

# [***Donald Trump Makes Remarks After Court Wraps; Prosecution and Defense Rest in Trump Hush Money Trial; Interview With U.S. Homeland Security Secretary Alejandro Mayorkas***](https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:6C32-N8P1-JCS1-63BY-00000-00&context=1516831)

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**Body**

NEIL CAVUTO, FOX NEWS ANCHOR: All right, so many battles, so little time.

Ahead of the Trump courtroom battle, the new border battle,it's on again. Senate Majority Leader Chuck Schumer is trying to revive that bipartisan border measure that didn't go anywhere. He's hoping to see a vote this week. Good luck with that.

Why Homeland Security Secretary Alejandro Mayorkas is urging its passage today, but Republicans saying it's going nowhere any day. Secretary Mayorkas is here, and only here, to talk about it minutes from now.

To the other big battle today. And that is in New York versus really Donald Trump. Closing arguments a week away, but, right now, the battle is over. Jury instructions. Donald Trump is watching it all go down. We will see what he has to say when the court wraps. And that is coming up.

Welcome, everybody. I'm Neil Cavuto on a busy, busy news day.

Nate Foy outside the courthouse, what we can expect -- Nate.

NATE FOY, FOX NEWS CORRESPONDENT: Hey, Neil.

So, former President Donald Trump has already spoken twice today. We're expecting him to speak again at 4:30. But you mentioned right now, throughout the entire afternoon session, lawyers on both sides have been debating about the jury instructions, which will be handed to the jury after closing arguments, and they will use these instructions as they reach their verdict.

And here are some of the key takeaways so far. Judge Merchan said that Michael Cohen's admission of guilt in related to federal campaign finance law cannot prove that former President Trump is implicated in any crime. Prosecutors are also arguing that some of the elements of these crimes do not have to meet the higher standard of willful intent.

Instead, they want to prove the crimes through unlawful means. Essentially, the prosecution wants to lower the standard of guilt. Merchan actually sided with Trump's lawyers about a key matter in the instruction. Prosecutors, of course, argue that Trump falsified records to illegally influence the 2016 election.

But the instructions will read -- quote -- "Take a look at this, Neil. If the payment would have been made even in absence of candidacy, payment should not be treated as contribution."

So, if the jury thinks that Trump was motivated by anything other than the election, his brand or his family, the bookkeeping charges could not be elevated to felonies. Now, attorney Bob Costello finished testifying today. Trump's team rested their case after that.

Today, Costello talked about his close relationship with Rudy Giuliani that he flaunted to Michael Cohen. That relationship, while he consulted with Cohen in 2018, he said Giuliani proposed setting up a so-called back channel from Cohen to Trump. But Costello says he sent messages at Cohen's request.

Now, Trump himself did not testify. His son Don Jr. said outside the courtroom today that it made no sense with how unfair this trial has been, in his view. Trump's team also chose not to call former FEC Chairman Brad Smith after Judge Merchan severely limited his testimony.

So, again, Trump is expected to speak after court wraps today at 4:30. The jury has been gone since this morning, Neil. They will come back on Tuesday, when we're expecting closing arguments. After that, the instructions to the jury that are being debated right now will be handed to the jury and deliberations will begin on Wednesday -- Neil.

CAVUTO: Got it. Thank you very much, my friend, Nate Foy, on that.

Tom Dupree back with us, as is Sol Wisenberg.

Sol, end it with you. Why is this charging conference so important? What is it that gets decided?

SOL WISENBERG, FOX NEWS CONTRIBUTOR: It's critically important, Neil. It tells the jury how to apply the law. It tells them what the law is.

Just to give one important example in this case, the government has to prove not only that Donald Trump did what they have alleged. They have to prove that he did it with an intent to defraud, and not only that, not only did he do it with an intent to defraud, but with the specific intent to commit or cover up another crime.

So that jury instruction that tells the jury that and how it's worded can be very important. What it should say is, even if you believe everything else Michael Cohen said or anything else the government put in, you cannot convict Trump unless you prove beyond a reasonable doubt that he had the specific intent to commit another crime.

And then the question is, what crime? Because the prosecution hasn't made it clear which exact theory they're going under. And so another important point, does the jury have to be unanimous on which other crime Trump was allegedly trying to cover up?

Because the government's thrown out three different crimes that he was trying to commit or cover up. So all of this is incredibly important. They should spend a lot of time on it. And jurors pay attention to the jury instructions, in my experience.

CAVUTO: So, Tom, I'm listening to what Sol said.

If you're the defense, you're kind of liking where this potentially could be going? Or are you?

TOM DUPREE, FORMER JUSTICE DEPARTMENT OFFICIAL: You are.

Look, what we have seen so far from the judge during this charge conference is that he has made some rulings in Trump's favor. He's also made rulings in the prosecution's favor, and then there are some issues that he's announced that he's going to basically sleep on and come back tomorrow with his decision.

But, look, Sol is exactly right. Jury instructions are one of the most critical aspects of the case. And one big picture -- or one significant aspect of this that should be kept in mind is that if a judge gets the jury instructions wrong, if he misinstructs the jury on the law, that is a classic example of what an appeals court will treat as reversible error.

There are many cases where you have a situation where a judge, even when the law is complicated, makes his best guess as to how to instruct the jury. And he gives an instruction that the appeals court later says turns out to have been wrong. And if that happens, the consequence, more often than not, is that the appeals court is going to flip it, vacate the verdict, and send it back.

CAVUTO: Sol, in the meantime, you have got a jury that gets to go home for about a week or so, digest everything they have heard. I know you were telling me a little bit earlier they're not supposed to be looking at the media or social sites and the rest.

But they're only human. They might be tempted to. And they're around their friends who might be curious knowing that they sit on this jury, what their thoughts are. How does that process go?

WISENBERG: Well, it's something that what it -- how it goes is, they shouldn't be talking to any body about it. Very hard to do in the age of social media. So I'd be very nervous about it if I were the prosecution or the defense. You're always worried about that.

I'd be more worried, given this jury pool in this whole populace in New York. I'd be more worried about it from the defense side. But it does give you more potential fodder for jury misconduct if you get convicted. But, of course, it's much better not to have them listen to that.

But if I could go back for just a second to this critical point that you asked, there are many famous, well-known white-collar cases that you're aware of, Neil, that have been reversed not based on insufficient evidence, but on an improper jury charge.

The governor from Virginia, former Governor Bob McDonnell...

CAVUTO: Oh, Sure.

WISENBERG: ... the Supreme Court reversed it on those grounds.

Do you remember the Arthur Andersen case, Andrew Weissmann's baby, where he convinced the trial judge to give a jury instruction that was improper and the Supreme Court ruled 9-0, reversed the conviction? That wasn't based on insufficiency of the evidence. It was based on an improper jury charge having to do with intent.

So this is really a big deal. And you're correct. It's very easy to have this reversed if the judge gets it wrong.

CAVUTO: So the judge can't go too far, but if I'm reading Sol correctly, Tom, there's the potential here that going too far on his part invariably risks hurting the prosecution, right? I mean, he can lay this in the hands of a higher court that could reverse everything.

DUPREE: Well, that's true.

And, look, sometimes there are cases where the prosecution's biggest victory is for the trial judge to refuse to give an instruction the prosecutors wanted to give, because he says, look, if I give that instruction you're telling me I should give, I could get reversed on appeal and this entire prosecution gets thrown out.

So, look, the judge obviously has a responsibility to get the law right and he's going to hear from the defense, he's going to hear from the prosecution as to how the jury should be instructed. But, at the end of day, it's the judge's call. It's his obligation and it's a solemn duty, frankly, to get it right and to tell the jury what legal principles they need to bring to bear in rendering a verdict.

These are obviously lay jurors. I guess they're two who are lawyers, but the majority of them are lay jurors. And this is a complicated area of law. And so they need to be given instructions that are not just clear, but also state the law accurately.

CAVUTO: You know, Sol, obviously, Donald Trump is famous for making some remarks as he leaves, oftentimes, as he comes in. He will probably make them again.

But all of this occurs as the judge is giving these sort of jury instructions and road map. Does the former president have to be extra careful with what he says, that -- anything that could potentially mess that up?

WISENBERG: Well, I mean, he's got to obey, theoretically, the gag order. He's had trouble doing that so far. He's gotten better about it the last few days.

As long as he doesn't violate the gag order, I don't see anything that he does with respect to the jury instructions as presenting -- or talking about them that presents a problem for him.

CAVUTO: All right, gentlemen, watch it very closely. We are waiting the year on a couple of the big developments.

The former president himself walking out of that courtroom any minute now and maybe give us his thoughts on the day and how it's going as they sort of hammer out some of these charging instructions.

Then, don't forget we have Alejandro Mayorkas with us, the health and human -- homeland security secretary, his take on what Chuck Schumer is trying to do, resurrect that border security measure that failed overwhelmingly on Capitol Hill. He wants to give it another try. The secretary is all open to that, even though Republicans say it's not happening, it's a waste of time.

Mayorkas here a few minutes from now.

(COMMERCIAL BREAK)

CAVUTO: All right, well this could be a case, as you're looking outside the New York state Supreme Court, of Don versus Juan. We're waiting for possible remarks from the former president.

But Jonathan Turley tells us it's Judge Juan Merchan who really could be the defense's biggest challenge here. He's here to explain.

Jonathan, tell me about that.

JONATHAN TURLEY, FOX NEWS CONTRIBUTOR: Well, it's not that I disagree with everything the judge has decided. He's made some good decisions, but they have largely gone in favor of the prosecution.

Some of the most important decisions, he's taking on advisement. is some of the decisions he made today, quite frankly, are hard to figure out. He -- for example, with Costello, the former attorney for Cohen, the prosecutors stopped Costello from fully answering a question what he meant in an e- mail.

And so when the defense got their chance, they said, would you like to explain? And the prosecutors said, no, it's beyond the scope.

Well, that should have been a ridiculous objection. And Merchan, however, sustained it. I mean, it was the same scope. He was being asked, what did you mean by that? And the judge sustained it.

So it's moments like that where you really feel like there might be a thumb on the scale. The most important stuff going on right now is probably the least engaging for passersby. It deals with how the jury will be instructed. That could very well determine the outcome in this case.

The government is arguing some pretty sweeping positions. Among them, it's -- they're arguing that they don't have to prove willful intent on all of the elements on all of these actions. They're suggesting that things like unlawful means, which is really an important term of influencing election, can be satisfied by less than the criminal standard.

And the defense, I think legitimately, is saying, whoa, you're -- you're going to convict someone on a lower-than-criminal-standard on an important element. And this is really the result of this sort of Frankenstein case.

Bragg took this dead misdemeanor, zapped it back into life as a felony by sort of stitching together different crimes. And now the government's trying to use that to say, yes, we did that, but it also means we don't have to prove the full criminal standard on all elements.

CAVUTO: So let me ask about having brought Robert Costello to the stand.

Just judging fellow lawyers, do you think that was a good move on the part of defense, or did it risk being overkill?

TURLEY: Well, Neil, I had said earlier that I would not have called Costello to the stand.

But that's largely because I'm a criminal defense attorney. I tend to be risk-averse.

CAVUTO: Right.

TURLEY: I think this case is collapsing on its own weight. I don't see how it could be sustained on appeal.

But the lawyers in that room have a different set of issues. Their client is running for president. And I think they feel they have a tough judge that's ruling against them, but, most importantly, a judge that's allowed this jury to hear and I think believe that there were election violations in this case, which is not true.

But the judge has allowed them to hear that repeatedly from prosecutors, from Cohen, from Pecker. And I think that's why they decided to bring in what I call a kill shot witness. They were hoping that Costello could seal the deal with at least a couple of witnesses.

This is more of a hung jury strategy, because you're saying, look, we're going to get hit, which they were, but this could seal it if there's some jurors who are already sort of feeling that they may stand against the rest, if necessary.

Costello did hurt Cohen. I mean, he did strongly contradict what Cohen had just said under oath. But in bringing him on, the prosecutors were able to bring in Rudy Giuliani and back channels and Costello's association or affiliation with Donald Trump.

CAVUTO: Jonathan, much has been said about the consensus that can develop. I switch around, watch all the news channels.

And what I started seeing on others, besides FOX, where there was growing criticism of the prosecution, and more compliments of the defense, it's built up an expectation. Now, you touched on maybe a hung jury or this is not going anywhere.

But I'm old enough to remember cases that look like they would go all one way. I'm old enough to remember the former labor secretary on Ronald Reagan, Raymond Donovan, of course, who had 20-some-odd counts, 28, I believe, on everything from impropriety to you name it that could have landed him in jail for the rest of his life.

The consensus was building the day before that jury announcement that he was going to be living in a jail cell for the rest of his life. He was exonerated on all counts. And he famously said, "Where do I get my good name back?" I'm paraphrasing here.

TURLEY: Right.

CAVUTO: But I guess I bring and hearken that case back, Jonathan, to you never know what a jury is going to decide or what individual jurors are most impressed with or not, do you?

TURLEY: No, you're absolutely right.

I'm hoping that this jury can redeem the integrity of the New York legal system, something the prosecutors and, frankly, the court have not done. I'm hoping that this New York jury will feel like they're getting played, and New Yorkers don't like to be chumps, and that they recognize this for what it is, that there is no clear crime here.

And they're relying on a convicted serial perjurer and someone who just admitted to committing grand larceny. And he's not the one charged in the case. So it is possible. But there's also that other possibility. They're going home for a long time.

As a criminal defense attorney, my hair would be on fire to send a jury back into the world for this length of time when your client is unpopular in this area. They're going to be with their neighbors. They're not sequestered. And it's going to remind them how unpopular it will be if they acquit this individual.

Now, I'm not casting aspersions on them.

CAVUTO: Right.

TURLEY: Because I really do believe jurors try to get it right. But that's a long time for the defense to have these people in the world.

And we will see what happens. But there is, I think, a greater chance now of a hung jury than a lot of people assumed from this district. I'm hoping that at a minimum that will be the case, because I got to tell you, I think this case has become more farcical by the day. And I think that Cohen really summed it up for a lot of people.

Even folks on other networks have said that. But you have to keep in mind we have all been talking about a host on another network who came out of the disastrous Cohen testimony and said, well, he did great. And that really wasn't stealing money. That was self-help for a bonus.

Look, some other jurors may have that same willful blindness. You don't know.

CAVUTO: You never know, because they might not want to talk to their friends about it, but their friends will certainly want to talk to them.

Jonathan Turley, we will see how that goes. They have a week to sort of stew over that maybe at barbecues or all the rest.

TURLEY: Right.

CAVUTO: All right, so we are waiting to hear from Donald Trump. We know this much. No matter how this case goes, he is raising a ton of money off of this.

We're going to spell it out, because he's already got an advantage in the latest month decidedly over Joe Biden.

We're also going to see what Chuck Schumer has up his sleeve trying to reintroduce that battered border security bill. Republicans say it's not going anywhere. Homeland Security Secretary Alejandro Mayorkas disagrees.

He's here to tell us why we do need another shot at this, even if Republicans say he's not going to get it -- after this.

(COMMERCIAL BREAK)

CAVUTO: All right, the Dow trying to claw its way back to 40000, but, in the middle of all that, the S&P and the Nasdaq hit records, optimism that the Federal Reserve is still on track to cut rates. They never, ever, ever give up.

Why that is happening -- after this.

(COMMERCIAL BREAK)

CAVUTO: All right, we still don't know how this case is going to work out for Donald Trump legally.

We know, politically, well, it's bringing him a lot of money into his campaign, 76 million bucks in the latest month. That was close to double what Joe Biden was taking in. Now, cash on hand is an edge that the former president had, but, who knows, maybe not for long, and, of course, this on the heels of the president's plans, former president's plans to be in the South Bronx on Thursday.

Might say that's going into the belly of the bluest of blue beast. That is a very Democratic-centered area. But, then again, so is New Jersey. The president drew a crowd of more than 100,000 in Wildwood less than two weeks ago.

Craig Shirley here, presidential historian, "The Search for Reagan" author, on sometimes the candidates and their performance can confound you.

Craig, the fact that the former president is gunning for these locales, sometimes in the case of New York-New Jersey area, because he's limited to how far he can go, but it could work for him. What's your sense?

CRAIG SHIRLEY, PRESIDENTIAL HISTORIAN: It's very smart ***politics***, Neil.

I can think of many times where candidates, actually, they got out of the mold to campaign in nontraditional areas, and it did them very, very well. Reagan in 1980 was in New York City, campaigning in New York City the weekend before the election.

CAVUTO: Right.

SHIRLEY: And a few weeks before that, he was in the South Bronx and in New Jersey.

On the other hand, it can backfire too, like Jimmy Carter in 1980 campaign in California, which was a fool's errand. There was no way he was going to wrest California away from Ronald Reagan, although it did cause the Reagan campaign to commit more advertising dollars to California. So that part of the strategy worked.

But it's good for (AUDIO GAP) campaign. It's good for momentum. It's good for morale. It's good for money. It also reshuffles the deck. So it gets people focused on other things. Trump...

CAVUTO: No, we talked about...

(CROSSTALK)

CAVUTO: But you make a good point.

(CROSSTALK)

SHIRLEY: Everybody was talking about a thousand, a hundred...

CAVUTO: I'm sorry, Craig. We're having some more audio issues here. Now, hopefully, you're addressing them here.

SHIRLEY: No, that's...

(CROSSTALK)

CAVUTO: The one thing, Craig, I did notice, when you talk about Ronald Reagan and campaigning in the South Bronx, of course, he famously kicked off his campaign with the Statue of Liberty in the backdrop there.

But there was also the subliminal message, look where I am, folks, and it worked out for him. He won a lot of these bluest of blue states, in fact, almost every state in that election, four years later doing it all over again.

I'm just wondering. When a lot of people criticize this, they criticized Ronald Reagan for appearing at these blue locales. I know they criticized Donald Trump back in 2016 for going to these battleground states. It was considered a waste of effort on the part of a guy who couldn't win there.

I even remember them making fun of John F. Kennedy when he was campaigning in West Virginia, this rich Maine senator with a hardhat on, and later on talking to coal miners there. That was a crucial primary. He beat Hubert Humphrey. It was a seminal event. So they can shock you.

SHIRLEY: Yes, they can.

Don't forget too, Kennedy was a Catholic. And, of course, that was very controversial in 1960.

CAVUTO: That's right.

SHIRLEY: And West Virginia was heavily Protestant. So Kennedy winning really helped the great momentum for his campaign to propel him through the Democratic nomination.

CAVUTO: So how do you see it now? Obviously, Donald Trump hopes to make a virtue out of what could be just a bad set of developments, campaigning in these areas, but getting big crowds.

Is that telling?

SHIRLEY: Yes, oh, very much so. It's so good for your psychology. And it's so bad (AUDIO GAP)

Look, Joe Biden is not only having sleepless nights right now. He's having napless afternoons worrying about the money that Trump is raising, the crowds that he's raising. And it's -- in ***politics***, if you're heading into a lemon, make lemonade.

And that's what Trump is doing. He's making lemonade and he's doing a very good job at it.

CAVUTO: All right, we still have a long way to go, to your point, Craig, but always good talking to you.

Craig Shirley, the presidential historian, "The Search For Reagan" his latest. He knows of what he speaks. So let's see if history repeats itself.

In the meantime here, taking a look at, well, Chuck Schumer trying to maybe get a better sense of the border security bill that went down in flames, but he's going to try it again.

Alejandro Mayorkas on what he makes of that and why he thinks this time will be the charm, my special guest -- coming up.

(COMMERCIAL BREAK)

CAVUTO: All right, still some activity buzzing in the courthouse.

Donald Trump has already decided against testifying in his hush money trial, and his lawyers no doubt probably requested that and tried to force the point they're doing well enough as is.

This is all wrapped up. The defense has rested its case. The prosecution has. And, right now, the issue comes down to some of the final details and instructions that will go to the jury. And it's haggling over those details that are quite important to each side.

Nate Foy at the New York state Supreme Court with more.

Hey, Nate.

FOY: Hey, Neil.

So, on the 20th day of this trial, after 22 witnesses, again, lawyers on both sides just going back and forth line by line about the instructions that will be given to the jury after closing arguments are made on Tuesday of next week, and the latest from the courtroom right now, Trump's lawyers pushing back on what will be shared with the jury with evidence related to the fallout from the "Access Hollywood" tape, as well as the term hush money.

So Judge Merchan agreed to clarify that the fact that Michael Cohen pleaded guilty to federal campaign finance law does not imply Trump's guilt of any crime. But Trump's team asked the judge to instruct the jury that hush money payments are not illegal. Merchan says that it came up multiple times at the trial and an instruction from the bench would take things too far.

Now, Trump's team also asking for a limiting instruction about evidence surrounding the fallout of the "Access Hollywood" tape. Prosecutors argue that Trump falsified business records to illegally influence the 2016 election.

And I mentioned earlier a really key ruling from Merchan, as part of the instructions that will be given to the jury, they will be told that if the payment to Stormy Daniels would have been made regardless of Trump's candidacy, it cannot be considered a campaign contribution.

So if the jury finds that Trump was motivated by his family or his brand, the felonies become misdemeanors. Now, Trump's team rested their case after Bob Costello testified today. Again, he was the 22nd witness, only the second for the defense after prosecutors called 20 witnesses to the stand.

He testified about his close relationship with Rudy Giuliani and setting up a back channel that was initially proposed by Giuliani, so that Cohen could communicate with Trump. He said that he only reached out at Cohen's request and that he had Cohen's best interest at heart.

But, as you mentioned, Neil, we're waiting on former President Donald Trump to speak for a third time today. Some of his allies and his son Don Jr. spoke outside the courthouse earlier. Trump will be speaking momentarily. And then we will be back here next Tuesday, because of the holiday weekend, where lawyers on both sides will make their closing arguments and then the instructions will be given to the jury, with deliberations beginning on Wednesday of next week -- Neil.

CAVUTO: All right, thank you, my friend.

We are getting some other dribblings of what's going on in that courthouse right now and in that courtroom. Over the last few minutes, we're told that Donald Trump was getting frustrated. We don't know exactly what incited this, that he threw down a note, sighed, leaned back, crossed his arms.

And this was after Judge Merchan was speaking condescendingly to a witness. Now, again, the back-and-forth on this is sort of hard to necessarily say whether this has to do with some of the closing instructions and all the rest. But we are monitoring that, also waiting to hear from the president, also waiting to hear from Alejandro Mayorkas.

As you know, he was impeached in the House. He survived getting convicted in the United States Senate, but he goes on as the head of the Department of Homeland Security. And, right now, he is still pressing with his job to try to see that maybe they can get a border bill or something like it passed in the Senate. It's an uphill fight, but Chuck Schumer is ready to wage it on Thursday.

Mayorkas is here to tell us what the odds are. Republicans say zero to less than zero -- after this.

(COMMERCIAL BREAK)

CAVUTO: All right, I want to clarify something I was saying a little bit earlier. And it's my bad. I was mishearing what my producer was telling me.

I will tell you a little bit what's going on in the courthouse right now, that Donald Trump is getting frustrated. Now we have a better idea why that is. He reportedly threw down a note, sighed, threw his head back, crossed his arms.

This was after Judge Merchan was speaking condescendingly to Emil Bove. That's his lawyer. That didn't go down well. Of course, there was similar criticism of a lot of folks certainly in the Trump camp who were not too keen on the way the judge had treated Robert Costello, the early legal adviser to Michael Cohen.

And this appears to have happened -- or raised its head again with the judge's treatment of Mr. Bove. Now, again, I don't know if that's the case here and whether it's singularly tied to that.

But I do want to go to Tom Dupree on the significance of this.

This sort of reignites a sense from the defense team, if true, that they're slighted by the judge and the judge goes after them. What do you make of that?

DUPREE: Yes.

And, Neil, look, it doesn't surprise me that there's going to be this type of friction in a case, particularly at something like a charge conference, where the stakes are so unbelievably high. You are going to have lawyers for both sides being really aggressive, and, frankly, maybe in the judge's view, kind of rubbing him the wrong way because they're pressing their arguments with vigor and they're arguing issues that the judge thinks he's already decided and that sort of thing.

So it doesn't surprise me that you see these sorts of tensions here. I suspect that what the defense is urging the judge to do is to basically issue instructions that the judge just doesn't feel comfortable giving. That's the defense lawyers' job. They have the obligation to kind of push as hard as they can for every instruction they think the law supports.

The judge isn't always going to see it that way. So, again, it's unfortunate that this happens, but it doesn't really surprise me, given the magnitude of what's at stake here today.

CAVUTO: Tom, a judge can lay out the instructions for a jury. Now, a jury is then under sort of this, all right, this is our road map. This is what we have to decide.

But a jury, jurors can wonder from that, right? If they like Donald Trump, they're not going to listen to those exact instructions. If they dislike him, they're not going to listen to those instructions, are they? Isn't that a risk?

DUPREE: Well, Neil, what the lawyers will tell you is that jurors are presumed to follow their instructions.

(LAUGHTER)

DUPREE: But I can tell you, as a practical matter, that that doesn't always happen.

And, look, you're never going to know what's going to go on in the sanctity of a jury's deliberation room. And I do think that you have cases where the jury gets these instructions. And make no mistake. These are long, complex instructions. It's probably going to take the judge at least an hour to deliver them next week.

And I could very well envision a situation where jurors kind of go in one ear, come out the other. And when it comes time to deliberate, maybe there's some remnant to those instructions tucked away in the back of their minds. But, to your point, they're going to decide the way that their gut tells them is the right outcome.

CAVUTO: How likely is it, Tom, that Judge Merchan can say, all right, we have these nearly, what, three dozen counts against the former president? Can he throw out some? Can he say, all right, these are the germane ones I want the jury to deal with?

DUPREE: Yes, he certainly can do that. And we have seen the Trump team has basically been arguing that he should throw out all the counts because they're just deficient as a matter of law and the prosecution hasn't proven its case.

The judge has the power to do that. In this case, I think it's pretty unlikely that the judge is going to throw out any of the charges and not let the jury consider them. We have seen the way the judge has approached this case from the beginning. He's not kind of going the extra mile to rule in Trump's favor.

And I think it's probably too heavy a lift right now to try to get this judge to throw these charges out. I think this judge is convinced that all of these charges need to go to the jury. And I expect that's probably what's going to happen.

CAVUTO: Tom, what about this other argument about misdemeanor versus felony charges, in other words, a roll of the dice on the part of defense? All right, let's make this, we agree to misdemeanor charges and as long as we don't elevate them to felonies.

I mean, what is the significance of that? Is that even likely?

DUPREE: Well, I suppose it's possible.

Look, I mean, here's the thing, right? There's a big, big difference between convicted of a misdemeanor and being convicted of a felony. Obviously, the penalties are very different. In this case, frankly, I think there would be serious problems with the statute of limitations if they tried to convict Trump just of misdemeanors.

So I think there's big danger for the prosecution there. But the overarching point here is that, if the jury is given an option, if they are given basically a menu of things they can do, in other words, convict Trump of felonies, convict Trump of misdemeanors, or acquit Trump, there's a possibility that you could have what's viewed as a compromised verdict, where there are some jurors that might say, we'd like to convict him of a felony.

There are other jurors who might say, we think he should be acquitted entirely. And then they kind of negotiate and, over the course of deliberations, they say, look, let's compromise, and convict him of the misdemeanor.

So if this jury is given that option, that could be one of the most significant things that happens in the course of this entire case.

CAVUTO: So what happens -- the court is over for the day, by the way.

What happens in this next week?

DUPREE: Well, next week is when things are going to get even more interesting, Neil.

What's going to happen first is, these instructions are going to be issued to the jury, presumably after closing arguments. Tuesday, the judge anticipates maybe a full day devoted to closing arguments.

CAVUTO: All right, I'm jumping on you, my friend.

DUPREE: Yes.

CAVUTO: Donald Trump is going to speak right now. Let's listen in.

DONALD TRUMP, FORMER PRESIDENT OF THE UNITED STATES (R) AND CURRENT U.S. PRESIDENTIAL CANDIDATE: Thank you very much.

Jonathan Turley just came out with a statement that he thinks that this case is collapsing of its own weight. This case is a disgrace to our country, to the state of New York. Never seen anything like it.

Steven Calabresi: "It's an outrage that the district attorney brought this case and that the judge did not declare it a mistrial." Very highly respected Steven Calabresi, who says an outrage that the district attorney brought this case and the judge did not declare a mistrial. And everybody's saying it, in one form or another.

Andy McCarthy: "What they have, this kind of a case is, is that the federal prosecutors at my old office of Southern District of New York wouldn't take it in the first place."

They would not take it. The Southern District turned down this case, and the case that Cy Vance looked at and wouldn't take it, and the case that Bragg himself looked at in 2022 and shut down.

And this is what we have been wasting all this time on.

Alan Dershowitz: "I have observed and participated in trials throughout the world. I have seen justice and injustice in China, Russia, Ukraine, England, France, Italy, Israel, as well as in nearly 40 or 50 states. But in my 60 years as a lawyer and law professor, I have never seen a spectacle such as the one I observed sitting in the front row of the courthouse."

He's never seen anything like it. He's been a great lawyer, great legal scholar for years. He's never seen anything like it.

"It's all ***politics***," said Leo Terrell. "If anyone tells you otherwise, they're not a lawyer."

Let me just tell you that the White House is the person or the group, whatever, they're the one trying this case. You heard who was doing all the talking, representative from the White House just recently. This is all about Biden can't campaign, so he's trying to injure his opponent.

They're trying to hurt the opponent, because they can't win it fair and square.

CAVUTO: We are monitoring this, folks. And this will be playing on our Web site.

But I do want to make time here for Alejandro Mayorkas. He is the homeland security secretary.

And another development that is playing out in the United States Senate is, they are trying to revisit that border bill. It looks like it's going nowhere. Chuck Schumer wants to take another stab at it.

Again, Donald Trump's remarks on our Web site are coming in, but we do want to address this. It's another important development here, because the secretary has tried to resurrect this, but it looks like an uphill fight.

Secretary, very good to have you.

Is it an impossible fight? Republicans say you're just wasting your time, Chuck Schumer is wasting his time. What do you say?

ALEJANDRO MAYORKAS, U.S. SECRETARY OF HOMELAND SECURITY: Neil, thanks for having me on.

The senators and I and others put a tremendous amount of effort and time into negotiating the bipartisan Senate bill. That bipartisan Senate bill would deliver for us changes to 30-year-old laws that are incredibly needed. We're dealing with a terrifically broken asylum system and would deliver for us resources at a level that we desperately need that we do not have. And so we need this legislation to pass.

CAVUTO: But it's not going to go anywhere, right? It's not going to go anywhere.

Does that worry you that you're -- that Chuck Schumer is wasting his time, you're wasting your time? This isn't going to go anywhere.

MAYORKAS: Look, Neil, I am focused on achieving needed outcomes. And this legislation is a needed outcome. And I'm not going to lose hope, nor am I going to stop advocating for it.

The American people deserve and need it. The United States Border Patrol deserve and need it. The United States Border Patrol union supported this legislation. I'm going to continue to push for it.

CAVUTO: All right, but the president's doing a lot of things that are in this measure already. And a lot of people criticize him for doing that. What took you so long?

Including this measure to shut down the border once there are 4,000 crossings a day, some of these other days, to speed up asylum adjudication and try to get it done within 180 days, rather than waiting for years, stuff that President Biden could have done all along, but didn't.

Doesn't that strike you as odd?

MAYORKAS: Neil, we took action a long time ago. And migration is a very dynamic phenomenon.

CAVUTO: Well, this was just announced in the last week.

MAYORKAS: And we are seeing the results that take time to take hold.

We built capabilities in foreign countries, in Guatemala, in Costa Rica, in Mexico as well. And, sometimes, they don't develop overnight. They take time to mature. And we will continue to take actions within the confines of our authorities. We need Congress to act.

CAVUTO: All right, but I guess it struck a lot of people as odd, no disrespect, Secretary.

Chad Wolf, your predecessor, was among those saying: "We're almost 3.5 years in their crisis and only now are they starting to take these executive actions. These are actions that we have been pleading with the administration to take for 2.5 to three years."

What do you say to that?

MAYORKAS: I don't -- that's not accurate. That's what I say.

We implemented the asylum officer rule through regulation. We implemented the circumvention of lawful pathways rule through regulation. We have built additional facilities, deployed enforcement and removal operations officers.

This year, we have removed or returned more than 720,000 people who do not qualify for relief under the law, more than any full fiscal year since 2011. We have been enforcing the law from day one, despite the political rhetoric that suggests otherwise.

CAVUTO: All right, but the rap against your administration, maybe your boss -- I know he was happy to see that you survived this, getting convicted in the United States Senate. You were impeached in the House, only the second such Cabinet member to experience something like that.

But I know you're trying to go on and move on, but a lot of your critics have said, as they have of your boss, you botched this. You botched what's going on at the border. Donald Trump was much tougher on the border, believed in a wall that seemed to work. You did not. The president did not, and this is all catchup for you guys. What do you say, Secretary?

MAYORKAS: Neil, let's take a look at the history of migration, rather than take political snapshots.

The history of migration is that the level of encounters at our southern border increased almost 100 percent in 2019 over 2018. What distinguished 2020, when the numbers dropped significantly? The COVID-19 pandemic. That really dropped migration, not just to our southern border, not just throughout the Western Hemisphere, but around the world.

And we, this country, under the leadership of President Biden, overcame the COVID-19 pandemic more rapidly than any country in our hemisphere. Our economy came roaring back more than in any country in our Western Hemisphere.

And people seek to come to the United States because of the opportunities here, the economic opportunities here. We still have approximately eight million vacant jobs in the United States that American workers are not filling.

And so, therefore, our asylum system, which is fundamentally broken, presents an opportunity for them to remain here for too long. Despite that, within the authorities that we have, we have returned or removed more people in the last 12 months than in any full fiscal year.

And we're using our legal muscle more aggressively than it has been in the past.

CAVUTO: Well, that's good. That's good, Secretary, but a lot of people are concerned.

MAYORKAS: But we are restricted by a broken system, which is why we continue to believe that the Senate must pass the legislation.

CAVUTO: I understand that, sir. All right, well, hope springs eternal.

But the bottom line is, you are in charge of keeping us safe. And do you think we are safe, with how porous the border has become? That's not at all saying it's all your fault. I'm just saying that, are we safer now than we were before 9/11?

MAYORKAS: I would say three things, Neil.

One, I'm incredibly proud of the men and women of the United States Border Patrol that risk their lives every day to keep Americans safe and secure, number one.

CAVUTO: No, I'm sure you are, but are we safer? Are we safer now?

MAYORKAS: Number two, our screening and vetting capabilities are stronger than they ever have been.

And, three, the reality is, Neil, that we, and not just the United States alone, but Western countries, are in a heightened threat environment, especially after the October 7 terrorist attacks by Hamas against Israel. That has only elevated the threat environment in Western countries.

And that is why we are as vigilant as we are 24/7 in keeping our country safe.

CAVUTO: Real quickly, I'm switching gears on Robert F. Kennedy Jr.

As you know, he's asked repeatedly for Secret Service protection. You're the guy who would provide something like this or say yes to it. And, apparently, you have said no, and he's still looking. Why not?

MAYORKAS: We have established factors. We have a bipartisan group of leaders in the United States Senate and the House that make recommendations to me. They have...

CAVUTO: Why wouldn't he qualify? Given his family history, why wouldn't he qualify for it on that alone?

MAYORKAS: Because the factors are security-related.

The bipartisan group of members have recommended to me that security be declined. It is ultimately my decision, but I have followed their recommendation each time.

CAVUTO: Do you think that would be a mistake?

MAYORKAS: I do not knowingly make mistakes, Neil.

CAVUTO: OK.

MAYORKAS: And, in this case, I have followed the recommendations of a bipartisan group.

CAVUTO: Got it.

Secretary Mayorkas, thank you very much. A lot of ground to cover there. We appreciate you taking the time.

That will do it for us here.

"The Five" is now.

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