LINDSEY THE INSURANCE LAWYER'S DISAPPEARING AGREEMENT TO A LITIGATION HOLD

I was disappointed, in the way we here in the peanut gallery sometimes are, that Tish James had to specifically rebut the silly things that Lindsey Halligan's loaner AUSA, Roger Keller, claimed to try to excuse Lindsey's stalking of Anna Bower.

Attorney General James' original request asked Judge Jamal Walker to order the government to do three things:

1. Abstain from further extrajudicial statements like Lindsey's Signal stalking of Bower
2. Follow rules and laws requiring prosecutors (and Federal employees generally) to retain their communications
3. Create and maintain a log of all contact between any government attorney or agent on this case and any member of the news media

As Lawfare's excellent trial dispatch from Molly Roberts described, when initially presented with this question, loaner AUSA Keller — "a civil litigation lawyer by training," Roberts helpfully noted — got hung up on a contact log tracking not just with the reporters Lindsey the Insurance Lawyer spoke to, but also with whom others (this is implicit, but let me make it

more obvious) like Eagle Ed Martin did.

Keller responded to this request, that prosecutors follow the rules, by demanding that the defense follow the same rules … which is not how it works, both Abbe Lowell and Judge Walker reportedly responded.

> The next motion invites a bit more controversy, or at least confusion. James also filed a motion prior to the arraignment asking the court to order the government to follow rules preventing disclosure of investigative and case materials, as well as to refrain from extrajudicial statements concerning the case to the press and public. This motion was prompted in part by an Oct. 20 article published in*Lawfare* by my colleague, Senior Editor Anna Bower, detailing texts sent to her by Halligan in which Halligan criticizes Bower's tweets about New York Times coverage of grand jury testimony in the case.
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> This violated, the filing says, Rule 6(e) of the Federal Rules of Criminal Procedure. It argues that the exchange with Bower and the other instances of apparent disclosure it describes—including pre-indictment reports that prosecutors intended to bring charges—also violate various rules, regulations, and ethical obligations. The motion doesn't ask for a finding to that effect, only for an order to prevent such conduct in the future.
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> The judge, mentioning only "a journalist" and "an article published," notes these oddities of the filing. Anyone hoping for a television-ready showdown in which the defense demands the prosecution be held in contempt is quickly disappointed: Judge Walker has interpreted the filing correctly,

confirms Lowell.

The judge determines that leaves the prosecution three options: oppose the motion in its entirety; don't oppose it at all; or oppose the proposed relief. The Eastern District prosecutors would have to preserve all documents relevant to the trial (a litigation hold) as well as create a log of all contact between its attorneys or agents and the media. **The litigation hold doesn't bother Keller.** But he expresses reservations about the log, mentioning that "the defendant is also active on the Internet." Specifically, he takes issue with her tweeting that she is innocent.

The judge, understandably, appears perplexed. He remarks that it's unclear what Keller is asking. And it is: A public tweet from James in which she says "I am not fearful, I am fearless" has little to do with contact between her attorneys and the media. The misunderstanding only becomes greater when Keller elaborates that any log requirement for the government should also be a requirement for the defendant, and should cover "statements of innocence before the press."

Does he mean that James should have to keep a record of any proclamations of her intention to fight the charges against her? Or does he mean she shouldn't be allowed to make them at all?

Keller seems to be suggesting that the restrictions on the defendant's public speech should mirror those placed on the prosecution. But this is not how these things work. Prosecutors have unique obligations not placed on defendants, who have First Amendment rights to protest their innocence.

> Judge Walker delicately instructs Keller—a civil litigation lawyer by training, as it turns out—to take some time to think about the matter and get back to him. Lowell, for his part, declares that the rules to which government lawyers are held aren't the same ones that apply to a defendant.
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> "The court certainly understands the requirements," responds the judge. It is a little less certain that the prosecutor does. [my emphasis]

Now, when I first read Roberts' dispatch, I honestly thought Keller's confusion stemmed from that detail, "a civil litigation lawyer by training." He just doesn't know what he's doing.

But when I started writing an abandoned post on his response, I came to believe he — like Lindsey the Insurance Lawyer — is mostly performing for a one man audience. To understand why I think that, check out how loaner AUSA Keller spends a 17¶¶ response:

1. Lindsey the Insurance Lawyer and loaner AUSA Keller ask that Walker not impose unilateral requirements **to preserve all communications** and keep a log [my emphasis]
2. Background: a grand jury indicted the Defendant
3. Walker should not impose unilateral requirements to **preserve all communications** and keep a log and also, US v. Trump! (citing the DC Circuit opinion partly upholding the gag on Trump), because Lindsey the

Insurance Lawyer had to protect her client [my emphasis]

4. Here's a citation that's totally inapt but which will allow me to argue Tish James has to shut her yap
5. If the government has to "**preserve *all* communications** with *any* media person" and also keep a log of those contacts, "the unstated threat that she – at some future point in time – may engage in a 'gotcha' game where she brings a sanctions motion" may "chill all Government/media interaction" [my bold, italics original]
6. "There is no Court-imposed requirement that the Government preserves the records," but can you imagine if a log of all communications means "all communications"?
7. If we have to follow the rules, Tish James has to follow rules for prosecutors too (citing US v Trump again)
8. "Defendant's right to a fair trial does not give [her] the right to insist upon the opposite of that right – that is a trial prejudiced

in [her] favor," citing US v. Trump again

9. Because she's a lawyer, Attorney General James has to adhere to NY rules of professional conduct even if Lindsey the Insurance Lawyer refuses to adhere to any rules of professional conduct
10. After her arraignment, James said she "will not bow" and there have to be rules against *that*!
11. Lindsey the Insurance Lawyer covertly bullying a journalist on disappearing messages is nowhere near as bad as Tish James saying "I will not bow" on a telly that Donald Trump can see!
12. Lindsey the Insurance Lawyer was just protecting her client – which client I will decline to name – "from substantial undue prejudice"
13. Grand jury secrecy is no big deal
14. Lindsey the Insurance Lawyer didn't explicitly reveal what went on in the grand jury
15. Lindsey the Insurance Lawyer was merely – and heroically – "protect[ing] her client from unfair prejudice resulting from reporting

half-truths”

16. I’m going to distract from the way Bower caught Lindsey the Insurance Lawyer pretending “thousand(s)” of dollars was not just *two* thousand
17. You should tell Tish to shut her yap!

I admit, the first time I read this filing, I read in terms of obvious bullshit to rebut, like I imagine lawyers do.

But when you lay it out like this, paragraph by paragraph, the pressing question becomes whether these people — not just Lindsey the Insurance Lawyer, Donald Trump’s defense attorney, but also loaner AUSA Keller — think Donald Trump, and not the US of A, are their client, a client demanding that his minions ensure that Tish James doesn’t become a rock star because of this prosecution.

Because otherwise, why demand that Tish James bow down? Why cite US v. Trump so prominently?

James addressed both these questions. She asked, Who exactly do these people think their client *is*?

> Third, the government’s assertion that Ms. Halligan was only trying to protect “her client” raises the question of who she believes “her client” to be. Her “client” is neither the President, nor the Attorney General, nor the Administration, nor even her Office. It is the United States, as the case caption makes clear, and “[t]he United States wins its point whenever justice is done its citizens in the courts.”2 The point remains true regardless of whether the outcome is the one that the government favors. “Justice is done”

> when its “citizens in the courts” receive a fair trial. And in any event, a defendant’s fair trial rights decidedly trump any so-called “unfair prejudice” to the government’s case from public reporting. Courts have held that extrajudicial statements and comments by attorneys may be restricted to protect a defendant’s fair trial rights and the integrity of judicial proceedings—which override any desire by government prosecutors to “attempt to protect [Ms. Halligan’s] client from unfair prejudice.” Opp. at 6. See, e.g., Sheppard v. Maxwell, 384 U.S. 333, 361 (1966); Gentile v. State Bar of Nevada, 501 U.S. 1030, 1066 (1991).
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> 2 DOJ, Remarks as Delivered by Attorney General Merrick B. Garland, https://www.justice.gov/archives/opa/speech/attorney-general-merrick-b-garland-deliversremarks-office-access-justices-gideon (Mar. 17, 2023).

The insistence that “fair trial rights decidedly **trump** any so-called ‘unfair prejudice'” is, I hope, an intentional double entendre.

James’ citation for the quote, “[t]he United States wins its point whenever justice is done its citizens in the courts,” is more subtle. The footnote cites this speech by Merrick Garland, a tribute to public defenders and defense attorneys generally, in which he emphasized the import of rule of law.

> It reaffirmed that the law protects all of us — the poor as well as the rich, the powerless as well as the powerful.
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> In so doing, it reaffirmed this country’s commitment to the Rule of Law.
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> And trust in the Rule of Law is what holds American democracy together.

But the words, "[t]he United States wins its point whenever justice is done its citizens in the courts," are not Garland's words (though that was not the only speech where he used them). They were spoken by Willliam Taft's Solicitor General, Frederick Lehmann, and they are inscribed on the building at DOJ. Judge Walker (a former AUSA) will presumably recognize that; Keller the loaner AUSA *should*: but Lindsey the Insurance Lawyer may see only a citation to Garland and worry about her boss — her client — again.

Then there's James's treatment of Keller the loaner AUSA's inapt reliance on US v. Trump. She uses that to recall Trump's misconduct as a defendant, something she knows well.

> The government's reliance on United States v. Trump, 88 F.4th 990 (D.C. Cir. 2023)—a case affirming a limited gag order placed on then-defendant Donald Trump in response to his public statements *threatening witnesses, participants, and the judiciary during litigation*—to defend Ms. Halligan's interactions with the reporter is entirely misguided. Opp. at 3–4. Trump is relevant only to the extent that it proves the relative strength of a criminal defendant's First Amendment rights and the extraordinary circumstances required to justify any burden on such rights. See id. ("[A] criminal defendant—who is presumed to be innocent—may very well have a greater constitutional claim than other trial participants to criticize and speak out against the prosecution and the criminal trial process that seek to take away his liberty."). The Trump court set out facts justifying the order in vigorous detail, including a timeline of President Trump's extensive attacks on witnesses, court officials, judges, law clerks, and other government personnel. See id. at 1010. It also catalogued the

> violent and threatening responses resulting from President Trump's statements. See id. at 1011.
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> Even under those extraordinary circumstances, the court still found that "Mr. Trump [was] free to make statements criticizing the current administration, the Department of Justice, and the Special Counsel, as well as statements that this prosecution is politically motivated or that he [was] innocent of the charges against him." Id. at 1028. Attorney General James' speech, including following her initial appearance, cannot be reasonably compared to the statements that led to the United States v. Trump gag order, and regardless, would have been outside of its reach.

And James invoked Trump's "almost weekly … disparaging comments against her" to suggest the government won't win a war of the lesser wrong.

> The comparison that the government now offers is to a *public* statement by a *defendant* who has faced almost weekly assertions by the President, or those carrying out his bidding, calling for her prosecution and conviction or making other disparaging comments against her. The government's argument appears to be that "two wrongs don't make a right." But the defendant has not contravened the cited rules; the government has. The relief requested in the Motion is intended only to ensure that does not happen again and that, if it does, the government does not delete the evidence of its wrongdoing. That relief should be unobjectionable to the government.

The James prosecution is not functionally necessary for Donald Trump's witch hunt — it is discrete punishment for someone who humiliated

Donald Trump by treating him as a garden variety fraudster. That may be why Lindsey the Insurance Lawyer only got one loaner AUSA for this case, as compared to two overt ones for the Comey case (plus at least one more guy writing the filings), which is one part of the larger project. So maybe this is all about the posturing, an attempt to ensure that nothing about this prosecution backfires on the "client."

But the focus on Trump — the need to respond to the totally inapt reliance on US v. Tump — distracted from something potentially more important.

Go back to bullet 5 again. Here's that full quote:

> Essentially, Defendant attempts to chill all Government/media interaction with the unstated threat that she — at some future point in time — may engage in a "gotcha" game where she brings a sanctions motion because the Government inadvertently failed to maintain a document or include a contact in its log.

This is an astonishing statement, one James addresses this way:

> The opposition's hyperbolic claim that the Motion seeks something like a gag order, Opp. at 3, fares no better. Government counsel and their agents have an ongoing obligation to refrain from certain types of extrajudicial statements and disclosures that may jeopardize a fair trial in this case. James Mot. at Sec. I. The defense is not asking the Court to "chill" all the government's interaction with the media; it concedes that many statements that "a reasonable person would expect to be further disseminated by any means of public communications" are permissible.1

> James Mot. at 9 (quoting Loc. Crim. R. 57.1(C)). Rather, the defense is seeking the Court's assistance in assuring that the government adheres to the rules it has set for itself.
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> 1 Another red herring, based on nothing in the Motion, is the government's suggestion that Attorney General James is "attempt[ing] to chill all Government/media interaction" to later play "a 'gotcha' game" over the government's failure to maintain a document or include a contact in its log. Opp. at 3. Following long-standing rules on extrajudicial statements is not "gotcha," it is basic to the government's obligation to protect fair trials.

These are *prosecutors*, wailing about being asked to retain documents! The government complains about being asked to preserve documents five times, plus the requirement that it maintain documents in its chill comment. And loaner AUSA Keller makes those complaints after having agreed to a litigation hold at the arraignment, something James notes in the first paragraph.

> [A]s government counsel acknowledged at the October 24, 2025, initial appearance and arraignment, the government agreed to comply with the litigation hold request made in the Motion to prevent any further deletions and to preserve any other extrajudicial communications that may have been made.

Loaner AUSA Keller outright states that it would "chill" … *something* if prosecutors are asked to retain all their documents, something that normal prosecutors do as a matter of course, at least until a matter is concluded. This is like Trump demanding that he get to wipe every phone involved in this prosecution on a daily basis, after spending years misrepresenting what

happened after Mueller team members left that team.

It's not a "gotcha" if, as a prosecutor, you start deleting documents willy nilly. It is a real violation. It should be. Especially in a case like this one where the President accidentally issues orders on his social media site intended to be private. Is there a whole stash of Truth Social DMs about this case that have been deleted?

So I get the point of replying to the issues loaner AUSA Keller raised, including the inapt nod to the indignities that Donald Trump suffered after he got indicted and then threatened to kill witnesses (including the witness he almost got killed on January 6).

But that repeated complaint about merely *retaining* all your communications, particularly coming after already orally agreeing to do so, has me wondering if something much bigger than Lindsey the Insurance Lawyer's stalking problem is going on.

Update: Judge Walker has issued the litigation hold but not required prosecutors to log their contact with journalists. He even extended his admonition on complying with Local Rules to James' legal team as well as prosecutors.

> The Court also ORDERS *all counsel* to comply with Local Rule 57.1, whichprohibits any "lawyer, law firm, or law enforcement personnel associated with the prosecution or defense" from making or authorizing4 certain extrajudicial statements, including offering "[a]ny opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case," subject to their professional obligations. E.D. Va. Crim. R. 57.1(C)(6). Any "lawyer who is participating . . . in the . . . litigation of [this] matter" may also have an ethical duty to refrain from

> making extrajudicial statements that pose a risk of prejudicing the proceeding. See ABA Model Rules of Prof'l Conduct R. 3.6 (2023).5

The footnotes to this passage decline to extend the local rules to Tish James herself, but does extend them to anything her attorneys advise her to say.

> 3 In its opposition to the motion, the government argues that the alleged statements regarding the grand jury proceedings do not "rise to the same level" as the defendant's public statements proclaiming her innocence. ECF No. 30 at 5. The Court does not believe a comparison of the defendant's public statements and the government's interactions with the media does much to resolve any question presented here.
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> 4 The parties do not discuss this point in their briefing, but the Court observes that the Local Rules' prohibition on 'authorizing' extrajudicial statements would appear to apply to public statements a defendant might make with the advice of counsel—though Rule 57.1 binds only the lawyer, not the defendant.
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> 5 The government argues that the defendant herself is subject to certain restrictions on her communication with the media because she is a "lawyer." ECF No. 30 at 4 (quoting E.D. Va. Crim. R. 57.1(C)). But the Court finds that "lawyer" within the meaning of the Local Rules refers to a person practicing law in this district, not to any individual with a juris doctor degree or a bar license. Accordingly, this Order does not extend to the defendant's speech as a defendant. But see supra n.2.

And he cites US v. Trump back at loaner AUSA Keller (making several copy and paste errors in the process) for the principle that defendants have more right to speak than the attorneys on the case.

> At this stage of the litigation, the Court does not find that a restriction on the defendant's own speech is necessary to ensure a fair trial for both sides. The Court certainly has the power to "control the speech and conduct even of defendants in criminal trials when necessary to protect the criminal justice process," United States v. Trump, 88 F.4th 990, 1006 (D.C. Cir. 2023) (citing Nebraska Press, 427 U.S. 539, 553–54 (1976)). But so far, the government has not demonstrated that the defendant's speech has risen to the level that it must be dampened in spite of her First Amendment rights in order to preserve a just legal process. See id. at 1008 (recognizing that "a criminal defendant—who is presumed to be innocent—may very well have a greater constitutional claim than other trial participants to criticize and speak out against [t]he prosecution and the [criminal] trial process . . . .").

One of the funniest part of Judge Walker's opinion his how he refers to Lindsey the Insurance Lawyer's unlawful role.

> The motion criticizes alleged communications between a government attorney1and a member of the media via the encrypted messaging app Signal.
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> 1 The status of the government attorney who made the alleged statements is the subject of a motion pending before the Honorable Cameron McGowan Currie. ECF No. 22. Thus, the Court will avoid referencing the role of the attorney in this case. Additionally, this Court

> generally does not refer to government attorneys by name. It will not depart from that practice here