

My name is Jonathan Fahey, and I am a partner at Holtzman Vogel.

## **Background**

I've spent most of my 25 years practicing law as a prosecutor, both at the state and federal level. I went to law school because I wanted to be a prosecutor. Growing up I had seen the impact a prosecutor could have in keeping the community safe, speaking on behalf of the most vulnerable at their greatest time of need, and the importance of tempering justice with mercy through watching my mom. My mom, Helen Fahey, started as an Assistant Commonwealth's Attorney in Arlington, Virginia, became the elected Commonwealth's Attorney and later was appointed by President Clinton to be the United States Attorney for the Eastern District of Virginia. I learned from my mom that how a prosecutor conducted themselves was critically important to the administration of justice and the job was about public safety and not politics.

After clerking for a year in the Arlington County Circuit Court, I began my career as a prosecutor with the Fairfax Commonwealth's Attorneys Office, working for Robert Horan, a legendary prosecutor. While working for Mr. Horan, I prosecuted cases from the least serious traffic offenses to the most serious and violent felonies.

Mr. Horan entrusted his assistants to make the important decisions with nearly all of our cases. The only admonition we had was that we were expected to treat everyone fairly and respectfully.

I moved from the Commonwealth's Attorneys Office to the U.S. Attorney's Office for the Eastern District of Virginia, where I prosecuted a range of cases, including drug trafficking, gang crimes, and white-collar offenses. I served in the office for 17 years, spanning multiple administrations holding multiple leadership positions. During my time with the U.S. Attorney's Office, I had the opportunity to work with exceptionally talented attorneys who were committed to justice while adhering to the highest ethical standards. From administration to administration, these values remained intact.

In 2019, I left the U.S. Attorney's Office to run for Commonwealth's Attorney in Fairfax against a candidate from the progressive prosecutor movement who had defeated long-time incumbent in the Democratic primary. Although I was unsuccessful in my race and was outspent by an opponent funded almost exclusively by outside interest groups, my campaign garnered bi-partisan support which I attribute to my commitment to public safety and justice.

After the campaign I joined the Department of Homeland Security where I served in a variety of roles. For the last three and a half years, I have been in private practice where I focus on litigation and investigations.

### **Progressive Prosecutor Movement**

The progressive prosecutor, sometimes referred to as “rogue prosecutors,” began about 10 years ago under the auspices that the criminal justice system is inherently unfair and needed to be reformed, and the best and easiest way to fix the system was through elected prosecutors. Through the support of massive spending from outside interest groups, progressive prosecutors were elected throughout the country, often through primaries where elected Democratic prosecutors were unseated in favor of their progressive opponents. Often without any prosecutorial experience, these progressive candidates ran on platforms of criminal justice reform that amounted to efforts to delegitimize the entire criminal justice system and refusing to prosecute certain offenses. Once elected, they proceeded to essentially nullify laws passed by legislatures at their discretion on a variety of offenses—an action once thought unthinkable became commonplace.

Unsurprisingly, this practice has opened the door for the abuse of the criminal justice system to achieve political ends rather than addressing the public safety needs of the community or fulfilling oaths taken to enforce the rule of law. Today's "lawfare" prosecutions are a natural evolution of this phenomena.

### **Alvin Bragg Case**

Alvin Bragg ran for District Attorney of New York as a progressive prosecutor with an intention of decriminalization of certain offenses, lighter sentences for offenders, and getting Donald Trump. He has doggedly pursued all three.

Upon assuming office, Bragg issued the "Day One Memo" to implement policies that essentially decriminalized misdemeanors, reduced most felonies to misdemeanors, and reduced serious felonies to less serious felonies. All while routinely allowing violent offenders to be released on bail. Crime has been rampant in New York, and merchants are forced to take unprecedented steps to protect their merchandise from theft, knowing offenders will not be held accountable thanks to Bragg's progressive policies.

Bragg's case against Donald Trump is the most egregious example of the politicization of the justice system or "lawfare." This case was brought, despite major deficiencies, being previously rejected by his own office, and seemingly of no benefit to the public at large, while being entirely inconsistent with his own office's policies and practices.

The case is ostensibly a fraud action based upon actions taken almost eight years ago about a supposed event that happened a decade before that. One of the most alarming aspects of the case is that the "fraud" did not involve anyone losing money or even being harmed in any way. To the extent that the ledger entries were inaccurate, they were entered into the books of a private company that understood what they were for. It is unheard of for a fraud case to be brought where no losses were suffered, and the only possible victim is the perpetrator of the fraud.

It is also extremely rare for a case this old to be brought, especially considering the relative insignificance of the case. Typically cases this old are only brought for more important crimes where there is a public safety interest. Here, none of that is present. It is also quite notable that this case appears to have been rejected by his

own office and that of his predecessor. In my 19 years as a prosecutor, I cannot think of a situation where a twice rejected case was resuscitated in this manner.

The trial itself raises additional concerns about the politicization of the justice system, particularly as it relates to former President Donald Trump. Despite having donated to President Trump's former and future political opponent, the Judge declined to recuse himself. Even if not required by law, this decision is particularly concerning where ramifications are so significant and will have nationwide impact. Secondly, when the Judge's adult daughter potentially stands to make money related to the case, it is surprising that the judge did not ask for another judge to handle the case whose presence would not create the same or similar concerns.

Although the jury convicted, the trial itself was replete with appellate issues that may lead to the case being overturned. Among the issues, are the extraneous evidence allowed during Ms. Daniel's testimony, the refusal to allow the defense an opportunity to present relevant evidence to one of the secondary crimes, and the lack of unanimity or clarity as to the jury's verdict on the secondary crimes. Even after its guilty verdict, it is entirely conceivable that a majority of the jurors

believed that President Trump did not commit each of the three potential supplemental crimes yet convicted him anyway based upon the way the court instructed the jury.

### **Supreme Court's Immunity Decision**

Although the recent Supreme Court's decision was issued in the context of the Special Counsel's federal prosecution of former President Trump for conduct related to the 2020 presidential election, the Court's holding will have broader ramifications that affect all four criminal cases. President Trump raised presidential immunity as a defense against each prosecution, which means that each trial judge will have to individually assess the impact of the decision on the case before them.

To begin, the Court has already ordered some of the allegations stripped from the Special Counsel's D.C. indictment. Because the Court held that "the President cannot be prosecuted for conduct within his exclusive constitutional authority[,] Trump is therefore absolutely immune from prosecution for the alleged conduct involving his discussions with Justice Department officials."<sup>1</sup> The ramifications of this holding extend further than the D.C. case. The Georgia prosecution, although based upon state rather than federal law, is still focused on much of the same conduct as the D.C. prosecution during a period when Donald Trump was still

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<sup>1</sup> *Trump v. United States*, No. 23-939, slip op. at 21 (July 1, 2024).

President of the United States. To the extent that any of the Georgia charges are predicated upon internal executive branch discussions with the President's subordinates such as the Supreme Court found objectionable here, those charges cannot survive.

The Bragg case is in the greatest jeopardy. Before the New York trial, President Trump asked Judge Merchan to limit the use of certain evidence consisting of “[his] social media posts and official statements” and an official form filed by President Trump with the Office of Government Ethics in 2018.<sup>2</sup> President Trump also asked Judge Merchan to adjourn the trial until the Supreme Court decided *Trump v. United States*, arguing that “adjournment would mitigate the risk that an error in the application of this complex federal-law issue could require the Court, the parties, the State, the City, and the County to expend the resources necessary to re-try the case.”<sup>3</sup> That warning now looks prescient, and Judge Merchan's decision to deny the defendant's reasonable requests looks even less wise now than it did then.

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<sup>2</sup> Def.'s Motions to Exclude Evidence and for an Adjournment Based on Presidential Immunity, No. 71543-23, at 22-23 (March 7, 2024), available at: [https://www.documentcloud.org/documents/24475014-20240307-motion-re-presidential-immunity\\_redacted](https://www.documentcloud.org/documents/24475014-20240307-motion-re-presidential-immunity_redacted).

<sup>3</sup> *Id.* at 19.



That is because the Supreme Court didn't just prohibit prosecutors from filing criminal charges based upon a President's official acts; the Court also prohibited prosecutors from using a President's official acts as evidence in prosecutions for other unofficial conduct. As the Court explained, the use of official acts evidence in ancillary proceedings "threatens to eviscerate the immunity we have recognized" because "[i]t would permit a prosecutor to do indirectly what he cannot do directly—invite the jury to examine acts for which a President is immune from prosecution to nonetheless prove his liability on any charge."<sup>4</sup> Put simply, it is not clear which evidence convinced the New York jury to convict President Trump on 34 felony charges; all that is certain is that they were permitted to review evidence of Trump's official acts as President that, according to the Supreme Court, should never have been admitted at trial. That error taints the entire prosecution and should result in a mistrial. Judge Merchan's letter published on X says it all: President Trump's sentencing hearing has been adjourned to September 18, "if such is still necessary."

### **Conclusion**

The politization of the justice system does far more than harm its intended target, it undermines the confidence in the entire system and those who are entrusted to administer it.

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<sup>4</sup> *Trump*, No. 23-939, slip op. at 31.