

# JACK SMITH ATTEMPTS TO PREVENT TRUMP FROM DELAYING DC TRIAL WITH INTERLOCUTORY APPEALS

In a hearing in the stolen documents case on November 2, Jay Bratt implored Judge Aileen Cannon not to base the timing of the Florida trial based on assumptions about the DC case, because that trial date

The Court really cannot let or should not let the D.C. trial drive the schedule here. In the D.C. case, they are making many of the same arguments, though they have not yet filed a motion for adjournment. They have already said that they likely will. They have talked about –

[snip]

A lot of this, though, is in the realm of the – I don't want to say hypothetical, but it is in the realm of we don't know what is going to happen. We don't know what is going to happen in this case. We don't know what is going to happen in the D.C. case. Among the things that the Defense has raised in the D.C. case is that if there are adverse rulings on any of the pending motions to dismiss, that they would seek an appeal and seek to stay the proceedings. That could happen. We don't know. Obviously, there are arguments both ways, arguments both before the Trial Court before the D.C. Circuit, but that could happen. That trial date could disappear.

[snip]

Things could happen, things could happen with the D.C. case that would make going forward on May 20th, 2024, in this case not feasible. That may happen and we can address that, at that time, but we should be moving forward in this case.

The one thing he mentioned that could happen was a defense request to stay proceedings pending appeal.

Judge Tanya Chutkan certainly doesn't want anything to delay the DC case. She said that explicitly in an October 16 hearing on Trump's bid to stay her gag order.

THE COURT: This trial will not yield to the election cycle and we're not revisiting the trial date, Mr. Lauro.

Perhaps to make that even clearer, after Trump filed to motion a stay pending appeal of any decision on his Absolute Immunity argument on November 1, she issued a requested order pertaining to jury selection by setting the beginning of that process to start on February 9.

But Jack Smith's team appears to be concerned that Trump may use interlocutory appeals to delay the trial. In a response to Trump's November 1 motion, Molly Gaston not only opposed that stay (which she described as an attempt to apply appellate and civil procedure to this criminal trial), but she requested that Judge Chutkan prioritize those decisions that are subject to interlocutory appeal: the Absolute Immunity bid, and one part of Trump's Constitutional challenge to the indictment pertaining to double jeopardy.

[T]he defendant's stay motion exposes his intention to use his meritless immunity claim to disrupt the Court's schedule. Accordingly, to prevent undue

delay and maintain the trial date, the Court should consider and decide first among the motions pending on the docket the defendant's two claims that could be subject to interlocutory appeal: presidential immunity and double jeopardy.

In her motion, Gaston lays out Trump's various dilatory tactics.

The defendant has planned to file this motion for months but waited until now in hopes of grinding pretrial matters to a halt closer to the trial date. As early as August 28, 2023, for instance, defense counsel informed the Court that the defendant would raise "executive immunity . . . with the Court likely this week or early next week, which is a very complex and sophisticated motion regarding whether or not this court would even have jurisdiction over this case. . . ." ECF No. 38 at 33-34. But the defendant did not file an immunity motion that week or the following. Instead, he waited more than a month before filing the promised pleading on October 5. See ECF No. 74. The defendant then waited another month to file the stay motion, late at night on November 1. Tellingly, earlier that same day, when defense counsel appeared at a hearing in the defendant's criminal case in the Southern District of Florida, he used this Court's March 4 trial date and pretrial schedule as an excuse to try to delay that trial—without disclosing that, within hours, he would file his stay motion here seeking to disrupt and delay the very deadlines in this case that he was using as a pretense. See *United States v. Trump*, No. 23-80101, Hr'g. Tr. at 24 (S.D. Fla. Nov. 1, 2023). In short, the defendant's actions make clear that his ultimate objective

with the stay motion, as has consistently been the case in this and other matters, is to delay trial at all costs and for as long as possible.

To thwart Trump's efforts to stall any longer, Gaston requests that Chutkan prioritize the issues that can be appealed.

To limit such disruption, the Court should promptly resolve the defendant's immunity motion, as well as his double jeopardy claim that is also potentially subject to interlocutory appeal, so that the Government can seek expedited consideration of any nonfrivolous appeal and preserve the Court's carefully selected trial date.

She promises DOJ will use all mechanisms available to accelerate Trump's own appeal.

To prevent the defendant from using the timing of any such appeal to disrupt the Court's trial date, the Court should promptly consider and decide his immunity and double jeopardy motions. If the Court rules in the Government's favor and the defendant appeals, the Government will take all possible measures to expedite the appeal, see *Apostol v. Gallion*, 870 F.2d 1335, 1339-40 (7th Cir. 1989) (identifying mechanisms such as requesting summary affirmance or asking to expedite the appeal), just as the defendant sought to expedite his appeal of the Court's Rule 57.7 Order—relief that the court of appeals provided. See *United States v. Trump*, No. 23-3190, Order (D.C. Cir. Nov. 3, 2023) (expediting merits briefing and oral argument). In any event, although a non-frivolous appeal would temporarily divest this Court of jurisdiction, it would do so over only “those aspects of the case involved in

the appeal.” Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (per curiam). In sum, the Court’s prompt resolution of the defendant’s immunity and double jeopardy claims would best position this case to stay on track with its current pretrial schedule and trial date.

The thing is: The double jeopardy claim *is* frivolous; James Pearce noted that the four charges in the current indictment are for a totally different crime than the incitement of insurrection charged in impeachment.

But no matter how shitty the Absolute Immunity bid is, because of the historic nature of the case, all judges are going to take it seriously, including Chutkan.

The Absolute Immunity bid was fully briefed on October 26. Trump’s reply in the double jeopardy bid is due next week.

I don’t know appellate procedures well enough, nor can I imagine how John Roberts’ court will respond to a request to expedite something like the Absolute Immunity request.

But I do know that Jack Smith’s team seems to recognize that this bid for delay might work. Political pundits on both sides of the aisle are accounting for a trial that will start on March 4. But there has not yet been enough scrutiny on whether Trump’s bid for delay will succeed.