

WHERE THE TRUMP INVESTIGATIONS STAND: STOLEN DOCUMENTS

As noted in this post, I started to write short summaries of where the three main investigations into Trump stand, but they turned into posts. So I'm posting them serially.

In my post on the Georgia investigation, I noted that, as charging decisions have drawn near, Republicans in Georgia have started turning on each other. That's worthwhile background for Jack Smith's twin investigations.

That's particularly true given the report that Boris Epshteyn met for two days with January 6 prosecutors on April 20 and 21, a report that has not yet been followed by any readout of what transpired, as well as the April 4 DC Circuit decision not to stay January 6 testimony from Mark Meadows and others, which similarly has not been matched by any report that Trump's Chief of Staff has testified.

I'm not saying either man – both of whom are key players in both Jack Smith investigations – flipped. Both are dumbly loyal.

I'm saying that Smith is likely at the same point Willis is: trying to secure key witnesses for an eventual prosecution. Witnesses in a federal investigation might bank on Trump's ability to beat Biden in 2024 and start pardoning people before they do serious prison time. If not, they might start seeking a deal. The single most useful thing about putting both Trump investigations under Smith is that he can leverage someone's legal exposure in one part of the investigation to coerce their cooperation in another part where they're crucial witnesses.

Epshteyn, for example, was the gatekeeper for the obstruction under investigation in the stolen documents case, as well as lawyers like Alina Habba who inexplicably testified in the

documents case. But he's also significantly exposed in the January 6 conspiracy. Plus, DOJ is currently investigating the cryptocurrency scam he and Steve Bannon used to dupe Trump supporters. He's dumbly loyal. He's also got a whole lot of criminal exposure.

From what we know of the stolen documents investigation, Smith has focused on three of the main questions he needs to answer for a charging decision:

- Obstruction (18 USC 1519): What happened in advance and after June 3, 2022 that resulted in Trump's non-compliance with the May 11 subpoena. Who ordered and who knew about it?
- Espionage Act (18 USC 793): Are there classified documents that Trump deliberately hoarded about which prosecutors could tell compelling stories that would not, also, result in more damage to national security if declassified for trial?
- Deliberate removal (18 USC 2071): To what degree did Trump deliberately curate classified documents he wanted to take? Were there documents that his advisors persuaded him should not be declassified that he took when he left anyway? I think this is the least likely charge, unless there's

evidence that Trump stole stuff he had not managed to convince others to release publicly while President.

But there's another question that may be just as important as the evidence to support the charges, and may elicit quite a debate within DOJ: venue. The easiest way to overcome all the difficulties with charging a former President with 793 would be to charge his retention of documents after the time when:

1. The Archives had explained that retaining them was unlawful under the Presidential Records Act
2. Both the Archives and DOJ had asked for them back
3. Jay Bratt had informed him (through Evan Corcoran) that they were being stored improperly

That is, if he were to charge 793, Smith would likely charge for actions Trump took between May and August of last year, at Mar-a-Lago. So (while some smart lawyers disagree) there would be at least a fair argument that it would have to be charged in SDFL.

Ideally any charges against a former President would be strong enough to convince a South Florida jury, but the possibility of Aileen Cannon presiding over such a trial would be daunting. Plus, judges in DC have far more experience dealing with cases involving classified information than most other districts other than EDVA.

Whereas, if Smith were to charge only obstruction, venue in DC is not a stretch at all.

The letter Trump's lawyers sent to Mike Turner

makes clear they believe (or hope) Trump will be charged only with obstruction. Their defense right now is that the Archives never should have referred the 15 boxes of classified records to the FBI (never mind that NARA did the same with Joe Biden), and therefore DOJ should never have issued the subpoena he blew off.

This defense has the advantage of playing to Republican voters who can easily be persuaded that Biden is being treated differently than Trump. That Trump's lawyers have adopted it may suggest they believe that a President's unfettered ability to declassify secrets would make 793 charges more difficult.

It would, normally! But DOJ has, at least, laid the groundwork to do just that. Much of what has been perceived as delay really consists of the Archives and DOJ working through each of the reasonable approaches past Presidents, as well as Biden and Mike Pence have adopted to classified documents. But ultimately the subpoena created the conditions in which prosecutors could easily prove the elements of the offense of a 793 charge: that he (1a) refused to give back (2) national defense information (3) in unsecure conditions (1b) after someone asked him to give it back.

Not only are Trump's attorneys wildly ill-suited to an Espionage case, but as they admit in the letter, they haven't reviewed the classified documents Trump retained. If, as some of the questions reportedly asked of witnesses seems to have suggested, Trump tried to curate classified documents for his own personal revenge, then it may make 793 charges more compelling.

And some of the last witnesses Smith brought in on this case, even after Evan Corcoran seemingly finalized evidentiary testimony on April 4, were the men who had declassified – but also, in some cases, declined to declassify – documents of unprecedented sensitivity for Trump, often in pursuit of revenge.

There's one other matter that likely poses a

challenge as Smith decides whether to charge this case: the challenge of getting any remaining documents back. Beryl Howell never gave DOJ the contempt ruling they wanted to use to compel Trump's lawyers to retrieve remaining documents. Another way of doing so would be to conduct a coordinated search at the moment of a defendant's arrest. But that would require a dramatically different kind of arrest than we expect to see.

Note that Trump has plans to visit his Irish golf resort this week.

Links

Where the Trump Investigations Stand: Georgia

Where the Trump Investigations Stand: Stolen Documents

Where the Trump Investigations Stand: The January 6 Conspiracies