“WITHOUT PREJUDICE:” JACK SMITH MOVES TO DISMISS THE DC CASE

Jack Smith has moved to dismiss the DC case against Donald Trump. OLC has found that the categorical prohibition on the federal indictment of a sitting President means DOJ cannot sustain the indictment against Trump.

> OLC concluded that its 2000 Opinion’s “categorical” prohibition on the federal indictment of a sitting President—even if the case were held in abeyance—applies to this situation, where a federal indictment was returned before the defendant takes office. 2000 OLC Opinion at 254.1 Accordingly, the Department’s position is that the Constitution requires that this case be dismissed before the defendant is inaugurated. And although the Constitution requires dismissal in this context, consistent with the temporary nature of the immunity afforded a sitting President, it does not require dismissal with prejudice. Cf. id. at 255 (“immunity from prosecution for a sitting President would not preclude such prosecution once the President’s term is over or he is otherwise removed from office by resignation or impeachment”). This outcome is not based on the merits or strength of the case against the defendant

But OLC does not require dismissing the indictment with prejudice.

That means if Congress were to decide to impeach Trump on these issues, he could again be charged (through January 6, 2026).

Though it’s not yet clear whether Smith will dismiss the appeal against Walt Nauta and Carlos

De Oliveira in Florida, this clears the way for Smith to file a report on what he found.

Update: In the 11th Circuit, Smith has moved to dismiss the appeal without prejudice against Trump but not his two co-defendants.

Update: Judge Chutkan grants Jack Smith's request. How is notable: she focuses on defending the decision to dismiss without prejudice.

> Federal Rule of Criminal Procedure 48(a) provides that before trial, the Government "may, with leave of court, dismiss an indictment." The "'principal object of the "leave of court" requirement' has been understood to be a narrow one—'to protect a defendant against prosecutorial harassment . . . when the [g]overnment moves to dismiss an indictment over the defendant's objection.'" United States v. Fokker Servs. B.V., 818 F.3d 733, 742 (D.C. Cir. 2016) (quoting Rinaldi v. United States, 434 U.S. 22, 29 n.15 (1977)).1 Here, Defendant consents to the dismissal, Motion at 1, and there is no indication that the dismissal is "part of a scheme of 'prosecutorial harassment'" or otherwise improper, Fokker Servs. B.V., 818 F.3d at 742 (quoting Rinaldi, 434 U.S. at 29 n.15). Rather, the Government explains that it seeks dismissal pursuant to Department of Justice policy and precedent. Motion at 2–6. The court will therefore grant the Government leave to dismiss this case.
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> Dismissal without prejudice is appropriate here. When a prosecutor moves to dismiss an indictment without prejudice, "there is a strong presumption in favor" of that course. United States v. Florian, 765 F. Supp. 2d 32, 34 (D.D.C. 2011). A court may override the presumption only when

> dismissal without prejudice "would result in harassment of the defendant or would otherwise be contrary to the manifest public interest." Id. at 35 (quoting United States v. Poindexter, 719 F. Supp. 6, 10 (D.D.C. 1989)). As already noted, there is no indication of prosecutorial harassment or other impropriety underlying the Motion, and therefore no basis for overriding the presumption—and Defendant does not ask the court to do so. See Motion at 1. Dismissal without prejudice is also consistent with the Government's understanding that the immunity afforded to a sitting President is temporary, expiring when they leave office. Id. at 6 (citing Memorandum from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 225 (Oct. 16, 2000)).
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> Some courts in this district have advanced a broader view of the "leave of court" requirement. For instance, one concluded that "a judge may deny an unopposed Rule 48(a) motion if, after an examination of the record, (1) she is not 'satisfied that the reasons advanced for the proposed dismissal are substantial'; or (2) she finds that the prosecutor has otherwise 'abused his discretion.'" United States v. Flynn, 507 F. Supp. 3d 116, 130 (D.D.C. 2020) (quoting United States v. Ammidown, 497 F.2d 615, 620–22 (D.C. Cir. 1973)). Even under that broader interpretation, however, the court finds no reason to deny leave here.