

THE HOLDING PATTERN ON THE NON-TRUMP JANUARY 6 CHARGES

There were two reports yesterday that relate to something I've been thinking about: The likelihood that most, if not all, of any more Trump-related January 6 charges will be delayed, at least until after his trial next year.

The first is a WaPo report that Jack Smith's office withdrew a subpoena for records and testimony relating to Save America PAC – the fundraising Trump did off of false claims about voter fraud, which he has since used to pay lawyers and other things unrelated to the claims he made in raising the money.

The **withdrawal of the subpoena earlier this month** indicates Smith is scaling back at least part of his inquiry into the political fundraising work that fed and benefited from unfounded claims that the election was stolen, said the people, who spoke on the condition of anonymity to discuss an ongoing criminal investigation.

Save America was still working to gather all of the records sought in the subpoena when it was notified by Smith's office that the demand for information had been withdrawn, two of the people familiar with the matter said.

[snip]

Broadly, the subpoenas and related interviews by Smith's investigators sought information about the post-election, pro-Trump fundraising, and what people inside Save America and other groups knew about the veracity of the claims they were making to raise money, the people familiar with the matter said.

[snip]

While interviewing potential witnesses associated with Trump, Smith's prosecutors have asked pointed questions about who is paying for their lawyers and why, people familiar with the questions have said. Trump advisers have said the Save America PAC, which raises most of its money through small-dollar contributions by Trump supporters across the country, is footing the legal bills for almost anyone drawn into the Trump investigations who requests help from the former president and his advisers.

[snip]

Four people with knowledge of the investigation said prosecutors had not asked questions about fundraising in recent months, after several subpoenas and witness interviews on that topic earlier in 2023.

Relatedly, while Jack Smith's team had raised Stan Woodward's payment arrangement when they first raised his conflicts with Chief Judge James Boasberg in June, it has not come up in the conflict review before Judge Cannon in Florida (the follow-up hearing to which is scheduled for Friday).

It's certainly possible that something about the stage of the election has led DOJ to back off this focus. It's equally possible DOJ has reviewed the advice given by Trump's campaign finance lawyers, Jones Day, in 2020 and decided that advice of counsel would make charges unsustainable.

Then there's this fascinating Bloomberg discussion, featuring abundant quotes from Zach Terwilliger, the son of George Terwilliger, Mark Meadows' lawyer, about frustration among defense attorneys in the case regarding Smith's uncertain instructions regarding whether

witnesses are just that – witnesses – or also subjects of the investigation.

Three defense lawyers representing people sought for voluntary interviews say they're frustrated that special counsel Jack Smith's team insists on labeling their clients subjects without providing additional detail as to where they fit in the case or whether they could become a target. They've asked to remain anonymous to discuss sensitive matters.

Justice Department guidance doesn't define what a witness is and prosecutors prefer the flexibility of the broad subject label, which covers anyone within the scope of a grand jury investigation.

Yet Smith's search for corroborating witnesses aimed at proving the 2020 election case against the former president pressures prosecutors to incentivize people to talk, but without exposing themselves to counterattacks from defense lawyers and Trump supporters. How they navigate that balancing act could help shape the legal fate of Trump and his allies.

"It is an exercise in understandable murkiness. And it's more complicated here," said Jim Walden, a former federal prosecutor who's now a criminal defense attorney. "Anyone in the Trump administration has at least potential liability if they helped him form strategy about his election loss."

By sticking strictly to the subject designation, Smith's team retains the ability to charge individuals who appear innocent but later turn out to have liability, while protecting itself from accusations they baited people into talking. At the same time, they'd risk

undercutting **their mission of expediting the Trump trial**, as defense lawyers insist on negotiating drawn-out immunity deals before an interview. [my emphasis]

While the Bloomberg piece refers to a “mission of expediting the Trump trial,” neither of these articles mentions something that, to me at least, seems obvious: Whether or not a jury convicts Trump next spring, if Trump wins the presidential election, none of this may matter. The criminal exposure of Trump’s associates won’t matter, because any that remained loyal would just be pardoned, as Paul Manafort and Roger Stone and Mike Flynn and George Papadopoulos and Steve Bannon were pardoned during Trump’s first term.

While I could imagine DOJ charging a handful of people who linked the crime scene to Trump before the election, most everything else would simply expose parts of the investigation that would otherwise be better kept quiet.

Which adds yet another reason why we can’t expect to understand the steps Jack Smith may still be taking: because on top of all the other reasons prosecuting a former and potentially future President is unprecedented, the likelihood that he would just pardon himself out of any further mess is part of it.

No one seems to care anymore: but there are a good many Trump associates – not just his unindicted co-conspirators – who bear some responsibility for what happened on January 6, 2021. But DOJ may have decided it makes not sense to prosecute any of them until there’s certainty, at the very least, about Trump’s fate.