Prosecuting Political Leaders During an Election

A framework for understanding when it's appropriate to prosecute a candidate for office

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Introduction

THE 2024 PRESIDENTIAL ELECTION will be unique for many reasons, not least because one of the likely major-party nominees is Donald Trump, a former president who is facing 88 felony criminal charges in four separate cases—two state and two federal.[1] In a democratic system of government that aspires to uphold the key principles that no one is above the law and prosecutorial discretion should be exercised independently from partisan politics, prosecutions of current or former high-ranking political officials will always be challenging. That is especially so here given the interplay between the prosecutions of Trump and the upcoming election, and the fact that most of the charges against Trump concern his own alleged efforts to thwart a free and fair election and resist the peaceful transfer of power. One of the cases is currently scheduled for trial before the November election, and at least one other—the federal election interference case prosecuted by Special Counsel Jack Smith—may also take place before November, starting as late as the fall.[2]

Trump has taken the position that he cannot be fairly prosecuted at all, and certainly not before the next election, repeatedly claiming that all of the prosecutions are partisan "witch hunts" and "election interference." Relatedly, he has sought to delay the trial of each case until after the 2024 election and branded every effort by prosecutors to move the cases forward expeditiously as proof that they are improperly politically motivated.[3]

Without question, law enforcement should not be used as a tool to undermine the integrity of elections or improperly influence voters. At the same time, criminal defendants should not be permitted to immunize themselves from standing trial by declaring themselves candidates for political office. Indeed, the criminal justice system should be concerned only with enforcing the law in a fair and evenhanded manner. So how should the public—and journalists who cover the news—make sense of these election-year prosecutions of a candidate without falling into the trap of viewing them as inherently politicized? Similarly, how should they view the timing of various events in the trial process in relation to the 2024 election?

The questions of whether and when, in a democracy, it is appropriate to investigate and try a political candidate in close proximity to an election are related to the overarching question of when and whether it is appropriate to prosecute political leaders at all. On the latter subject, Protect Democracy issued a guide—*Investigating and Prosecuting Political Leaders in a Democracy*—that explains why imposing accountability on political leaders who engage in criminal conduct is critical to maintaining core democratic principles, and provides criteria for assessing when such investigations and prosecutions are appropriate.[4] That guide explains that investigations and prosecutions are not inherently politically *motivated* (and thus improper) simply because they have political *ramifications*. This paper builds on that guide by explaining that election-adjacent criminal prosecutions of candidates likewise are not inherently improper and by providing a framework for assessing the propriety of particular prosecutions.

> Election-adjacent criminal prosecutions of candidates are not inherently improper.

Just as there are objective criteria for assessing when prosecutions of political leaders are appropriate and when they cross the line, as this paper will explain, there are also objective ways to assess the appropriate timing of criminal trials in relation to elections—including when it is appropriate to consider the date of an election when setting a trial schedule. These include:

- Precedent for prosecuting candidates or political leaders seeking (re)election;
- The law governing the rights of defendants and the public interest in the fair administration of criminal justice; and
- Prosecutors' adherence to general principles of fair prosecution and avoidance of election interference.

Each of these factors should be considered against the backdrop of fundamental democratic principles. Foremost among these is the idea that, in a democracy, the people govern themselves through laws and that no one is above the law. This means that our political leaders must be subject to accountability for violations of the law and cannot use their political status to immunize themselves from criminal prosecution.[5] Also fundamental is the principle that the people choose their leaders in free and fair elections. This includes the idea that the government should not interfere in elections for or against any candidate. It does not mean, however, that candidacy confers a right to special treatment or that the public should be deprived of information in advance of an election simply because that information might negatively affect a candidate.

While the interaction between these principles naturally may raise questions, the principles are not fundamentally at odds. The Supreme Court has long recognized that they are complementary. The law holds that speedy trials (so long as they are consistent with the defendant's due process and other constitutional rights) are the best way to both treat criminal defendants fairly *and* ensure the fair administration of justice.[6] And trials themselves are the best way to allow the public to observe and understand both the laws and the process of law enforcement—and to learn whether defendants have violated the law and been afforded their constitutional rights by prosecutors and courts. Relatedly, the Constitution, the Federal Rules of Criminal Procedure and Evidence, and relevant standards of prosecutorial conduct require that prosecutors not only enforce the law, but ensure fair trials. Many of those same authorities arm judges with robust tools to do the same.

This paper will explain key considerations for assessing election-year prosecutions of political candidates and apply them to Trump's federal cases. That analysis will demonstrate that speedy resolution of those cases is of paramount public interest—even if trials take place close in time to the 2024 election.

Precedent for Prosecuting Political Candidates

WHILE THERE ARE MANY ways the criminal prosecutions of Donald Trump are unprecedented, the fact that they will continue despite his choice to once again seek elected office is not one of them. American history provides a number of examples of public officials under criminal indictment who have been prosecuted while they seek re-election. And—as in any society that values the rule of law—this is a good thing. A criminal defendant's decision to seek public office should not entitle him to any special treatment, least of all to immunity from criminal liability.

For instance, in 2008, during the administration of Republican George W. Bush, Republican Senator Ted Stevens of Alaska was indicted on seven federal felony counts related to gifts he received from an oil pipeline company.[7] At the time, Stevens was seeking re-election to an eighth term in the Senate.[8] Despite his candidacy, Stevens' trial proceeded on a regular schedule. Stevens' lawyer told the judge that the senator was not trying to "ask for any special favors because he's a senator and served 40 years in the Senate."[9] A jury convicted Stevens on all seven counts just eight days before the election.[10]

In 2016, during the administration of Democrat Barack Obama, Democratic representatives Corrine Brown and Chaka Fattah both mounted re-election campaigns while under federal indictment, and both ultimately lost in their party primaries.[11] Notably, neither congressperson sought to delay their prosecution because of their status as candidates for office. In fact, in Fattah's case, preparation for trial was at its busiest right before the April primary date, with some consequential motions due just days before Democratic voters cast their ballots.[12]

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Similarly, former Texas governor Rick Perry sought the 2016 Republican presidential nomination while

under indictment for state-law felonies related to alleged threats to cut funding for the office of a Democratic district attorney in order to pressure her to leave office.[13] Though Perry quickly dropped out of the race, he did not use his candidacy as a ground to delay his prosecution. And there are still more examples. Democratic Representative William Jefferson of Louisiana was indicted in 2007 (again during the Bush administration) and prosecuted while he ran for (and eventually lost) re-election.[14] Democratic Representative Raymond Lederer was indicted in January 1980, during the administration of Democrat Jimmy Carter, as part of the Abscam scandal, but won reelection in November of that year. He was later convicted and expelled from the House.[15]

Even more recently, a grand jury indicted (and the current Department of Justice has continued to prosecute) Democratic Senator Robert Menendez on charges of bribery, fraud, extortion, and obstruction of justice stemming from an alleged years-long conspiracy in which Menendez used his office to protect and benefit several businessmen and the government of Egypt in exchange for cash, gold, and a Mercedes.[16] The federal judge assigned to the case set a trial date in May 2024, just one month before New Jersey's primary election.[17]

In short, in the United States, it is hardly unprecedented to prosecute a candidate for public office during an election year. Prosecutors under the political leadership of both political parties have done so, bringing election-year charges against members of the governing as well as opposition parties. As numerous experts have observed, accountability for political leaders and other powerful citizens who break the law is actually a *feature* of democratic societies, not a sign of democratic decline.[18] In this regard, it is Trump's claim that his political candidacy should excuse him from having to stand trial that is unusual.

Law Governing the Fair Administration of Justice

LONG-STANDING SUPREME COURT precedent and federal statutory law bear on the question of when—and on what schedule—it is acceptable to try a candidate during an election year. In a democratic society that follows the rule of law, every criminal defendant should be afforded equal rights and have their conduct judged under the same laws and standards, no matter how politically powerful they are. As the Supreme Court explained in 1882:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.[19]

Accordingly, the phrase, "Equal Justice Under Law" is engraved above the entrance to the United States Supreme Court.

In addition to the principle that everyone should be equal before the law, Congress and the courts have developed a body of law meant to ensure the justice system balances two sets of sometimes competing interests: the accused's right to prepare and present a fulsome defense, and the public's interest in fair and orderly law enforcement. Critical to protecting both is the idea that the best way to ensure fairness is, in general, a public trial commenced without unnecessary delay and conducted in accordance with constitutional guarantees of due process.

The Federal Rules of Criminal Procedure, federal statutory law, and the Constitution all guarantee criminal defendants procedural and substantive rights which the courts are empowered to enforce and duty-bound to uphold. These rights include the right to challenge the sufficiency of the charges and confront the witnesses against them; the right to a speedy trial; the right to discovery of the government's evidence and time to review it, including the right to be informed of any arguably exculpatory evidence in prosecutors' possession; the right to choose their own counsel and to participate in their defense strategy; and the right to present a complete defense.[20] In addition to the rights afforded criminal defendants, individuals accused of crimes naturally retain their other constitutional rights, like the First Amendment right to free speech (including the right to engage in political speech) and the right to equal protection of the laws.[21]

Balanced against these rights of the accused, however, are the interests of the public in the fair and efficient administration of justice. In a criminal case, the prosecuting party is referred to as "the United States" or "the State," or sometimes "the People," in reference to the basic notion that when someone transgresses a criminal law, it is not merely the particular victims of that crime who are injured, but society as a whole. As the

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Justice Department explains it, "[a] determination to prosecute represents a policy judgment that the fundamental interests of society require the application of federal criminal law to a particular set of circumstances."[22] The fact that criminal laws are enforced in the interest of the people as a whole in turn gives rise to several concrete public interests in criminal prosecutions that the Supreme Court has recognized.

The public's right to observe criminal proceedings

The public has a recognized right to observe criminal proceedings. In the information age, this means that private individuals and the media have a right to observe trials. As Justice Burger wrote in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980):

> When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion...The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operate to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security[.]"

In practical terms, this means that the public has in interest in seeing the criminal justice system in action, both to judge for themselves whether the law is being enforced in a thorough and effective manner and what the evidence is and how the defendant responds to it—and to observe whether the prosecution and the courts are affording the defendant the full measure of his or her constitutional and statutory rights. The latter is especially important where, as here, the process itself is the subject of substantial, public criticism by the defendant and others.

The public interest in speedy trials

It is well settled that "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Barker*, 407 U.S. at 519; *see also Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979) ("The public...has a definite and concrete interest in seeing that justice is swiftly and fairly administered."). This public interest in a speedy trial is manifold: "[A] public trial protects the right of the accused to have the public know what happened in court; to let the citizenry weigh his guilt or innocence for itself, whatever the jury verdict; [and] to assure that the procedures employed are fair." *Rovinsky v. McKaskle*, 722 F.2d 197, 201–02 (5th Cir. 1984).

Congress, too, has recognized the public's interest in a speedy trial. The Speedy Trial Act, which sets deadlines for pretrial proceedings and the commencement of trial in criminal cases, requires trials to take place within 70 days of indictment absent a court-approved extension of time and permits delays only when a judge makes an on-the-record finding that a delay "outweigh[s] the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A); *see also Zedner v. United States*, 547 U.S. 489, 498 (2006) (Scalia, J., concurring) (noting that "the Act protects the interests of the public as well as those of the defendant"). And the American Bar Association's Criminal Justice Standards on Speedy Trial lists one of its primary purposes as "further[ing] the interests of the public, including victims and witnesses, in the fair, accurate, and timely resolution of criminal cases."[23]

carries the burden of proof." *Id*. In addition, delay presents opportunities for bad actors to commit other crimes, diminishes the deterrent value of criminal prosecutions, and otherwise thwarts the interests of justice. *Dickey v. Florida*, 398 U.S. 30, 42 (1970)(Brennan, J., concurring).

The importance of the nature and seriousness of an alleged offense

Related to the public's general interest in expeditious law enforcement is the notion that prosecutors and courts should consider the nature and seriousness of the offense when determining an appropriate trial schedule. Some commentators have suggested that it is inappropriate for the government and the courts to consider an impending election when scheduling a trial of a candidate.[24] It is generally true that the existence of a political campaign should not dictate a trial schedule and candidates should get no special consideration—or be treated less favorably—because of their status as candidates. However, prosecutors and courts rightly consider the nature of the offense charged—as well as the characteristics of the defendant, including the danger he potentially poses to society if guilty—when setting a criminal case for trial.

> "Because delay defeats the truth-seeking component of criminal cases, it "is not an uncommon defense tactic" that contravenes the public interest.

Because delay defeats the truth-seeking component of criminal cases, it "is not an uncommon defense tactic" that contravenes the public interest. *Barker*, 407 U.S. at 521. As the Supreme Court has explained, with the passage of time, "witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which

Indeed, courts and prosecutors are not only allowed but required to take into account the nature of the offense and the character of the defendant when making certain pretrial determinations, some of which bear heavily on the duration or brevity of the criminal proceedings. The Bail Reform Act, for instance, requires a court to examine "the nature and circumstances of the offense charged" and "the history and characteristics of the person" accused when setting conditions of pretrial release. 18 U.S.C. § 3142(g). This is, in part, to ensure that the defendant will not "endanger the safety of any other person or the community" pending trial. § 3142(c). Likewise, when sentencing a defendant upon conviction, courts must consider "the nature and circumstances of the offense and the history and characteristics of the defendant," as well as the need for the sentence "to reflect the seriousness of the offense" and "to promote respect for the law." 18 U.S.C. § 3553(a).

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The Justice Department's *Principles of Federal Prosecution* (discussed in more detail below) underscore the centrality of the seriousness of the offense and the conduct of the defendant in making determinations about how to conduct federal investigations and trials. Among the factors a prosecutor should consider in "determining whether a prosecution would serve a substantial federal interest," are "the nature and seriousness of the offense," "the deterrent effect of prosecution," "the person's culpability in connection with the offense," and "the person's personal circumstances." Additional factors, such as whether a crime has widespread impact on a community or would have a substantial impact "if commonly committed," whether the accused might be in a position to re-offend, and whether "the accused occupied a position of trust or responsibility," weigh heavily in the exercise of prosecutorial discretion.[25]

In short, just as in other situations where a person charged with a crime is in a position to commit similar crimes in the future, that fact is properly weighed in setting a trial schedule. To take one example, if a law enforcement officer charged by a grand jury with using excessive force on a person in his or her custody is still on the job, this fact would

appropriately warrant as speedy a trial as due process permits. So, too, if a defendant is charged with election interference or election fraud and has announced his intention to seek election again, it is appropriate that a court consider the risk the defendant poses during the pretrial period and the need for an appropriately expeditious trial date.

Conflicts in trial and campaign schedules

Depending on the precise timing of the trial(s), questions may arise as to how courts should address potential scheduling conflicts between the trial and the presidential campaign. While it will be unusual to see a presidential candidate sitting in a courtroom during campaign season, it is generally understood that courts are not required to consider the career or other personal consequences of a trial on defendants indicted for serious offenses. Judge Tanya Chutkan explained the balance between the defendant's interests and the public interest during a hearing on the trial date in the federal election interference case. "Setting a trial date should not depend on the defendant's professional and personal obligations," she said. "Mr. Trump must make any trial date work." Chutkan then made an analogy to the trial of a professional sports star. "It would be wrong for me to accommodate her [the athlete's] schedule" in deciding when the trial should be held.[26]

But courts do sometimes adjourn trials or otherwise make scheduling adjustments for religious observances, health situations, and for other individualized reasons that might arise depending on the circumstances of the defendant and the case. "B]road discretion must be granted trial courts on matters of continuances," *Morris v. Slappy*, 461 U.S. 1, 11 (1983), and review of that discretion is tethered to whether or not a particular request would impact the defendant's due process rights. As the Supreme Court has explained it, "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

In sum, a political candidate has the prerogative to seek scheduling accommodations and have specific requests considered in the same way as any other defendant, but, importantly, the trial schedule overall should not yield to the campaign. Any other approach risks undermining the public interest in a speedy trial, would be unfair to defendants who are not political candidates, and would create harmful incentives for seeking public office. It would also be untenable in a system in which national elections occur every two years and campaigns extend almost continuously.

A defendant's right to adequate time to prepare for trial

To be sure, a trial court's decision to proceed over a defendant's request for more time can be so unreasonable as to violate the Constitution's guarantee of due process. But the situations in which courts have found a constitutional violation are relatively rare.[27]

For instance, in *Chandler v. Fretag*, 348 U.S. 3 (1954), the defendant was charged with breaking into a business and stealing $3 worth of goods. When he appeared at court, he was informed for the first time that he would be charged as a habitual offender, a charge which carried a life sentence. He promptly asked the judge for time to find a lawyer. The judge denied his request, impaneled a jury, and the defendant was convicted. The entire process took five to ten minutes. In *Argo v. Wiman*, 209 F. Supp. 299 (M.D. Ala. 1962), the defendant's retained attorney was not present the morning of trial. The trial judge denied the defendant's request for a short continuance

and appointed a different lawyer over the defendant's objection, giving the new lawyer fifteen minutes to review the prosecutor's file and prepare for trial. In these extreme cases, the courts found that a "rush to trial" violated the defendants' due process rights.

In contrast, cases in which the defendant has been given several months to prepare are typically found to be proper. *See, e.g.*, *United States v. Dupree*, 833 F. Supp. 2d 241, 248 (E.D.N.Y. 2011) ("Dupree has had adequate time—nearly fourteen months—since the original indictment was returned to prepare for trial."); *Jones v. Cummings*, 998 F.3d 782, 789 (7th Cir. 2021) ("[T]he fact that the default rule under the Speedy Trial Act, 18 U.S.C. § 3161, calls for an indictment within 30 days of arrest and trial 70 days later strongly suggests that there is no generic problem with eight months.").

The bottom line is that criminal defendants possess a host of statutory and constitutional rights, including basic constitutional rights available to everyone, such as the First Amendment right to free speech. But in the context of a criminal proceeding, the exercise of those rights must be balanced against society's interest in the fair, orderly, and efficient administration of justice. A defendant's First Amendment right cannot be exercised to such an extreme degree that it creates a "carnival atmosphere" in the courtroom, threatening the integrity of the proceedings. *United States v. Trump*, 88 F.4th 990, 998 (D.C. Cir. 2023). Nor can a defendant's right to prepare a defense and consult with his attorney be exercised to create delay for a tactical advantage. A defendant's status as a candidate for political office does not displace this balancing, nor does it diminish society's interest in a fair and orderly prosecution.[28]

Prosecutorial Standards Prohibiting Election Interference

IN ADDITION TO THE LAW governing defendants' rights and the fair administration of justice set forth above, the rules and regulations that apply to exercises of prosecutorial discretion can help determine which prosecutorial decisions that might affect elections are appropriate and which are not. Here, the rules, regulations, and policies that govern prosecutions brought by the Justice Department (and that apply to prosecutorial decision making in the federal cases against Trump) should guide the analysis.

Justice Department standards and guidelines

The Justice Department's prosecutorial decisions are governed by the *Principles of Federal Prosecution*[29] found in the Department's *Justice Manual*.[30] All Department prosecutors, including special counsels, are required to adhere to the Justice Manual.[31] It is important to note that the Manual sets forth internal policy and does not on its own create any rights enforceable by the general public.[32] However, the Manual is grounded in the Constitution and overarching democratic principles.

The Justice Manual contains several provisions relating to elections. In its Protection of Government Integrity chapter, in a section titled, *Actions that May Have an Impact on an Election*, the Manual provides:

> Federal prosecutors and agents may never select the timing of any action, including investigative steps, criminal charges, or statements, for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party. Such a purpose is inconsistent with the Department's mission and with the Principles of Federal Prosecution....Any action likely to raise an issue or the perception of an issue under this provision requires consultation with the Public Integrity Section, and such action shall not be taken if the Public Integrity Section advises that further consultation is required with the Deputy Attorney General or Attorney General.[33]

This section does not prohibit election-adjacent actions per se, but prohibits any investigative step or charging decision made *for the purpose* of affecting an election.

In the same vein, in the section on "impermissible considerations" for initiating or declining charges, the Manual further provides that federal prosecutors "may never make a decision regarding an investigation or prosecution" for the purpose of affecting an election or for the purpose of helping or harming a candidate. Also prohibited are charging decisions based on a person's "political association, activities, or beliefs."[34] And notably, in accordance with these rules, the Manual provides:

> The Department should not engage in overt criminal investigative measures in matters involving alleged ballot fraud until the election in question has been concluded, its results certified, and all recounts and election contests concluded.[35]

In addition to these rules, the Department has a long-standing internal "rule of forbearance" that generally counsels against taking any overt investigative steps—including seeking indictments—within 60–90 days of an election, when doing so could influence its outcome. This internal unwritten norm is broader than the Justice Manual's formal charging policies in that it arguably prohibits actions that merely *might affect* an election as opposed to actions taken for the *purpose* of affecting an election. The norm has been described by high-ranking Department officials variously as "a very important norm" in which "we avoid taking any action in the run up to an election," a "practice…not to take actions that might have an impact on an election," and a "rule… that you can't indict or do investigative steps" in close proximity to an election.[36] It exists alongside "election year sensitivities" guidance issued in memoranda by every post-Watergate Attorney General, which contain language such as "politics must play no role in the decision of federal investigators or prosecutors regarding any investigations or criminal charges."[37]

Justice Department policies do not apply to indicted cases

Importantly, the Justice Department's election interference policies apply primarily to decisions within the Department's control—such as initiating investigations, overt investigative steps, and seeking indictments—and not to already-indicted cases, which are under the control of courts and governed by constitutional due process, the Speedy Trial Act, and federal rules. This is by operation of the Constitution and the plain text of the written regulations. Article II locates the duty and authority to enforce the law in the executive branch and commits to its prosecutors the broad discretion to decide whether and when to open investigations, take investigative steps, and initiate charges. These are the actions for which the Justice Department may "select" timing and the actions to which its rules apply. As explained in the Principles of Federal Prosecution:

> "[The Justice Manual] does not prohibit election-adjacent actions per se, but prohibits any investigative step or charging decision made for the purpose of affecting an election.

> Under the federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of federal criminal law. The prosecutor's broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas has been recognized on numerous occasions by the courts.[38]

Decisions outside executive branch purview and discretion belong to the other branches of government. Congress, in accordance with its Article I legislative powers, has the authority to decide what criminal laws to enact and the timetable—consistent with the Bill of Rights—within which those laws should be enforced. And once a case is charged and an indictment is returned by a grand jury, Article III judges set trial schedules.

For that reason, it does not violate Department policy for an ongoing case to proceed or be resolved close in time to an election.[39] As noted above, federal prosecutions of lower-ranking politicians have gone forward adjacent to elections. Moreover, although some commentators have suggested otherwise, there is widespread agreement among former federal prosecutors affiliated with both major political parties that the Department's policies do not govern actions in indicted cases.[40] While prosecutors cannot take actions even in indicted cases that are *calculated* to produce a partisan election outcome (hence the use of the term "primarily" above), there is nothing in the Department's rules that require prosecutors to attempt to slow down a case simply because a trial might occur during election season or to otherwise accommodate a political campaign. Indeed, the law on speedy trials and the Department's charging principles described above would prohibit or counsel strongly against doing so.[41]

Weighing Trump's Claims of Election Interference

AS NOTED ABOVE, LAW enforcement is among the most powerful tools wielded by any government and well-established laws and norms hold that, in our democratic system, law enforcement powers should be exercised independently of partisan politics and should never be used *for the purpose* of affecting the outcome of an election.[42] However, just as prosecutions with political implications are not inherently illegitimate, neither are prosecutions that might affect voters' decisions—even if they proceed in close proximity to an election and even if the defendant is a candidate. Indeed, such a rule would have the absurd consequence of allowing criminal defendants to use running for office as a tool for immunizing themselves from legal accountability.

So what role does precedent, the governing law, and the Justice Department's rules and policies play in helping to assess whether the Department is conducting a particular prosecution appropriately or whether it is engaged in improper partisan election interference?

Many of the same benchmarks used to assess whether a prosecution is politically motivated that we identified in our guide on *Investigating and Prosecuting Political Leaders in a Democracy* are helpful in this analysis.[43] This includes asking the following key questions:

Key questions for assessing prosecutions

- Were there safeguards in place to prevent politicized prosecutions and has the Justice Department respected them?
- Is there any evidence of political interference in the case, such as inappropriate public or private commentary by officials or the prosecutors themselves?
- Have courts and other independent arbiters indicated any concern with the timing or conduct of the prosecution?

The answers to these questions suggest that the special counsel's efforts to pursue speedy trials of Trump in advance of the 2024 election are an appropriate exercise of his prosecutorial judgment in furtherance of his duty to vindicate the public interest.

First, the federal prosecutions of Trump involve serious offenses that support a substantial federal interest in seeking charges. As the Justice Manual makes clear, among the foremost considerations in deciding to charge a federal crime are the nature and seriousness of the offense, which may "include a consideration of national security interests"; the subject's personal culpability, including whether he or she was a leader of a criminal endeavor as opposed to a minor participant; and the subject's personal circumstances, "such as the fact that the accused occupied a position of trust or responsibility which he/she violated in committing the offense."[44]

Applying these criteria, the federal interest in addressing the offenses with which Trump is charged—conspiring to overturn a lawful election and willfully retaining national defense information after leaving office—could scarcely be greater. Trump was the President of the United States when the actions at the center of the indictments took place or were initiated, and the offenses themselves strike at the heart of our democracy and national security. In addition, deterring and mitigating future harm is a critical purpose of criminal law. The fact that Trump has been indicted for election and national-security related crimes and now seeks to resume the same office he held when he allegedly committed those offenses is a fair consideration in determining how quickly trials should take place. Furthermore, both cases were charged more than a year prior to the 2024 general election and well over 90 days in advance of any of the primaries, and both trials (set by the court rather than prosecutors) were originally scheduled well in advance of the 2024 election. Trump is the driving force behind pushing the possible trial dates closer to November.

Second, the Justice Department and the White House have employed numerous safeguards to avoid political interference in the cases. Attorney General Merrick Garland appointed a special counsel to oversee the Trump prosecutions immediately after Trump declared himself a candidate for president.[45] His announced purpose in doing so was to insulate the prosecutions from even the appearance of political interference. In addition, Garland not only re-issued the policy limiting contacts between the Justice Department and the government's political leadership, but also made adherence to standards preserving the Department's independence from political partisanship a top priority in its strategic plan.[46]

While President Biden has made a handful of problematic comments (some of them private and anonymously sourced) about the cases against Trump,[47] those comments fall far short of demonstrating that Biden is interfering with the Justice Department to influence the Attorney General and direct the prosecutions. Assuming that Biden has expressed private frustration with what he views as the Justice Department's lack of urgency in pursuing Trump, his comments suggest that Biden is *not* directing or interfering in the actions involving Trump. Attorney General Garland also appointed a special counsel to investigate Biden's own handling of classified records and allowed a Trump-appointed United States Attorney (now also special counsel) to pursue indictments of Biden's son in cases that are now scheduled for trial before the election. In both instances, the investigations have fueled political narratives central to Republicans' campaign against Biden.[48] Importantly, the prosecutors in those cases testified under oath that the Justice Department has not interfered in their investigations or decisions.[49]

Third, the actions of grand juries—comprising citizens of the community who are responsible for determining whether prosecutors have sufficient evidence to bring a case—and federal judges indicate that the Justice Department has complied with the law both in indicting the cases against Trump and advocating for speedy trials. A grand jury indicted Trump on charges that he sought to overturn a free and fair election and obstruct the peaceful transfer of power. A separate grand jury—in his home county—indicted him for violating the Espionage Act. To date, while Trump has filed motions to dismiss the indictments against him on various grounds, none of those motions has been granted. In particular, Trump's assertion that he is entitled to absolute immunity from criminal prosecution for any conduct while he was in office—a move that has delayed the federal election interference trial for months—has been unanimously rejected by judges of both political parties and is now pending before the Supreme Court.[50]

Finally and most significantly, prosecutors are required to present proposed trial schedules to the court and defendants are permitted to contest them and argue for more or—sometimes—less time to prepare. In the federal election interference case, following an indictment on August 1, 2023, the prosecution asked for the trial to commence on December 1, 2023, a request that would have allowed for the completion of trial before any presidential primaries. Trump opposed that request and asked for a trial date in 2026. After hearing the parties' arguments during a live hearing, District Court Judge Tanya Chutkan explained her duty to balance the public interest in a speedy resolution of the case against Trump as well as Trump's right to due process. As noted above, she made clear that Trump's electoral ambitions should have no role in excusing him from a speedy trial schedule. "Setting a trial date should not depend on the defendant's professional and personal obligations," she said. She also noted that the prosecution had provided Trump with expedited discovery—including witness statements—"beyond their normal obligations," and further observed that Trump was on notice of his likely indictment long before it was returned.[51]

> "Now that Trump has successfully delayed his federal trials beyond their scheduled dates, no law or policy prohibits a trial from starting in the fall or continuing as voters are casting their ballots—a process that begins in September in many jurisdictions.

At the conclusion of the hearing, Judge Chutkan set a trial date of March 4, 2024, which allowed Trump seven months to prepare for trial. That date has now been vacated because Trump continues to press the claim that he is entitled to absolute immunity from criminal prosecution for actions he took while he was president. He has also argued that appellate consideration of his immunity defense should proceed as slowly as possible.[52] Should Trump's trial now occur close in time to the start of voting, or even be ongoing on election day, the responsibility for pushing it to that point will be his.

In short, nothing about the manner in which the Justice Department has conducted the cases against Trump, including the timing of charges and trial schedules, suggests that the Department has done anything inappropriate in seeking to commence those trials prior to the 2024 election, or that the courts have done anything improper in allowing them to go forward (to the extent that they have done so). On the contrary, speedy trials of these cases is exactly what the law and Justice Department policy call for.

Furthermore, now that Trump has successfully delayed his federal trials beyond their scheduled dates, no law or policy prohibits a trial from starting in the fall or continuing as voters are casting their ballots—a process that begins in September in many jurisdictions. As described above, Trump has been the driving force in pushing the trials so close to the election. The prosecutors and the courts should take care to ensure that none of their decisions on what evidence to present or admit is motivated by a desire to affect voters' decisions. As long as their actions make sense in terms of the elements of the charges the government must prove and rules of evidence and other applicable law, the fact that the testimony of certain witnesses might be damaging—or helpful—to Trump's political cause is of no moment.

And last, contrary to Trump's claim that he cannot get a fair trial during a "Presidential election cycle,"[53] the justice system is equipped to ensure that he does. Trump's claim that he cannot get a fair trial amidst campaign-related publicity, including that generated by President Biden,[54] ignores the fact that the trial of a former president who also has self-proclaimed celebrity status would always generate enormous publicity. It also ignores that Trump has demanded—and been granted—wide latitude to publicly criticize the prosecutors, court personnel, and the nature of the cases against him, even when what he says is verifiably false and potentially prejudicial to a jury pool.[55] Even so, Courts have broad authority to ensure that a jury is seated that will give both the defendant and the prosecution a fair trial. The courts will be able to use jury questionnaires and *voir dire* to cull people from the jury pool who have formed opinions that will not allow them to consider and render decisions based on the admissible evidence presented in court. The court also has the ability to protect jurors from exposure to outside pressures and out-of-court statements and media coverage by protecting jurors' identities and sequestration. Moreover, Trump, like all defendants, is protected by the reasonable doubt standard and the requirement that a jury be unanimous in a vote to convict him on any of the offenses with which he is charged.

Conclusion

FORMER PRESIDENT TRUMP HAS made repeated overt attempts to use his former presidency and current candidacy to shield himself from the laws that apply to everyone else. When his actions in and out of office prompted multiple criminal investigations, he declared his candidacy for the 2024 presidential nomination nearly two years prior to the election for the purpose of arguing that any resulting charges would be "election interference." Once indicted, he pursued unprecedented absolute immunity claims, both to insulate himself from accountability and to further his strategy of delay.

fairly demanded both the charges and the trial schedules that prosecutors have sought and courts have imposed. It would turn fundamental democratic principles on their head to allow Trump to evade trial for election and national security offenses committed while he was president because the outcomes of the trials might affect his candidacy to once again be elected president. It would also thwart the public interest in hearing the evidence, observing the trials, and knowing the verdicts. For all these reasons—and by the objective measures outlined above—trials prior to, or even during, the 2024 election will

> "Trump's own actions have fairly demanded both the charges and the trial schedules that prosecutors have sought and courts have imposed.

There is nothing in the laws, rules, or norms that protect the fair administration of justice and prohibit the government from using law enforcement to interfere in elections that suggests the Department of Justice has proceeded inappropriately. On the contrary, Trump's own actions have

not be inherently unfair because of the timing. Indeed, prosecutors would be failing to carry out their duties in service of the fair administration of justice if they declined to press forward notwithstanding the pending election.

Notes

1 Trump was indicted on 91 felony counts, but the trial court in Georgia recently dismissed three counts. Order on Defendants' Special Demurrers, *State of Georgia v. Trump, et al.*, Indictment No. 23SC188947 (Mar. 13, 2024), https://tinyurl.com/588yt3bp.

2 Trial in the State of New York's case against Trump for election interference begins on April 15, 2024. Georgia prosecutors have proposed an August 5, 2024 trial date in the state RICO case there. The special counsel's case was originally set to go to trial on March 4, 2024, but the district court vacated that scheduling order pending the Supreme Court's resolution of Trump's assertion of absolute immunity. The federal case about mishandling classified documents at Mar-a-Lago does not yet have a trial date set, though prosecutors have asked for it to commence in July. Trump's lawyers have argued that it should wait until after the election, but proposed an August 12, 2024 start date in the alternative. *See generally,* Norman L. Eisen, Ryan Goodman, et al., *Master Calendar of Trump Court Dates: Criminal and Civil Cases,* Just Security (Sept. 5, 2023), https://tinyurl.com/5bptak4y.

3 Peter Stone, *Trump's latest ploy to delay trials is to cry 'election interference,' DOJ veterans say*, The Guardian (Mar. 8, 2024), https://tinyurl.com/3p85ypmk.

4 Kristy Parker, Justin Florence, et al., *Investigating and Prosecuting Political Leaders in a Democracy*, Protect Democracy (May 2023), https://tinyurl.com/23v633pb.

5 *See* Grant Tudor, Erica Newland et al., *Towards Non-Recurrence: Accountability Options for Trump-Era Transgressions,* Protect Democracy (Jan. 6, 2022), https://tinyurl.com/44frjnkb.

6 *Barker v. Wingo*, 407 U.S. 514, 519 (1972) ("The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.")

7 Indictment, *United States v. Stevens*, No. 1:08-CR-231 (D.D.C. July 29, 2008), https://tinyurl.com/53b3j9j2.

8 NBC News, *Justice Department Indicts Senator Ted Stevens* (July 29, 2008), https://www.nbcnews.com/id/wbna25916299.

9 Erica Bolstad, *Stevens' Trial Scheduled Before Election*, Anchorage Daily News (July 31, 2008), https://tinyurl.com/38jd834f.

10 After evidence of serious prosecutorial misconduct came to light, the Attorney General moved to set aside Stevens' conviction and dismiss the indictment. The trial court granted the motion.

11 Ryan Tarinelli, *Santos Isn't The First Member of Congress Indicted. Here's How Others Ended Up, Roll Call* (May 10, 2023), https://tinyurl.com/2utr3rcw.

12 *See* generally Docket Sheet, *United States v. Fattah*, No. 2:15-CR-346 (E.D. Pa.).

13 Richard Fausset, *Indicted and Running for Office? It Didn't Begin with Trump*, The New York Times (Apr. 1, 2023), https://tinyurl.com/4459xamp.

14 AP, *Louisiana: Indicted Lawmaker to Run for Re-election*, The New York Times (Jun. 18, 2008), https://tinyurl.com/yc86tf9j; David Stout, *Ex-Rep. Jefferson Convicted in Bribery Scheme*, The New York Times (Aug. 5, 2009), https://tinyurl.com/26ks8xej.

15 AP, *Raymond Lederer, Abscam Figure, is Dead at 70*, The New York Times (Dec. 3, 2008), https://tinyurl.com/mucjmssz.

16 Superseding Indictment, *United States v. Menendez*, No. 1:23-490 (S.D.N.Y. Mar. 5, 2024).

17 On March 21, 2024, Menendez announced that he would not run as a candidate in the Democratic primary. Instead, he would leave the door open to run as an independent candidate in the general election. Nicholas Fandos, Tracey Tully, *Menendez Won't Run as Democrat but Leaves Door Open to Independent Bid,* The New York Times (Mar. 21, 2024), https://tinyurl.com/2s3fnacf.

18 Paul Musgrave, *America Needs to Prosecute Its Presidents*, Foreign Policy (Sept. 29, 2020), https://tinyurl.com/msx-sn8rw; Donald Ayer, *The Trump Prosecutions Are Cause to Celebrate the Rule of Law*, The Atlantic (Dec. 7, 2023), https://tinyurl.com/2zfxcbu8; Ashley Ahn & Brawley Benson, *It's Actually Common to Indict Leaders of Democracies*, Foreign Policy (July 18, 2023), https://tinyurl.com/44kbxdr3; Rachel Kleinfeld & David Solimini, *What Comes Next? Lessons for the Recovery of Liberal Democracy* (October 2018), https://tinyurl.com/jr4dya8v.

19 *United States v. Lee*, 106 U.S. 196, 220 (1882).

20 *See* United States Constitution Amendments IV, V, VI, and XIV.

21 Of course, once a person is indicted by a grand jury, they can be subject to conditions of release that limit the full exercise of their constitutional rights and courts can impose certain restrictions on speech in the interests of justice. *United States v. Salerno*, 481 U.S. 788 (1987). Accordingly, some courts, including the judge in Trump's federal election interference case, have issued gag orders in order to protect witnesses, court staff, and others from harassment and intimidation. *United States v. Trump*, 87 F.4th 524 (D.C. Cir. 2023)

22 U.S. Dep't of Justice, *Principles of Federal Prosecution*, Justice Manual § 9-27.001 (2023), https://tinyurl.com/2w9vstvk.

23 American Bar Association, Criminal Justice Standards: *Speedy Trials,* (2006), https://tinyurl.com/ycxzv7j5.

24 *See, e.g.,* Jack Goldsmith, *The Consequences of Jack Smith's Rush to Trial*, Lawfare (Feb. 14, 2024), https://tinyurl.com/448z62kk.

25 U.S. Dep't of Justice, *Principles of Federal Prosecution*, Justice Manual § 9-27.230 (2023), https://tinyurl.com/mvhxe4jx.

26 Saraphin Dhanani, *Trump has Jan. 6 Trial Date, and It's the Eve of Super Tuesday*, Lawfare (Aug. 28, 2023), https://tinyurl.com/478sjfwx.

27 The legal test is fact-intensive. Among the factors the D.C. Circuit considers are: "[T]he length of the requested delay; whether other continuances have been requested and granted; the balanced convenience or inconvenience to the litigants, witnesses, counsel, and the court; whether the requested delay is for legitimate reasons, or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; whether the defendant has other competent counsel prepared to try the case, including the consideration of whether the other counsel was retained as lead or associate counsel; whether denying the continuance will result in identifiable prejudice to defendant's case, and if so, whether this prejudice is of a material or substantial nature; [and] the complexity of the case."*United States v. Eiland*, 738 F.3d 338, 355 (D.C. Cir. 2013).

Additionally, the defendant must demonstrate that the denial of additional time prejudiced him. *United States v. Celis*, 608 F.3d 818, 839 (D.C. Cir. 2010).

28 Trump's trial schedules are not currently the subject of any court challenges. However, as noted above, he has sought to delay all of them in various ways, sometimes through seeking extensions of pre-trial deadlines, filing and appealing dispositive motions, and sometimes through overt arguments (as he recently advanced in the Supreme Court in relation to the schedule for his immunity appeal) that it would be unfair for him to be tried in advance of the election. *See*, *e.g.,* Response in Opposition to Government's Proposed Trial Calendar, *United States v. Trump* (Aug. 17, 2023), https://tinyurl.com/bdrjrjry; Reply in Support of President Trump's Application for a Stay of the DC Circuit's Mandate Pending the filing of a Petition for Writ of Certiorari, *Trump v. United States* (Feb. 15, 2024), https://tinyurl.com/2nfe3v3p.

29 U.S. Dep't of Justice, *Principles of Federal Prosecution*, Justice Manual § 9-27.000 (2023), https://tinyurl.com/yc3466bk.

30 U.S. Dep't of Justice, Justice Manual (2023), https://www.justice.gov/jm/justice-manual.

31 Code of Federal Regulations, General Powers of Special Counsel, 28 CFR Part 600 (2023), https://www.ecfr.gov/current/title-28/chapter-VI/part-600.

32 U.S. Dep't of Justice, *Authority*, Justice Manual § 1-1.200 (2023): "The Justice Manual provides internal DOJ guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." https://tinyurl.com/2s3zkwz7.

33 U.S. Dep't of Justice, *Protection of Government Integrity,* Justice Manual § 9-85.500 (2023), https://tinyurl.com/3nbfuj7z.

34 U.S. Dep't of Justice, *Principles of Federal Prosecution*, Justice Manual § 9-27.260 (2023), https://tinyurl.com/yc3p9jhk.

35 U.S. Dep't of Justice, *Protection of Government Integrity*, Justice Manual § 9-85.300 (2023), https://tinyurl.com/4ytzh2vh.

36 U.S. Dep't of Justice, *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election,* Office of the Inspector General (June 2018), at 16–17, https://tinyurl.com/59cmb5r7.

37 Office of the Attorney General, Memorandum for All Employees, Election Year Sensitivities (May 25, 2022), https://tinyurl.com/3srptsn7.

38 *Principles of Federal Prosecution, supra* note *22* § 9-27.100.

39 Genevieve Nadeau & Kristy Parker, *The Special Counsel is Right to Oppose Trump's Delay Strategy*, Lawfare (Feb. 22, 2024), https://tinyurl.com/4mj8w27e.

40 *See* Peter Stone, *Trump's latest ploy to delay trials is to cry 'election interference,' DOJ veterans say*, The Guardian (Mar. 8, 2024), https://tinyurl.com/3p85ypmk; Daniel Dale, *Fact Check: Trump falsely claims Justice Department rules say candidates can't be prosecuted in the middle of a campaign*, CNN (Feb. 28, 2024), https://tinyurl.com/3ja8b6yz.

41 Some commentators have specifically faulted the special counsel for seeking accelerated Supreme Court review of the district court's denial of Trump's immunity claim as a move calculated to improperly "rush" Trump to trial. This criticism overlooks key facts: First, Trump's immunity claim is legally quite weak. Second, his claim threatened to (and since has) scuttled a scheduled trial date that has never been at issue on appeal. Third, expediting appellate review of the immunity defense is not the same as expediting the trial, and the special counsel's effort to *maintain* the scheduled trial date is properly read as an effort to complete the trial *well in advance of* the election—not close to it. Finally, Trump's transparent effort to pursue his claimed immunity defense as slowly as possible indicates that delay is a primary component of his defense strategy—just the sort of defense strategy the Supreme Court has warned defeats the public's interest in the fair administration of justice.

42 Kristy Parker, Justin Florence, et al., Investigating and Prosecuting Political Leaders in a Democracy, Protect Democracy (May 2023), https://tinyurl.com/23v633pb.

43 *Id*.

44 *Principles of Federal Prosecution, supra* note 25 § 9-27.230.

45 U.S. Dep't of Justice, *Appointment of a Special Counsel,* Office of Public Affairs (Nov. 18, 2022), https://tinyurl.com/bdh89hx2.

46 U.S. Dep't of Justice, *Objective 1.1 Protect Our Democratic Institutions*, Dep't of Justice Strat. Plan, (2023) https://tinyurl.com/2zabh5jb.

47 Jack Goldsmith, *President Biden Needs To Stop Commenting on Justice Department Investigations,* Lawfare (May 7, 2023), https://tinyurl.com/2ajr3swx.

48 Rebecca Falconer, *Hunter Biden's federal gun charges trial set for early June*, Axios (Mar. 13, 2024), https://tinyurl.com/y7ezpv72.

49 Makini Brice & Andrew Goudsward, *Hunter Biden prosecutor faced no political pressure in probe, he tells lawmakers*, Reuters (Nov. 7, 2023), https://tinyurl.com/3cjf797s; Jordain Carney, *Hur says Garland did not interfere*, Politico (Mar. 12, 2024), https://tinyurl.com/3bb4atvr.

50 *United States v. Trump*, __F.Supp.3d__, 2023WL 8359833 (D.D.C. Dec. 1, 2023); *United States v. Trump*, 91 F.4th 1173 (D.C. Cir. 2024), *cert granted, Trump v. United States*, No. 23-3228 (Feb. 28, 2024).

51 Saraphin Dhanani, *Trump Has Jan. 6 Trial Date, and It's the Eve of Super Tuesday,* Lawfare (Aug. 28, 2023), https://tinyurl.com/478sjfwx.

52 Trump opposed the special counsel's petition for cert before judgment, the motion for expedited appeal of the immunity issue in the DC Circuit, and expedited review of the DC Circuit's decision denying immunity. In applying to the Supreme Court for a stay of the mandate following the DC Circuit's denial of his immunity claim, Trump asserted that he wanted to seek en banc review before certiorari and explicitly argued that a pre-election trial would be unfair to him—even though the timing of the trial is not an issue on appeal. *See* Application for a Stay of the D.C. Circuit's Mandate Pending the Filing of a Petition for Writ of Certiorari, *Trump v. United States*, No. 23-3228 (Feb. 12,. 2024), https://tinyurl.com/mryubhxe; Reply in Support of President Trump's Application for a Stay of the D.C. Circuit's Mandate Pending the Filing of a Petition for Writ of Certiorari, *Trump v. United States*, No. 23-3228 (Feb. 15, 2024), https://tinyurl.com/3nubzv42.

53 *See, e.g.*, Response in Opposition to the Government's Motion for Continuance and Proposed Scheduling Order, *United States v. Trump* (Jul.10, 2023), https://tinyurl.com/5ehbdt3u.

54 *Id*. at 9.

55 *United States v. Trump*, 87 F.4th 524 (D.C. Cir. 2023) (upholding certain restrictions on Trump's pre-trial speech while also permitting attacks on special prosecutor); Kristy Parker, *Trump "gag" order: More at stake than the First Amendment*, Protect Democracy (Nov. 8. 2023), https://tinyurl.com/2r5u39ju.

Protect Democracy is a nonpartisan nonprofit organization dedicated to preventing American democracy from declining into a more authoritarian form of government.

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