

MIKE PENCE SIMPLIFIES THE GAG ORDER DISPUTE

If my Irish Daylight Savings calculation and PACER operations are correct, Donald Trump submitted his reply to DOJ's opposition to a stay on the gag Judge Tanya Chutkan imposed at around 8:50PM ET last night.

President Trump's political opponents (some of whom are witnesses), the Biden Administration, and the citizenry writ large in connection with the 2024 campaign. This is precisely where the Gag Order runs headlong into unconstitutional shoals. President Trump is absolutely entitled to defend himself publicly and explain with specificity why the charges against him are false and meritless.

The filing includes the kind of sophistry John Lauro excels at. It continues to artificially dismiss the abundant evidence that Trump's statements routinely lead to violence (in one place, by dismissing anything that happened more than three months ago: Taylor Taranto's stalking of Barack Obama in response to Trump's Truth Social post was on June 28, exactly four months before this filing).

But it is not frivolous. Trump wildly misrepresents the scope of the gag, particularly as it pertains to Joe Biden, about whom the gag imposes no restrictions.

This Order shall not be construed to prohibit Defendant from making statements criticizing the government generally, including the current administration or the Department of Justice; statements asserting that Defendant is innocent of the charges against him, or that his prosecution is

politically motivated; or statements criticizing the campaign platforms or policies of Defendant's current political rivals, such as former Vice President Pence.

These are not easy First Amendment questions.

And, Trump used the prosecution's request to put restrictions on witness tampering into Trump's release conditions (which is where Amy Berman Jackson put a similar gag for similar reasons on Roger Stone) to note its tactical position of strength.

The prosecution's request is also jurisdictionally improper. The Court entered the Gag Order, and President Trump promptly filed a notice of appeal. The prosecution does not dispute that the Gag Order is an appealable order. See Doc. 110, at 8. Thus, when President Trump filed his notice of appeal, it divested the Court of jurisdiction to amend or modify the Gag Order: "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). The prosecution's latest proposal seeks to end-run around the Court of Appeals' jurisdiction by modifying and reasserting the Gag Order as a condition of release while it is being challenged on appeal, which the Court lacks jurisdiction to do. See *id.*

Trump intends to take *this* gag order to a partisan Supreme Court where several Justices are already raring to forcibly protect the kind of violent threats that Trump specializes in. Heck, if Trump succeeds as well as he might, his appeal of this gag could solve the problem with

the “mob” part of the indictment which I’ve noted.

And all that’s why the stakes of Pence’s decision to drop out of the presidential race yesterday matters.

I came here to say it’s become clear to me: this was not my time. So after much prayer and deliberation, I have decided to suspend my campaign for president, effective today.

He’s absolutely right. It is not the time for someone running on having upheld the Constitution to run in the Republican Party. The GOP is little more than a criminal protection racket to shelter one man, Donald Trump.

Pence dropped out before 5PM ET. By the time Trump submitted his motion claiming some of the witnesses the gag would prevent him from attacking were his political opponents, Pence dropped out of the race.

So long as Pence was in the race running on the policy of upholding the Constitution, as he did on January 6, there was a clear conflict between the gag’s restrictions on Trump’s attacks on witnesses and its explicit permission to attack the policies of his rivals in the 2024 Presidential race.

That conflict has been resolved.

These First Amendment questions are still difficult. This appeal may still give Trump a vehicle to get SCOTUS to protect the kind of mob incitement that is at the core of the indictment.

But yesterday, Pence resolved the most difficult of the questions.

Update: On Sunday night, Judge Chutkan denied the stay. Her order notes:

- Even if a request to alter Trump’s release conditions

- were procedurally proper, it's not necessary to enforce the terms of the gag
- Trump ignored the causal link between his attacks and certain kinds of threats
 - Trump failed to fully raise the First Amendment interests of his followers in his opposition to a gag
 - Trump ignored the way Judge Chutkan had tailored her order (for example, by not gagging attacks on DC)
 - Trump adopted a dictionary rather than the well-accepted legal definition of "interested parties"
 - The difference between Trump's general attack on the "Election Rigging Biden Administration," which is not gagged, and a post claiming "if [Meadows would] say BAD THINGS about that 'MONSTER'" Donald Trump he might avoid prison, which is gagged, is clear