

TUESDAY, APRIL 11, 2023

PERSPECTIVE

Trump's greatest deal

By Vaughn R. Walker

The spectacle last week of a former president in the dock was striking. For one who has been around the court system for more than a half century, it's natural to speculate on how this case and others that may follow will turn out. I won't make a prediction – there are too many unknowns. I will, however, describe the logical outcome.

Most criminal prosecutions result in a plea deal. There is no reason to think that because the defendant is a former president that logic is any different. Pleas offer certainty and resolution. Trials offer expense, delay and uncertainty. It's no wonder pleas are usually a good bargain for both sides.

In this case, too, a plea deal makes sense. The closest parallel was the plea of Spiro Agnew in 1973. Agnew resigned as vice president the same day he pled no contest to income tax charges. This avoided then what may loom here. Because President Richard Nixon was under suspicion for his role in the scandal around the Watergate break-in, the country faced the prospect that Nixon's impeachment and removal from office would result in a president being criminally prosecuted while in office. Given the slow pace of the criminal process, the present proceedings against Trump (and those that may follow) could mean that Trump could be elected president before the criminal proceedings against him are resolved.

Despite the oft-repeated mantra "No one is above the law," the prospect of a president being prosecuted while in office is grim, indeed. It may be hyperbole, but that sce-



Shutterstock

nario suggests that the most powerful position in the land would not be the president, but his pre-trial services supervisors and his probation officer following a conviction. The uncertainties in this situation dwarf those in most criminal cases and offer incentives for both sides to settle to avoid this scenario.

But, of course, there is more. A criminal defendant usually has little or no incentive to accelerate the prosecution. As one very able and experienced criminal defense lawyer explained to me, "The difference between a continuance and an acquittal is that an acquittal lasts longer." As cases drag on, memories fade, evidence becomes stale and proceedings can go sideways. These usually help defendants and hurt prosecutors. There is no reason that these factors differ in the

proceedings against Trump. The New York case against Trump is already about events that happened about seven years ago. The other possible cases are of more recent vintage.

Trump can, of course, attempt to accelerate the proceedings, but defendants seldom do so for the above reasons. His lawyers could ask for an early trial. In more than two decades on the federal bench, I had only one defendant in a criminal case ask for an early trial. He won a flat-out acquittal. But it was a weak case. The New York case against Trump is by no means a slam dunk for the prosecution. Because of other possible prosecutions looming over Trump, asking to accelerate the New York case is a risky strategy. A win in New York is no insurance against a federal

Hon. Vaughn Walker previously served as a United States District Judge, Northern District of California and is a mediator and arbitrator with FedArb.



prosecution, one in Georgia or in whatever else may come out of the woodwork.

No doubt, Trump's lawyers will attempt to obtain dismissals of all or many of the thirty-some charges against him (and, they should do so). No one can predict the outcomes of dismissal motions. Usually, such motions trim a case down, but seldom eliminate it altogether. Maybe the New York case is a better candidate for a complete wipeout of charges than most cases, but Trump's lawyers would be well advised to tell him not to count on that possibility.

Maybe Trump will get lucky. The Georgia prosecutor may not charge him for election interference – either through her own accord, or, possibly, the Georgia Legislature may frustrate her bringing charges against Trump. Indeed, Trump may try to work on his friends there to achieve that result. That is an uncertain strategy and

one fraught with new perils if lobbying by Trump or his supporters commit other violations.

As to the classified documents investigation, the special federal prosecutor might wrap up his investigation without filing charges, though published reports suggest this is unlikely.

While the possibility of charges in other cases and jurisdictions complicate negotiations of a plea deal for Trump, those difficulties are manageable. What is not manageable is the risk that the New York case is the only criminal exposure that Trump faces. That requires a high degree of luck, like drawing to an inside straight. Trump is a dealmaker – or so he fancies himself. He may yet be able to make his greatest deal of all. What terms may be on offer will not be clear until more events occur or possibly do not occur. Meanwhile, the election cycle is

just around the corner. This offers incentives to both sides.

Trump accuses the New York prosecutor of being the handmaiden of the Democratic Party and having launched a political witch hunt. He will likely say the same about the Georgia prosecutor if she brings charges, and the federal special counsel if he does as well. While I know nothing to suggest that Trump's accusations are anything other than political rhetoric, it doesn't seem wise to try to create a narrative that these prosecutions are politically motivated.

Prosecutors are human. Who doesn't bristle at the suggestion (much less the outright accusation) of ulterior motives? Trump's best strategy is to focus on the weaknesses of the one case now against him and the weaknesses of those that may follow. Such a strategy would seem to be out of character. Give him credit, however, he

was on the right track in asserting recently that he is "a completely innocent person."

A completely innocent person has little to fear from the criminal process. But Trump does not need to prove his innocence. He need only defeat the prosecution's allegation of his guilt or raise enough doubt about these allegations to warrant him taking a plea deal with a straight face and preserve some measure of his dignity. There are significant uncertainties in the pending case against Trump and those that may soon follow. At some point, there will come a time when the stars align and Trump may have the chance to make the greatest deal of his lifetime. It likely will be some sort of plea deal to one or more of the charges against him. In this sense, Trump is like everyone else. He is not above the law or, more accurately, the way the criminal justice system usually works.

Reprinted with permission from the *Daily Journal*. ©2023 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.

