

JUDGE KAREN HENDERSON'S FLOODGATE CONCERNS

While Judge Florence Pan was asking, over and over, if Trump attorney John Sauer *really* was saying that a President could assassinate his rival and, if not impeached, avoid any accountability, Judge Karen Henderson expressed her disagreement with Sauer's argument more circumspectly.

But she did express disagreement.

If I read her comments right, they mean that, *at worst*, Henderson would support remanding the case to Judge Chutkan to figure out whether the things of which Trump is accused are official acts. Indeed, by the end of a brutal set of questions, that seemed to be what Sauer was begging for, which at least would produce the delay his client seeks.

Henderson's key lens – something she asked both Sauer and AUSA James Pearce – was, rather than distinguishing between private and official acts, instead distinguishing between discretionary acts and those mandated by law, ministerial acts.

Whether the progeny of *Madison v. Marbury* has distinguished between discretionary official acts and ministerial, by which they mean, imposed by law, and it's the latter one by which he can be held liable.

This seemed to be the basis on which she wants to base jurisdiction (where Pan and Michelle Childs seemed inclined to argue they didn't have jurisdiction). She seemed to be saying that a President could be prosecuted for things that were dictated by law but not for things not dictated by law.

Sauer didn't get her point. He responded that

nothing in the indictment was ministerial.

To which Henderson objected that the Take Care Clause requires the President to follow, “every one of ... the laws.”

Why isn't it ministerial when his constitutional duty, to take care that the laws be faithfully executed, requires him to follow those laws? Every one of them.

Sauer kept digging, arguing the Take Care Clause was entirely discretionary.

Henderson responded, getting to what, I think, is her point. The progeny of *Marbury* has given Article III courts jurisdiction over ministerial actions, which when yoked with the Take Care Clause requires the President to be subject to individual laws.

I think it's paradoxical to say that his constitutional duty, to take care that the laws be faithfully executed, allows him to violate criminal law. Now, we're at the motion to dismiss stage. The government has charged the specific criminal laws. We have to assume they're true.

[snip]

We've gotten beyond *Marbury* in the sense that official acts have been subdivided into discretionary and duty-bound or ministerial. And in the ministerial or duty-bound, at least with respect even legislators and judges, they have been held criminally liable. And that's in the face, at least with respect to the legislators, of an explicit privilege.

It's clear that she was bothered by Sauer's Take Care Clause arguments, which argued that everything included in the indictment might be covered by the Take Care Clause requiring that the President enforce the law.

Sauer seemed to recognize defeat: as he finished he asked again for a stay so Trump can appeal.

As mentioned, Judge Henderson asked the same question about Marbury of James Pearce, arguing for Jack Smith. He responded this way:

Our interpretation is much closer in line to what I think I heard Judge Pan setting out and similar to yours. It certainly does not erect an unreviewable power for the Presidency. I think the prime example of that is the steel seizure case. The Youngstown case. That was President Truman closing the steel mills. That was the court coming in and reviewing that. We see that all the way through to the present. And so it's hard to see any world in which the court just says, we can't intervene here.

I accept the court's, Judge Henderson, the distinction between ministerial and discretionary acts. Compliance with the law is not some sort of discretionary call, right? It is something that, I fully endorse or agree with the idea of a paradox of a President's, on the one hand, having the Article II Take Care responsibility, and on the other hand seeing the law, compliance with the law as optional.

That seemed to get Henderson where she wanted to go to decide the case. Then she revealed her worry: That in deciding against Trump, it will unleash a floodgate of similar criminal prosecutions.

Henderson: Let me switch and ask you, how do we write an opinion that would stop the floodgates? Your predecessors in their OLC opinions recognized that criminal liability would be unavoidably political.

Pearce: So, a couple of responses. Of course, that was with respect to a

sitting President. I think the analysis is extraordinarily different with respect to a former President, which OLC, I'm sorry –

Henderson: But with respect to being necessarily political.

Pearce: There is a political process, which is impeachment. And we can talk about that. But there is a legal process which is decidedly not political. And that is a process which has the kinds of safeguards that a couple of members of the court here have already referred to. We're talking about prosecutors who follow strict codes and who are presumed to act with regularity, grand jurors, petit jury eventually, and this court, Article III courts standing above it.

But I also want to push back a little against this idea of floodgates. At least since the Watergate era, fifty years ago, has there been widespread societal recognition including by Presidents and the Executive Branch that a former President is subject to criminal prosecution.

And Nixon was not about private conduct. Nixon was about – among other things – using the CIA to try to interfere with an FBI investigation. He then accepts a pardon, understanding that, after having resigned, so that also undermines this impeachment first argument. After Nixon, we then see a series of independent and special prosecutors investigating a range of different types of conduct.

[snip]

This notion that we're going to all of a sudden see a floodgate, the careful investigations in the Clinton era didn't result in any charges. The fact that this investigation did doesn't reflect that we are going to see a sea change of

vindictive tit for tat prosecutions in the future. I think it reflects the fundamentally unprecedented nature of the criminal charges here. Never before has there been allegations that a sitting President has, with private individuals, and using the levers of power, sought to fundamentally subvert the democratic republic and the electoral system. And frankly, if that kind of fact pattern arises again, I think it would be awfully scary if there weren't some sort of mechanism by which to reach that criminally.

Ultimately, Pearce argued that Trump's parade of horrors has been disproven by the last fifty years in which it has been presumed that former Presidents could be prosecuted, but none were, until Trump.

Henderson *has* been sympathetic to Trump's past claims that he's being treated differently, politically. So I can understand how it would concern her.

But as noted, once you're dealing with a former President, that shouldn't be an issue.