WHEN MICHAEL DREEBEN ACCEPTED JOHN SAUER'S INVITATION TO TALK ABOUT SPEECH AND DEBATE

Trump's appeal of Judge Tanya Chutkan's immunity opinion is interesting for the personnel involved. The briefs repeat the very same arguments — and in some instances, include the same passages almost verbatim — made less than three months ago. But first Trump brought in John Sauer to argue his appellate cases, then in the last few weeks, former Deputy Solicitor General Michael Dreeben quietly joined the Special Counsel team (importantly, the Solicitor General appointed by Joe Biden has no role in this appeal).

That makes any changes in the arguments of particular interest, because accomplished appellate lawyers saw fit to add them.

- Trump motion to dismiss
- Jack Smith Response
- Trump appeal
- Jack Smith Response

Admittedly, two things happened in the interim to change the landscape significantly. In Blassingame, issued hours before Chutkan released her order, DC Circuit Chief Judge Sri Srinivasan laid out how a President running for reelection does not act in his official duty. In Meadows, 11th Circuit Chief Judge William Pryor adopted that analysis in the criminal context with regards to Mark Meadows in the Georgia case.

That provided both sides the opportunity to address what I had argued, on October 21, was a

real weakness in Jack Smith's first response: the relative silence on the extent to which Trump's actions were not part of his official duties.

> In total, DOJ's more specific arguments take up just six pages of the response. I fear it does not do as much as it could do in distinguishing between the role of President and political candidate, something that will come before SCOTUS — and could get there first — in the civil suits against Trump.

Citing both Blassingame and Meadows, Smith and Dreeben invited the DC Circuit to rule narrowly if it chose, finding that the crimes alleged in the indictment all pertain to Trump's role as candidate.

> The Court need not address those issues here, however. The indictment alleges a conspiracy to overturn the presidential election results, JA.26, through targeting state officials, id. at 32-44; creating fraudulent slates of electors in seven states, id. at 44-50; leveraging the Department of Justice in the effort to target state officials through deceit and to substitute the fraudulent elector slates supporting his personal candidacy for the legitimate ones, id. at 50-54; attempting to enlist the Vice President to fraudulently alter the election results during the certification proceeding on January 6, 2021, and directing supporters to the Capitol to obstruct the proceeding, id. at 55-62; and exploiting the violence and chaos that transpired at the United States Capitol on January 6, 2021, id. at 62-65. The indictment thus alleges conspiracies to advance the defendant's prospects as a candidate for elective office in concert with private persons as well as government officials, cf.

> Blassingame, 87 F.4th at 4 (the President's conduct falls beyond the outer perimeter of his official duties if it can only be understood as having been undertaken in his capacity as a candidate for re-election), and the defendant offers no plausible argument that the federal government function and official proceeding that he is charged with obstructing establish a role—much less an exclusive and conclusive role—for the President, see Georgia v. Meadows, No. 23-12958, 2023 WL 8714992, at *11 (11th Cir. Dec. 18, 2023); United States v. Rhodes, 610 F. Supp. 3d 29, 41 (D.D.C. 2022) (Congress and the Vice President in his role as President of the Senate carry out the "laws governing the transfer of power") (internal quotation marks omitted).

The short term goal here is to convince Judge Karen Henderson, the Poppy Bush appointee on this panel whose judicial views have grown as radical as any Trump appointee's, to reject Trump's claims. Ultimately, Jack Smith is arguing against Presidential immunity even for official acts, but a ruling limited to acts taken as a candidate might provide a way to get Judge Henderson to join the two Biden appointees on the panel, Florence Pan and Michelle Childs, in rejecting Trump's immunity claims.

In both his briefs, Trump had — ridiculously! — argued that Nixon's Watergate actions were private acts yet Trump's January 6 actions were part of his official duties. Smith swatted that claim away in a passage noting that Nixon's *acceptance* of a pardon served as precedent for the notion that a President could be tried for actions done as President.

> That President Nixon was named as an unindicted coconspirator in a plot to defraud the United States and obstruct justice, Nixon, 418 U.S. at 687, entirely refutes the defendant's efforts

> (Br.27-28, 41) to distinguish that case as involving private conduct. See United States v. Haldeman, 559 F.2d 31, 121-22 (D.C. Cir. 1976) (en banc) (per curiam) (explaining that the offense conduct included efforts "to get the CIA to interfere with the Watergate investigation being conducted by the FBI" and "to obtain information concerning the investigation from the FBI and the Department of Justice") (internal quotation marks omitted). And President Nixon's acceptance of the pardon represents a "confession of guilt." Burdick v. United States, 236 U.S. 79, 90-91 (1915).

Again, once the categorization adopted by Srinivasan is available, it makes the comparison with Nixon far more damning.

One of the most interesting additions to the earlier arguments, however, is that Sauer added a second kind of immunity to Trump's earlier discussion that the principles of judicial immunity carry over to Presidential immunity: Speech and Debate. In two cursory paragraphs, Sauer claimed that, like members of Congress, Trump should enjoy both civil and criminal immunity for their official, "legislative" acts.

> Legislative immunity. Legislative immunity encompasses the "privilege … to be free from arrest or civil process" for legislative acts, i.e., criminal and civil proceedings alike. Tenney, 341 U.S. at 372. Such immunity enables officials "to execute the functions of their office without fear of prosecutions, civil or criminal." Id. at 373–74 (quoting Coffin v. Coffin, 4 Mass. 1, 27 (Mass. 1808)).
>
> Thus, legislative immunity "prevent[s]" legislative acts "from being made the basis of a criminal charge against a member of Congress." Johnson, 383 U.S.

> at 180. A legislative act "may not be made the basis for a civil or criminal judgment against a Member [of Congress] because that conduct is within the sphere of legitimate legislative activity." Gravel v. United States, 408 U.S. 606, 624 (1972) (emphasis added). Speech and Debate immunity "protects Members against prosecutions that directly impinge upon or threaten the legislative process." Id. at 616.

Did I say two developments have changed the landscape of this discussion? I'm sorry, I should have added a third: In response to the September DC Circuit remand of Scott Perry's appeal of Judge Beryl Howell's decision that Jack Smith could have some stuff from his phone — in a panel including Henderson — on December 19, Howell's successor at Chief Judge, James Boasberg reviewed the contested files anew and ruled that Smith could have most of them, including communications pertaining to "efforts to work with or influence members of the Executive Branch."

> Subcategories (c), (d), (e), and (f) comprise communications about non-legislative efforts to work with or influence members of the Executive Branch. Even if such activities are "in a day's work for a Member of Congress," the Speech or Debate Clause "does not protect acts that are not legislative in nature."

Kyle Cheney (who snagged an accidentally posted filing before it was withdrawn) described what many of those communications would include, including Perry's advance knowledge of Trump's efforts to install Jeffrey Clark as Attorney General.

Boasberg's order required Perry to turn over those communications by December 27; if he appealed that decision, I'm not aware of it. So

as you read this Speech and Debate section, consider the likelihood that Jack Smith finally obtained records from a member of Congress DOJ has been seeking for 17 months, since before Smith was appointed.

The DC Circuit opinion in Perry is not mentioned in any of these briefs. But the developments provide an interesting backdrop for Dreeben's much longer response to Sauer's half-hearted Speech and Debate bid. Much of it is an originalist argument, noting that whereas Speech and Debate was explicitly included in the Constitution, immunity for Presidents was not, not even in a landscape where Delaware and Virginia had afforded their Executive such immunity.

Along the way, Dreeben includes two citations that weren't in Jack Smith's original submission: One from Clarence Thomas making just that originalist argument about Presidential immunity: "the Constitution explicitly addresses the privileges of some federal officials, but it does not afford the President absolute immunity." And one from Karen Henderson, the key vote in this panel, noting that, contra Sauer's expansive immunity claim, "it is well settled that a Member is subject to criminal prosecution and process."

> Unlike the explicit textual immunity granted to legislators under the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, which provides that "for any Speech or Debate in either House," members of Congress "shall not be questioned in any other Place," the Constitution does not expressly provide such protection for the President or any executive branch officials. See Vance, 140 S. Ct. at 2434 (Thomas, J., dissenting) ("**The text of the Constitution explicitly addresses the privileges of some federal officials, but it does not afford the President absolute immunity.**"); JA.604-06. By

> contrast, state constitutions at the time of the founding in Virginia and Delaware did grant express criminal immunity to the state's chief executive officer. JA.605 (citing Saikrishna Bangalore Prakash, Prosecuting and Punishing Our Presidents, 100 Tex. L. Rev. 55, 69 (2021)). To be sure, the federal Constitution's "silence . . . on this score is not dispositive," Nixon, 418 U.S. at 705 n.16, but that silence is telling when placed against the Constitution's Impeachment Judgment Clause, which presupposes and expressly preserves the availability of criminal prosecution following impeachment and conviction. See U.S. Const. art. I, § 3, cl. 7.
>
> [snip]
>
> The defendant suggests (Br.16-17, 18-19) that common-law principles of legislative immunity embodied in the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, inform the immunity analysis here, but that suggestion lacks support in constitutional text, history, or purpose. The Framers omitted any comparable text protecting executive officials, see Vance, 140 S. Ct. at 2434 (Thomas, J., dissenting), and no reason exists to look to the Speech or Debate Clause as a model for the defendant's immunity claim.
>
> In contrast to the defendant's sweeping claim of immunity for all Presidential acts within the outer perimeter of his duties, the Speech or Debate Clause's scope is specific: it is limited to conduct "within the 'sphere of legitimate legislative activity.'" Gravel v. United States, 408 U.S. 606, 624 (1972). "Legislative acts are not all-encompassing," and exclude a vast range of "acts in [a Member's] official

> capacity," such as outreaches to the Executive Branch. Id. Beyond that limitation, the Clause "does not purport to confer a general exemption . . . from liability . . . in criminal cases." Id. at 626. Nor does it "privilege [Members or aides] to violate an otherwise valid criminal law in preparing for or implementing legislative acts." Id. Courts have therefore recognized for more than 200 years that a Representative "not acting as a member of the house" is "not entitled to any privileges above his fellow-citizens" but instead "is placed on the same ground, on which his constituents stand." Coffin v. Coffin, 4 Mass. 1, 28-29 (1808); see Rayburn House Off. Bldg., 497 F.3d at 670 (Henderson, J., concurring in the judgment) (observing that "**it is well settled that a Member is subject to criminal prosecution and process**"). The Speech or Debate Clause does not "make Members of Congress super-citizens, immune from criminal responsibility." United States v. Brewster, 408 U.S. 501, 516 (1972). The defendant's immunity claim, however, would do just that, absent prior impeachment and conviction.
>
> The Speech or Debate Clause's historical origins likewise reveal its inapplicability in the Presidential context. The Clause arose in response to successive British kings' use of "the criminal and civil law to suppress and intimidate critical legislators." United States v. Johnson, 383 U.S. 169, 178 (1966); see United States v. Gillock, 445 U.S. 360, 368-69 (1980) (noting that the English parliamentary privilege arose from "England's experience with monarchs exerting pressure on members of Parliament" in order "to make them more responsive to their wishes"). In one instance, the King "imprison[ed] members

> of Commons on charges of seditious libel and conspiracy to detain the Speaker in the chair to prevent adjournment," and the judiciary afforded no relief because "the judges were often lackeys of the Stuart monarchs." Johnson, 383 U.S. at 181. That history has no parallel here: the defendant can point to no record of abuses of the criminal law against former Presidents, and the Article III judiciary provides a bulwark against any such abuses. [my emphasis]

Having been invited to discuss congressional immunity, Smith's brief cites another comment from Henderson's Rayburn concurrence elsewhere. "[T]he laws of this country allow no place or employment as a sanctuary for crime."

> see United States v. Rayburn House Off. Bldg., 497 F.3d 654, 672-73 (D.C. Cir. 2007) (Henderson, J., concurring in the judgment) ("**[T]he laws of this country allow no place or employment as a sanctuary for crime.**") (citing Williamson v. United States, 207 U.S. 425, 439 (1908)). [my emphasis]

Tactically, all this is just an argument — an originalist argument — that even an immunity explicitly defined in the Constitution, Speech and Debate, does not — Judge Karen Henderson observed in 2007, when the question of immunity pertained to Black Democrat William Jefferson, in a case in which she sided with DOJ attorney Michael Dreeben — exempt anyone from criminal prosecution. Read her concurrence! She makes the same arguments about Tudor kings that Smith and Dreeben make!

But much of Jack Smith's response, in my opinion, lays the ground work for other, future appeals. For example, this brief adopts a slight change in the way it describes the fake elector plot, emphasizing the centrality of Trump, "caus[ing his fake electors] to send false

certificates to Congress," a move that may be a preemptive response to any narrowing of 18 USC 1512(c)(2) that SCOTUS plans in the Fischer appeal of obstruction's use for January 6.

Ultimately, Smith is still arguing for a broader ruling, rejecting Trump's presidential immunity claims more generally. Ultimately, I imagine this adoption of language from Clinton v Jones is where Jack Smith would like to end up.

> Given that, the Constitution cannot be understood simultaneously (and implicitly) to immunize a former President from criminal prosecution for official acts; rather, the Constitution envisions Presidential accountability in his *political* capacity through impeachment and in his *personal* capacity through prosecution. See Clinton, 520 U.S. at 696 ("[F]ar from being above the laws, [the President] is amenable to them in his private character as a citizen, and in his public character by impeachment.") (quoting 2 J. Elliot, Debates on the Federal Constitution 480 (2d ed. 1863) (James Wilson)).

To get there without possibly fatal delays, though, Dreeben and Smith need to get Henderson to agree to at least a narrow rejection of Trump's immunity claims.

And so, responding to Sauer's invitation, Dreeben reminded Henderson of what she said about a case he argued 16 years ago.

But if I were Scott Perry, three days after he was ordered to turn over records about his plotting with Donald Trump to overturn the election, I'd be watching these arguments closely.