THE SEPTEMBER 26 BRIEF WE'LL GET IN THE TRUMP JANUARY 6 CASE

As I laid out in this thread, Judge Tanya Chutkan has set a deadline of September 26 for Jack Smith's team to write a brief explaining how the superseding indictment against Trump consists exclusively of private conduct. From news coverage (Anna Bower and Roger Parloff did a typically good write-up of the hearing), it wasn't entirely clear to me what that brief would entail.

Here's how Thomas Windom described it in Thursday's hearing:

> MR. WINDOM: So what would our brief and what would our approach look like? What we anticipate filing in an opening brief is a comprehensive discussion and description of both pled and unpled facts. What this would do would be to set the stage so that all parties and the Court know the issues that the Court needs to consider in order to make its fact-bound determinations that the Supreme Court has required.
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> THE COURT: Your proposal mentions the Government's briefing would include a proffer about unpled categories of evidence. You just mentioned that. Can you be a little more specific — or is that what you're getting to? — about what that would look like? I mean, are you talking about not just — not the evidence itself, obviously, but the form it would take, proffered by — in written form? What are we talking about?
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> MR. WINDOM: Sure. So our initial view on it is this. We didn't want to get ahead of the Court to lay anything specifically out.

> But here's what we are – what we were thinking and what we wanted to discuss with the Court: We were thinking a comprehensive brief where we would set forth the facts. What we would – that part of the brief would include things that are both in and outside the indictment. We anticipate that the brief would have a substantial number of exhibits. Those exhibits would come in the form of either grand jury transcripts, interview transcripts, 302s, documentary exhibits, things of that nature, things that would allow the Court to consider both the circumstances and the content, form and context, all in the words of the Supreme Court, that the Court needs to have in order to make its determinations.
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> We also in that brief, in addition to the facts, we would set forth for the Court why we believe that the conduct that is in the brief is private in nature and is not subject to immunity; and then with respect to the allegations in the superseding indictment involving the vice president, that the Supreme Court specifically talked about with respect to a presumption of immunity, why we believe that that presumption of immunity is rebutted.
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> We would – the benefit of us going first, which is what we are asking for, is that we would have everything in one place. The defense would know what the landscape looks like, as would the Court. And then we think that that would create a cleaner docket both for your determinations and also for any appellate court to review your determinations.
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> THE COURT: All right. So at this point, you wouldn't anticipate proffering any actual evidence. It would be written

> submissions. And then, should I feel that I need further evidence, we would discuss that. Is that what you're talking about?
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> MR. WINDOM: That's right, your Honor.

Particularly given Windom's reference to grand jury transcripts, that raised the question of how much of these "substantial number of exhibits" we'd get to see. The answer, per Windom, is that the existing protective order would govern.

> THE COURT: How much of that information do you anticipate is going to be under seal?
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> MR. WINDOM: So that's a good question. We don't know the specific answer to that.
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> But I do know this: A year ago, we spent a considerable amount of time going through a protective order and making sure it could stand time. Paragraphs 11 and 12 specifically deal with this situation the defense counsel has raised. It is the Court that will decide what is unsealed from the sensitive discovery. It is not the defense or the Government that will do that.
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> We anticipate, consistent with the protective order, that any filing of sensitive material would occur first with a motion for leave to file under seal. The parties and the Court can determine thereafter what gets released into the public record in redacted form.

Here's the operative language from the Protective Order.

> 11. The parties may include designated Sensitive Materials in any public filing or use designated Sensitive Materials during any hearing or the trial of this

> matter without leave of court if all sensitive information is redacted, and the parties have previously conferred and agreed to the redactions. No party shall disclose unredacted Sensitive Materials in open court or public filings without prior authorization by the court (except if the defendant chooses to include in a public document Sensitive Materials relating solely and directly to the defendant's personally identifying information). If a party includes unredacted Sensitive Materials in any filing with the court, they shall be submitted under seal.
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> 12. Any filing under seal must be accompanied by a motion for leave to file under seal as required by Local Rule of Criminal Procedure 49(f)(6)(i), as well as a redacted copy of any included Sensitive Materials for the Clerk of the Court to file on the public docket if the court were to grant the motion for leave to file under seal.

Effectively, then, Windom imagines that many of the exhibits would be submitted under seal, and there would be a fight about what gets released publicly, perhaps not unlike the process that has unfolded before Judge Cannon.

But Judge Chutkan would have the final say.