

# SPECIAL COUNSEL REPORTS INCLUDE DECLINATION DECISIONS

In this appearance on BradCast last week, I scoffed a bit at this Devlin Barrett/Glenn Thrush piece. The headline news – that Jack Smith will step down before Trump comes in – was fairly obvious from Smith’s request for three weeks to figure out what to do. The focus on Smith’s obligatory report is something I made clear a week earlier. To be sure, the piece relies on interviews to confirm that Smith (and his staff) will resign, that only outside decisions could thwart their effort to finish up, that Smith has encouraged those who don’t have to stick around to move on.

It’s this section, which aside from the assertion that most of the classification vetting has already been done, is not attributed to the anonymous sources for the story (but which could rely on background sources), that I find odd.

Justice Department regulations require a special counsel’s report to explain why the prosecutor decided to file the charges they did, and why they decided not to file any other charges they considered.

But like much of Mr. Smith’s work involving Mr. Trump, this step is fraught with both technical and practical challenges that could make the report significantly different – and shorter – from the lengthy tomes produced by other recent special counsels. It also unlikely to contain much in the way of new or revelatory disclosures.

Mr. Smith, who has been the subject of round-the-clock protection after receiving death threats since taking

over, has already described much of the evidence and legal theories behind the election obstruction indictment. Since he filed two separate and lengthy indictments last year against Mr. Trump, he has supplemented that record with scores of court filings elaborating on the allegations.

One potential wrinkle for the filing and release of Mr. Smith's report is that it may have to undergo a careful review by U.S. intelligence agencies for any classified information. That can be a lengthy process. Intelligence agencies took weeks to review Mr. Hur's report.

But in the case of Mr. Smith's final report, most of that vetting has already been done, so officials expect that step to take little time.

It correctly describes that Special Counsel regulations require them to report on why they filed particular charges ... but also why they didn't file other charges, their declination decisions, but then suggests we've already seen what there is to see.

Jack Smith's declination decisions are one place where a report might get interesting. Just as one example, the search warrant for Mar-a-Lago listed three suspected crimes: 18 USC 793(e) (retaining national defense information) and 18 USC 1519 (concealing a document to obstruct an investigation), both of which were charged. But it also listed 18 USC 2071 (removal of documents). That crime was not charged, even though the indictment describes that Trump personally oversaw the process of packing up boxes (that a witness described Trump knew) containing classified documents to send to Mar-a-Lago.

In January 2021, as he was preparing to leave the White House, TRUMP and his White House staff, including NAUTA,

packed items, including some of TRUMP's boxes. TRUMP was personally involved in this process. TRUMP caused his boxes, containing hundreds of classified documents, to be transported from the White House to The Mar-a-Lago Club.

Since the warrant was made public, there has been a pretty heated discussion about 2071, not least because Republicans claimed that Smith had considered charging it, which carries a light three year maximum sentence but also disqualifies someone from holding office again, as a way to disqualify Trump from running for President.

There are at least two obvious explanations for why Smith didn't charge 2071. Perhaps it would be impossible to charge a President under 2071, given that until noon on January 20, 2021, he had authority to do whatever he wanted with those classified documents, sending them off while he was still President. Or perhaps Smith thought he could have charged it, but first needed the testimony of one of the key people involved in the packing process: Walt Nauta.

The reasons behind that prosecutorial decision not to charge Trump for intentionally taking classified documents with him are interesting for another reason. Among the classified documents discovered at Mar-a-Lago that weren't charged is a "compilation" that mixed communications with "a book author, a religious leader, and a pollster" with some kind of classified information.

This document is a **compilation** that includes three documents that post-date Plaintiff's term in office and **two classified cover sheets, one SECRET and the other CONFIDENTIAL**. Because Plaintiff can only have received the documents bearing classification markings in his capacity as President, the entire mixed document is a Presidential record.

Besides the classified cover sheets, which were inserted by the FBI in lieu of the actual documents, none of the remaining communications in the document are confidential presidential communications that might be subject to a claim of executive privilege. Three communications are from a book author, a religious leader, and a pollster. The first two cannot be characterized as presidential advisers and all three are either dated or by content occurred after Plaintiff's administration ended.  
[my emphasis]

These documents are nowhere near as sensitive as the ones actually charged against Trump; prosecutors probably prioritized documents that it would be easy to convince a jury they were "national defense information" for the indictment, an explanation that also may appear in the report. But the compilation of classified information with a pollster's message also *suggest* that Trump not only took classified documents home, but he used them as part of his campaign to get elected again (it would be particularly interesting if this document pertained to something like Israel).

And note NYT's description that "most of that vetting has already been done"? In discovery communications, prosecutors have described that *some* of the classified documents found at Mar-a-Lago have since been declassified; for others, prosecutors would have been working on substitutions they might use in case of trial. So for less sensitive documents, prosecutors may be able to describe precisely what Trump took.

Another classified document, classified Secret, found at Mar-a-Lago but not charged is the very first classified document the FBI found, something pertaining to Emmanuel Macron and associated, in some way, with an Executive Grant of Clemency for Roger Stone stashed (unlike all the other pardon packages found in the search) in Trump's own desk drawer. I'll admit that,

given my understanding of the Stone investigation, I'm particularly interested in this file, but here's to hoping that prosecutors will satisfy my curiosity about the document.

There are similarly important declination decisions on the January 6 side of the investigation.

The most obvious of those is why Jack Smith never indicted any of the eight people variously treated as co-conspirators: Rudy Giuliani, John Eastman, Sidney Powell, Jeffrey Clark (who was removed in the superseding indictment pursuant to SCOTUS' immunity ruling), Ken Chesebro, Boris Epshteyn, and – treated as co-conspirators in the immunity brief but not the superseding indictment – Steve Bannon and Mike Roman. It might be as simple as a decision, given the course of the Mueller investigation, to ensure that Trump couldn't pardon these co-conspirators before charging any of them.

But prosecutors might also explain why Bannon and Roman only belatedly got included as co-conspirators. I have speculated that it may have to do with delays in exploiting the phones of Roman and Epshteyn. If that's true in the case of Epshteyn, those delays would likely have arisen from post-hoc privilege claims tied to Epshteyn's claim to be Trump's lawyer. And if that *is* true, it would mean Trump's nominee for Deputy Attorney General, Todd Blanche, was the one who fought for the delay.

In any case, any discussion of Trump's co-conspirators may prove useful to the extent that state prosecutors are able to sustain their cases against the co-conspirators.

Finally, though, there is perhaps the most important declination decision: the decision – after Congress impeached Trump and the January 6 Committee referred for prosecution – not to charge 18 USC 2383, inciting insurrection, the single charge that (per SCOTUS' decision in the Colorado case) could have disqualified Trump from the Presidency under the Fourteenth

Amendment. The reasoning here might be fairly prosaic: Perhaps Smith feared precisely the immunity challenge, tied to impeachment acquittal, that Trump launched anyway. Perhaps Smith was not able to substantiate that case until he received evidence and testimony that post-dated the delay John Roberts caused, and so could charge insurrection *now*, but could not have done so in August 2023, when he first indicted Trump.

If Smith were to explain why he declined that charge, however, he would – as Robert Hur did in his 388-declination report – describe the evidence that would have supported such a charge.

NYT suggests Smith's report will be short; again, it's not clear whether that reflects information received on background, or just speculation. Smith has had an eternity to consider the possibility Trump would be elected, and he managed to write up the 165-page immunity brief in the same three weeks he gave himself in asking for an extension until December 2.

Even assuming we've already seen the evidence Smith has – Smith's decision to exclude mention of the Proud Boys and Trump's January 6 fundraising from the immunity brief suggests there may be stuff we have not seen – the declination decisions, themselves, may provide important answers to questions about whether it ever was possible to disqualify Trump from becoming president again.

And it's a marker in the sand. The report presumably will, at least, lay out some of the consequences of what John Roberts has wreaked. Republicans won't care. But that lays out what they own going forward.