

3 Factors That May Complicate Jury Selection In Trump Trials

By **Richard Gabriel** (August 29, 2023)

The Sixth Amendment to the U.S. Constitution states, among other things, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

With former President Donald Trump currently facing jury trials in Georgia, Florida, New York and Washington, D.C., the judges, attorneys and court systems in these venues face three unique and difficult challenges in selecting fair and impartial juries for these cases.



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This article discusses how politics, pretrial publicity, and juror cynicism about the justice system could complicate the jury selection process.

1. Politics and Personal Experience

All four of these trials involve political issues, in one way or another.

A trial in Washington poses particularly thorny problems on the impartiality issue. Not only will many jurors know about events leading up to the Jan. 6 attacks, but many in the Washington area are employed by the government; may have worked for or had interactions with the Trump administration; and may have been directly affected by the events on Jan. 6, 2021.

Additionally, jurors will have been exposed to media reports about the numerous Jan. 6 defendants who have been convicted of assault, seditious conspiracy or obstruction of Congress.

As a result, a Trump defense team may ask for a change of venue — asking that the trial be moved to another federal jurisdiction outside of the U.S. District Court for the District of Columbia. They may argue that over 90% of Washington, D.C., voters in the last presidential election cast a ballot for President Joe Biden,[1] and thus, most jurors called in this jurisdiction would have a natural bias against Trump in a case involving the 2020 election.

However, change of venue motions are rarely granted, and U.S. District Judge Tanya Chutkan could decide that the media reports were national news and that a juror's political affiliation does not necessarily bias them against the former president.

The issues in the new Georgia indictments also can be seen as having a direct impact on Democratic voters in the state.

Trials in Fulton County, Georgia, as well as Manhattan, will take place in predominantly Democratic strongholds — in both places, over 70% voted Democrat in the 2020 presidential election[2] — causing Trump's lawyers to possibly file change of venue motions to move those trials to more politically conservative counties.

Additionally, Trump can also seek to remove his state court case in Georgia to federal court

in the hope of obtaining a more conservative jury pool from the counties surrounding Atlanta.

If U.S. District Judge Aileen M. Cannon keeps the Florida classified documents case in Fort Pierce that small jurisdiction pulls jurors from St. Lucie, Martin, Indian River, Okeechobee and Highlands Counties, which are much more conservative counties than Miami-Dade or Palm Beach Counties, with approximately 50% registered Republicans in most of the five counties and the remainder of voters split between Democrats and other party registrations.[3] Trump won all of these counties in 2020.[4]

While some Republican jurors may be more inclined to believe these trials are a "witch hunt" because approximately 70% of Republicans believe that Biden did not legitimately win the 2020 election,[5] and some Democratic Party jurors may have already prejudged Trump's guilt, strict party affiliation may not be an accurate determinant of verdict inclination in these cases.

In a Fox News interview following the conviction of candidate Trump's campaign manager Paul Manafort, juror Paula Duncan said she was a Trump supporter and didn't want Manafort to be guilty, but the evidence was "overwhelming." [6]

Additionally, there are certainly Republican voters who may favor Florida Gov. Ron DeSantis or other Republican candidates, or have become tired of Trump's numerous scandals.

There also may be Atlanta Democrats who may have difficulty with the unique application of a racketeering charge in a voting case, or New York Democrats who may question why Trump is being charged with falsifying business records over his alleged hush-money payment to adult film actress Stormy Daniels.

Republicans can convict Republicans, and Democrats can acquit Republicans.

Usually, demographic categories such as gender and race are the poorest predictors of juror decision making. But demographics can provide a starting point in a complex jury selection analysis because Trump has been outspoken on issues that have affected so many Americans.

For example, Trump's defense attorneys must consider how women will respond to evidence in his New York trial, given that Trump has made numerous comments about women in the past that have been characterized as disparaging and misogynistic, and has recently been found liable for the sexual abuse of journalist E. Jean Carroll.

Black jurors in Atlanta may be influenced what they saw as the Trump campaign's efforts to suppress the Black vote there.

In South Florida, Trump was able to strongly cultivate Latino voters in the 2020 presidential elections.[7] Whether those voters still support Trump is an issue for both prosecutors and defense lawyers to puzzle over.

Life experiences and beliefs are the engines that drive jury verdicts, because they determine how jurors will interpret the evidence in a given case.

The attorneys in the Washington case must certainly ask jurors whether they or anyone close to them was affected by the events leading up to or including Jan. 6, 2021.

Jurors in both New York and Florida also have a history with Trump that precedes his presidency. Whether potential jurors dealt with his hotels, golf courses, businesses or real estate ventures, or watched him on "The Apprentice," the attorneys will have to understand how those prior experiences or attitudes may incline a juror toward guilt or acquittal.

2. Pretrial Publicity

In numerous high-profile trials, the courts have wrestled with the seemingly conflicting constitutional right to a free press and a defendant's right to an impartial jury.

In the murder trial of Sam Sheppard in 1954 — the case that inspired the TV series and movie "The Fugitive" — the media coverage was so extreme that the U.S. Supreme Court overturned Sheppard's murder conviction in 1966.

In *Sheppard v. Maxwell*, the court stated,

Though freedom of discussion should be given the widest range compatible with the fair and orderly administration of justice, it must not be allowed to divert a trial from its purpose of adjudicating controversies according to legal procedures based on evidence received only in open court.[8]

And in language sure to be relevant to any upcoming trial of Trump, the court wrote that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."

Yet, in upholding the conviction of Enron executive Jeffrey Skilling in 2010, the Supreme Court also ruled that jurors are not required to be "totally ignorant of the facts and issues involved" in a case.[9]

In high-profile trials, jurors struggle with separating what they have seen and heard on the news with the actual evidence presented in court.

In the O.J. Simpson trial, much of the massive media pretrial coverage described the "mountain of evidence" against the former football star. In the Casey Anthony case, a statewide poll conducted by WFTV indicated that 70%-90% of those surveyed already believed Casey Anthony to be guilty before the trial had begun.[10]

Yet, despite the pervasive and negative pretrial publicity in both the Simpson and Anthony trials, juries acquitted those defendants.

In Trump's trials in Washington, Atlanta, Florida and New York, many jurors may have already heard about statements or recordings made by Trump, or seen the photos of the boxes of documents in ballrooms and bathrooms, whether the judge rules them to be admissible or not.

Trial judges try to solve the pretrial publicity problem by asking jurors if they can set aside what they have seen in the media and any opinions they may have formed.

While this is a cognitive impossibility — there is no anatomical "set aside" shelf in the brain — jurors often try hard to discern the difference between evidence, news, and opinion or commentary.

In any high-profile trials with extensive media coverage, prospective jurors should be

closely questioned to determine their self-awareness and ability to perform this difficult critical thinking task.

3. System Credibility

While Congress has suffered from low approval ratings for years, the justice system has managed to maintain relatively strong credibility until recently.

The recent publicity over Supreme Court decisions and ethics; Trump's attacks on the FBI, prosecutors and judges; and even Biden's comment after the Supreme Court's recent affirmative action decision that "[t]his is not a normal court," have all taken a toll.

Whereas law enforcement and the courts have traditionally been seen by the public as objective and neutral arbiters of legal disputes, these news stories, editorial opinions and political attacks have caused many jurors to question the motives of these agencies and systems.

Judges and prosecutors in the Trump cases will have to be on the lookout for nullification jurors, or jurors who would refuse to follow the law because they believe the system itself is unfair.

Recently, I helped conduct a national poll in collaboration with the American Board of Trial Advocates, the Online Courtroom Project and the American Society of Trial Consultants to measure the public's confidence in our justice system.

In March, 1,031 respondents participated in an online survey. The polling was conducted in all 50 states, and was weighted to capture responses from a representative sample that matches the demographics of U.S. census data.

This polling shows deep-seated dissatisfaction with many aspects of our justice system, which can affect the credibility of the courts and the willingness of jurors to follow the law.

Indeed, 50% of the survey respondents believed that judges are somewhat or very biased in how they decide cases, and nearly 47% of respondents believed the Supreme Court makes decisions based on the justices' personal and political beliefs rather than in accordance with the Constitution and established law.[11]

Yet, when asked about how confident they were in different parties to deliver justice, those polled stated they had a higher confidence in juries than judges.

Given these attitudes — and while any verdict in a Trump case is bound to be controversial — verdicts by representative cross-sections of the Atlanta, Washington, Fort Pierce and New York City communities have a greater chance of being accepted as legitimate determinations of the evidence and law by the public.

Final Thoughts

Selecting an impartial jury in any of the Trump cases will be extraordinarily challenging. A group of ordinary citizens will be deciding the fate of a former president. Hundreds, if not thousands, of jurors will need to be called and interviewed in each venue.

The judges and attorneys will need to evaluate a complicated matrix of factors to assess whether jurors can be truly impartial.

This includes assessing a prospective juror's exposure to prior publicity on a range of subjects, their views of Trump, their political opinions and personal beliefs, their individual personality and how they will work with other jurors, and the social pressure they may feel from family, friends, co-workers and their community to bring back a certain verdict. It won't be easy.

But despite all of these challenges, something extraordinary happens when 12 citizens from different backgrounds, life experiences, values and beliefs get together and are charged with making an important decision.

All the political and media noise falls away, and the jury becomes centrally focused on rendering a verdict based only on the facts and the law. And that may be the best example of a constitutional democracy at work.

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Disclosure: Gabriel consulted for the defense in the O.J. Simpson and Casey Anthony Trials.

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[1] <https://www.nbcnews.com/politics/2020-elections/district-of-columbia-president-results/>.

[2] https://www.bestplaces.net/voting/city/new_york/manhattan; <https://www.bestplaces.net/voting/county/georgia/fulton>.

[3] <https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reports/voter-registration-by-county-and-party/>.

[4] <https://www.politico.com/2020-election/results/florida/>.

[5] <https://www.cnn.com/2023/08/03/politics/cnn-poll-republicans-think-2020-election-illegitimate/index.html>.

[6] <https://www.nbcnews.com/news/crime-courts/manafort-juror-paula-duncan-manafort-guilty-mueller-probe-witch-hunt-n903201>.

[7] <https://www.nbcnews.com/news/latino/did-trump-draw-out-new-latino-republican-voter-bloc-florida-n1248577>.

[8] <https://supreme.justia.com/cases/federal/us/384/333/>.

[9] <https://supreme.justia.com/cases/federal/us/561/358/>.

[10] <https://www.wftv.com/news/exclusive-wftv-polls-potential-jurors-in-casey->

cas/286602200/.

[11] https://www.astcweb.org/resources/Documents/Trust%20in%20Justice%20National%20Survey%20Report%20w_%20Charts.pdf.