

Hurricane season isn't over for Trump

The latest waves hitting the shore this week prove that hurricane season isn't over for former President Donald Trump. The release of several years of redacted tax returns, a Ways and Means committee's summary report of Trump's recent tax filings, and the Jan. 6, 2021, committee's final report (accompanied by a referral of Trump to the Department of Justice for possible criminal charges) creates forces that rival any physical storm. While it's dramatic, even seductive, to watch the tempest as it rages, the lasting consequences of this week are yet to be revealed. Indeed, the most significant developments on the Trump investigative fronts haven't even occurred.



**MICHAEL
MCAULIFFE**

The Jan. 6 committee's final hearing was effective political theater. The referral to the DOJ of Trump, attorney John Eastman and others for consideration of criminal charges has no legal force. The mere fact of the referral is newsworthy because it involves one branch of government, Congress, officially weighing in on the potential criminal misconduct by another branch's former chief executive. The impeachment process in January and February 2021 failed to secure a senatorial conviction for the same events — the transfer of presidential power — but far, far less was known about those events at the time of Trump's second impeachment. The Jan. 6 committee has created what may be the definitive historical accounting. That a criminal referral comes from that exhaustive effort is notable, but not lasting.

The special counsel, Jack Smith, does have more this week to work with than he did prior to the committee's actions. While he has the committee's recommendation to charge Trump, the special counsel likely won't decide or do anything differently because of the referral. What is of great interest to the special counsel is the

body of information, specifically videotapes and transcripts of interviews of potential witnesses and subjects of the Jan. 6 review, for his ongoing investigation. Smith, or the team that preceded him, never was going to make charging decisions with hundreds of witness statements and recordings in existence (taken by the committee) but not in their (and the grand jury's) possession. A basic rule of criminal investigations is that the prosecutor must possess all statements of a witness in order to assess that person's utility and credibility. Because the special counsel team only now will be receiving the larger set of witness materials (along with the public) from the Jan. 6 committee, it couldn't have reached any prosecutorial decisions earlier.

Comparing a person's statements on the same or similar issues can and will help prosecutors in different ways. For example, if the person makes different assertions in separate statements about the same thing, the obvious issue is to find out why the change occurred. If a potential witness lied to an agent or obstructed the investigation, that fact — if provable — might constitute leverage to gain the person's truthful cooperation. That flip process is used in many federal criminal investigations. The Trump matters are no exception.

Ultimately, the special counsel (and the other prosecutor's offices investigating Trump) has to identify, assemble and assess evidence. Evidence can be documentary

(emails, letters, etc.) or testimonial (witness statements). The next period will require enforcement authorities (DOJ special counsel and others) to engage in rigorous legal and factual analyses to make their decisions. Only now, with the release of voluminous records of the Jan. 6 committee's investigation, can those prosecutors have sufficient access to the known universe of potential evidence.

Of course, the special counsel has responsibility for more than one investigation of Trump. In theory, the Mar-a-Lago investigation is much simpler than the Jan. 6 one in that the scope is narrower, and the evidence required to prove the possible charges more straightforward. But charging Trump in one case before the other is finished presents significant challenges for the prosecutors. Discovery obligations and the commitment of resources necessary to try a former president for crimes (even if limited in scope) for the

first time in the nation's history may distract from the uncharged, ongoing investigation of the much larger scale Jan. 6 insurrection. The two matters need not to be mutually exclusive, but they might become competitive as they each develop at individual (and different) paces.

What this week shows is the storm is with us for a while.

Michael McAuliffe is a former federal prosecutor. He also served as the elected state attorney for Palm Beach County. Currently, he is a practicing lawyer, an adjunct professor at William & Mary's Law School and a senior lecturing fellow at Duke University's School of Law. He is the author of the novel "No Truth Left To Tell."

