

'No white knight': Jack Smith's record rife with mistrials, overturned convictions, judicial rebukes



Prosecutor Jack Smith waits for the start of the court session of Kadri Veseli's initial appearance at the Kosovo Specialist Chambers court in The Hague, Netherlands, Nov. 10, 2020. Smith, the prosecutor named as special counsel to oversee investigations related ... Prosecutor Jack Smith waits for the ... more >

By Jeff Mordock

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Special counsel Jack Smith, who has brought federal charges against former President Donald Trump, is an “overzealous” prosecutor who relies on ethically dubious tactics, including media leaks and enticing witnesses, say those who have been caught in his snare.

Mr. Smith headed the Justice Department’s Public Integrity Section during the Obama administration from 2010 to 2015. He led a team of 30 prosecutors pursuing public corruption cases against major political figures.

Mr. Smith and other prosecutors — some working on the Trump case — have followed a familiar playbook. The script earned Mr. Smith a reputation as a hard-driving, intense prosecutor, but a string of mistrials and overturned convictions led to sharp rebukes from federal judges, including U.S. Chief Justice John G. Roberts Jr.

“These are no white knights. They are very dangerous and will use any tactics to win at all costs,” said former Rep. Rick Renzi, an Arizona Republican whom Mr. Smith’s team convicted in 2013 on corruption and fraud charges.

Mr. Renzi maintained his innocence but served nearly two years in prison before Mr. Trump pardoned him in 2021. He credits a 190-page white paper that his legal team submitted to the Justice Department claiming “repeated, concealed and corrosive” misconduct by prosecutors.

He said he was shocked by the similarities between his case and the prosecution of Mr. Trump.

Mr. Trump was charged with 37 felony counts, including willful retention of national defense information, obstruction and false statements. Walt Nauta, an aide to the former president, has also been indicted in the investigation.

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A review found that Mr. Smith's team followed the same playbook in the Trump case as in other high-stakes political prosecutions of both Republicans and Democrats. That playbook has resulted in a spotty record:

- Mr. Smith's conviction against former Virginia Gov. Robert F. McDonnell, a Republican accused of accepting payments and gifts in violation of federal public corruption laws, was overturned by the Supreme Court.
- The case against former Sen. John Edwards of North Carolina, a Democratic presidential candidate accused of illegally using campaign cash to conceal his mistress and love child, ended with a hung jury and mistrial.
- The prosecution of Sen. Robert Menendez, a New Jersey Democrat accused of taking bribes, collapsed in a mistrial.
- The conviction of New York Assembly Speaker Sheldon Silver, a Democrat, on federal corruption charges was overturned by an appeals court. He was convicted during a second trial, but an appeals court threw out three of the six guilty verdicts. He died last year.

“Government lawyers have a higher duty to the truth and cause of justice, and that's where some of these government prosecutors, like Mr. Smith, have fallen short,” Mr. McDonnell said. “They are smart and well-credentialed, but they don't seem to be exercising good judgment when it comes to this point.”

Mr. Menendez declined to comment.

A spokesman for Mr. Smith declined to comment for this report.

Attorney General Merrick Garland has staunchly defended Mr. Smith's standing as a “veteran career prosecutor.”

“As I said when I appointed Mr. Smith, I did so because it underscores the Justice Department’s commitment to both independence and accountability,” Mr. Garland said last month. “He has assembled a group of experienced and talented prosecutors and agents who share his commitment to integrity and the rule of law.”

Attorney-client privilege

Several patterns emerge from most of Mr. Smith’s high-profile prosecutions. The first is a questionable piercing of the attorney-client privilege.

In the Trump case, Mr. Smith’s team persuaded a federal judge to set aside the protections under the crime-fraud exception. The exception allows attorneys to break attorney-client privilege if they believe the legal advice was used in furthering a crime.

The ruling allowed prosecutors to access notes of Trump attorney Evan Corcoran that formed the basis for much of their allegations against the former president.

Mr. Smith took a similar tack in the Renzi case. He submitted as evidence recordings of the former lawmaker’s private conversations with his attorneys.

U.S. District Judge David Bury concluded that prosecutors unlawfully recorded the calls, and he ordered them to be suppressed along with the fact that the calls were wiretapped.

“The government’s conduct, in its totality, warrants a more significant sanction than just suppressing the privileged evidence. The court suppresses the wiretap,” Judge Bury said, adding that the government “acted unreasonably” to “exceed its authority.”

Mr. Smith was more successful in the McDonnell case. The 4th U.S. Circuit Court of Appeals upheld that attorney-client privilege did not protect emails from a government lawyer. The court concluded that Mr. McDonnell’s legal team failed to prove that the emails constituted legal advice.

Mr. McDonnell said he is still “stunned and incredibly disappointed” that confidential discussions with his attorney were disclosed to a grand jury.

Media leaks

Another hallmark of a Smith prosecution is leaking to news media. Several high-profile cases have been punctuated by news reports revealing evidence favorable to the prosecution.

Mr. McDonnell said the case against him was littered with leaks, beginning with a newspaper report of the investigation.

“There is no question the initial story came from the government leaking things to The Washington Post,” he said. “There was a grand jury impaneled, and it was pretty clear that grand jury information was being leaked to The Washington Post, which is a separate violation of the law.”

Mr. Renzi’s experience was similar. Ahead of the 2006 midterm elections, when his seat was hotly contested, news of his corruption investigation appeared in local and national media. Some reports cited Justice Department officials.

The leaks were so pervasive that Justice Department officials, including FBI Director Robert Mueller, issued a memorandum with a “stern message” about prosecutors’ obligation to preserve the confidentiality of investigations.

Mr. Menendez’s legal team said prosecutors engaged in a deliberate pattern of media leaks that damaged the senator’s credibility with the public to increase the chances of indictment. The attorneys said prosecutors’ actions amounted to “serious misconduct.”

Last month, several outlets published a leaked audio recording of a 2021 private meeting between Mr. Trump and staffers. The former president discussed holding secret government documents that he did not declassify.

“The media leaks are a three-pronged attack,” Mr. Renzi said. “It taints the jury pool, suppresses voter turnout and pressures the judge to rule in their

favor.”

Witness enticement

Stanley Woodward, an attorney for Mr. Nauta, said a prosecutor on Mr. Smith's team trying to secure cooperation suggested that Mr. Woodward's application for a judgeship would be considered more favorably if he and his client turned against Mr. Trump. Mr. Woodward has filed a complaint with the chief U.S. judge in Washington alleging prosecutorial misconduct.

In the McDonnell case, prosecutors filed charges against the former governor's wife and promised to drop the charges if she would testify against him.

The government promised to pay \$25,000 to Phillip Aries, the cooperating witness in the Renzi case, but prosecutors invoked his testimony more than 90 times during closing arguments. Mr. Aries said he did not receive “one thin dime” for his cooperation.

Weeks before Mr. Renzi's Supreme Court petition, Mr. Aries emailed a prosecutor seeking his \$25,000 payment, which he said would be like “winning the lottery.”

Although the FBI promised the payment, Mr. Renzi said, Mr. Smith's team was aware of the deal and concealed it from the defense team.

Pushing limits of the law

Another hallmark appears to be a broad interpretation of the law, resulting in several rebukes or failed prosecutions in Mr. Smith's political cases.

Mr. Edwards, the 2004 Democratic vice presidential nominee, was charged with six counts, including three counts of violating the Federal Election Campaign Act.

Ultimately, the Justice Department was embarrassed when the jury deadlocked on five of the six felony counts and acquitted Mr. Edwards on the last one.

The National Review, a conservative news journal, questioned the government's claims before the trial. It said efforts to conceal an extramarital affair and illegitimate child hardly amounted to election fraud.

In the Menendez case, 10 of the 12 jurors said prosecutors stretched the definition of the bribery and corruption statute and failed to make the case that receiving the gifts violated federal law.

The most stunning condemnation was in the McDonnell case when the Supreme Court overturned his conviction.

“There is no doubt that this case is distasteful; it may be worse than that,” Justice Roberts wrote in a unanimous opinion. “But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute.”

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