

# PROTECTIVE ORDER: WHO IS THE VICTIM OF TRUMP'S 18 USC 241 CHARGE?

Yesterday, one day after Magistrate Judge Moxila Upadhyaya warned Trump not to engage in witness tampering, he posted first a video claiming that the prosecutors who are prosecuting him – none of whom Joe Biden appointed – were Biden's accomplices in an attempt to win the election. He followed that with a tweet threatening, "IF YOU GO AFTER ME, I'M COMING AFTER YOU!"

Shortly thereafter, two prosecutors who were career prosecutors in the Trump Administration before they came to report to Merrick Garland, Molly Gaston and Thomas Windom, filed a motion for a protective order. While the ostensible goal of the motion was to accelerate the process of sharing discovery in a way that won't end up in a tweet somewhere, they did use it to alert Judge Tanya Chutkan of Trump's tweet.

The Government's proposed order is consistent with other such orders commonly used in this District and is not overly restrictive. It allows the defendant prompt and effective use of discovery materials in connection with his defense, including by showing discovery materials to witnesses who also agree to abide by the order's terms. All the proposed order seeks to prevent is the improper dissemination or use of discovery materials, including to the public. Such a restriction is particularly important in this case because the defendant has previously issued public statements on social media regarding witnesses, judges, attorneys, and others associated with legal matters pending against him. And in recent days, regarding this case, the defendant has

issued multiple posts—either specifically or by implication—including the following, which the defendant posted just hours ago:



If the defendant were to begin issuing public posts using details—or, for example, grand jury transcripts—obtained in discovery here, it could have a harmful chilling effect on witnesses or adversely affect the fair administration of justice in this case. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1070 (1991) (“The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial . . . obviously threaten to undermine this basic tenet.”). [my emphasis]

As I predicted, Trump quickly claimed the threat was about RINOs – even the Koch Brothers! – not the prosecutors prosecuting him.



- August 5, 2023 -

### Statement from Trump Spokesperson

"The Truth post cited is the definition of political speech, and was in response to the RINO, China-loving, dishonest special interest groups and Super PACs, like the ones funded by the Koch brothers and the Club for No Growth."

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Contrary to the claims of Trump and dozens of lawyers who haven't read the indictment, it's really not about his First Amendment right to lie, which is undoubtedly why he's staging an early attempt to make this about his ongoing First Amendment right to lie.

Whatever. As I'm writing this I keep thinking about the line from the indictment describing that Trump tweeted his implicit threat against Mike Pence during the riot at a moment his advisors left him alone in his Dining Room: "after advisors had left the Defendant alone in his dining room, the Defendant issued a Tweet intended to further delay and obstruct the certification."

The actual substance of the debate over the protective order will be genuinely interesting. Trump is running for office and he is entitled to attack Biden – albeit not physically. The motion described that prosecutors had proposed a recent protective order issued by Carl Nichols, a Trump appointee.

It's likely that Judge Chutkan will call a hearing to deal with extrajudicial statements, while the lawyers fight about the protective order.

The whole predictable attack made me think, though, about Joe Biden's role in all this. While the implicit threat against Jack Smith certainly threatens, "the fair administration of justice in this case," the other prosecutors are

not parties here. And there were no known witnesses included in Trump's attack. Contrary to what Trump said, Biden has had no role in all this (in fact he should enjoin Trump from claiming prosecutors he didn't appoint are his "accomplices").

Depending on how DOJ conceives the 18 USC 241 charges, he could be Trump's victim.

DOJ didn't really lay that out in the indictment – whose votes Trump attempted to leave uncounted. Probably, as a Michigan mail-in voter (and in the county where Trump actually lost the election!), I'm among those people. I assume Rayne and bmaz are too.

But is Biden the victim here, too?

It won't affect the resolution of this particular spat. But it does raise interesting questions about the structure of any gag going forward.

Update: Chutkan is *not* ordering Trump to explain his tweet.

**MINUTE ORDER as to DONALD J. TRUMP: It is hereby ORDERED that by 5:00 PM on August 7, 2023, Defendant shall file a response to the government's [10] Motion for Protective Order, stating Defendant's position on the Motion. If Defendant disagrees with any portion of the government's proposed Protective Order, ECF No. 10-1, his response shall include a revised version of that Protective Order with any modifications in redline.**