

***Due Process and New York v. Trump:  
A Conversation with Professor Seth Barrett Tillman\****

Interview Conducted and Transcribed by Maclain Conlin (All errors are my own).<sup>1</sup>

*(All views expressed in this interview are those of the guest and do not necessarily represent the position of the Clemson Law Review or its leadership.)*

**Maclain Conlin:** Good afternoon, and welcome to the *Clemson Law Review's* interview series.

Today, in a particularly timely installment, we are joined by a very special guest, Professor Seth Barrett Tillman. Professor Tillman is an Associate Professor at the Maynooth University School of Law and Criminology in County Kildare, Ireland. He is a widely recognized expert on American constitutional law and legal history and the author or co-author of numerous essays and articles, including *The Right to a Unanimous Verdict and the Jury Instructions in People v. Trump*, which was published in *Just Security* last summer.<sup>2</sup> Today, he joins us to discuss the latest developments in President Trump's appeal of his New York state criminal conviction, as well as the constitutional arguments made by President Trump's legal team. Professor Tillman, thank you for joining us.

**Seth Barrett Tillman:** Thank you for having me.

**MC:** To begin, would you mind providing an overview of the legal provisions at issue in this case?

**SBT:** Of course. This case is a little bit more complex than it first appears. The allegation was a *conspiracy* to violate the election law.<sup>3</sup> The outermost crime is the conspiracy. The object of the conspiracy was to violate the election law and the election law requires that the violation occur "by unlawful means." We have this contraption of three levels of wrongdoing engineered by the prosecutor's office.

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<sup>1</sup> This interview was conducted on October 28, 2025 and published on October 30, 2025.

<sup>2</sup> See Seth Barrett Tillman, *The Right to a Unanimous Verdict and the Jury Instructions in People v. Trump*, JUST SECURITY (June 10, 2024), <https://www.justsecurity.org/96654/trump-unanimous-verdict/>, accessed October 28, 2025; see also Brief of Professor Seth Barrett Tillman and Landmark Legal Foundation as *Amici Curiae* in Support of Defendant-Appellant Donald J. Trump, *People of the State of New York v. President Donald J. Trump*, App. No. 2025-00648 (N.Y. App. Div. 1st Dept. Oct. 29, 2025) (filed by Robert W. Ray, Esq., of Sterlington PLLC, and J. Andrew Salemme, Esq., of Tucker Arensberg, P.C.), Doc. No. 72, <https://ssrn.com/abstract=5652010>.

<sup>3</sup> N.Y. Election Law § 17-152 "makes it a misdemeanor for 'two or more persons to conspire to promote or prevent the election of any person to a public office by unlawful means.'" Brief for Defendant-Appellant President Donald J. Trump, *People of the State of New York v. Donald J. Trump* at 67, App No. 2025-00648 (N.Y. App. Div. 1st Dep't Oct. 27, 2025), Doc. No. 66, <https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=gXzO2QOX8fren%2FCyAGIzRA%3D%3D&narrow=true>, accessed October 28, 2025 (citing N.Y. Election Law § 17-152).

The question then became what is meant by “unlawful means”—used to effectuate the object of the conspiracy. The issue here is what the jury has to agree on—that is, can each juror have a different view as to what the “unlawful means” was, or do they have to agree on the “unlawful means”? The prosecution alleged three different unlawful means but the trial court didn’t require that the jury agree on any one of them. So we don’t know if there was jury unanimity as to any one of three specific unlawful means alleged, and the question is: *Was that a unanimous verdict if different jurors had different views from one another in regard to the unlawful means alleged?*

I’m of the view, and I was of the view when these jury instructions were issued, that the trial court’s jury instructions were plainly wrong. This is a violation of the defendant’s Sixth Amendment jury-unanimity rights. There’s a lot of case law in this area, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000). To me, there is both a technical legal issue here and what you might also call a wider cultural issue, which is: *Where is the defense bar in the United States?* Usually, when there is a defendant who’s alleging a violation of a serious constitutional right, the defense bar is there, talking about it. Here, there is just utter silence. If the defense bar thinks that this Trump’s jury-unanimity argument is weak, they are certainly not saying it. If the defense bar thinks Trump’s position is strong, again, they are certainly not saying it. They are not shouting from the rooftops.

These are the same litigators who have to go into court when litigating other New York crimes prosecuted against their clients. Trump’s position, if upheld by the courts, would be a very valuable argument with regard to analyzing New York state law. Keep in mind that New York City’s defense bar includes some of the most elite lawyers in the United States, both practicing in the federal courts and the New York state courts.

I’m an academic, and other academics have published on the issue of *Apprendi* and jury unanimity. I’m in Ireland—I ask: *Where are all the American and U.S.-based academics?* Every law faculty has professors who teach procedural criminal law and substantive criminal law. Every law faculty has constitutional scholars, and this is a constitutional issue. I can guess as to why there is silence. Is this issue of little moment to them? Is it that they all support Trump and don’t want to say something that might hurt him, or that they oppose him and don’t want to say something that might inadvertently help him? Could either of these be the case?

You don’t even see vanilla analyses of these issues appearing in the major journals or even the professional journals, like the legal newspapers that report news and events of the day with short, neutral analyses. It’s a stone wall of silence on the jury-unanimity issue and that is really telling. I happen to think—and I don’t know this to be the case, as it is more of a sociological or anthropological question—one reason you have this silence is that many know Trump is right on this particular issue, but they are afraid of becoming unpopular by saying it out loud. It is Orwellian, or, perhaps, better described as characteristic of the behavior of primary school students.

**MC:** Could this silence make the unanimity issue more difficult to resolve?

**SBT:** I don't think it will make it more difficult for the New York courts to decide or for the Manhattan District Attorney's Office to argue or for Trump's lawyers to argue. I think it's catastrophic, though, in terms of American legal culture that practitioners and others are afraid to talk about what they believe in academic settings and elsewhere beyond academic settings.

It should be that the loudest and most vigorous speech comes from the defense bar. They're the guys who are constantly saying, "We will defend every single criminal to make sure that every right is protected. Don't hold it against us that we defend wrongdoers. You could be the next target of a malicious prosecutor." Here, if they were willing to go out and say, "Trump is guilty, and the jury instructions were correct, and here's why"—all that would be very interesting. But we don't even get that. We get nothing. Is it that they simply don't care—or, even worse, that they are deeply afraid of being unpopular. I don't know how a defense bar could be successful if popularity is governing their willingness to talk about these issues, irrespective of whether they think Trump's jury-unanimity rights were violated.

Looking at this from the outside—and I certainly have views about the jury-unanimity issue—there is a larger cultural problem here which is, arguably, more important than the concrete legal issue. At the end of the day, it doesn't matter whether Trump's convictions are upheld. If he loses this case, it doesn't affect whether he is president. He's in office. The only way to remove him is via a House impeachment and a Senate trial ending in conviction, and I don't see that happening. For that reason alone, we should be able to have these discussions without being afraid of political consequences because nothing that happens in the court will affect whether Trump is or is not president at this point. And yet, the stone wall of silence is still there. And like I said, it is difficult to explain why it is there.

There is a deep irony here. I am an American academic writing from Ireland, and you can count on one hand the number of American or U.S.-based academics who have explored this issue and written about it. It is very unfortunate.

Having gotten all that out of the way, we can now turn to the legal issues themselves. The legal issue is the following: Here, we have a charge of conspiracy, and the object of the conspiracy was to violate the election law, and the election law is only violated if "unlawful means" were used. The prosecutor basically alleged three different potential unlawful means: first, violations of the Federal Election Campaign Act (FECA); second, tax violations; and third, falsifying business records. The prosecutor presented evidence for each of these three means. The judge instructed the jury that so long as they agreed that unlawful means were used, that is enough for unanimity. There doesn't have to be agreement on which particular unlawful means effectuated the object of the conspiracy, which was allegedly to wrongfully promote or prevent the election of a person to some public office.

Different evidence came in for each one of these three predicate wrongs.

Conceptually, they are different from one another. One really must ask what is left of unanimity if people could have a different view of what the unlawful means were. Is the jury, in any meaningful sense, agreed as to what crime was committed?

This is certainly the view that the defense team put forward, and that I am hopefully going to put forward very soon in my own *amicus* brief (after this interview ends). But another way of looking at it—and this is the way that the prosecutor’s office looked at it—is that it’s not very uncommon that where there’s an element for a crime, the level of specificity for that element does not require unique agreement on that element. For example, if a statute required that a weapon was used, one juror could believe it was one model gun and another juror could believe that it was a different model gun. They don’t have to agree on the exact model so long as, based on the statute, they agree that a weapon was used. That’s one way of looking at it.

I think that the law on this argument is not as clear as it could be. I don’t want to suggest that there is an absolute slam-dunk case here for either side. I think the side for jury unanimity, as Trump has argued, is the better view, as I’ve argued myself. This is how I would put it: where a statute defines a crime, and one of the elements of the crime is an act or a thing, then different jurors can have different views as to whether that act or thing is fulfilled. But where an element of a crime is, in fact, another crime that itself could be charged—and that’s what we have here with a conspiracy to violate an election law where the election law has a predicate offense of using “unlawful means”—the jury must agree on what the specific predicate crime is because the crime itself has elements. When you allege that someone committed a crime, that crime itself has elements that must be unanimously agreed to.

I think that’s the distinction that many state courts have adopted with some clarity. New York’s courts, including its appellate courts, have not spoken to this issue—especially in regards to the election statute—with any degree of clarity. In fact, Trump remains the only person ever charged, as far as I know, under this election statute. So it’s not like there are jury instructions or a statutory history for us to look to. But when you look at other states, with regard to other similarly structured crimes, or to federal crimes, such as RICO, the statutory systems and the case law do make reasonably clear that where there is an element of a crime that is itself a (predicate) crime, the jury must be unanimous with regard to that specific predicate crime. And where different predicates are alleged, that’s insufficient, because we don’t know if there was unanimity with regard to any specific alleged predicate crime. That’s the key issue here.

And that’s also the mistake that I think Judge Merchan made when he looked at the various precedents under New York law, which did not look to predicate statutory violations. Instead, they involved predicate acts—allegations that a thing happened or a thing was done or used. But that thing that happened or mechanism that was used was not itself a crime. So the specificity of each juror’s agreeing was not strictly necessary. By contrast, if more than one crime is alleged as a predicate,

I think that a judge must give a specific unanimity instruction. That might be where this case ends up.

I'm not saying that the New York intermediate appellate court will reverse Judge Merchan. We simply don't know. And we're probably not going to see a decision from this court until just about the next election—the 2026 midterm congressional elections. That's the amazing thing about this, because that's the way that the parties have timed this. It almost looks like both sides want the decision to come just around the time of the congressional midterms because both sides have asked for multiple extensions. Trump's people didn't file their appeal the next day after Judge Merchan announced his sentence. They waited almost until the time period for seeking an appeal had elapsed. And then Trump's attorneys asked for an extension to file his opening brief. And afterwards, both parties asked for a second extension to file the opening brief, which the court granted. So, now, we're many months, nearly a year, since Judge Merchan announced his sentence.

By the time briefing is done, and oral argument, and squarely before the judges of the First Department of the New York Supreme Court's Appellate Division, and they get around to writing a decision and issuing it, it's probably going to be around the time of the congressional election. This is the worst time for it to be announced, because this is the sort of thing that shouldn't feed into an election cycle. The decision on the appeal should be the natural working out of the judicial process rather than a whole new election issue.

Another thing that one has to ask is: *What is the interest of justice here that Alvin Bragg, the Manhattan District Attorney, is really serving at this point?* No matter what happens at this point, Trump remains president. And the Appellate Division can't increase the sentence Merchan imposed. So at best, the only thing that Bragg is defending is that Trump retains the title of felon. But at worst, he's wasting the state judiciary's resources and spending his own office's resources to defend this decision by Judge Merchan.

What legitimate purpose is served by District Attorney ("DA") Bragg in defending the sentence and conviction below? The traditional purposes served by the criminal law include: deterrence—general and specific, retribution, restitution, and rehabilitation. I find it difficult to see how any of these traditional purposes are meaningfully served by the DA's defending Merchan's decision below. I suppose that the DA's real purpose *might* be fairly described as some sort of institutional expressivism—which is easy to do when spending other people's (that is, the taxpayers') money. But if that is Bragg's purpose, then that simply feeds into the narrative that violations of the criminal law are not now (and never were) the core of the prosecution against Trump; rather, it was always just politics.

This largely covers the jury-unanimity issue at stake in this case. The defense brief, the one that the President's lawyers filed yesterday, had several other arguments for overturning Judge Merchan's decision, but I don't really feel qualified to comment on them. I've read them. I was familiar with them when they were talked

about during the trial court proceedings, and I certainly read them in the appellate brief, which was very strong. The arguments in this brief aren't entirely new. They were made by Trump's lawyers from the trial court proceedings, or at least something very close to them, but of course, there was much less briefing at the trial court level. And some of those lawyers that had worked for Trump in the prior proceeding are now in the Justice Department, and one of them has since become a judge of the United States Court of Appeals for the Third Circuit, so there is that.

One of the other complexities in this case is that there are now collateral proceedings outside of the New York state system in the federal courts, including the U.S. Court of Appeals for the Second Circuit, which is the federal appellate court that includes New York. In that litigation, Trump is looking to have the litigation moved out of the state court system and into the federal court system, where I think he believes he'll have greater procedural protections. And perhaps he'll have access to a better body of precedent in a certain sense, because federal courts are (believed by many to be) more likely to see their own federal precedents as controlling (or, at least, persuasive) than state courts would be. That might be one of the reasons that both sides have sort of sought a delay until now, because if the Second Circuit were to rule before the Appellate Division, it might be that the Appellate Division would look for guidance from the Second Circuit.

However, the Appellate Division's judges do not have to defer to the Second Circuit. The New York Appellate Division's ability to decide a case, particularly under New York state law, is not controlled by anything that happens in the federal courts, with the exception of the U.S. Supreme Court. Still, a decision of the Second Circuit would be very persuasive, I think, to New York state court judges.

**MC:** How did the Founding generation think about jury unanimity, and how might their understanding apply to this case as a matter of original meaning?

**SBT:** Jury instructions in the eighteenth century were not as complex as they are today, in large part because state crimes were still common law crimes. They often didn't have well-defined elements. The judges would give oral instructions, and the jurors would simply sequester themselves and vote on it. There wasn't a lot of written guidance. Sometimes there was no written guidance. The idea of written jury instructions, as a matter of course, came much later.

And what makes it even more complex is the idea of predicate crimes, which I believe is a twentieth century novelty, with the exception of inchoate crimes such as attempt and conspiracy, which did have predicates. But even then, when a conspiracy was alleged, it was a conspiracy to violate some known law. So there was a predicate crime, but there was only one such predicate.

Today we have much more complex crimes that are part of the positive law system. There's a statute, and there's a code provision, and you have crimes like RICO, which say there have to be two predicate crimes, and there has to be unanimity with regard to those two. It's right there in the statute.

In the eighteenth century, people talked about jury unanimity. That meant there

were twelve jurors, and they all had to agree. As to the scope of that unanimity, I don't know that they gave a lot of thought to that, because the crimes were so much simpler, and they were common law crimes. They often weren't part of vast statutory codes.

So I don't know that we could go back to history and tradition and get a meaningfully precise answer. That doesn't mean the State could do anything it wants. There's a concept of unanimity. The question is: *What do we do with that concept when we have crimes that are vastly more complicated than the ones where the original tradition of unanimity evolved from?*

And that's a very hard question, and it's not one that I've sought to answer. As a matter of fact, I think a different paper ought to be written first. The paper that ought to be written, I think, and I wish I had time to write it myself, is one that goes to the Australian courts, the New Zealand courts, the South African courts, the English (and Welsh) courts, the Scottish courts, the Irish courts, the courts of India, and the Canadian courts—all the other courts in the primary political jurisdictions of the common law world. They have complex statutory systems. What have *they* done with this issue? If all the courts have come out consistently, one way, that's probably indicative of the answer to our historical question. That would be a really interesting paper to write.

Of course, you need access to the rich case histories of all those other legal systems, which do exist to some extent, on the various electronic platforms, e.g., Westlaw International and LexisNexis. But doing that research is going to be difficult. Probably the best way to do that research would be to try to reach out to scholars (and recently retired judges!) in each of those countries and ask them about how predicate crimes are treated in their legal code. And it might be that the answer to that is there's a statutory solution. That is, the legislature has announced this is the way we want this issue treated. And unless there's a strong common law tradition to define unanimity, the legislature gets to define the issue. That might be part of the answer.

I wish I could say that there is a concrete originalist answer. Perhaps there is, and I think that paper is yet to be written. I haven't written that paper. I discuss our understanding of jury unanimity within the context of case law from the Supreme Court, particularly case law from the last fifty years. I discuss the Supreme Court's jury-unanimity decisions *because* that's what other courts will look to, as well as the Supreme Court itself. Courts, particularly lower courts, tend to only look at originalist answers when there is no announced case law on the subject from or through which they can navigate.

But where there is rich case law, or even some case law, that's going to be the best evidence of what they ought to be doing. Now, whether that's right or wrong as an original matter is a different question, but that's certainly the way American courts, state and federal, tend to function. Another way to think about it is that the largest role for originalism is, as my frequent co-author, Professor Blackman, put it once,

when you're in an open field, as opposed to a thicket of precedent.<sup>4</sup> That is, where the case law hasn't addressed a question, but you could go back in history and find out what the practice was apart from the case law, and then that becomes a way of addressing the question, and that has become a (if not the only) widely accepted role for originalism. But that requires the lawyer and the scholar to be something of a historian. And that itself is a very controversial role.

**MC:** Thank you for joining us today, Professor Tillman, and for offering your time.

**SBT:** It was my pleasure.

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<sup>4</sup> See Josh Blackman, *Back to the Future of Originalism*, 16 CHAP. L. REV. 325, 343 (2013).