

Trump's Legal 'Super Tuesday' Will Start One of the Most Bizarre Presidential Elections in History

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The 2024 presidential campaign technically began months ago with the first announced candidates. Yet April 4 will be "Super Tuesday" for America's first [carceral](#) presidential campaign, with the arrest and arraignment of Donald Trump. With the exception of the socialist (and incarcerated) [Eugene Debs in 1920](#), we have not faced the prospect of a president who could be elected with both a term of office and a term of imprisonment.

The New York indictment of Trump has been widely criticized as politically motivated and legally flawed. Manhattan District Attorney Alvin Bragg [boasted during his 2021 campaign](#) about being best suited to go after Trump, and he is making good on his boast with a [highly dubious bootstrapped legal theory](#).

The New York indictment will face considerable challenges. Those challenges will likely take some time to resolve, and if this case follows the customary schedule of criminal matters, it still may be pending when Americans go to the polls to select the next president in 2024.

In addition, a Georgia grand jury reportedly has finished its work on other charges against Trump. Weeks ago, Emily Kohrs, the forewoman of that special grand jury, gave a series of [bizarre giggling interviews](#) about nailing Trump. It is a mystery, given Kohrs' apparent confirmation of pending charges, why [Fulton County District Attorney Fani Willis](#) has held back on an indictment.

Although stronger than the Manhattan case, the Georgia case has its own problems but could make it to trial because those problems are largely fact questions generally left to jurors. But it too would likely be pending by Election Day 2024.

The most serious threat among the potential cases is being developed by Justice Department special counsel Jack Smith. His investigation of Trump's role in the Jan. 6, 2021, Capitol riot is unlikely to result in charges and, if it did, is unlikely to survive challenges on

First Amendment grounds. His investigation of the Mar-a-Lago classified-documents controversy presents a far more established — and, frankly, easier — route for prosecution. From its earliest filings, the Justice Department maintained there is evidence of obstruction and false statements — claims that it could use to distinguish any prosecution from the unlawful possession of classified material by President [Joe Biden](#) or former Vice President Mike Pence.

Smith is under a tight schedule if he wants to charge Trump, though. Since the Justice Department ([incorrectly in my view](#)) maintains that a sitting president cannot be indicted, Smith would have to charge and, ideally, try Trump before Election Day. Indeed, the Justice Department strives to avoid any major legal steps that might impact voting near to an election — a period that could stretch back to the late summer of 2024.

What this means is that Trump could face as many as three sets of criminal charges in three different jurisdictions as he campaigns for the presidency. He would likely seek accommodations from courts to delay any trial during the campaign.

Whether or not Trump can delay a trial, much of 2024 will be focused on carceral rather than political issues. Trump has long claimed that Democrats are weaponizing the criminal justice system against him and other Republicans. Bragg has given him the case positive for proving that allegation, especially since Bragg ran for office on his ability to find a criminal charge against Trump.

The question is what happens if any of these efforts succeed.

I [previously raised](#) the prospect of an actual indictment in converting the election into a debate for presidential self-pardons. [Article II](#) of the Constitution states that a president may “grant reprieves and pardons for offenses against the United States, except in cases of impeachment.” There is no language specifying who may or may not be the subject of a pardon, and presidents have [abused the pardon power](#) to protect political allies and even family members.

Numerous legal analysts have [argued](#) those constitutional provisions “make no sense if the president could pardon himself.” Yet it seems highly doubtful that courts would agree. Despite the massive gravitational pull of Trump on the legal analysis of many pundits, there is nothing in the Constitution to exclude presidents alone from pardon eligibility. The Supreme Court stated in [Schick v. Reed](#) that “the pardoning power is an enumerated power of the Constitution and ... its limitations, if any, must be found in the Constitution itself.”

While a newly elected Trump could only pardon himself for the federal crimes, it is the federal case that likely represents the greatest threat to him. Moreover, the two state cases would add to Trump’s narrative of facing ‘political prosecutions’ from a ‘weaponized’ legal system on every level. Trump often campaigns on just such a primal level. He knows that a man chased by a dog can spark public outcry — but a man chased by a *pack* of dogs can spark public outrage.

It is not simply the election that could take a carceral turn, however.

What would happen if Trump were elected but convicted in either state case? Such a trial would likely occur after the election. Even if courts extended a trial until after the 2024 election, it would be difficult to delay it for four years.

The last time a president faced the threat of a criminal trial was in 1872, when [Ulysses S. Grant was arrested for speeding in his horse-drawn carriage](#) in Washington.

I have long maintained that a sitting president can be indicted and tried. Almost 25 years ago, I wrote an academic work, “‘From Pillar to Post’: The Prosecution of Sitting Presidents,” that challenged immunity theories protecting presidents. I do not believe the indictment of a president or former president is a national tragedy. To the contrary, it is the ultimate affirmation that no one is above the law.

However, that doesn’t mean it wouldn’t get weird if Trump loses in court but wins in the election.

If Trump were convicted in a state proceeding, it would not bar him from running — or serving — as president. A state judge could grant probation or an alternative sentence to avoid imprisonment. Moreover, appeals on the issue of incarceration could take years to address a state order conflicting with the performance of a federal function. Once that time was exhausted, a court could order any incarceration to be delayed until after the end of the presidential term, since Trump could not be elected a third time.

We may have to face one of these scenarios. The question is whether voters may not only accept this prospect but some might even invite it. Regardless of how it works out, this election is about to take a carceral turn.

Elections often raise the politics of crime — but in this election, it may be hard to separate the politics *from* the crime.

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