How A Motion Before Justices May Help Trump Beyond Court

By **Paul Tuchmann** (April 4, 2024)

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On April 25, the U.S. Supreme Court will hear oral arguments in Trump v. U.S., a case in which former President Donald Trump has argued that presidents are immune from criminal prosecution for conduct alleged to involve official acts during his tenure in office.

Trump was indicted in August 2023 for, among other things, interfering with the legally mandated process by which Congress was required to count the electoral votes certified by the states following the 2020 presidential election.

In his motion, Trump argues that he is immune from prosecution for actions he took as president, with very narrow exceptions, if any, following former President Richard Nixon's maxim that "when the president does it, that means that it is not illegal."

Both the U.S. Court of Appeals for the District of Columbia Circuit and U.S. District Judge Tanya S. Chutkan of the U.S. District Court for the District of Columbia have thoroughly and soundly rejected this argument, which would, as U.S. Circuit Judge Florence Y. Pan of the D.C. Circuit memorably put it during oral arguments there, effectively render a president immune from prosecution even if he dispatched the Navy Seals to murder a political rival.

There is no language in the U.S. Constitution that bestows such immunity on former presidents, and there is no precedent from any court suggesting that former presidents have such immunity.

Conversely, the clear language and structure of the Constitution hold that there is no such immunity, in particular the impeachment clause of Article I, Section 3, which reads that an officer of the U.S. who has been impeached "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."

That is why former President Gerald Ford pardoned his predecessor. Even though Nixon resigned before he could be removed from office via impeachment, it was universally understood that Nixon faced criminal jeopardy for actions he took as president. In short, Trump's arguments appear frivolous.

The primary purpose of this article, however, is not to examine the merits of Trump's arguments, but to consider the implications of Trump's ability to freeze the proceedings in place at the district court while appeals courts hear his appeals of his argument — a freeze that has had the practical effect of delaying his trial.

This freeze occurred because Trump's motion to dismiss the indictment did not seek to raise an affirmative defense to the charges that a defendant must present to a jury at trial, like entrapment or duress.

Nor was it the type of legal argument typically made to a trial judge before trial, like selective prosecution or failure to state an offense, that a defendant can only appeal after trial and conviction if the trial judge rules against them.

Rather, the motion argued that Trump was immune from prosecution entirely. This would

mean, if Trump's argument is correct, that he not only can't be convicted of these crimes, he can't even be tried for them.

This placed his presidential immunity argument in the rarefied company of a few other so-called defenses like double jeopardy and the congressional speech and debate clause.

These protect qualifying defendants from even having to face trial.

Thus, such defendants may take an interlocutory appeal of an adverse double jeopardy ruling by the trial judge, evading the collateral order doctrine and turning on its head the typical sequence in American criminal practice that a defendant may not appeal a trial judge's adverse rulings until after the defendant has been tried and convicted.

Why do a few such defenses to criminal charges merit this special treatment?

The basis for the special treatment of double jeopardy claims is rooted in the language of the double jeopardy clause of the Fifth Amendment of the U.S. Constitution, which holds that no person may "be subject for the same offense to be put twice in jeopardy of life or limb," as well as the principles underlying that clause.

If a person is tried for a crime to verdict, or convicted by a guilty plea, and then made to stand trial again, they will have been put "in jeopardy" — endured a trial twice — even if a conviction after the second trial is later overturned.[1]

The principle behind this immunity from a second trial, not just conviction, is that notwithstanding the presumption of innocence, the experience of being charged and tried is itself an imposition, if not a type of punishment, and that once a person has been tried a single time for an offense, even the relatively limited punishment of being charged and tried a second time improperly punishes a person who deserves the finality of repose after having already been tried once for a particular crime.

It also prophylactically guards against a vindictive or politically motivated prosecutor tying down a defendant by indefinitely prolonging the defendant's prosecution through repeated charges for the same crime.

Similarly, the speech and debate clause prevents the executive branch from using its power of prosecution to punish, distract or tie down political enemies in Congress over concern about political competition, disagreements in policy or resentment of constitutionally protected congressional oversight of the executive branch.

In that situation, it is not only conviction and sentence that the executive branch could otherwise hold over the heads of opposing members of Congress, but the expense, distraction and stress of defending themselves at a trial.[2]

Unlike immunity derived from the double jeopardy clause or the speech and debate clause, however, the immunity former Trump claims for himself is not tied to a specific clause of the Constitution.

Rather, he argues, it arises from the structure of our system of government, the role of the president of the United States in our system of government, and the impeachment process that is set forth in the Constitution. But it is far from obvious that a former president has immunity from criminal prosecution, let alone conviction, for acts they took as president.

While a delay for a federal criminal defendant's appeal of an adverse double jeopardy or speech and debate clause ruling by the trial court happens occasionally, the implications in Trump's case are particularly significant — enough of a delay may make it impractical, if not impossible, for him to be tried before the presidential election this November, when he is practically certain to be the Republican nominee.

Avoiding this trial before the November election would constitute a significant political advantage for Trump. Avoiding a conviction before voters make their choice for president would be an enormous political benefit to him.

Even if the trial could go forward before election day — and Judge Chutkan has previously indicated that a trial will not occur for at least a few months after the case is unfrozen at the district court upon conclusion of all appeals, to give the attorneys time to prepare — he will be able to make more salient political arguments that Judge Chutkan should delay the trial until after the election to avoid interfering with his campaign schedule.

If she refuses that request, he can argue that he — and by extension his political supporters — are being treated unfairly in a process driven by a U.S. Department of Justice controlled by Trump's political opponent.

And for a variety of reasons, if Trump wins the election before he is tried, or even if he wins and is sworn in before his conviction is final, it is hard to imagine that any federal case against him would survive his potential retaking of control of the executive branch on Jan. 20, 2025.

This is why special counsel Jack Smith petitioned the Supreme Court — unsuccessfully — to take what would have been the highly unusual step of hearing Trump's appeal directly from the district court, rather than potentially hear it after the D.C. Circuit ruled on the issue — to shorten the "freeze" at the district court.

That is also why Smith petitioned the Supreme Court — also unsuccessfully — not to hear an appeal of the D.C. Circuit's decision — for this is not one of the extremely rare situations where the Supreme Court is legally required to hear a litigant's appeal, but rather may do so at its discretion.

The Supreme Court could have chosen to wait to consider the presidential immunity claimed by Trump until after a conviction, but it chose to hear this argument now, thus prolonging the "freeze" at the district court.

Was all this delay, and the ramifications that follow, truly necessary? So many aspects of this case are unprecedented, but perhaps there was something like a middle ground that would have reduced the delay while a borderline-frivolous immunity argument made its way through appeals.

Typically, as in this case, when an appeal is filed, including an interlocutory one like for an appeal of a double jeopardy ruling, the district court is divested of jurisdiction. That is why the case is frozen in the district court pending the resolution of all appeals of the immunity issue.

But what if Judge Chutkan had the authority — subject to review by an appeals court, like most district court authority — to determine that an appeal of the denial of Trump's claim of presidential immunity was frivolous, very unlikely to succeed, or without a basis in precedent?

If the district court made such a determination, the interlocutory appeal of the district court's denial of immunity could proceed, even while pretrial proceedings in the district court case simultaneously continued, up until the time of trial. A defendant would not be able to game the system to delay their trial by mounting an immunity challenge for the primary purpose of delay.

And in fact, with respect to double jeopardy claims, the Supreme Court has already done something similar. In Richardson v. U.S.,[3] the Supreme Court in 1984 stated that a defendant's double jeopardy claims that are not colorable, meaning claims that have "some possible validity," may not be appealed before final judgment in the district court.

The special counsel's office had attacked Trump's presidential immunity arguments both on their merits and for being an instrument of strategic efforts to delay the trial.

It is curious that Smith did not at least try to argue that (1) this immunity claim was not colorable, and (2) like a noncolorable double jeopardy claim, Trump's immunity claim could not be appealed before trial.

Even more interesting, the group American Oversight appeared in the D.C. Circuit case as amicus curiae to make this type of argument, even as the special counsel did not.

The D.C. Circuit rejected American Oversight's argument and held that it could hear Trump's interlocutory appeal, because he did in fact make a colorable argument, even though his immunity claim was not rooted in a specific clause of the Constitution. But might the D.C. Circuit have treated this argument differently if the special counsel had made it, rather than a third party?

And why didn't the special counsel make this argument?

Perhaps it was worried about the Supreme Court, specifically the delay that might ensue if the D.C. Circuit ruled that Trump didn't have standing to take an interlocutory appeal — which would mean that the D.C. Circuit could not and therefore would not issue a ruling on the merits of the immunity claim before trial — only for Trump to appeal that decision to the Supreme Court.

The Supreme Court could then take up the standing issue and decide it in Trump's favor, and then send the case back to the D.C. Circuit for a ruling on the merits of the immunity claim, which Trump could then appeal once again to the Supreme Court — all before a trial even occurred.

But even if the special counsel's office had this strategic concern about making this argument to the D.C. Circuit, it still could have argued that under the circumstances — a colorable or barely colorable claim for a novel form of immunity, and the defendant's transparent attempts to delay the trial by any means — pretrial proceedings before Judge Chutkan could continue even as the interlocutory appeal played out.

That would reduce, if not eliminate the three months that the prosecution will lose to the freeze until the Supreme Court rules. It's difficult to see what the special counsel's office would have risked by making that argument, even if it didn't have a great chance of success.

Perhaps someday, when the case is over, the public will get answers to these questions

about the special counsel's strategy.

In the meantime, we await what will almost certainly be the Supreme Court's affirmance of the D.C. Circuit's decision — and a historic trial that may follow.

That is, if it can be scheduled before November, following a delay due solely to Trump's claim that he not only has a defense to conviction but is immune from prosecution, a delay that may prove to be the difference between Trump being reelected and Trump going to jail.

Paul Tuchmann is a partner at Wiggin and Dana LLP. He previously served as an assistant U.S. attorney in the Eastern District of New York.

[1] See Abney v. United States, 431 U.S. 651 (1977).

[2] See Heltoski v. Meanor, 442 U.S. 500 (1979), citing Dombrowski v. Eastland, 387 U.S. 82 (1967).

[3] Richardson v. United States, 468 U.S. 317, 326 at n.6 (1984).