Federal judge rejects Trump's claim of executive privilege in January 6 investigation

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A federal judge in Washington D.C. ruled Tuesday night that former President Donald Trump cannot invoke executive privilege to protect documents from his White House that relate to the preparation of the January 6 attack on the Capitol and Trump's actions and communications during that attack.

District Judge Tanya S. Chutkan focused her decision not on the merits of Trump's claim of executive privilege, but on whether he could, as a former president, assert the privilege when the current president and the current Congress—in the form of the House Select Committee investigating the January 6 attack—have agreed that the documents should be turned over by the National Archives to the committee.

"At bottom, this is a dispute between a former and incumbent President. And the Supreme Court has already made clear that in such circumstances, the incumbent's view is accorded greater weight," she wrote, citing a ruling against former President Richard Nixon, who sought to withhold materials relating to the Watergate scandal.

There are two remarkable aspects to the position taken by Trump in the legal proceeding, which began when he filed suit against the House committee last month.

First, Trump's legal arguments have the same basis as his lying claims of a stolen election. That is, his lawyers act as though President Joe Biden was not legitimately elected and therefore Trump remained in full possession of the White House.

Judge Chutkan noted that Trump did not accept that under the Supreme Court precedent, the current president, not the former president, determines the best interests of the executive branch.

The ex-president "does not acknowledge the deference owed to the incumbent president's judgment. His position that he may override the express will of the executive branch appears to be premised on the notion that his executive power 'exists in perpetuity,'" she wrote. "But Presidents are not kings, and Plaintiff is not President."

This line was highlighted in virtually every media account of the judge's decision, although they did not explain the fundamentally authoritarian character of Trump's argument.

The other important aspect of the Trump suit is that his lawyers did not claim that the documents sought by the House Select Committee—telephone logs, videos, contemporaneous notes of various White House aides, etc.—were irrelevant to the stated purpose of the House committee investigation.

This amounts to conceding the central political issue surrounding January 6: that Trump was at the center of the conspiracy to overthrow the Constitution and transform a lame-duck president, defeated at the polls, into a president-dictator. Neither the corporate media nor the congressional Democrats have sought to point out this obvious inference.

Judge Chutkan, an Obama appointee, stated her emphatic agreement with the legitimacy of the House investigation, against the argument of Trump's lawyers that the committee was a partisan political operation with no legislative purpose.

In establishing the committee, the House of Representatives was declaring "that discovering and coming to terms with the causes underlying the January 6 attack is a matter of unsurpassed public importance because such information relates to our core democratic institutions and the public's confidence in them," she wrote. "The court agrees.

"The court holds that the public interest lies in permitting—not enjoining—the combined will of the

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legislative and executive branches to study the events that led to and occurred on January 6, and to consider legislation to prevent such events from ever occurring again."

The National Archives is expected to begin turning over the documents on Friday to House investigators, but Trump's attorneys said they would immediately file two sets of appeals: one asking the Court of Appeals to review the lower court ruling, and the other with Judge Chutkan, asking her to stay the effect of her ruling pending that review.

Assuming, as most legal observers do, that Judge Chutkan will deny that request, Trump is expected to file an additional motion with the Court of Appeals, asking for an emergency stay to block any delivery of documents by the National Archives to the House committee.

The Court of Appeals has set December 27 for a hearing on the appeal of Judge Chutkan's ruling. Any emergency stay of her order would have to be issued by Friday.

Trump evidently expects that whatever the response of the Court of Appeals, he will file a further appeal to the US Supreme Court, where three of the nine justices are his own appointees, and six are right-wingers nominated by Republican presidents.

His expectation of favorable treatment was not fulfilled last November in relation to his bogus claims of election fraud, rejected 9-0 by the high court, and the outcome of such an appeal cannot be certain.

A more probable political-legal tactic is to stall any final decision on the handing over of documents for another year, until the 2022 elections, when Trump expects that the Republican Party will win control of the House, disband the Select Committee and rescind all its document requests, making the outstanding legal issues moot.

That is the near-certain outcome if the Republicans do retake the House, since a majority of House Republicans voted to overturn the will of the voters by denying certification to the electoral votes of the states of Arizona and Pennsylvania. Most of them supported overturning the electoral votes in five or six battleground states, until the unsuccessful fascist attack on the Capitol made such an action politically untenable.

This is the same stalling tactic pursued by Stephen Bannon and others of Trump's fascist co-conspirators who are defying subpoenas to testify before the committee. Bannon has been formally held in contempt of Congress, but there will be no penalty applied unless the Department of Justice takes action to enforce the congressional sanction.

Attorney General Merrick Garland has been silent on that question, taking no action more than three weeks after the contempt citation was issued. If the Department of Justice refuses to step in, dozens of Trump aides and allies will follow Bannon's lead and refuse to testify, turning the supposed investigation into a travesty.

Congressional Democrats hailed the lower court ruling. House Speaker Nancy Pelosi called it "an important victory for the Constitution, the rule of law and the American people." Her written statement went on to declare, "No one can be allowed to stand in the way of the truth—particularly not the previous President, who instigated and encouraged the insurrection."

But significantly, the House Select Committee has not sought the testimony of a single member of Congress, in the House or Senate, despite the mounting evidence that a dozen Republican members participated directly in the planning of the Capitol attack. This included giving "constituent tours" to some of the fascist attackers during the weeks leading up to January 6, so they could familiarize themselves with the layout of the building and make tactical preparations.

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