

South Dakota Newspapers, #67
Dave Bordewyk, Ann Volin
"We the People"
December 13, 2023

"Mr. Smith Goes to the Supreme Court to Save the Rule
of Law"

David Adler

Jack Smith, the special counsel prosecuting former President Donald Trump for his efforts to illegally overturn the 2020 election, made a bold and strategically wise move in a rare request to the U.S. Supreme Court to rule "expeditiously" on Trump's claim of absolute immunity from criminal prosecution. Trump's assertion that he is above the law represents a profound threat to the rule of law.

Smith's extraordinary request to the High Court to grant "certiorari before judgment" represents the best opportunity to preserve Trump's scheduled trial date—March 4, 2024—which his legal team is trying to delay. It also serves the vital interests of the rule of law, American democracy and the public's right to a speedy trial.

Federal District Court Judge Tanya S. Chutkan rejected Trump's assertion of "absolute immunity" from criminal prosecution. She rightly held that "presidents are not kings" and that in the United States, "no man is above the law." As expected, Trump appealed the ruling to the U.S. Court of Appeals for the District of Columbia Circuit.

Trump's appeal to the circuit court carries with it a pause in the pre-trial proceedings, including the process of securing jurors in what will be a historic trial. No American president has been tried on criminal

charges. The delay in the proceedings serves the strategic interests of the former president who, obviously, does not want to stand trial. If Trump can delay trial until the late summer months, he may be able to postpone it until after the election since Judge Chutkan would face the difficult question of whether to try Trump in the heat of the campaign, requiring him to be in court for the duration of the trial rather than on the stump. That dilemma is exacerbated by the need, and the right, of the American people to know, before they go to the polls, whether Trump committed a crime against the United States.

Even worse, if Trump were to win the election, he could order the justice department to drop the prosecution, meaning we might never know the full scope of evidence amassed by Smith and the ultimate truth about the allegations against Trump. The "verdict," as it were, would be left to scholars—less satisfactory than the judgment rendered by a jury of Trump's peers.

The United States of America v. Donald Trump is a case of first impression, which means the first time that the High Tribunal is asked to address the question of whether a former president enjoys absolute immunity from prosecution for crimes that he committed while in office. If the Court agrees to hear the case and decides that Trump does not, in fact, enjoy immunity from criminal prosecution, then the trial may proceed. If the Court decides, on the other hand, that the president is immune from criminal prosecution, then the case is dismissed. It is possible that the Court will decide that the case and the issues at the center of it should be fully ventilated by the circuit court, leaving the Supreme Court in the position of ruling after the normal appellate process has played out. All of that would take time, of course, likely too much time.

The Supreme Court should agree to hear this case. It should grant "certiorari before judgment." Rule 11 of the Court's practice emphasizes that this will be granted in cases of "imperative public importance." This is such a case. Indeed, if the question of whether the president is above the law does not present a question of "imperative public importance," then no case meets this stringent requirement.

The Court rarely grants certiorari before judgment. Historically, the two great cases in which the Court has granted the writ were those involving sweeping assertions of presidential power, though neither presented an issue of such soaring importance as a former president claiming he is above the law. In *Youngstown Sheet & Tube Co. v. Sawyer* (1952), better known as the Steel Seizure Case, the Supreme Court rejected President Harry Truman's claim of an emergency presidential power to seize the steel mills to keep them open and operating in the face of a nationwide steel strike at a time when the production of steel was vital to America's role in the Korean War and the success of the Marshall Plan in rebuilding Europe after the devastation of World War II. The Court held that no statute and no constitutional provision conferred authority upon the president to seize private property.

More recently, in 1974 in *United States v. Nixon*—the Watergate Tapes Case—the Court granted certiorari before judgment when President Richard Nixon asserted the power of "absolute executive privilege" to withhold taped conversations in the Oval Office in a criminal case involving Watergate defendants. The Court, in a unanimous 8-0 opinion (Justice William Rehnquist recused himself) authored by Chief Justice Warren Burger, a Nixon appointee, rejected Nixon's unprecedented assertion of power, finding no support in the architecture of the Constitution.

USA v. Trump represents the most profoundly important issue of our time, indeed, of any time in American history. The Court should decide if the president is immune from criminal prosecution and whether any man—or woman—is above the law.