

ALL HELL IS GOING TO BREAK LOOSE: MAYBE JACK SMITH DID PRECISELY WHAT ELIE HONIG CLAIMS HE DIDN'T

There are a number of laugh-in-his-face funny things about Elie Honig's column bitching that Jack Smith submitted his immunity filing before the election. First, for years Honig whined and moaned that the January 6 investigation would never reach the Willard Hotel, which was, in the opinion he formed without examining much of the evidence, the only way it would reach Trump.

Well, now the court filings have incorporated the Willard, yet Honig seems not to have noticed (but then, he has never exhibited much awareness of what's actually *in* court filings).

The meeting that **CC6** had organized so that the defendant and **CC2** could enlist Pence to reject Biden's legitimate electoral votes was scheduled late in the afternoon of January 4.³⁵³ In advance of the meeting, **CC1**, **CC2**, **CC6** and **P1** gathered at the Willard Hotel near the White House, and from there, **CC1** called and spoke with the defendant.³⁵⁴

More importantly, I *strongly suspect* that this filing *does* reflect the impact of DOJ policy prohibiting major actions in the three months leading up to an election.

That is, I suspect that Jack Smith considered making more substantive tweaks to the superseding indictment against Trump, but did not because of the DOJ prohibition. This is, to be clear, speculation. But the speculation rests, in part, on what we see in the court filings.

Start with this detail: When Jack Smith asked for a three week extension to submit a status report on August 8 – three weeks that he

predictably used to supersede the indictment – he didn't say he needed the time to present the case to a new grand jury. Rather, he said he needed the time to consult with other parts of DOJ.

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.

And while I think it likely that Smith *did* consult with OLC, the Solicitor General, and the prosecutors at DC USAO who are superseding other accused January 6 criminals charged with 18 USC 1512(c)(2) about the content of his indictment, that's not even what he said he was consulting about.

He said he was consulting about "the most appropriate schedule" to brief certain issues regarding the decision. He said he was consulting about DOJ rules, regulations, and policies.

The one DOJ policy pertaining to *timing* is precisely the one Honig is so upset about: the one prohibiting criminal charges or statements that might give an advantage or disadvantage to a particular candidate.

9-85.500 Actions that May Have an Impact on an Election

Federal prosecutors and agents may never select the timing of any action, including investigative steps, criminal charges, or statements, for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party. Such a purpose is inconsistent with the Department's mission and with the Principles of Federal Prosecution. See § 9-27.260. Any action likely to raise an issue or the perception of an issue under this provision requires consultation with the Public Integrity Section, and such action shall not be taken if the Public Integrity Section advises that further consultation is required with the Deputy Attorney General or Attorney General.

But as many people rebutted Honig, this pertains to stuff DOJ controls, like indictments, not to things a judge controls, like the briefing Judge Chutkan ordered, briefing about an indictment charged 14 months ago.

Tellingly, Honig *didn't* bitch when Jack Smith superseded the indictment against Trump less than 90 days before the election. That's probably because the indictment involved minor changes, mostly subtractions. Smith eliminated Jeffrey Clark's conduct entirely, added language to emphasize Mike Pence's role as Trump's running-mate, and focused more closely on the fraudulent vote certifications Trump and his co-conspirators created. Honig didn't opine that that more limited indictment would have required DOJ approval or violated pre-election rules.

The other reason I suspect that Smith considered, but did not, make more substantive

changes to the indictment is what appears and doesn't appear in the immunity filing.

First, as I alluded to the other day, there's an asymmetry in how DOJ discusses Trump's January 4 speech in Georgia and his January 6 speech. Regarding the former, prosecutors spend an entire paragraph laying out the fundraising emails Trump sent in advance of the Georgia speech, using those emails to argue that the speech was a campaign event.

Moreover, the defendant's Campaign sent numerous fundraising emails before, during, and after the speech, confirming the event's private nature. In a January 4 email around 3:00 p.m., the Campaign sent a fundraising email with the subject line "EPIC Rally in 6 HOURS," that began, "President Trump is heading to GEORGIA for a RALLY with Senators [Loeffler] and [Perdue]. This rally is going to be EPIC and will show the Nation that REAL Americans, like YOU, are fired up and ready to FIGHT to keep our Republican Senate Majority. The Senate Runoff Election is TOMORROW, and it's going to take the support of Patriots from all around the Nation if we're going to WIN BIG and SAVE America from the Radical Left."⁵⁷⁰ Later, at 9:21 p.m., the Campaign sent a fundraising email (in the name of the defendant's son) that began, "My father is on stage RIGHT NOW in Georgia rallying with Senators [Loeffler] and [Perdue] to DEFEND our Senate Republican Majority. Are YOU watching?"⁵⁷¹ The email reminded voters that "The Senate Runoff Election is TOMORROW and YOU are the only one who can stop ["the Left"] from taking over."⁵⁷² Another email at 10:41 p.m. (sent in the name of the defendant) began, "I just stepped off stage after speaking at an EPIC Victory Rally in Georgia with Senators [Loeffler] and [Perdue]. The energy of

the American People was UNMATCHED and I know we're going to WIN BIG tomorrow."573?

It's far more important to persuade Judge Chutkan that the January 6 speech was a campaign event. Yet, even though the filing spends three pages describing the "significant similarities" between the Georgia speech and the January 6 one, there's no parallel argument that Trump fundraised off the January 6 speech. Indeed, there's no other discussion of fundraising whatsoever in this filing, which is rather surprising given how Trump used his fundraising emails to cement The Big Lie. And we know that *there was* fundraising directly tied to the January 6 speech. As the January 6 Committee noted, the last email went out just as rioters breached the Capitol. J6C dedicated an appendix to both the legally sanctionable claims Trump made in fundraising emails and to ways Trump used the money raised to pay other bills, things other than what he told his rubes he would spend it on.

The easiest way to hold Trump accountable for January 6 in such a way that doesn't remotely implicate presidential immunity would be to charge him for fundraising fraud, adopting the same model SDNY used to charge Steve Bannon and his co-conspirators for fundraising off the wall Trump never built. But there's not a hint of that in the indictment currently before Judge Chutkan. The fact that prosecutors didn't include the fundraising directly tied to January 6, even though it would help ensure they got to use the January 6 speech at trial, suggests they may be withholding it to use in some other way.

A still more obvious thing missing from the immunity filing is the Proud Boys.

Back in December, in the last filing Jack Smith submitted before Trump's lawyers got Judge Chutkan to prohibit such things, Smith said he wanted to introduce Trump's encouragement of the Proud Boys as 404(b) evidence.

The Government plans to introduce evidence from the period in advance of the charged conspiracies that demonstrates the defendant's encouragement of violence. For instance, in response to a question during the September 29, 2020, presidential debate asking him to denounce the extremist group the Proud Boys, the defendant instead spoke publicly to them and told them to "stand back and stand by." Members of the group embraced the defendant's words as an endorsement and printed merchandise with them as a rallying cry. As discussed below, after the Proud Boys and other extremist groups participated in obstructing the congressional certification on January 6, the defendant made clear that they were acting consistent with his intent and direction in doing so.

[snip]

Of particular note are the specific January 6 offenders whom the defendant has supported—namely, individuals convicted of some of the most serious crimes charged in relation to January 6, such as seditious conspiracy and violent assaults on police officers. During a September 17, 2023, appearance on Meet the Press, for instance, the defendant said regarding Proud Boys leader Enrique Tarrio—who was convicted of seditious conspiracy—"I want to tell you, he and other people have been treated horribly." The defendant then criticized the kinds of lengthy sentences received only by defendants who, like Tarrio, committed the most serious crimes on January 6. [my emphasis]

But the Proud Boys don't appear, at all, in the immunity filing. You can go search for them using this OCR version. Nothing. Jack Smith said he wanted them to be part of the trial, but

they're not in this filing laying out that Smith might mention them at trial.

To be sure, there is a section of the immunity filing that addresses Trump's fondness for convicted Jan6ers.

In the years after January 6, the defendant has reiterated his support for and allegiance to 39478 39479 rioters who broke into the Capitol, calling them "patriots⁴⁷⁸ and "hostages,⁴⁷⁹ providing them financial assistance,⁴⁸⁰ and reminiscing about January 6 as "a beautiful day."⁴⁸¹ At a rally in Waco, Texas, on March 25, 2023, the defendant started a tradition he has repeated several times—opening the event with a song called "Justice for All," recorded by a group of charged—and in many cases, convicted—January 6 offenders known as the "January 6 Choir" and who, because of their dangerousness, are held at the District of Columbia jail.⁴⁸² At the Waco Rally, of the January 6 Choir, the defendant said, "our people love those people, they love those people."⁴⁸³ The defendant has also stated that if re-elected, he will pardon individuals convicted of crimes on January 6.⁴⁸⁴

But not only doesn't it mention the Proud Boys directly (one of them was part of the Jan6 Choir, though not any of the seditionists), it doesn't include the September 2023 interview in which Trump addressed Enrique Tarrío by name (bolded above).

⁴⁷⁸ GA 1973 at 16:52 (Video of Waco Rally 03/25/2023); GA 1962 at 48:29 (Video of Trump at Faith and Freedom Coalition 06/17/2022); GA 1971 (Video of Trump Interview 02/01/2022).

⁴⁷⁹ GA 1935 at 35:50, 01:16:16 (Video of Greensboro Rally 03/02/2024).

⁴⁸⁰ GA 1966 at 09:30 (Video of Trump

Interview 09/01/2022).

481 GA 1967 at 45:18 (Video of Trump Interview 08/23/2023); GA 1692 (Transcript of CNN Town Hall 05/10/2023).

482 GA 1973 at 03:00 (Video of Waco Rally 03/25/2023). See, e.g., United States v. Jordan Robert Mink, 21-cr-25 (D.D.C. 2023); United States v. Ronald Sandlin, 21-cr-88 (D.D.C. 2022); United States v. Barton Shively, 21-cr-151 (D.D.C. 2022); United States v. Julian Khater, 21-cr-222 (D.D.C. 2022); United States v. James McGrew, 21-cr-398 (D.D.C. 2022).

483 GA 1973 at 06:02 (Video of Waco Rally 03/25/2023).

484 GA 1971 at 15:51 (Video of Trump Interview with Schmitt 02/01/2022).

If you're going to impress SCOTUS with Trump's outrageous support for convicted rioters, you would include the Proud Boys.

Unless you were holding them in reserve.

The immunity filing *does* include the other key focus of that December 404(b) filing, though: Mike Roman's elicitation of a riot at TCF Center in Detroit.

In the immediate post-election period, while the defendant claimed fraud without proof, his private operatives sought to create chaos, rather than seek clarity, at polling places where states were continuing to tabulate votes. For example, on November 4, [Mike Roman]—a Campaign employee, agent, and co-conspirator of the defendant—tried to sow confusion when the ongoing vote count at the TCF Center in Detroit, Michigan, looked unfavorable for the defendant. There, when a colleague at the TCF Center told “We think [a batch

of votes heavily in Biden's favor is] right,"[Roman] responded, "find a reason it isn't," "give me options to file litigation," and "even if it is [sic]."18 When the colleague suggested that there was about to be unrest reminiscent of the Brooks Brothers Riot,19 a violent effort to stop the vote count in Florida after the 2000 presidential election, responded, "Make them riot" and "Do it!!!"20 The defendant's Campaign operatives and supporters used similar tactics at other tabulation centers, including in Philadelphia, Pennsylvania,21 and the defendant sometimes used the resulting confrontations to falsely claim that his election observers were being denied proper access, thus serving as a predicate to the defendant's claim that fraud must have occurred in the observers' absence.22 [my emphasis]

Notably, that section of the immunity filing repeats something the 404(b) notice did: it called Roman – like Bannon – an unindicted co-conspirator, even though in the introduction of the immunity filing, it described him as an "agent" along with the other three main campaign operatives.

The Government also plans to introduce evidence of an effort undertaken by an agent (and unindicted co-conspirator) of the defendant who worked for his campaign ("the Campaign Employee") to, immediately following the election, obstruct the vote count. On November 4, 2020, the Campaign Employee exchanged a series of text messages with an attorney supporting the Campaign's election day operations at the TCF Center in Detroit, where votes were being counted; in the messages, the Campaign Employee encouraged rioting and other methods of obstruction when he learned that the

vote count was trending in favor of the defendant's opponent.

[seven lines redacted]

The Government will also show that around the time of these messages, an election official at the TCF Center observed that as Biden began to take the lead, a large number of untrained individuals flooded the TCF Center and began making illegitimate and aggressive challenges to the vote count.

Thereafter, Trump made repeated false claims regarding election activities at the TCF Center, when in truth his agent was seeking to cause a riot to disrupt the count. This evidence is admissible to demonstrate that the defendant, his co-conspirators, and agents had knowledge that the defendant had lost the election, as well as their intent and motive to obstruct and overturn the legitimate results. [my emphasis]

As it did with Steve Bannon, the immunity filing called Roman a co-conspirator, without giving him a substitution, CC.

They're both just "persons."

At least in substitutions used in this filing.

Here's why that's especially interesting. As I noted in this post, the only evidentiary reason to describe Bannon as a co-conspirator is to introduce his words via hearsay exception, without requiring him to testify.

Some of what he said (bolded below), he said on texts to Boris Epshteyn, who was already treated as a co-conspirator, so those texts could come in anyway.

1. October 31: "He's gonna declare himself a winner." J6C (Originally

sourced to Mojo)

2. November 13: "Trump just fired."
3. December 13: Bannon resumes daily contact.
4. December 14: Alternate electors. J6C
5. January 2: "The Vice President's role is not ministerial." J6C
6. January 2: Trump wanted Pence briefed by Eastman immediately.
7. January 4: Pre-Pence Willard Hotel meeting, from which Rudy calls Trump.
8. January 4: Post-Pence Willard Hotel meeting.
9. January 5: "Fuck his lawyer."
10. January 5: Call with Trump before "All hell is going to break loose." J6C

Others don't involve Epshteyn (or are important for the way Bannon conveys recent contact with Trump).

One mention of Bannon in the immunity filing is his Halloween prediction that Trump would claim victory. According to Dan Friedman, who first reported on the recording, Bannon's October 31 prediction that Trump would declare victory was a recording of a meeting he had with Guo Wengui's activists.

The pre-election audio comes from a meeting between Bannon and a half dozen supporters of Guo Wengui, an exiled Chinese mogul for whom Bannon has worked. Bannon helped Guo launch a

series of pro-Trump Chinese-language news websites that have promoted an array of far-right misinformation, including a video streaming site called GTV. The meeting was intended to help GTV plan its election night coverage.

Though he did not attend, Guo arranged the confab, which was held in the Washington, DC, townhouse where Bannon tapes *War Room*, according to a person who was present.

Jack Smith chose to use this instance of Bannon's prediction, which ties to the foreign funding of Bannon's disinformation, rather than (as Bannon himself noted to Friedman in a comment for that story) any of the other times Bannon made the same prediction, including on his podcast.

[A] Bannon spokesperson argued that Bannon's statements on the recording are not news. "Nothing on the recording wasn't already said on War Room or on multiple other shows like The Circus on Showtime," the spokesperson said. "Bannon gave that lecture multiple times from August to November to counter Mar[c] Elias' Election Integrity Project." Elias is a prominent Democratic election lawyer. The spokesperson also said that the January 6 committee "should have the courage to have Mr. Bannon come and testify publicly about these events."

So one thing Smith does by including Bannon as a co-conspirator is to tie Guo's funding of Bannon's disinformation to January 6. Remember: SDNY treated Bannon as a co-conspirator at Guo's trial (though did not treat it as a foreign influence operation).

But the more important instance where you'd need to treat Bannon as a co-conspirator to introduce

his words is Bannon's later prediction: "All hell is going to break loose." The immunity filing directly ties the comment to an 11-minute phone call Bannon had with Trump, from 8:57 to 9:08 AM, earlier that morning.

The next morning, on January 5, the defendant spoke on the phone with [Bannon]. Less than two hours later, on his podcast, said in anticipation of the January 6 certification proceeding, "All Hell is going to break loose tomorrow."³⁷⁶

That is, the immunity filing treats this prediction like three other things it includes on Bannon: his prediction Trump would declare victory, Bannon's notice to Epshteyn that Trump would soon put Rudy in charge of post-election interference, and his January 2 instruction – given immediately after speaking to Trump – that Trump wanted John Eastman to brief Pence. All four use Bannon like a mirror to get to things (the filing implies) Trump told Bannon.

The immunity filing suggests that Bannon spoke to Trump, agreed that "all hell is going to break loose tomorrow," and then shared that detail on his podcast.

Notably, though, like Roman's elicitation of a riot, that's not *necessary* to the charges in the existing indictment. Bannon's involvement in the fake electors plot is – or is at least useful. Bannon's conveyance of instructions from Trump, particularly on January 2, is a way to show Trump's intent regarding the effort to pressure Pence.

But you don't need violence to prove these charges. Indeed, both the indictment and the immunity filing stop well short of implicating Trump with inciting violence. They describe Trump and his co-conspirators attempting to "exploit" the violence already in progress to cause further delay, but they don't accuse Trump of anticipating or encouraging that violence.

Steve Bannon and Mike Roman absolutely help prove the conspiracy counts currently charged against Trump; Roman's communications, in particular, provide key details of how he recruited fake electors.

Where they become far more important as co-conspirators, though, both with the TCF unrest and the violence at the Capitol, is in arguing that Trump conspired to stoke violence, something that Jack Smith has not (yet, at least not publicly) charged, something that would also implicate the missing Proud Boys.

These inclusions and exclusions all suggest that Jack Smith could have approached the superseding indictment differently, but did not.

Again, this is speculation, but I suspect that Jack Smith reserved a number of things for use after the election.

If we get that far.