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Trump Election Probe Report May Show Case For Charges

By **Rosie Manins**

Law360 (January 20, 2023, 4:49 PM EST) -- Publication of a special grand jury's final report in an unprecedented election interference probe could lay bare a Georgia district attorney's case against former President Donald Trump and his allies over their purported attempts in 2020 to illegally retain power.

An Atlanta judge is scheduled to hear arguments Tuesday about the grand jurors' request that their findings — which were delivered to the court earlier this month — be made public, after nearly eight months of testimony behind closed doors.

It seems unlikely that Fulton County District Attorney Fani T. Willis, who has remained tight-lipped about **the case**, would willingly reveal her hand before confirming whether criminal charges will be pursued against Trump or others.

"The DA gets the benefit of the report, whether it's published or not," said former Assistant U.S. Attorney Kevin J. O'Brien. "She gets to see how various pieces of evidence were received by this supposedly impartial body, but that doesn't require that everyone else see it."

The special purpose grand jury, impaneled in May at Willis' **request**, had no authority to indict. Its job was to hear evidence and issue findings about any attempt to unlawfully influence, alter or disrupt the administration of Georgia's 2020 general election.

Willis, a Democrat, **launched** the investigation in February 2021, following Trump's highly publicized and controversial request to the Georgia secretary of state that he "find" just over 11,000 votes in order for Trump to win the election.

O'Brien, a New York-based partner at Ford O'Brien Landy LLP who specializes in white collar defense, has no involvement in the case, but like many, he's been following its progression. He says there's a good chance the grand jury's report, detailing the scope of testimony and evidence, will recommend that Trump and others face criminal charges.

"If the conclusion is that Trump should be indicted, then that could happen fairly quickly," O'Brien said. "It's interesting that the jurors themselves wanted to publish the report because that often doesn't happen."

The case could soon go before a regular grand jury with the power to indict, which in Georgia are typically impaneled for two months.

O'Brien said witness tampering or interference is likely a key concern for Willis in regard to the report's publication. He said the issue is why defense attorneys don't usually receive witness statements until the end of the discovery process shortly before trial, adding the judge overseeing the election case is also probably mindful of the risk.

"[Prosecutors] want to sort of keep things tamped down," O'Brien said. "They don't want to show their cards any earlier than they have to."

It's possible the report could be redacted or its publication delayed. In his order setting a hearing on the matter, Fulton County Superior Court Judge Robert C.I. McBurney said the state law under which the grand jury recommended its report be published mandates such publication.

The statute says "when the recommendation is made, the judge shall order the publication as recommended."

Judge McBurney said the provision appears to apply to the work of special purpose grand juries, though the issue of whether the report constitutes a "presentment" under state law is unresolved. He invited arguments on that question from the district attorney's office and "any consolidated media intervenors."

O'Brien said the argument could be made that the report's publication would be more prejudicial the closer the case is to trial. He said publishing the report after trial "seems kind of pointless."

"You have to ask yourself why would the judge schedule a hearing if the grand jury did not recommend indictment," O'Brien said. "If that's the case it's kind of a nullity and there's no need to publish it. I don't think you'd be going through this exercise if [the jurors] hadn't voted to indict, and nor would they have recommended that the report be published."

Evidence of State Law Violations Appears Strong

That various Georgia laws were likely broken by Trump and his allies in the wake of the November 2020 election is a point on which many following the case can agree.

Trump's vote-finding request to Secretary of State Brad Raffensperger alone seemed to provide Willis with a "pretty strong case" alleging criminal solicitation to commit election fraud, Georgia State University College of Law professor Clark D. Cunningham said. He said solicitation doesn't have to result in election fraud to be considered a crime.

"You could almost just play [the request] for a jury and then send them out to deliberate," Cunningham told Law360. "What more is there to say? It's authentic. Trump doesn't deny that it's authentic. He doesn't say it's been edited in any way. I would not want to have to defend that as a defense lawyer."

The signing by top Georgia Republicans of a so-called fake electors certificate declaring Trump the 2020 presidential election winner in the state also appeared to be an obvious act of election fraud, Cunningham said. He said any encouragement of the electors by Trump and his allies, including former New York Mayor Rudy Giuliani and attorney John Eastman, could indicate a conspiracy on their part.

"This, by itself, is the clearest evidence of a crime," Cunningham said of the certificate. "On its face, these [declarations] are false. I think that's a really strong case."

The electors maintained in case filings that their signing of the certificate was provisional and lawful, because at the time, Trump's lawsuit contesting the Georgia election remained pending. They said their action preserved Trump's rights under law.

Trump has also been accused of asking Georgia Gov. Brian Kemp to call a special session of the state legislature to investigate the election and potentially back his electors.

And U.S. Sen. Lindsey Graham, R-S.C., was **ordered to testify** in Atlanta on allegations that he encouraged Raffensperger and other Georgia election officials to throw out ballots or otherwise alter the state's election practices and procedures. Graham has **argued** that his calls were related to his job as the chair of the U.S. Senate Judiciary Committee and research for the Electoral Count Reform and Presidential Transition Improvement Act, which he co-sponsored.

Willis said in a February 2021 letter to Georgia leaders that potential violations of state law under investigation included solicitation of election fraud, making false statements to state and local

governmental bodies, conspiracy, racketeering, violation of oath of office, and any involvement in violence or threats related to the 2020 election's administration.

The district attorney said those purportedly involved in the election disruption had contacted the offices of Raffensperger and Georgia Attorney General Christopher M. Carr, as well as the U.S. Attorney's Office for the Northern District of Georgia, leaving only her office as a nonwitness capable of investigating the matter.

In her request for a special grand jury, Willis said her office had received information indicating a "reasonable probability" that Georgia's administration of the November 2020 election was subject to "possible criminal disruptions."

Cunningham said conspiracy involving false documentation or statements could fall under Georgia's racketeering statute, as could the solicitation of threats or violence. He said Giuliani's alleged election fraud statements to Georgia lawmakers could be considered under the law, as could Trump's comments to Raffensperger about election fraud and his claim during a late November 2020 press conference that Raffensperger was an "enemy of the people."

"We know that Raffensperger and all kinds of election officials got horrible death threats, which could provide the basis to prosecute Trump for solicitation of terroristic threats," Cunningham said.

Indictment and Potential Conviction Remain in Doubt

Though evidence in the Georgia investigation appears to be stacked against Trump and his allies, there is no guarantee it will lead to indictments, much less any convictions.

University of Georgia political science professor Charles S. Bullock III said an indictment against the former president would be extraordinary. As a district attorney, Willis would have to think carefully about the potential ramifications of pursuing such an unusual measure, he said.

"Do you want to be the first district attorney to ever do something like this?" Bullock said. "If [a former president] did cross the line or get awfully close to the line, is the appropriate remedy to bring charges against them?"

Fulton County, comprising the heart of Atlanta, is home to more than a million people and the most populated of Georgia's 159 counties. It is also predominantly Democratic. But the resources of Willis' office are not without limitations.

"This is a wholly different type of case than a local DA typically brings," O'Brien said. "This is the big time."

O'Brien said evidence of Georgia officials being pressured over the 2020 election, including Trump's infamous request to Raffensperger, "seems pretty solid," but that criminal indictments might not be appropriate. While the conduct at issue is "troubling and probably illegal," he said a jury may be reluctant to incarcerate someone over "outrageous talk."

"That's the highest sanction possible," O'Brien said of an indictment. "And Trump, for all his malice ... he never followed through. It's typical Trump. There's a sort of lack of seriousness about it."

If Willis decides to pursue charges in the case, she could do so this year. Though her investigation overlaps with the federal probe into the Jan. 6, 2021, attack on the U.S. Capitol, Willis is unlikely to wait for an outcome in the national inquiry, O'Brien said.

"I don't think she's going to stay her hand just to make [U.S. Attorney] Merrick Garland happy," he said. "And there's no legal reason that says she should. She has sovereign authority responsible to the voters of Fulton County."

–Additional reporting by Dorothy Atkins. Editing by Michael Watanabe.

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