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Protective Order Battle Could Undermine Trump's Effective Defense

The protective order in the Jan. 6 criminal case against former President Donald Trump will set the rules of the road for how the defense can use and disclose materials gathered by the government, says Bradley's Elisha Kobre.

A battle is heating up in the Jan. 6 criminal case against former President Donald Trump that, while seemingly technical, will likely have a significant impact on the defendant's ability to mount a defense. It may well serve as a bellwether for how the court will resolve future similar procedural disputes.

On Aug. 4, the government filed a motion asking the court to enter a "protective order" governing how the parties—particularly the defendant—may disclose and use discovery materials the government must turn over to the defendant. Discovery materials broadly include records obtained through grand jury proceedings, testimony of witnesses before the grand jury, reports of witness interviews, and search warrants and other court orders requiring the production of various records obtained during the investigation.

These items can often contain personal information of witnesses or information that could compromise aspects of the government's investigation that aren't yet required to be disclosed. So it's common in criminal cases for the court to enter an order—a protective order—limiting the defendant's use of discovery materials or disclosure to others except as necessary to defend the case.

The Trump team filed objections to several provisions in the government's proposed protective order. Most prominently, the defense objected to the government's designation of "all" discovery materials as subject to restrictions of the protective order. According to the defense, applying the restrictions to "all" materials provided by the government—without regard to whether it's particularly sensitive or confidential—is unnecessary and will hamper the former president's ability to effectively defend the case.

That argument has some weight given the proposed order also includes a broad subcategory of "sensitive materials" to which yet even more severe stringencies would apply. If "sensitive materials" are those requiring special protections, the argument goes, then why apply restrictions to everything else.

The former president's team conceded the government's interest in restricting some of the documents it must produce but argued that "the need to protect that information does not require a blanket gag order over all documents produced by the government." Team Trump also pointed to other much narrower protective orders issued in the same court in other Jan. 6 cases.

While the broad protective order covering “all” discovery materials is not uncommon, the question before the court will be whether, in a case with this magnitude of public concern and political effect, the severe restrictions are consistent with the defendant’s right to effectively pursue his defense and the public’s First Amendment right to access to judicial proceedings.

Apart from this broader challenge, Trump’s team also attacks the government’s proposed protective order as overly restrictive in less overarching but still important ways. The proposed order, for example, limits disclosure of materials to only certain members of the defense team—persons “employed by” defense counsel. This “employed by” standard would exclude attorneys volunteering, without pay, to assist or advise in the former president’s defense, a likely circumstance given the high-profile nature of the case.

The government’s proposal would also impose even more severe restrictions on the use and disclosure of witness interview reports. Broad restrictions may be difficult to justify as to witnesses whose cooperation is already publicly known where there is no threat to the witness’s safety or the government’s investigation. And the Trump team also took issue with a procedural mechanism requiring the defense to file a motion with the court every time it wishes to file a document under seal—an understandable objection given that the government requested confidentiality requirements in the first place.

The protective order in the Trump case will set the rules of the road for how the defense can use and disclose materials gathered by the government during its investigation. The need to protect some of the materials from public disclosure—including the legitimate purposes of ensuring the safety of witnesses and the confidentiality of other information—must be balanced against Trump’s Constitutional right to mount an effective defense and the right of the public and media to have access to matters of immense public concern.

That balancing act is particularly critical in this case, with its historic public and political interest and implications. How the court handles this dispute will likely foreshadow its approach to future similar issues that will arise as the case proceeds.

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