

# [***Opinion: The Supreme Court has a different view of emergencies than we do***](https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:6BFF-PK81-DY7V-G0RV-00000-00&context=1516831)

CNN Wire

February 29, 2024 Thursday 5:49 PM GMT

Copyright 2024 Cable News Network All Rights Reserved

**Length:** 1396 words

**Byline:** Opinion by Dahlia Lithwick and Steve Vladeck

**Dateline:** (CNN)

**Body**

(CNN) &#8212; The Supreme Court [*ruled on Wednesday*](https://www.cnn.com/2024/02/28/politics/trump-supreme-court-immunity/index.html) that it would keep on hold former President Donald J. Trump's criminal prosecution arising from his alleged responsibility for the violent efforts on January 6, 2021, to prevent Congress from certifying his defeat in the 2020 election. In that same order, the high court made clear that it would hustle to hear his appeal from a pair of lower-court decisions that had rejected his claim to immunity from these charges.

The brief order was met with outrage and indignation from many - who complained that, by keeping the case from going forward immediately, the justices were almost guaranteeing that the crucially important January 6 case cannot go to trial before the presidential election this November, and that the justices were thus complicit in Trump's transparent efforts to delay accountability. The court said it would hear arguments on the case during the week of April 22.

Trump's lawyers had challenged a February 6 appeals court ruling [*that said*](https://www.nytimes.com/2024/02/06/us/politics/trump-immunity-election-case-ruling.html#:~:text=%E2%80%9CWe%20cannot%20accept%20former%20President,that%20the%20office%20of%20the), "We cannot accept Trump's claim that a President has unbounded authority to commit crimes that would neutralize the most fundamental check on executive power - the recognition and implementation of election results. Nor can we sanction his apparent contention that the Executive has carte blanche to violate the rights of individual citizens to vote and to have their votes count."

Although the court's order accelerates the briefing and argument, so that the matter can be conclusively resolved before the justices rise for their summer recess at the end of June, most critics were quick to contrast the expedited schedule with the one the court set in [*Bush v. Gore*](https://supreme.justia.com/cases/federal/us/531/98/) in 2000, the [*Watergate tapes case in 1974*](https://supreme.justia.com/cases/federal/us/418/683/) and other decisions in the court's history in which the justices moved with far more dispatch. The court, the argument goes, knows an emergency when it sees one. Evidently, the insurrection trial is just emergency-ish.

Descriptively, we certainly agree that the court is capable of moving faster. Over the 2021-2022 winter break, the court agreed to resolve, heard argument in and resolved [*two major challenges*](https://www.supremecourt.gov/opinions/21pdf/595us1r7_4315.pdf) to [*federal Covid-19 vaccination policies*](https://www.supremecourt.gov/opinions/21pdf/595us1r8_8o6a.pdf) in a matter of 27 days.

A few months earlier, the court heard oral argument in challenges to Texas' six-week abortion ban just 10 days after granting review - and it issued [*its ruling rejecting those challenges*](https://www.supremecourt.gov/opinions/21pdf/595us1r4_0861.pdf) six weeks later. And if we include cases in which the court hands down significant decisions without even taking a beat to allow for full briefing and oral argument - through its "[*shadow docket*](https://www.hachettebookgroup.com/titles/stephen-vladeck/the-shadow-docket/9781541602632/)" - examples abound of the court moving at light speed compared to the schedule set for a case that, on the merits, could and should have been resolved two weeks ago.

The problem, as we see it, rests in the daylight between political emergencies and legal ones. The Covid-19 vaccine cases were legal emergencies because, in the view of both sides to those cases, the continuing existence (or lower-court pauses) of those mandates were imposing massive and irreparable harm, albeit on different constituencies.

The Texas abortion case was a legal emergency because, at least while Roe v. Wade was still on the books, every day the Texas law remained in effect was a day in which abortions were effectively unavailable in the nation's second-largest state.

Ditto [*Bush v. Gore*](https://tile.loc.gov/storage-services/service/ll/usrep/usrep531/usrep531098/usrep531098.pdf), in which, whatever one thinks of the arguments on either side of the case, no one could deny that the clock was ticking toward a very real constitutional crisis that both parties needed resolved before inauguration day (if not the [*"safe harbor" deadline*](https://www.npr.org/2020/12/08/942288226/bidens-victory-cemented-as-states-reach-deadline-for-certifying-vote-tallies#:~:text=Dec.,intervene%20in%20the%20election%20results.) of the Electoral Count Act of 1887).

Much as both of us would like to see the January 6 insurrection trial go forward as soon as possible, this prosecution can be distinguished from these other cases - not because it's less important (it isn't), but because there isn't the same kind of ticking legal clock.

Rather, the ticking clock here is political - and the very real desire on the part of a whole lot of people, including us, to see these cases run their course prior to the November election. The same can be said of the Colorado ballot disqualification case, where the court acted on a calendar that [*isn't that different*](https://www.supremecourt.gov/orders/courtorders/010524zr2_886b.pdf) from the one it's following in the January 6 case. Because of the stay issued by the Colorado Supreme Court, there was no legal emergency; the status quo was to keep Trump on the ballot. The US Supreme Court moved quickly in that case; just not as fast as possible.

We both keep wishing that the Supreme Court would treat political exigencies with at least the same expediency with which it handles the legal ones. But wish as we might, that just isn't in the court's job description, and indeed at its best, the court should try to ignore political clocks as much as possible.

There are good arguments for why the court ought to be moving faster in these political emergency appeals. But it's worth emphasizing that, much as we don't like them, there are arguments on the other side, too - for why the court ought not to be moving even this fast. Trump didn't even ask the court to take up his appeal when he sought to keep the prosecution on hold; the court did that for him. And there have been some vocal commentators with no love lost for Trump, like Harvard law professor Jack Goldsmith, [*who have suggested*](https://www.lawfaremedia.org/article/the-consequences-of-jack-smith's-rush-to-trial) that the court could and should not decide the case on an expedited schedule - where it wouldn't get briefed or argued until the term that starts in October.

Thus, it's worth at least indulging the possibility that the court's action on Wednesday was a least-worst compromise - one that for the moment united the justices who would have kept the January 6 prosecution on hold indefinitely with those who didn't want to take it up in the first place.

This was a grand bargain - of a sort. The court gave both Jack Smith and Trump half a win - at least compared to the outcomes that would have been wipeouts.

If that's true, it raises a difficult question about how we should assess the Supreme Court's actions. Is the relevant baseline how our idealized court would act in individual cases, or is it how the court we have ought to act given its prior behavior? There's a tendency in contemporary discourse to focus on best-case and worst-case scenarios - for all of the obvious reasons: responsible contingency planning demands it, clickbait thrives on it and we have become so distrustful of those with whom we disagree that we tend to leap to the extreme explanation either for the things we like or, more often, the things we don't.

But when it comes to the Supreme Court, we ought not lose sight of the very real history of these "middle-case" scenarios - of the justices compromising with each other, whether for their own reasons or because they think it's the best move for the court as an institution.

Some of those compromises are apparent (and defensible) in real-time: There was all-but-overt horse-trading in the Watergate tapes case, in which the court's more liberal justices agreed to recognize a constitutionally grounded executive privilege in exchange for the more conservative justices holding that it didn't apply to Nixon. And there was the push for unanimity in some of the court's most important civil rights decisions (including [*Brown v Board of Education*](https://tile.loc.gov/storage-services/service/ll/usrep/usrep347/usrep347483/usrep347483.pdf)), often at the expense of analytical coherence.

Some of these compromises were never a good idea -like Chief Justice Roger B. Taney's clumsy and racist effort to ward off the Civil War in the [*Dred Scott*](https://www.archives.gov/milestone-documents/dred-scott-v-sandford) case. But this is the key point: These kinds of compromises are not inherently good; but they're also not inherently bad - even if some, or even many, of us don't think they were necessary or appropriate. A court that is splitting the baby might not be selling out. It might be solving exigent problems in the exact ways that differentiate judges from politicians in robes.

That might be a bitter pill to swallow in this moment, in which it looks ever-more likely that Trump will be able to run out the clock before this November's election. But the Supreme Court, for better or worse, is playing a much longer game, in which ***politics*** matters fractionally less than law. As it theoretically should.

Opinion by Dahlia Lithwick and Steve Vladeck

TM & © 2024 Cable News Network, Inc., a Time Warner Company. All rights reserved.

**Load-Date:** March 29, 2024

**End of Document**