

Originally published in

New York Law Journal

May 9, 2024

Sidebar Series: The Trump Gag Order

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Let's step away from Stormy Daniels' explosive testimony for a moment.

Judge Juan Merchan's second order holding ex-president Donald Trump in contempt is a blockbuster. In his first order, the court minced no words that this defendant violated the gag order no less than nine times. And he warned Trump that "the court will not tolerate continued willful violations of its lawful orders and that if necessary and appropriate under the circumstances, it will impose an incarceratory punishment..."

In the second order, the court doubled down: speaking directly to Trump. Merchan observed that fines were not acting as a deterrent. He continued: "This court will have to consider a jail sanction. At the end of the day, I have a job to do. Part of that job is to protect the dignity of the justice system."

This judge obviously means business. Observers could see from the beginning of this case that he wanted this trial to move forward expeditiously, that he would not permit it to be disrupted, and would do all he could to make certain that jurors and witnesses were not harassed or intimidated in any way. Trump, a man not accustomed to being told what to do or how to speak, has found himself in an entirely new environment—where his freedom to say or do as he pleases is constricted. Perhaps that is why he is often slumped in his seat at the defendant's table, or even periodically dozing off. And that is what probably prompts him to decry the gag order as "unconstitutional."

This is not to say the judge does not recognize Trump unique status, and should be able to respond in kind to "political attacks." Indeed, the judge has said that he is "keenly aware of, and protective of, defendant's First Amendment rights, particularly given his candidacy for the office of President of the United States."

He went on: "It is critically important that Defendant's legitimate free speech rights not be curtailed, that he be able to fully campaign for the office which he seeks and that he be able to respond and defend himself against political attacks."

In a word, then, no one is stopping Trump from campaigning, and engaging in legitimate political back-and-forth—as long as it does not cross the line that relates to witnesses or jurors, or directing others to do so.

Readers are invited to review the offending statements by Trump in an article that predicted this outcome, “[Why Trump Will Likely be Held in Contempt and What Then](#)”, which can be found on the [Just Security](#) site (Karen Agnifilo is one of the authors).

The purpose of holding a party in criminal contempt under the Judiciary Law is to punish for willful disobedience of a court order and to disincentivize them from similar conduct going forward. It is hard to know whether the lesson has been learned here, and whether Merchan’s unambiguous warning of jailtime will work.

Indeed, conventional wisdom, for what it its worth, is that Trump would like nothing better as grist for his campaign. In fact, he admitted as much outside of court when he said “our Constitution is much more important than jail. It’s not even close. I’ll do that sacrifice any day.”

Be that as it may, the court is unlikely to impose any kind of sanction that would interfere with the case moving along or that could have an impact on the jury should they inadvertently learn of such sanction. Perhaps, then, if jail is warranted, the court might put off imposing the penalty until both sides have rested, or, if Trump is convicted, as part of his sentencing.

Or perhaps the court will confine Trump to the holding cell behind the courtroom during lunch or before proceedings begin—the kind of sanction that might restrain further violations.

However this plays out, the one lesson Trump has undoubtedly learned by now is that this Judge is not like any political or business adversary he has ever met.

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