

THE TRAINED [UN]SEAL THAT PERFORMED FOR TRUMP'S LAWYERS

At least thus far, I am wrong. Trump's response to Jack Smith's request for an oversized opening brief did not stage an emergency his lawyers can use to ask John Roberts for immediate help.

Oh sure. They wailed about fairness.

The proposed approach is fundamentally unfair, as the Office would attempt to set a closed record for addressing unfiled defense motions by crediting their own untested assessments of purported evidence, denying President Trump an opportunity to confront their witnesses, and preventing the defense from obtaining discovery.

They complained about the election – one thing that Judge Chutkan has made clear she doesn't want to hear. They complained about the election over and over and over.

In doing so, though, they falsely claimed that Jack Smith was trying to release all this publicly.

[T]he Office is violating these protections and has instead articulated an unacceptable, extralegal “guiding principle” of “structur[ing] a schedule that leads to only one additional interlocutory appeal.” 9/5/24 Tr. 12-13. That is simply code for the Office's continued preference for the type of “highly expedited” proceedings prior to **the 2024 Presidential election** that the Supreme Court has already criticized.

[snip]

[T]he Special Counsel's Office is seeking to release voluminous

conclusions to the public, without allowing President Trump to confront their witnesses and present his own, to ensure **the document's public release prior to the 2024 Presidential election**.

The strategy reflected by the Motion would increase the irreparable harm caused by the Gag Order in this case. **False, public allegations** by the Special Counsel's Office, presented through a document that has no basis in the traditional criminal justice process, will undoubtedly enter the dialogue around **the election**. The Gag Order prevents President Trump from explaining in detail why the Office's selective and biased account is inaccurate without risking contempt penalties. While the D.C. Circuit modified and addressed the Gag Order previously, the court was careful to note that "**the general election** is almost a year away, and will long postdate the trial in this case." United States v. Trump, 88 F.4th 990, 1018 (D.C. Cir. 2023). Circumstances have changed drastically: **President Trump is the leading candidate in the Presidential election, which is just weeks away**. The Office cannot be permitted to issue a **massive and misleading public statement** that is not responsive to a defense motion, and risks adverse impacts to the integrity of these proceedings, while simultaneously insisting on an unconstitutional prior restraint on President Trump's ability to respond to their inaccurate assertions while he is campaigning.

The huge public filing that the Motion portends would also violate the Justice Manual, which prohibits "Actions that May Have an Impact on an **Election**." Justice Manual § 9-85.500 (emphasis added). "Federal prosecutors and agents

may never select the timing of any action, including investigative steps, criminal charges, or statements, for the purpose of affecting any **election**, or for the purpose of giving an advantage or disadvantage to any candidate or political party.” Id. Separately, prior to this case, DOJ followed an “Unwritten 60-Day Rule” summarized as follows⁶:

- *Former FBI Director Jim Comey*: “[W]e avoid taking any action in the run up to an **election**, if we can avoid it.” *DOJ-OIG Report* at 17.
- *Former Attorney General Loretta Lynch*: “[I]n general, the practice has been not to take actions that might have an impact on an **election**, even if it’s not an election case or something like that.” *Id.* at 18.
- *Former Deputy Attorney General Sally Yates*: “To me if it were 90 days off, and you think it has a significant chance of impacting an **election**, unless there’s a reason you need to take that action now you don’t do it.” *Id.* at 18.

Departures from these practices should

never be countenanced because they risk allowing prosecutors to impact national **elections**, but the situation is even worse here where the Special Counsel's Office is seeking to do so by turning criminal procedure on its head in order to file a 180-page false hit piece. See *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) ("The Supreme Court has repeatedly instructed courts to carefully consider the importance of preserving the status quo on the eve of an **election**."). "[O]nce the election occurs, there can be no do-over and no redress" for the voters or President Trump. *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014).

6 A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 **Election**, U.S. Dep't of Justice Office of Inspector General (June 2018) (the "DOJ-OIG Report") at 17-18, available at <https://s3.documentcloud.org/documents/4515884/DOJ-OIG-2016-Election-Final-Report.pdf>. [emphasis mine]

But the most curious complaint is that Trump's team says he'll be harmed even with these filings submitted under seal.

For example, in support of the Office's motion for a protective order, they argued that President Trump has "no right to publicly release discovery material, because the discovery process is designed to ensure a fair process before the Court, not to provide the defendant an opportunity to improperly press his case in the court of public opinion." ECF No. 15 at 4. Now it is the Office that wishes to press their case to drive public opinion rather than justice.

None of this will impress Judge Chutkan. She has repeatedly told them she doesn't want to hear about the election.

But they have previewed the argument they make when Jack Smith – or the press consortium – asks to unseal this.

Update: Judge Chutkan has ruled to permit Jack Smith his 180 pages. She addresses Trump's concerns regarding publicity by pointing to the protective order.

Fourth, Defendant contends that the briefing schedule would be unfair given the court's order restricting certain extrajudicial statements, ECF No. 105, and the Government's position with respect to the protective order in this case, see Reply in Supp. of Mot. for Protective Order, ECF No. 15. But the former contention mischaracterizes the court's order, and even so identifies potential political consequences rather than legal prejudice. Def.'s Opp'n at 7.1 And the court did not accept the Government position that Defendant decries—"that even materials marked 'nonsensitive' under the Protective Order" should be kept under seal, *id.* at 5—instead extending that protection only to sensitive materials, see Protective Order ¶¶ 2–12, ECF No. 28. The court likewise rejects Defendant's unsupported assertion that publicly docketing nonsensitive materials during the immunity briefing would impermissibly "impact potential witnesses and taint the jury pool." Def.'s Opp'n at 5. Moreover, and once again, Defendant offers no reason why the same predicted harms would not result from his own proposal, which would include immunity briefing with presumably the same materials. See Joint Status Report at 4.

¹ Defendant claims that he cannot "explain[] in detail why the Office's

selective and biased account is inaccurate without risking contempt penalties,” which could affect his political candidacy. Def.’s Opp’n at 7. As relevant here, the order only prohibits Defendant from “making or directing others to make public statements about known or reasonably foreseeable witnesses concerning their potential participation in the investigation or in this criminal proceeding.” United States v. Trump, 88 F.4th 990, 996 (D.C. Cir. 2023).

That language will lead to the nonsensitive material being unsealed sooner rather than later.

She mentions Trump’s wails about the election just once, noting that none of this causes him legal prejudice.

Fifth and finally, Defendant claims that the Government’s forthcoming brief violates Department of Justice policy. He asserts that the brief “would be tantamount to a premature and improper Special Counsel report,” Def.’s Opp’n at 6, which is provided at “the conclusion of the Special Counsel’s work,” *id.* (quoting 28 C.F.R. § 600.8(c)). And he argues that the brief would run afoul of the Justice Manual, which prohibits federal prosecutors from “select[ing] the timing of any action, including investigative steps, criminal charges, or statements, for the purpose of affecting any election.” *Id.* at 7 (quotation omitted). The court need not address the substance of those claims. Defendant does not explain how those putative violations cause him legal prejudice in this case, nor how this court is bound by or has jurisdiction to enforce Department of Justice policy.

