U.S. Department of Justice
Office of Legal Counsel

Washington, D.C. 20530

January 13, 2025

MEMORANDUM

TO: Merrick B. Garland, Attorney General

FROM: Christopher C. Fonzone, Assistant Attorney General CHRISTOPHER R FONZONE Digitally signed by CHRISTOPHER FONZONE Date: 2025.01.13 23:57:03 -05'00'

RE: Potential Legal Restrictions on the Public Release of Volume One of Special Counsel Smith's Report

On November 18, 2022, you appointed Special Counsel John L. Smith to investigate certain matters involving the conduct of former President Donald Trump. Now that his investigation has ended, Special Counsel Smith has completed and transmitted to you a final report explaining his decisions, pursuant to the Department's regulations governing special counsels. *See* 28 C.F.R. § 600.8(c). The Special Counsel's report contains two volumes, the first concerning the "election interference" case and the second concerning the "classified documents" case. The Department's special counsel regulations further provide that "[t]he Attorney General may determine that public release of the[] report[] would be in the public interest, to the extent that release would comply with applicable legal restrictions." *Id.* § 600.9(c).

Prior to finalizing his report and consistent with the Department's practices, the Special Counsel shared a copy of the report with President-elect Trump, and President-elect Trump's counsel subsequently sent you a letter objecting to the public release of the report. *See* Letter for Merrick Garland, Attorney General, from Todd Blanche and John Lauro (Jan. 6, 2025) ("Blanche Letter"). Among other things, the letter argued that the Special Counsel was not properly appointed or funded and that releasing the report would violate the Presidential Transition Act and presidential immunity doctrine. *See id.* at 1–2. You have asked us whether these objections would preclude you from publicly releasing volume one of the Special Counsel's report.[1] For the reasons that follow, we conclude that

[1] Co-defendants in one of the cases brought by Special Counsel Smith recently filed emergency motions in the Southern District of Florida and the Eleventh Circuit to enjoin release of the Special Counsel's report. The district court temporarily enjoined release of the report pending the court of appeals' resolution of the co-defendants' motion, which raised similar arguments as the motion before the district court. *See* Order, *United States v. Nauta*, No. 23-80101-CR (S.D. Fla. Jan. 7, 2025). The co-defendants argued to the Eleventh Circuit, similar to the Blanche Letter, that the Special Counsel was not properly appointed or funded and that releasing the report would violate the Presidential Transition Act and unconstitutionally disrupt the transition. After the issue was briefed, the Eleventh Circuit concluded that the co-defendants' motion for injunctive relief should be denied. *See* Order, *United States v. Nauta*, No. 24-12311 (11th Cir. Jan. 9, 2025). Following the court of appeals' decision, the district court denied the co-defendants' motion to enjoin release of the report with respect to volume one, but continued to temporarily enjoin release of volume two pending expedited consideration of the motion. *See* Order,

they do not.[2]

I.

President-elect Trump first contends that volume one cannot be released because Special Counsel Smith was improperly appointed and funded. *See* Blanche Letter at 3–4. We do not believe this to be the case. You appointed Special Counsel Smith pursuant to 28 U.S.C. §§ 509, 510, 515, and 533. *See* Department of Justice Order No. 5559 (Nov. 18, 2022). We concluded that your appointment of the Special Counsel was lawful at the time you made it, *see* Memorandum for Merrick B. Garland, Attorney General, from Christopher H. Schroeder, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Attorney General Order Appointing John L. Smith as Special Counsel* (Nov. 18, 2022), and we continue to believe that it was lawful and poses no bar to release of volume one of the report.

Section 515 allows the Attorney General to "commission[]" attorneys as "special assistant[s] to the Attorney General" or "special attorney[s]," who may "conduct any kind of legal proceeding, civil or criminal, . . . which United States attorneys are authorized by law to conduct." 28 U.S.C. § 515. Section 533 authorizes the Attorney General to "appoint officials" to, as relevant here, "detect and prosecute crimes against the United States" and "conduct such other investigations regarding official matters under the control of the Department of Justice . . . as may be directed by the Attorney General." *Id.* § 533. Finally, sections 509 and 510 vest all of the Department's authorities in the Attorney General, with limited exceptions not relevant here, and allow the Attorney General to "make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." *Id.* §§ 509, 510.

These statutes allow the Attorney General to appoint prosecutors to conduct investigations such as those governed by the Department's special counsel regulations, *see* 28 C.F.R. pt. 600, and authorized your appointment of Special Counsel Smith in particular. Indeed, the Supreme Court has already held as much. In *United States v. Nixon*, the Court determined that the Attorney General had statutory authority under these provisions to appoint a special prosecutor, akin to Special Counsel Smith, to investigate crimes committed in connection with the Watergate break-in. 418 U.S. 683, 694–95 (1974) (explaining that these statutes "vest[] in [the Attorney General] the power to appoint subordinate officers to assist him in the discharge of his duties," including the power to "delegate[] the authority to represent the United States . . . to a Special Prosecutor"). As the D.C. Circuit has explained, *Nixon*'s determination concerning "the Attorney General's statutory authority to issue the [special prosecutor] regulations was a necessary antecedent to determining whether . . . a justiciable controversy existed" in that case.

United States v. Nauta, No. 23-80101-CR (S.D. Fla. Jan. 13, 2025). Accordingly, as of the time of this writing, there is no injunction prohibiting your release of volume one of the Special Counsel's report. And since you are temporarily enjoined from releasing volume two of the Special Counsel's report, we do not address it here.

[2] The President-elect's counsel also argued that release of the report would "violate[] fundamental norms regarding the presumption of innocence," including "prohibitions on extrajudicial statements by prosecutors and Rule 6(e)," governing grand jury secrecy. *See* Blanche Letter at 1. We understand that these issues are being addressed by other Department components, and we thus do not address them here. We also note that the President-elect did not raise a specific claim of privilege with respect to material in the report and that the White House Counsel's Office declined to review the report for privileged information.

In re Grand Jury Investigation, 916 F.3d 1047, 1053 (D.C. Cir. 2019). The Supreme Court's holding on this point therefore is dispositive. And if there were any doubt, the long history of Attorneys General using these statutory authorities to appoint special counsels and similar prosecutors—and courts agreeing that Attorneys General could do so, *see id.*; *In re Sealed Case*, 829 F.2d 50, 55 & n.30 (D.C. Cir. 1987); *In re Grand Jury Investigation*, 315 F. Supp. 3d 602, 651–58 (D.D.C. 2018)—confirms the lawfulness of your appointment of Special Counsel Smith.

As to the President-elect's argument concerning Special Counsel Smith's funding, the Department of Justice has funded the Special Counsel under a permanent indefinite appropriation that Congress enacted to "pay all necessary expenses of investigations and prosecutions by independent counsel appointed pursuant to the provisions of 28 U.S.C. 591 et seq. or other law." Pub. L. No. 100-202, tit. II, § 101(a), 101 Stat. 1329, 1329-9 (1987). The President-elect's argument that this funding mechanism is improper relies on the erroneous determination that no "other law" supported the Special Counsel's appointment. As explained, 28 U.S.C. §§ 509, 510, 515, and 533 authorized his appointment.

We acknowledge that a district court judge presiding over one of Special Counsel Smith's prosecutions came to a different conclusion than our Office and determined that the Special Counsel was improperly appointed. *See United States v. Trump*, No. 23-80101-CR, 2024 WL 3404555 (S.D. Fla. July 15, 2024). The Department has appealed that determination, *see* Brief for the United States, *United States v. Trump*, No. 24-12311 (11th Cir. Aug. 26, 2024), and consistent with its litigating position, *see* Opposition to Motion for Injunction, *United States v. Nauta*, No. 24-12311 (11th Cir. Jan. 9, 2025), we do not believe the district court's decision precludes you from releasing volume one of the Special Counsel's report. As the district court itself has recognized, the court's ruling was limited to dismissal of the indictment. *See* Order at 2, *United States v. Nauta*, No. 23-80101-CR (S.D. Fla. Jan. 13, 2025). The district court did not purport to enjoin the ongoing operations of the Special Counsel's office nationwide and did not bar the Special Counsel from performing other duties, including the preparation of volume one of his report, which involved different charges than those before the district court here. Indeed, it is unclear if the district court could even have done so, since, as noted above, the D.C. Circuit—whose law governs Department headquarters and the Special Counsel's offices where the final report was prepared—has rejected the same theory concerning the Special Counsel's allegedly improper appointment that the district court accepted. *See In re Grand Jury Investigation*, 916 F.3d at 1053.

In any event, the Attorney General has the statutory authority to hire Department of Justice employees generally, *see* 5 U.S.C. § 3101, and is vested with all of the authorities of the Department, *see* 28 U.S.C. § 509. Your ability to decide whether to release an investigative report prepared by Department officials does not depend on the specific special counsel regulations or on the lawfulness of Special Counsel Smith's appointment under those regulations.

II.

President-elect Trump next argues that release would violate the Presidential Transition Act and presidential immunity doctrine. *See* Blanche Letter at 4–5. We believe this argument also does not preclude your release of volume one of the report. The Presidential Transition Act

contains no such prohibition, and presidential immunity from criminal prosecution does not extend to the release of volume one of the Special Counsel's report.

The Presidential Transition Act sets forth procedures whose purpose is to "promote the orderly transfer of the executive power in connection with the expiration of the term of office of a President and the inauguration of a new President." Pub. L. No. 88–277, § 2, 78 Stat. 153, 153 (1964) (codified as amended at 3 U.S.C. § 102 note). These procedures include authorizing the Administrator of General Services to provide a President-elect with necessary services and facilities, streamlining background investigations for high-level national security positions, and the like. *See id.* § 3. Although the Act notes the sense of Congress that government officials should "take appropriate lawful steps to avoid or minimize disruptions that might be occasioned by the transfer of the executive power," *id.* § 2, the Act does not prohibit the release of an investigative report concerning officials of an incoming administration on the grounds that release of such information could be disruptive to the transition of power.

The President-elect's argument that release of volume one of the Special Counsel's report would contravene principles of presidential immunity likewise does not preclude the report's release. The President-elect contends that release of volume one would generate public opprobrium that would divert the President-elect's time and energy and interfere with his ability to carry out his responsibilities. *See* Blanche Letter at 5 (citing *Trump v. United States*, 603 U.S. 593, 613 (2024), and *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 246–49 (2000) ("*Prosecution of a Sitting President*")). And it is true that these reasons contribute to incumbent Presidents being categorically but temporarily immune from criminal prosecution while in office. *See Prosecution of a Sitting President*, 24 Op. O.L.C. at 249–54. In addition, Presidents, including former Presidents, are "absolutely immune from criminal prosecution for conduct within [their] exclusive sphere of constitutional authority" and "at least . . . presumptive[ly] immun[e] from criminal prosecution for . . . acts within the outer perimeter of [their] official responsibility." *Trump v. United States*, 603 U.S. at 609, 614.

These presidential immunities from prosecution, however, do not prohibit the investigation of or reporting on presidential conduct. On the contrary, our opinion concluding that a sitting President is immune from prosecution made clear that such immunity does not extend to the investigation of a President's conduct. *See Prosecution of a Sitting President*, 24 Op. O.L.C. at 257 n.36. Consistent with that principle, prior special counsels have investigated—and released reports about—the conduct of sitting Presidents, while acknowledging that criminal charges could not be brought during their presidencies. *See* 2 Robert S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* 1–2 (Mar. 2019); Robert K. Hur, *Report on the Investigation into Unauthorized Removal, Retention, and Disclosure of Classified Documents Discovered at Locations Including the Penn Biden Center and the Delaware Private Residence of President Joseph R. Biden, Jr.* 1 (Feb. 2024); *see also Trump v. Vance*, 591 U.S. 786, 803 (2020) (explaining that then-President Trump had "concede[d]—consistent with the position of the Department of Justice—that state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term").

Similarly, the Supreme Court has made clear that not all effects on a President's time, energy, and ability to carry out his responsibilities are sufficient to confer immunity from

process. For instance, in holding that a President is not immune from civil damages litigation arising out of events that occurred before taking office, the Court explained that while the "distractions [of litigation] may be vexing to those subjected to them, they do not ordinarily implicate constitutional separation-of-powers concerns." *Clinton v. Jones*, 520 U.S. 681, 705 n.40 (1997). Likewise, in holding that a state prosecutor could issue a criminal subpoena to a President, the Court rejected then-President Trump's argument that "the diversion occasioned by a state criminal subpoena imposes an . . . intolerable burden on a President's ability to perform his Article II functions." *Trump v. Vance*, 591 U.S. at 801. We believe that any potential distraction that may accompany the release of volume one of the Special Counsel's report does not compare to the interference with a President's responsibilities and decisionmaking processes occasioned by a criminal prosecution, where "trial, judgment, and imprisonment" are on the line. *Trump v. United States*, 603 U.S. at 613. Thus, even assuming *arguendo* that the principles underlying the immunity of a sitting President from prosecution apply to the President-elect in this context, they would not preclude the release of volume one of the report.

Finally, as a corollary to the President's immunity for official acts, the Supreme Court has held that the government may not present to a jury "evidence about [immune] conduct" to "help secure [a] conviction" on other charges, which would, in the Court's view, "heighten the prospect that the President's official decisionmaking will be distorted" and "threaten[] to eviscerate the immunity." *Id.* at 630–31. We understand this prohibition to be an evidentiary rule in criminal trials that serves to protect the President's immunity from prosecution with respect to official conduct. This rule, however, is not a broader prohibition that forecloses discussing the conduct outside the context of criminal trials. We thus do not believe that simply mentioning acts for which the President-elect is immune from criminal prosecution as background in volume one of the Special Counsel's report contravenes the Court's guidance in this area.

* * * * *

For these reasons, we conclude that the President-elect's arguments that Special Counsel Smith was not properly appointed or funded and that releasing volume one of his report would violate the Presidential Transition Act and presidential immunity do not preclude you from publicly releasing volume one of the report, should you determine that doing so "would be in the public interest." 28 C.F.R. § 600.9(c).