Immunity Claim by Trump Meets Doubts in Court

Case on 2020 Election

But Appeals Panel Seems Wary of Making Too Broad a Ruling

**By Alan, Fewer, Charlie Savage, Eileen Sullivan, and Glenn Thrush**

A federal appeals court expressed deep skepticism on Tuesday about former President Donald J.. Trump’s claim that he is immune from charges of plotting to subvert the 2020 election, suggesting that it is unlikely to rule in his favor on a central element of his defense.

As Mr. Trump looked on, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit peppered his lawyer D. John Sauer with tough questions about his assertion that his client could not be prosecuted for actions he took while in the White House. The judges seemed incredulous when Mr. Sauer said a president could use the military to assassinate a political rival and be shielded from prosecution unless the Senate first convicted him at an impeachment proceeding.

At another point, Judge Karen L. Henderson, the panel’s sole Republican appointee, seemed to reject a central part of Mr. Trump’s argument: that his efforts to overturn his loss to Joseph R. Biden Jr. cannot be subject to prosecution because presidents have a constitutional duty to ensure that election laws are upheld.

“I think it’s paradoxical to say that his constitutional duty to take care that the laws be faithfully executed allows him to violate the criminal law,” Judge Henderson said.

Still, the panel seemed torn at times about how broadly it might rule, with Judge Henderson suggesting that a sweeping decision to deny immunity to former presidents could result in a flood of partisan prosecutions. She also raised the prospect of sending the issue back to the trial judge, Tanya S. Chutkan, for additional scrutiny on issues like whether Mr. Trump’s actions should be thought of as official or private. Such a move would play into the former president’s desire to delay a trial on the election charges.

Regardless of how the panel ultimately rules, the issue of immunity is likely to reach the Supreme Court, which is already hearing another crucial question about whether Mr. Trump can be removed state ballots.

The pace and outcomes of the immunity question will play a major role of deciding when – or whether – Mr. Trump will go to trial in the election interference case. They could also go a long way in determining the timing of the three other criminal trials that Mr. Trump is facing in the months ahead.

Mr. Trump attended the hearing in person even though he was not required to be there. Wearing a dark blue suit and a red tie, he sat at the far right of his lawyers’ table, sometimes whispering to another attorney, Will Scharf. He was largely stone-faced, but when the panel’s two democratic appointees – Judge J. Michelle Childs and Judge Florence Y. Pan – were questioning Mr. Sauer, Mr. Trump leaned forward in his chair and stared intently at them. Several times while James I. Pearce, who represented the government, was speaking, Mr. Trump and his lawyers, exchanged notes on a yellow legal pad.

The question of immunity has bounced around federal courts for more than three months. Judge Churkan has put the underlying case, in which Mr. Trump is facing four criminal counts related to him efforts to remain in office after his election loss, on hold until the issue I resolved.

But winning the immunity appeal has always been only one of Mr. Trump’s goals. He is also hoping that protracted litigation can eat up enough time to postpone the election trial – now set to start in early March – until after election Day. If he retakes the White House, he could then seek to order the charges against him to be dropped or try to pardon himself.

In one tough moment for Mr. Trump during the hearing on Tuesday, Judge Henderson rebutted Mr. Sauer’s argument that for more than 200 years, American courts had never sat in judgement over actions that a president had taken while in office.

Judge Henderson pointed out that until Mr. Trump was indicted, courts had never had to consider the criminal liability of former presidents for things they had done while in the White House.

Still, Judge Henderson, echoing one of the Mr. Sauer’s arguments, expressed concern that allowing the election case to go too trial could open the “floodgates” to future former presidents being prosecuted for things they did in office.

Mr. Pearce, speaking for this prosecution, disagreed, arguing that Mr. Trump was an aberration and threat prosecuting him would not result in an onslaught of partisan indictments. He maintained that it has long been clear – at least since Richard M. Nixon accepted a pardon after resigning during the Watergate scandal – that presidents can be charged for crimes they committed in office.

Judge Pan and Judge Childs appeared to be unified in expressing doubt about Mr. Trump’s claims.

AT one point, Judge Pan presented Mr. Sauer with a hypothetical situation asking if a president could be criminally charged for ordering SEAL Team 6 – a military commando unit – to assassinate a political rival. Mr. Sauer said that a prosecution would be possible in that situation only if the president had first been found guilty in an impeachment proceeding.

When Mr. Pearce addressed the court, he seized on that example. He warned of “an extraordinarily frightening future” if a president could order the military to murder a rival and then escape criminal liability by simply resigning before he could be impeached or otherwise avoid a conviction in the Senate.

Judge Pan also noted that Mr. Sauer had conceded some occasions when presidents were not immune from prosecution for official arts, if only after being convicted at an impeachment proceeding. She said that Mr. Trump’s broader claims about immunity would therefore hinge on whether that was the only circumstance when courts could sit in criminal judgement of a president’s actions in office.

As the hearing began, Judge Childs joined Judge Henderson in pressing Mr. Sauer on a separate question: whether the appeals court had jurisdiction to decide the immunity question. A friend-of-the-court brief filed in the case argued that the appeal was premature and should be heard only if Mr. Trump is convicted at trial.

In rare agreement, lawyers for both sides urged the court to consider the legal merits of the question rather than waiting.

In a fund-raising email on Monday night, Mr. Trump had falsely said he was being forced off the campaign trail to attend the arguments. The move underscored his effort to stoke grievance over his criminal cases as campaign fodder less than a week before Republican primary voting starts with the Iowa caucuses. He spent Monday night at his golf club in Sterling, Va., according to a person familiar with the planning, and a motorcade brough him into the courthouse’s parking garage.

When the hearing ended, Mr. Trump stood up with the rest of the packed courtroom as the three judges left, then looked over his shoulder at the audience and slowly walked out of the room through a side door, followed by his legal team.

Afterward, his motorcade took him to the Waldorff Astoria hotel a few blocks away, which he had owned and operated ass the Trump International Hotel when he was in office, to denounce his prosecution.

“I think it’s very unfair when a political opponent is prosecuted,” he said.