JUDGE TANYA CHUTKAN HAD TO TELL TRUMP THAT, "THERE IS NO 'PRESIDENTIAL IMMUNITY' CLAUSE"

Less than twelve hours after the DC Circuit ruled that an office-seeker does not enjoy presidential immunity from civil suit, Judge Tanya Chutkan issued her order ruling that Trump does not enjoy presidential immunity for crimes committed while president.

Her opinion can be summed up in one line.

> [T]he United States has only one Chief Executive at a time, and that position does not confer a lifelong "get-out-of-jail-free" pass.

The timing of Chutkan's decision is almost certainly not accidental. The key issue in this opinion, absolute immunity, has been fully briefed (as Trump noted on November 1 when he asked to stay all other proceedings until this was resolved) since October 26.

Chutkan said she was ruling now because the Supreme Court requires immunity to be resolved as early as possible.

> Defendant has also moved to dismiss based on statutory grounds, ECF No. 114, and for selective and vindictive prosecution, ECF No. 116. The court will address those motions separately. The Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Hunter v. Bryant, 502 U.S. 224, 227 (1991) (citations omitted). The court therefore rules first on the Immunity Motion and

> the Constitutional Motion—in which Defendant asserts "constitutional immunity from double jeopardy," United States v. Scott, 464 F.2d 832, 833 (D.C. Cir. 1972).

She did not source that cite to Trump's request for a stay, nor did she say she was also ruling on Trump's motion to dismiss on Constitutional grounds, which includes a Double Jeopardy claim, because Molly Gaston asked her to,

But by ruling as she did (without a hearing), she simply mooted Trump's request to stay any further proceedings with a minute order.

> MINUTE ORDER as to DONALD J. TRUMP: In light of the court's [172] Order denying Defendant's [74] Motion to Dismiss Based on Presidential Immunity; Defendant's [128] Motion to Stay Case Pending Immunity Determination is hereby DENIED as moot.

This puts the onus on Trump to appeal, which he reportedly will (though he has dilly-dallied on some of these motions, so we'll see how much time he kills in the process).

It seems clear that Chutkan waited for Blassingame, the civil immunity opinion, because she found a way to cite it twice and still release her own opinion on the same day.

But it also seems likely that Judge Chutkan and her clerks simply reviewed that opinion to make sure nothing wildly conflicted with her already completed opinion, because her opinion doesn't incorporate details of the absolute immunity argument — such as the significance of the fact that five of six co-conspirators described in the indictment (everyone but Jeffrey Clark) is a private citizen, which would be important if the DC Circuit applied any of their civil immunity test to the criminal context.

Indeed, one of Chutkan's citations to

Blassingame effectively admitted she didn't get into its test — whether Trump was acting in his official role when he did the things alleged in the indictment.

> Similarly, the court expresses no opinion on the additional constitutional questions attendant to Defendant's assertion that former Presidents retain absolute criminal immunity for acts "within the outer perimeter of the President's official" responsibility. Immunity Motion at 21 (formatting modified). Even if the court were to accept that assertion, it could not grant Defendant immunity here without resolving several separate and disputed constitutional questions of first impression, including: whether the President's duty to "take Care that the Laws be faithfully executed" includes within its "outer perimeter" at least five different forms of indicted conduct;5 whether inquiring into the President's purpose for undertaking each form of that allegedly criminal conduct is constitutionally permissible in an immunity analysis, and whether any Presidential conduct "intertwined" with otherwise constitutionally immune actions also receives criminal immunity. See id. at 21–45. Because it concludes that former Presidents do not possess absolute federal criminal immunity for any acts committed while in office, however, the court need not reach those additional constitutional issues, and it expresses no opinion on them.
>
> 5 As another court in this district observed in a decision regarding Defendant's civil immunity, "[t]his is not an easy issue. It is one that implicates fundamental norms of separation of powers and calls on the court to assess the limits of a President's functions. And, historical

> examples to serve as guideposts are few." Thompson v. Trump, 590 F. Supp. 3d 46, 74 (D.D.C. 2022); see id. at 81–84 (performing that constitutional analysis). The D.C. Circuit recently affirmed that district court's decision with an extensive analysis of just one form of conduct—"speech on matters of public concern." Blassingame v. Trump, Nos. 22-5069, 22-7030, 22-7031, slip op. at 23–42 (D.C. Cir. Dec. 1, 2023).

Instead, Chutkan argued – in language that likely preceded the Blassingame opinion, in a section on whether holding a former President criminally accountable will pose some of the harms to the presidency and government that suing a current or former President might – that no matter what the analysis is for civil immunity, criminal immunity is different.

> The rationale for immunizing a President's controversial decisions from civil liability does not extend to sheltering his criminality.
>
> [snip]
>
> For all these reasons, the constitutional consequences of federal criminal liability differ sharply from those of the civil liability at issue in Fitzgerald. Federal criminal liability will not impermissibly chill the decision-making of a dutiful Chief Executive or subject them to endless post-Presidency litigation. It will, however, uphold the vital constitutional values that Fitzgerald identified as warranting the exercise of jurisdiction: maintaining the separation of powers and vindicating "the public interest in an ongoing criminal prosecution." 457 U.S. at 753–54. Exempting former Presidents from the ordinary operation of the criminal justice system, on the other hand, would undermine the foundation of

> the rule of law that our first former President described: “Respect for its authority, compliance with its laws, [and] acquiescence in its measures”—“duties enjoined by the fundamental maxims of true liberty.” Washington’s Farewell Address at 13. Consequently, the constitutional structure of our government does not require absolute federal criminal immunity for former Presidents.

The analysis has to be different of course. If you can be impeached for using your office to extort campaign assistance, it should not be the case that you cannot, though, be criminally charged for that extortion.

This is an opinion about whether impeachment provides the sole recourse for holding a former President accountable.

Judge Chutkan provides a very neat solution to that problem, by noting that impeachment is just one of two ways to remove a President who has misused his office.

> [T]here is another way, besides impeachment and conviction, for a President to be removed from office and thus subjected to “the ordinary course of law,” Federalist No. 69 at 348: **As in Defendant’s case**, he may be voted out. The President “shall hold his Office during the Term of four Years.” U.S. Const. art. II, § 1, cl. 1. Without reelection, the expiration of that term ends a Presidency as surely as impeachment and conviction. See United States v. Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (Marshall, Circuit Justice) (“[T]he president is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again.”). Nothing in the Impeachment Judgment Clause prevents

> criminal prosecution thereafter. [my emphasis]

Because voters saw fit to remove Trump, Chutkan held, he can now be charged criminally.

Chutkan punts the other questions upstairs to the DC Circuit and from there to SCOTUS.

And while I think Chutkan's analysis of the two impeachment issues — immunity and double jeopardy — is sound, I do worry that her treatment of several other issues — the things Trump included in his motion to dismiss on Constitutional grounds besides double jeopardy — got short shrift as a result.

Those issues have only been briefed since November 22. She and her clerks probably wrote that part of the opinion over Thanksgiving weekend. And far less of her opinion addressed those issues — seven pages for the First Amendment issues and four for matters of fair notice — than addressed the impeachment issue:

- Core political speech of public concern 33
- Statements advocating govt to act 35
- Statements on 2020 Election 37

Double Jeopardy 38

Due Process 44 (4 pages)

Importantly, while she noted at the outset of her opinion (in the five page "background" section) that Trump totally misrepresented the indictment against him, she didn't lay out how, in addition to speech-related actions charged as conspiracies, there are some actions that are more obviously fraud, such as the effort to counterfeit elector certificates or the knowingly false representations about Mike Pence's intent. Trump's misrepresentation of the indictment is really egregious, but Chutkan barely explains why that's a problem in this opinion.

Both the First Amendment issues and the notice issues (particularly on 18 USC 1512, though there's readily available language on 18 USC 241 charge in the Douglass Mackey case) have been addressed repeatedly in other January 6 cases. Since those cases will be appealed on a more leisurely pace than this one, I worry that the issues are not fully addressed. And those are the issues about which Clarence Thomas and Sammy Alito were most likely to intervene in any case.

This is an opinion about holding a former President accountable before he becomes President again. The danger is real: On the same day two courts ruled that Trump didn't have absolute immunity for his conduct while he was President, his Georgia lawyer argued that if he wins in 2024, he can't be tried on that case until 2029.

But for now, the matter has been sent to the DC Circuit to deal with.