

JUDGE MERCHAN'S HALF BABY

Judge Merchan has rejected Trump's challenges to his conviction in the New York hush money case and scheduled a sentencing for January 10. But he has intimated he will sentence Trump to an unconditional discharge – meaning he won't serve a jail sentence or probation.

In my opinion, this is a tactical decision and like every other legal decision about Donald Trump, unsatisfying and inadequate.

I think Merchan is trying to affirm the import of the jury's guilty verdict, while daring Trump to ask for more.

The tradeoff I think Merchan is making is that by giving Trump nothing tangible to lose except his claim to innocence, he nevertheless situates the case in such a way that Trump can appeal.

But Merchan did so while weighing the record in favor of judicial independence.

After affirming the seriousness of Trump's crime and the evidence against Trump (the first of ten "Clayton Factors" Merchan was obliged to consider given Trump's request he just make the case go away), Merchan next addressed Trump's claim that his contributions to society say he should escape punishment.

Merchan used that factor to discuss Trump's attacks on Courts and Rule of Law. Among the items Merchan listed was the need to gag Trump; he noted, too, that even the Supreme Court backed his decision.

Defendant argues that his "contributions to this City and the Nation are too numerous to count," and concludes his argument under this section by referencing two NY Supreme Court cases which are entirely distinguishable. Defendant's Motion at pg. 59. This Court agrees that Defendant served his country

as President and will do so again in a matter of weeks. However, that service is but one of the considerations to weigh under this factor.

Despite Defendant's unrelenting and unsubstantiated attacks against the integrity and legitimacy of this process, individual prosecutors, witnesses and the Rule of Law, this Court has refrained from commenting thereon unless required to do so as when ruling on motions for contempt of court. However, Defendant, by virtue of the instant motion, directly asks this Court to consider his character as a basis to vacate the jury verdict, and this Court must do so in accordance with the requirements of CPL section 210.40(1)(d).

Defendant's disdain for the Third Branch of government, whether state or federal, in New York or elsewhere, is a matter of public record. Indeed, Defendant has gone to great lengths to broadcast on social media and other forums his lack of respect for judges, juries, grand juries and the justice system as a whole. See People's Response at Section IV. C. In the case at bar, despite repeated admonitions, this Court was left with no choice but to find the Defendant guilty of 10 counts of Contempt for his repeated violations of this Court's Order Restricting Extrajudicial Statements ("Statements Order"), findings which by definition mean that Defendant willingly ignored the lawful mandates of this Court. An Order which Defendant continues to attack as "unlawful" and "unconstitutional," despite the fact that it has been challenged and upheld by the Appellate Division First Department and the New York Court of Appeals, no less than eight times.

Indeed, as Defendant must surely know, the same Order was left undisturbed by the United States Supreme Court on December 9, 2024. [citation]. Yet Defendant continues to undermine its legitimacy, in posts to his millions of followers. Indeed, this is not the only instance in which Defendant has been held in contempt or sanctioned by a Court.⁸ Defendant's character and history vis-a-vis the Rule of Law and the Third Branch of government must be analyzed under this factor in direct relation to the result he seeks, and in that vein, it does not weigh in his favor.

⁸ For example, Defendant has been held in contempt by courts within this jurisdiction and sanctioned by others. *People of the State of New York v. The Trump Organization, Inc.*, No. 451G8512020 [citation] ("Frivolous lawsuits should not be used as a vehicle for fundraising or fodder for rallies or social media. Mr. Trump is using the courts as a stage set for political theater and grievance. This behavior interferes with the ability of the judiciary to perform its constitutional duty) [my emphasis]

Trump claimed he was too important to sentence. Judge Merchan responded that Trump has undermined the Courts at every level.

And then he noted that the Supreme Court had backed him, Merchan, in defending the sanctity of his court.

That's not the only legal issue Merchan highlighted as important. Merchan also noted Trump's claim to President-elect or retroactive immunity.

Defendant presents this Court with the novel theory of President-elect immunity

as it applies to [citation], arguing that such immunity presents a “legal impediment to conviction.” For the reasons stated above, this Court remains unpersuaded that President-elect immunity is the law and thus, neither that doctrine, nor the Supremacy Clause or Presidential Transition Act present a legal impediment to imposition of sentence. Alternatively, Defendant seeks, in essence, a form of retroactive immunity. Both of these theories are briefly addressed below.

Essentially, what Defendant asks this Court to do is to create, or at least recognize, two types of Presidential immunity, then select one as grounds to dismiss the instant matter. First, Defendant seeks application of “President-elect immunity,” which presumably implicates all actions of a President-elect before taking the oath of office. Thus, he argues that since no sitting President can be the subject of any stage of a criminal proceeding, so too should a President-elect be afforded the same protections. Defendant’s Motion at pg. 35. Second, as the People characterize in their Response, Defendant seeks an action by the Court akin to a “retroactive” form of Presidential immunity, thus giving a defendant the ability to nullify verdicts lawfully rendered prior to a defendant being elected President by virtue of being elected President. It would be an abuse of discretion for this Court to create, or recognize, either of these two new forms of Presidential immunity in the absence of legal authority. The Defendant has presented no valid argument to convince this Court otherwise. Binding precedent does not provide that an individual, upon becoming President, can retroactively dismiss or vacate prior criminal acts

not does it grant blanket Presidential-elect immunity. This Court is therefore forbidden from recognizing either form of immunity.

Merchan is right: these are garbage theories. Theories that even most of SCOTUS would reject.

And that may be why Merchan adopted his wildly unsatisfying approach to sentencing. First, he rejected Alvin Bragg's bid for an Alabama Rule because it would not permit Trump ability to appeal – to appeal his retroactive immunity claims, to appeal his claim about judicial prerogatives. Similarly, Merchan declined to just hold the sentence in abeyance unless he was unable to sentence Trump.

This Court has considered and now rejects the People's suggestion that it adopt the "Alabama Rule" which would preserve the jury verdict while terminating the proceedings as such a remedy would deny Defendant the pathway he needs to exhaust his appellate rights.

The Court has also considered the People's alternative proposal of holding sentence in abeyance until such time as Defendant completes his term of Office and finds it less desirable than imposing sentence prior to January 20, 2025. The reasons are obvious. However, if the Court is unable to impose sentence before Defendant takes his oath of office, then this may become the only viable option.

And after telling Trump the only way he would just hold the sentence in abeyance is if he were not able to sentence him before his term, Merchan informed him that he's inclined to given him a sentence of unconditional discharge, in part *so Trump can appeal*.

a sentence of an unconditional discharge

appears to be the most viable solution to ensure finality and allow Defendant to pursue his appellate options.

Merchan is giving Trump a choice: Show up – even by video – and be sentenced as an adjudged fraudster – with the expectation that he won't go to jail and if he wants to appeal things like his retroactive immunity and bad character he can do so. Or he can no show.

In which case the sentence will hang over his head for the entirety of his presidency.

None of this is satisfying.

But Judge Merchan seems to have carved out a little corner of rule of law – retroactive immunity and the judicial contempt on which even this SCOTUS has already upheld Merchan – that Trump can test before the Supreme Court. If Trump wants to take those chances, he can have an unconditional discharge precisely so he can make that appeal.

Or he can have the sentence hanging over his head for his entire term.