

Cozen Currents: Is There No Shame?

The Cozen Lens

- House Speaker Kevin McCarthy (R-CA) made it through the shutdown showdown but has perpetually been at risk of losing his gavel. The best thing he has going for him though is that any successor might have it worse than he does.
- Former President Trump's legal troubles are beginning to come to a head and could create challenges for him during the general election as the myriad trials get underway.
- In recent years, the position of state attorney general has taken on greater prominence. Amid gridlock in Washington, attorneys general have used litigation, investigation, and enforcement powers to play a bigger role in myriad political issues.

Don't Underestimate Kevin McCarthy

No Backup. FY24 spending has been McCarthy's biggest test yet. During the debt limit standoff earlier this year, he at least had the explicit support of his conference and Senate Republicans in negotiating; in his latest predicament, he has often found himself alone on an island.

- When the US risked defaulting on its debt, McCarthy was able to pass a party-line bill which had no chance of becoming law but demonstrated that he had a united conference behind him. Senate Republicans deferred to McCarthy and fully had his back. This enabled him to secure some wins: cuts to the IRS' budget, increased work requirements for food stamps, and spending caps.
- The latest kerfuffle was being called the "Seinfeld shutdown" — it would have been a "shutdown about nothing." McCarthy opponents justified their actions by pointing to dissatisfaction over border security, Ukraine aid, and current spending levels, but at its heart, this is the same fight that led to the 15 ballots McCarthy needed to attain the gavel in the first place. The House GOP, with its current slim margin and significant internal differences, is essentially ungovernable and McCarthy requires Democratic votes to fulfill basic governance functions. The "clean" continuing resolution (CR) passed on Saturday represents McCarthy's boldest attempt to demonstrate that unpalatable yet undeniable truth to his caucus.
- A handful of far-right members, due to personal animus or ideology, don't want to accept McCarthy as speaker. In the past, similar groups in the House GOP have relied on the mere threat of removal, not needing to go any further. Former Speaker John Boehner (R-OH) faced a filed motion to vacate but no actual removal vote was held; the last time one successfully ousted a speaker was in 1910. But McCarthy isn't like past speakers and the current political environment is different. In a post- (and possibly pre-) Trump, post-shame world, McCarthy isn't concerned with an anachronistic concept of "political dignity."

I'm Still Standing. Don't count McCarthy out just yet. DC's latest parlor game is guessing how long he will last. He's been consistently underestimated and still has some moves to play.

- It's easy to threaten to remove a speaker but actually doing it is hard. Obviously, if too many House Republicans oppose McCarthy, it will be politically untenable for him to remain speaker. Additionally, if House Democrats don't provide at least some tacit support, then he will lose a motion to vacate. So, he has to minimize the number of House Republicans who oppose him while also gaining support from House Democrats.
- To minimize House GOP defections beyond the handful of far-right members who are already looking to depose him, McCarthy needed to demonstrate his willingness to fight.



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Hence, the political theater in recent weeks with trying to pass a partisan CR. This included waiting until just before a shutdown to put a clean CR on the floor and playing the best hand he had politically by taking out Ukraine aid (for now). This allowed McCarthy to claim that he tried everything he could to appease his right flank, but their recalcitrance left him no choice but to go ahead without them.

- As the ancient proverb says, "The enemy of my enemy is my friend." As much as Democrats don't want to save McCarthy, it's currently the least worst option. If enough Democrats don't affirmatively vote to take his gavel, it effectively leaves McCarthy beholden to Democrats. McCarthy, like President Biden, might as well say, "Don't compare me to the Almighty; compare me to the alternative." McCarthy has a cordial relationship with House Minority Leader Hakeem Jeffries (D-NY), and he began back channeling with him last week. As long as McCarthy is comfortable that Jeffries views it politically better to keep McCarthy as speaker rather than giving the House GOP the rope to hang themselves, it enables McCarthy once again to fight another day.

The Political Implications of Trump's Indictments

The Shoe Has Yet to Drop. For all of the legal trouble that former President Trump has faced in the last year, the criminal indictments have had little impact on his standing in the Republican primary, but the same may not hold true in the general election.

- Since Trump's first criminal indictment in March, there has been little change in his poll numbers among GOP primary voters. Some believe these have led his base even more fervently to support the former president.
- Recent polls suggest that the cases could hurt him more in the general election. An NBC News poll last month found that sixty-two percent of voters have either major or moderate concerns about Trump's indictments. While potentially concerning, national polls will not be the best predictors in this year's election, as a handful of swing states will determine the outcome and polling there has yet to begin in earnest.

A Full Calendar. As Trump's civil cases get underway, the criminal cases have scheduled start dates looming.

- Trump is facing three civil lawsuits, the first of which started its trial yesterday about the Trump Organization's alleged fraudulent business practices in New York. The remaining two are scheduled to begin in January as the primaries start. These pose potentially greater reputational risk to Trump and risk damaging his image as a businessperson more than the criminal charges.
- Three of the four criminal cases in which Trump is charged are scheduled to have their trials start next spring. The first will be the federal election interference case in DC which is expected to begin on March 4, the day before Super Tuesday, when 16 states will hold primaries. The other two federal trials regarding the alleged mishandling of classified documents in Florida and hush money payments in New York will start amidst the rest of the primaries, putting all of the criminal proceedings, except Trump's own trial in the Georgia state case, on schedule to begin before the Republican National Convention, which will take place July 15-18 in Milwaukee.
- The Georgia election interference case is the most complex of the pending criminal ones, as it is premised on an extensive conspiracy under RICO and Trump is one of 19 defendants. One defendant already pled guilty last week and a trial for two others is set to begin on October 23rd as part of an expedited schedule. Trump will not be one of these two, and it is still being determined when his particular trial will begin, which very well might not occur until after Election Day, but the steady drip of news from the proceedings of those who are tried before him will likely keep Trump's charges in the headlines on a daily basis. This case, albeit without Trump on trial yet, will be the only criminal one to begin before the Iowa caucuses, scheduled for January 15, 2024.

The Real Complications Lie Ahead. If there were to be an unprecedented criminal conviction of Trump, this could lead to even thornier questions and potentially create a constitutional crisis.

- One unknown is how Trump would be punished if he were to be convicted. Putting the

former president in jail would be logistically complicated due to the Secret Service requirements. Some alternatives, such as house arrest, could be used instead.

- A more complex question is what may happen with a pardon. For Trump to attempt to pardon himself, at least with respect to any federal charges and/or convictions, this would likely lead to a constitutional crisis, probably resulting in the Supreme Court getting involved and possibly even impeachment proceedings (again) in Congress. For Biden or another Democrat, it becomes a complicated political question with minimal upside. Biden would likely allow the appeals process to play out, stretching any decision as long as possible.

The Evolving Role of the State AG

The Power of the AG. In the politically polarized times of today, state attorneys general (AG) are increasingly important.

- The AG's job was perhaps once seen by some as a steppingstone to the governor's mansion (hence the old joke that AG stood for "aspiring governor"). In reality, the AG office has significant authority. While a governor's agenda depends on the cooperation of the state legislature, an AG has the power to shape behavior through his or her litigation and investigation authority.
- The AG's growing role can be traced back to the tobacco litigation of the 1990s. In 1998, 46 states plus the District of Columbia, Puerto Rico, and the US Virgin Islands entered into the Master Settlement Agreement with the four largest tobacco companies after filing suit over the health care costs that resulted from smoking (four states reached their own settlements).
- Amid gridlock in Congress, state AGs have the power to make progress on issues that are intransigent on the federal level. In a sign of the growing recognition of the importance of this position, several members of the House have left Congress to become AGs of their respective states, including now-Secretary of Health and Human Services Xavier Becerra (D-CA) in 2017, Rep. Keith Ellison (D-MN) in 2018, and Rep. Dan Bishop (R-NC), who is running for North Carolina AG in 2024.

Driving Policy Change. AGs from both parties have taken action on major issues across multiple sectors.

- In recent years, AGs from both parties have filed litigation in response to the opioid crisis targeting manufacturers, distributors, and others. These legal challenges have also given the state AG a power of the purse separate from the state legislature. Using settlement money, most states set up opioid abatement programs to fund efforts such as treatments and education, and the AG has influence over how this money is spent. This builds on the tobacco model and creates a new precedent for AG investigations.
- AGs have been especially active in tech policy. In states with data privacy laws, the AG's office is generally empowered to enforce the rules, and in states without a private right of action for privacy violations, the AG is the front line of defense. AGs have also filed suit against top tech companies. In recent years, Google has faced multiple antitrust lawsuits from states and reached a settlement in one last month. In 2020, 46 state AGs joined the Department of Justice in an antitrust lawsuit against Meta, and last week, a bipartisan group of 17 state AGs joined the Federal Trade Commission in an antitrust lawsuit against Amazon.
- AGs have also been active in environmental issues, generally diverging along party lines. In recent years, a top issue for Republican AGs has been fighting the consideration of environmental, social, and governance (ESG) factors in investing, including by warning companies and challenging Biden administration rules. By contrast, California's AG has made climate change a priority by filing suit against oil companies last month.

AGs Under Federalism. State AGs of both parties have taken the lead in challenging the executive branch when the White House is occupied by the other party.

- As US politics have become more polarized in recent years, state AGs have increasingly become more active in national politics by fighting the incumbent

administration in court. There were only 30 multistate lawsuits filed during the Reagan presidency, compared to 76 under George W. Bush and 78 under Obama.

- This type of litigation rose dramatically under the Trump administration. In four years, states filed over 150 lawsuits, mostly Democratic AGs seeking to overturn actions by the White House but also including some Republican AGs challenging the Affordable Care Act and Deferred Action for Childhood Arrivals program. Major cases focused on a proposed citizenship question added to the US Census, the rollback of environmental regulations, the Tax Cuts and Jobs Act, and net neutrality.
 - This pattern is continuing under the Biden administration. As of the beginning of last month, states have filed 68 multistate lawsuits since President Biden took office on issues including student loans, Covid-19 vaccine and workplace requirements, and proposed environmental regulations.
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