

THE LEGAL CASES IMPLICATING DONALD TRUMP'S CONDUCT THAT WON'T GO AWAY [BECAUSE OF HIS ELECTION]

There's been a lot of chatter since Tuesday about how the criminal cases against Donald Trump will go away because of his election (CNN has one of the most comprehensive discussions of what will happen to Trump's guilty verdict in New York, for which he is due to be sentenced this month).

But there's been less discussion of the legal cases implicating Donald Trump's conduct that won't go away solely because of his election (which is to say, they may go away for other reasons). These implicate Trump, but because his biological person is not the defendant, should not be implicated by his election.

Consider AJ Delgado's lawsuit against Trump's first campaign and his campaign managers. She sued five years ago for sex, gender, and pregnancy discrimination after Trump's people allegedly retaliated when she filed a discrimination case when she was sidelined after Jason Miller got her pregnant. Of late, she's been slogging along pro se, seeking evidence of other women who were discriminated against by either of his then two campaigns and getting depositions of people who were involved in the effort to silence her. In September, Trump filed his motion for summary judgment. But Delgado just got a continuance on hers until the end of December because she had to depose Michael Glassner and because Miller continues to waste her time dicking around on paternity issues in Florida.

More interesting still, there's Peter Strzok. In

July, DOJ settled the Privacy Act lawsuits Strzok and Lisa Page filed for having their texts shared with the press. But his claim that he had been fired for his First Amendment protected speech and denied due process continued. In September, DOJ filed its motion for summary judgement. While the filing and exhibits are significantly redacted, the motion seems to dirty Strzok up based on claims about his actions in the cases related to 2016 and argue standard Human Resources claims about the process by which he was fired. Last week, Strzok filed his own motion for summary judgment. Again, it's heavily redacted, but he notes that the FBI changed their firing guidelines after he and Andrew McCabe were fired. He lays out evidence that others who sent inappropriate content on their FBI devices, including racist language and language attacking Hillary Clinton, were not fired.

But the case is most likely to come down to David Bowdich's credibility. Bowdich's deposition appears to say that he fired Strzok because of the damage his texts did to the FBI. Strzok will attempt to discredit Bowdich's claims, firstly, with a statement from Andy McCabe that when the texts were first discovered, Bowdich said nothing to disagree with McCabe's stance that Strzok would not be fired. There's something else, which is completely redacted, that the FBI only disclosed when they settled the Privacy Act suit, but it's not clear what that is. *If it ever goes to trial*, then Trump's claims that he was responsible for the firing will be at issue (and anything else interesting he said in the hard-won deposition Strzok got, as well as Trump's requests for retaliation.

All that said, the judges in these two cases – Magistrate Judge Katharine Parker (and if it survives, Analisa Torres) for Delgado, and Amy Berman Jackson for Strzok – seem pretty skeptical of these two cases, so they may get dismissed on summary judgment. If not, you *might* see trials on Trump's discrimination and

retaliation against his perceived enemies next year. But if ABJ doesn't throw out this case, DOJ is likely to appeal before trial in a bid to expand their authority to fire people without due process.

But I see no reason they'll get dismissed because Trump will be President. His campaign is the defendant in the first case, FBI is the defendant in the second.

An even more interesting example is Hunter Biden.

A lot of people are rightly saying that Biden should protect his son (and brother) by simply pardoning them on the way out – and I get that instinct. All the more so because, yesterday, James Comer suggested he – or Trump's DOJ – would renew his pursuit of Hunter Biden in the next Congress. But even after that, Karine Jean-Pierre reiterated the answer she's always given: President Biden will not pardon his son.

President Biden still has no plans to pardon his son, Hunter Biden, in the final months of his presidency, the White House press secretary reiterated on Thursday.

"We've been asked that question multiple times and our answer stands – which is no," White House press secretary Karine Jean-Pierre said at Thursday's press briefing.

I had *already* been thinking that Hunter may not want a full pardon, because he still has appeals that might succeed.

And amid discussions of DOJ's hopes to defeat the Aileen Cannon precedent on Special Counsels, rather than just dismiss the stolen documents case against Trump and the two aides who protected him, it makes more sense.

Here's a (dated) summary of all the legal proceedings in Hunter's life (the two disgruntled IRS agents have since added several

suits, one targeting Abbe Lowell for defamation).

The basis for appeal that most dick pic sniffing journalists are focused on is Hunter's Second Amendment challenge to his conviction in Delaware. In the wake of *Bruen*, other defendants have had some (mixed) success arguing that – for example – the government can only prohibit possessing guns *during* drug impairment, and prosecutors very pointedly dodged having to prove that in Hunter's case. Because other (more dangerous) defendants are delaying incarceration during appeal, I think it plausible that Judge Maryellen Noreika will agree to do so here, too.

But Trump's successful claim that Jack Smith was not lawfully appointed carries over to Hunter's cases too (and, importantly, Alexander Smirnov's). David Weiss was hired under the very same authority that Jack Smith was, the authority that Cannon said was unconstitutional. And both Hunter and Smirnov already tried to make the same argument on interlocutory basis.

On paper, Hunter's challenge to David Weiss' appointment as *Special Counsel* is weakest in Delaware, because Weiss could have prosecuted him as US Attorney anyway. But Cannon's ruling says that improper appointment resets everything to before the appointment happened. And the most important evidence submitted at Hunter's trial – the gun residue, a warrant to search his laptop for evidence of drug use, and probably key interviews with Zoe Kestan – all happened after Weiss started acting as Special Counsel. They also all happened after statute of limitations for the crime expired. If this challenge succeeded, the case should be time barred.

Hunter's case against David Weiss' appointment would be stronger in LA, because Weiss chose not to use special attorney authority to charge Hunter there (though given how prosecutors charged him, Trump's DOJ would have until next year to refile the charges).

The case is stronger still for Smirnov, because

– by all appearances – Weiss got Special Counsel authority so he could investigate a matter implicating Joe Biden, Smirnov’s allegedly false attempt to frame Biden. Smirnov’s charges, too, are getting stale. Because Weiss charged Smirnov for statements he made in 2020, not last year, they would expire next spring (I’ll return to what recent motions in the case say about Weiss’ investigation).

But as I already said, Smirnov is someone whom Trump might have real incentive to pardon at the start of his term, particularly if Smirnov gets his renewed bid for a delay, meaning a pardon would be pre-trial.

While there are other people (most notably, Michael Cohen) who might challenge their prosecution based on the Cannon precedent, if prosecutions against Smirnov, Walt Nauta, and Carlos De Oliveira went away, via whatever means, then Hunter Biden would be the sole person facing prison time based on what Cannon said was an unconstitutional appointment. While normally he might not do so, given those circumstances, I think both Judge Mark Scarsi might let Hunter stay out of prison pending appeal as well.

The Second Amendment and Special Counsel appeals will get the most attention.

It’s Hunter’s other appeals that might be more interesting, though. Best as I can tell, Hunter has preserved the following issues for appeal in one or both of his cases:

- David Weiss reneged on a signed deal (the Noreika and Scarsi decisions are slightly inconsistent on this point, so there’s a circuit split already)
- Pressure from Trump and Congress led Weiss to change his mind about prosecuting

Hunter (I'm not certain this has been preserved in Los Angeles)

- Pressure from the IRS agents led Weiss to renege on the tax plea deal
- Noreika improperly admitted evidence from the laptop
- Noreika improperly excluded evidence of how the Delaware cop who interviewed Hunter in 2018 and the gun shop owner pushed to get Hunter prosecuted and then revised their stories long after the fact
- Noreika improperly refused discovery on issues pertaining to the Brady side channel and Smirnov's attempt to frame Joe Biden

Hunter's lawsuits against the IRS and Garrett Ziegler may strengthen his hand in some of these challenges. The Ziegler lawsuit, for example, implicates chain of custody going back to John Paul Mac Isaac, and therefore chain of custody that reflects on the chain of custody problems the FBI chose to ignore. The IRS lawsuit may provide a way to depose the IRS agents' lawyers about when their contacts with Congress really started.

And one of the claims that Noreika blew off that would have renewed import are two IRS laws that criminalize pressuring the IRS to investigate people, one of which explicitly pertains to the President.

Some of Trump's possible actions, like a Smirnov pardon, might strengthen Hunter's hand in making these arguments.

Barring a Hunter Biden pardon, he gets to at least try to make these appeals after he is sentenced in December. And because his appeals will implicate two other legal appeals popular on the right – Trump’s own argument about Special Counsels, and efforts to eliminate gun controls – he may be able to do that on (lengthy) pretrial release.

Again, these are all uphill fights. I’m not saying these appeals will work. But even just arguing them will implicate the kinds of corruption we expect to see going forward.

Right wingers are going to make sure Hunter Biden’s life sucks anyway. But by dint of Trump’s conviction, he has what almost no one else in the country will be able to have: standing to argue about Trump’s own corruption.