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How Trump Could Turn The Government Against Jack Smith

By **Phillip Bantz**

Law360 (November 8, 2024, 4:46 PM EST) -- Special counsel Jack Smith and his team of prosecutors could face politically motivated retribution by President-elect Donald Trump and his allies in the form of a congressional investigation, a U.S. Department of Justice probe and even criminal prosecution, according to experts.

At the moment, criminal charges against Smith seem relatively unlikely based on the norms that have "governed the Department of Justice since the dawn of the country," but that could soon change, Arlo Devlin-Brown, a white collar partner at Covington & Burling LLP and a former federal prosecutor, told Law360.

"The question will be: How much do those norms hold up in the second Trump administration?" he said.

Smith and his team of prosecutors that brought federal criminal cases against Trump for alleged election interference in Washington, D.C., and the hoarding of classified documents in Florida have frequently drawn the ire of Trump. In August, the federal judge overseeing the D.C. case denied Trump's motion to dismiss the matter for "selective and vindictive prosecution."

That same month, the president-elect reposted a message on his Truth Social network that derided Smith as a "jackal" and "career criminal" and called for him to be "prosecuted for election interference and prosecutorial misconduct."

And last month, Trump said that Smith "should be considered mentally deranged, and he should be thrown out of the country," and that one of his first acts as president would be **firing** Smith.

Axing Smith might be unnecessary, as his office appears to be winding down the cases against Trump ahead of Inauguration Day in January, per Justice Department policy that sitting presidents cannot face trial. A federal judge on Friday granted Smith's motion, filed the same day, to **freeze** the D.C. case "as a result of the election" and to "afford the government time to assess this unprecedented circumstance."

The Florida case was dismissed in July by U.S. District Judge Aileen Cannon, who ruled that Smith's appointment as special counsel was unconstitutional. His office has appealed to the Eleventh Circuit, but has not made any filings since Trump's electoral victory.

Even if the cases are dismissed, it's highly likely that Smith and his team will be dragged through a congressional investigation after Trump takes office. House Republicans wrote a letter to Smith on Friday asking him to preserve records related to the cases.

"All of [Smith's] files will be subpoenaed by a Republican-controlled committee," predicted Jon Sale, co-chair of the white collar practice at Nelson Mullins Riley & Scarborough LLP and a former Watergate prosecutor. "In the past, the Justice Department has resisted such subpoenas, but this time they [congressional investigators] will be very aggressive in fighting to get all the files."

However, such an investigation could have some blowback for Trump, as it would shift the spotlight back to the criminal allegations against him related to his role in the Jan. 6, 2021, attack on the U.S. Capitol and open the door for Smith and Democratic members of Congress to air the president's dirty

laundry.

"Is that good theater for the Republicans? I don't think so," said Kevin O'Brien, a partner at Ford O'Brien Landy LLP and a former federal prosecutor. "If Trump is smart, he'll just be happy to see Smith gone. And the less ado he makes about it, the better."

Paul Tuchmann, a partner at Wiggin and Dana LLP, added, "If you were President Trump, that's the last thing you would want anyone to spend time or attention on."

A Trump spokesperson did not return a message seeking comment. Smith's spokesperson declined to comment.

Another option for Trump is to direct his DOJ to have its inspectors general probe Smith's office, which would be "deeply painful" for the targeted prosecutors as any government investigation might have "traumatic personal and professional repercussions for Smith, even if it's totally unfounded," according to Devlin-Brown.

"It would be scouring [Smith's] entire investigation [of Trump] and the conduct of the prosecutors involved," he said. "And inspectors general have broad leeway to write reports that can describe violations of DOJ policy and other things, ranging from misconduct to poor judgment, even if it's something that doesn't rise to the level of a criminal violation."

Another possibility is that Trump will direct his attorney general to investigate and criminally prosecute Smith, though the potential charges against Smith are unclear. If that happens, Smith could raise an immunity defense for carrying out a job that Attorney General Merrick Garland **tapped** him to oversee.

"As long as there's a factual basis for what Smith has done, and it appears that there is, he and his team will ultimately have the protection of our institutions," said former Connecticut U.S. Attorney Stanley Twardy, now of counsel at Day Pitney LLP.

Trump could try to weaponize other government agencies against Smith and his office, similar to how former President Richard Nixon attempted to sic the IRS on his enemies — an effort that failed because the IRS defied Nixon's orders.

Experts told Law360 that Trump and his agents might pressure state bar associations to discipline and, potentially, disbar Smith and members of his team, which involves dozens of lawyers across the country.

Finally, Trump could send a message to the legal community that his administration will not give government work to law firms that hire Smith or members of his office, making it difficult for them to return to private practice if they seek to leave the DOJ, which could become an inhospitable workplace for them under Trump.

"None of these [prosecutors] may be the most appetizing people to hire if they've made enemies with all the people who end up running the Justice Department," O'Brien said. "But that's only one view. We'll just have to see."

--Editing by Daniel King.