embark) on an unprecedented journey into uncharted waters, with unimaginable consequences.

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