

Bloomberg Law

DC Circuit Gives Supreme Court Easy Out of Trump Immunity Fight

Lydia Wheeler and Kimberly Strawbridge Robinson
February 7, 2024

A US federal appeals court gave the Supreme Court an easy off ramp if the justices want to stay out of a second dispute involving Donald Trump, this one centered on whether he's immune from criminal prosecution for alleged election interference.

The US Court of Appeals for the DC Circuit did what it could to make the Supreme Court's review less likely in issuing a straightforward, well-reasoned decision that's written for a broad audience, legal scholars say.

"If this had been a hazard and sloppy opinion, I think the court would have felt like it needed to step in," said Erica Hashimoto, a professor at Georgetown University Law Center and director of its appellate litigation program. "It is certainly not that."

The 57-page opinion was joined by all three judges on the panel, including Karen LeCraft Henderson, a George H.W. Bush appointee, as well as Florence Pan and J. Michelle Childs, who were both appointed by Joe Biden.

They rejected the former president's claim that he is categorically immune from criminal liability for acts taken while in office. That contention "is unsupported by precedent, history or the text and structure of the Constitution," the judges said.

'Irrational' Reading

Hashimoto said the court's historical points and its reasoning for rejecting Trump's claim that he has to be impeached and convicted in order to be prosecuted are particularly persuasive.

If Trump's right, "that's going to apply to a lot of federal officers who are subject to impeachment," she said. "It can't possibly be that none of them can be prosecuted."

The DC Circuit didn't mince words when it called Trump's interpretation implausible.

"His reading would prohibit the Executive Branch from prosecuting current and former civil officers for crimes committed while in office, unless the Congress first impeached and convicted them," the panel said. "No court has previously imposed such an irrational 'impeachment first' constraint on the criminal prosecution of federal officials."

The fact that the decision was a unanimous ruling not signed by any one judge and roundly rejected all of the claims methodically, in an even-keeled tone, “was meant to give the Supreme Court every reason to let it stand and avoid taking up another Donald Trump matter on the docket,” Anthony Michael Kreis, a law professor at Georgia State University, said in an email.

Any opportunity a majority of the court “can take to avoid being dragged further into Trump drama in an election year is one they’re willing to take,” he said, and this “sober and thorough decision” coming from three judges of very different ideological stripes may well give the court that out.

It takes four justices to agree to hear a case and five to put a lower court’s ruling on hold.

Trump slammed the decision in a post on his social media network, Truth Social. He called it a “Nation-destroying ruling” that would “terribly injure not only the Presidency, but the Life, Breath and Success of our Country” if not overturned.

With the 2024 presidential election in full swing, the Trump team has consistently sought to delay the election interference trial, originally scheduled for early March. A new date hasn’t been set.

The Republican front-runner is facing four charges that, despite knowing that he lost the 2020 presidential election, he pushed false election fraud claims in an effort to stay in office.

Additionally, the Supreme Court will hear arguments on Thursday in Trump’s appeal to stay on the Colorado’s 2024 primary ballot. The court scheduled a special sitting to review whether Section 3 of the 14th Amendment bars him from holding office, as the Colorado Supreme Court ruled in December. The provision disqualifies certain public officials from holding office after they’ve participated in an insurrection or rebellion.

Interest Unclear

Though the DC Circuit may have made it easier for the Supreme Court to reject an appeal, the unprecedented nature of the case, which is the first criminal prosecution of a former president, may persuade the justices to weigh in regardless.

“Clean cuts both ways,” said Daniel Richman, a Columbia Law School professor and a former federal prosecutor in the Southern District of New York. “Its powerful and straightforward reasoning could be read to have broad implications and when that’s the case, the Supreme Court may take more interest in it,” he said.

Clark Neily, the senior vice president for legal studies at the Cato Institute, said the justices may want to weigh in to show Trump “got every opportunity to press his claims, including from the highest court of the land.”

Ultimately, though, Neily doesn't think the Supreme Court will rule in Trump's favor. "There are a lot of important and challenging questions presented in the cases against Trump, Neily said. "But this is not one of them."

The November election could also factor into the justices' decision to grant or deny a Trump appeal.

If a justice thinks "we ought to have an election first and only then resolve this case, they might be more open to taking this case and essentially precluding a prosecution from going forward in any expeditious way," Richman said.

The court gave the Trump team until Feb. 12 to ask the Supreme Court to intervene.

Regardless of whether the Supreme Court decides to step in, Thomas Wolf, the Brennan Center's director of democracy initiatives, said the D.C. Circuit's "per curiam" ruling provided counter programming to Trump's suggestion that he was being persecuted by his political rivals.

"We've seen a lot of commentary and attacks on the lower court as highly personalized," Wolf said, referring to US District Judge Tanya Chutkan, who initially rejected Trump's immunity claims in overseeing the criminal case.

The D.C. Circuit opinion "puts ownership over the ultimate determination in the hands of all three of the judges," Wolf said. "It helps strengthen the message to the public that what is truly speaking here is the voice of the law."