

DC CIRCUIT LIKELY TO NARROW JUDGE CHUTKAN GAG

Ruby Freeman was not a public figure until Donald Trump and Rudy Giuliani made her one, until they turned her into the villain of their feverish conspiracy theories about black women and voting. But early on in the appellate hearing on Judge Tanya Chutkan's gag in the January 6 trial, Trump's attorney John Sauer claimed there were no people covered by the gag who were not public persons.

That will become important if, as I suspect, the DC Circuit panel of Patricia Millett, Cornelia Pillard, and Bradley Garcia, upholds Judge Chutkan's gag, but narrows it with regards to public persons. I suspect the court will throw out the gag on Trump comments about prosecutors (but not their family), limit the gag about public people like Mark Milley and Mike Pence to specifics about this trial, but adopt the gag as is for non-public people like Freeman.

Then we'll have a fight about who counts as a public figure or not.

The most striking thing about the hearing, however, was how aggressively Trump attorney John Sauer dodged any accountability for his client. The judges, especially Millett, asked him a series of hypotheticals to try to get him to lay out a standard that wouldn't fall astray of the First Amendment. And Sauer kept getting cornered saying, basically, only the clear harm standard could apply to a gag on his client's speech. Effectively, he was saying that Trump has to be criminally charged with witness tampering rather than gagged. At one point, Sauer suggested that Trump must be permitted to wage this case in the public sphere, that there can be no consideration for the public interest in a fair trial. In another, he got awfully close to arguing that Trump should be treated as

a stranger to this case, meaning no restrictions could be imposed, rather than the accused defendant. In a third, Sauer suggested that Trump must be permitted to run for election on a campaign of threats against his adversaries. Over and over, Sauer argued that Trump should be permitted to say things publicly – at campaign rallies or on his failing Social Media site – that Sauer he agreed would be prohibited under the gag order if he did it on the phone with a witness.

I doubt this will be a winning argument before the DC Circuit. But Sauer is really making a play for Clarence Thomas and Sam Alito, not Patricia Millett.

Update: Fixed reference to Sauer as Lauro.