JACK SMITH ASKS FOR AN EXTENSION

Judge Tanya Chutkan was clearly ready to get the prosecution of Donald Trump back on the road.

The day after she got the SCOTUS mandate from its immunity ruling, she set a deadline for a status report and status conference, and denying (for now, until all issues of immunity are settled) Trump's challenge to the application of 18 USC 1512(c)(2).

> ORDER as to DONALD J. TRUMP: Setting status conference for August 16, 2024 at 10:00 A.M. in Courtroom 9; requiring joint status report by August 9, 2024; denying without prejudice Defendant's 114 Motion to Dismiss the Indictment Based on Statutory Grounds; and staying briefing deadlines for the Government's 191 Motion in Limine and Motion for CIPA Section 6(a) Hearing. Signed by Judge Tanya S. Chutkan on 8/3/2024.

But yesterday, Jack Smith asked for more time, citing the need to consult with other parts of DOJ before proposing a way forward.

> The Government continues to assess the new precedent set forth last month in the Supreme Court's decision in Trump v. United States, 144 S. Ct. 2312 (2024), including through consultation with other Department of Justice components. See 28 C.F.R. § 600.7(a) ("A Special Counsel shall comply with the rules, regulations, procedures, practices and policies of the Department of Justice," including "consult[ing] with appropriate offices within the Department for guidance with respect to established practices, policies and procedures of the Department . . . ."). Although those consultations are well underway, the Government has not finalized its

> position on the most appropriate schedule for the parties to brief issues related to the decision. The Government therefore respectfully requests additional time to provide the Court with an informed proposal regarding the schedule for pretrial proceedings moving forward. The defense does not object to the Government's request for an extension.
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> Accordingly, the Government requests that the Court enter an order requiring the parties to submit another joint status report by Friday, August 30.

Of course, no one knows why Smith might need the delay.

By far the most obvious, however, has to do with how DC USAO plans to apply 18 USC 1512(c)(2) going forward after SCOTUS limited the application of obstruction charges in *Fischer* to matters pertaining to the evidence. Two of Trump's charges are obstruction, one charged as a conspiracy, the other individually.

Thus far, DOJ has dealt with the crime scene cases implicating obstruction on a case by case basis. Those before Carl Nichols, the judge whose outlier ruling was adopted by SCOTUS, are getting dismissed. But some others are getting delayed, still others are getting recharged under 18 USC 231 (rioting). Sentencing involving obstruction are likewise being delayed.

As Justice Ketanji Brown Jackson noted in her concurring opinion on the obstruction ruling, because the vote certification involved the electoral certifications themselves, some of those crime scene cases might survive this ruling.

> That official proceeding plainly used certain records, documents, or objects—including, among others, those relating to the electoral votes themselves. See Tr. of Oral Arg. 65–67.

> And it might well be that Fischer's conduct, as alleged here, involved the impairment (or the attempted impairment) of the availability or integrity of things used during the January 6 proceeding "in ways other than those specified in (c)(1)." Ante, at 8. If so, then Fischer's prosecution under §1512(c)(2) can, and should, proceed. That issue remains available for the lower courts to determine on remand.

DOJ has always argued this was possible. But it's likely only possible, if at all, for those defendants who knew the import of the certificates themselves.

For Trump, however, the continued exposure is far broader (as Justice Amy Coney Barrett noted in her concurrence on the immunity ruling), because by orchestrating the fake elector certificates, Trump created a fraudulent document.

And DOJ needs to figure out how these two potential bases will interact going forward. Likely, DC USAO also has to consult with the Solicitor General's Office, to figure out what they think will survive appeal, including how an obstruction charge built on the fake electors would survive.

So that's probably a big cause of the delay: DOJ, as a whole, has to settle on how they'll deal with obstruction going forward in light of *Fischer*. Charges for some crime scene defendants may depend on how Smith approaches obstruction charges against Trump.

But I'm mindful of something else. Jack Smith asked for a delay until August 30, three weeks *plus a day* from the original deadline. That's the last day of the month — and that may be the only reason Smith asked for that date.

It's also probably the last day that DOJ would permit charging anyone political before the election. That is, as has happened with some

crime scene defendants, DOJ may be considering recharging this case (or charging others against whom some of these charges would stick).

And, aside from the possibility of charging a bunch of Trump's co-conspirators, that allows for one very provocative possibility.

Justice John Roberts' explicitly said that an acquittal on impeachment doesn't rule out charging that same count criminally.

> Impeachment is a political process by which Congress can remove a President who has committed "Treason, Bribery, or other high Crimes and Misdemeanors." Art. II, §4. Transforming that political process into a necessary step in the enforcement of criminal law finds little support in the text of the Constitution or the structure of our Government

So if Jack Smith originally avoided the insurrection charge against Trump to avoid any claim Trump's impeachment acquittal ruled out such a charge, he has no such worry now.

As the per curium opinion in the Colorado disqualification case noted, insurrection remains on the books (I need to refer back to the hearing transcript, but someone like Justice Sammy Alito made the same observation at the hearing).

> And the Confiscation Act of 1862, which predated Section 3, effectively provided an additional procedure for enforcing disqualification. That law made engaging in insurrection or rebellion, among other acts, a federal crime punishable by disqualification from holding office under the United States. See §§2, 3, 12 Stat. 590. A successor to those provisions remains on the books today. See 18 U. S. C. §2383.

Recharging this to include insurrection is the

exact equivalent to what DOJ is doing elsewhere, replacing an obstruction charge with a rioting charge. And it would be consistent with the inclusion of a Proud Boy prosecutor on the Trump case, which I suspect to have occurred.

Again, ***by far the most likely*** explanation for the delay is that DOJ is just trying to figure out what to do with 1512 charges, against Trump and all the crime scene defendants.

But the three SCOTUS opinions — immunity, 1512, and 14th Amendment — explicitly leave this possibility. The immunity provision does not exclude charges on which Trump has been acquitted in an impeachment. Elsewhere, DOJ is replacing obstruction with rioting charges. And the 14th Amendment ruling explicitly noted that Insurrection remains good law.

So it is a possibility — and a possibility that would have to be considered by August 30.