

THE EVIDENCE NEEDED FOR A TRUMP PROSECUTION

It would be easier to prosecute Trump for January 6 than Peter Navarro. I say that (in advance of today's debate about referring Navarro and Dan Scavino for contempt) because it is far easier to tie Trump's actions directly to the successful obstruction of the vote certification on January 6 than it would Navarro's, and Navarro's actions are fairly tangential to the proof that Trump's actions met the elements of obstruction of the vote certification.

Months ago, I laid out how to prosecute Trump using the framework that DOJ has already used with hundreds of January 6 defendants. But in this post, I will show how much evidence DOJ has already collected proving the case against Trump by using the framework for Trump's criminal exposure laid out by Judges Amit Mehta and David Carter, incorporating a key point made by Judge Reggie Walton.

In his opinion upholding the lawsuits against Trump, Amit Mehta found that it was plausible Trump conspired with the militias and also that he bore aid-and-abet liability for assaults at the Capitol (see this post and this post). He found that:

- Trump and the militias jointly pursued an effort to disrupt the vote certification
- Trump planned the unpermitted march to the Capitol
- Trump encouraged the use of force and threats to thwart

the certification from proceeding

- Trump knew supporters would respond to his calls to come to DC and march on the Capitol
- Trump called for collective action
- Trump intended his “fight like hell” comment to be taken literally and rioters did take it literally
- Trump ratified the riot

In his opinion finding that one email from John Eastman must be turned over to the January 6 Committee on a crime-fraud exception (see this post), Carter laid out the following proof that Trump obstructed the vote certification:

- Trump tried to persuade Pence to disrupt the vote certification
- He publicly appealed to Pence to do so
- He called on his followers to walk to Congress to pressure Pence and Congress

Carter laid out this evidence that Trump had corrupt intent:

- Proof that he had been told the vote fraud claims were false and his own request of Brad Raffensperger showed he knew he had lost
- Trump had been told the Eastman’s plan was not legal

Carter laid out this evidence he had entered into a conspiracy:

- Trump held lots of meetings to talk about plans to obstruct the vote count
- Trump ratified Eastman's plan in his Ellipse speech

To those two frameworks finding that Trump probably conspired to obstruct the vote certification, Judge Walton held that you cannot point to back-room plotting to get to the intentions of the actual rioters; you can only look at what the rioters themselves accessed, Trump's public speech and Tweets (see this post).

This table (which is still very much a work in progress) lays out what evidence would be needed to prosecute Trump. The horizontal Elements of 1512(c)(2)/Relevant to Motive and Co-Conspirators sections show what is necessary given the elements of the offense as laid out by the judges and in DOJ filings, versus what might provide evidence of a broader conspiracy. The Must Have/Nice to Have columns show that for each kind of proof, there's what is necessary and what would be really useful before indicting a former President.

Evidence	Must Have	Nice to Have
Elements of 1512(c)(2)		
Proof Trump led rioters to believe the vote was fraudulent	Rioters' citation of Trump's false claims	Proof that Peter Navarro, Steve Bannon, and Sidney Powell provided knowingly false claims to motivate rioters
Proof Trump got bodies to DC	Rioters' response to Trump's calls, especially December 19 Tweet	Evidence of funding for busses Dan Scavino comms encouraging viral push
Proof Trump targeted Pence	Rioters' response to Trump's calls by focusing on Pence	Pence aide testimony Proof Trump further incited mob after learning of Pence's flight
Proof Trump got bodies to the Capitol	Trump's false claim he'd walk to Capitol Trump's request that Alex Jones lead rioters to Capitol	Evidence showing Trump called for march in defiance of advice Testimony from Dustin Stockton, Jennifer Lawrence, and Katrina Pierson
Evidence Trump entered into conspiracy with the militias	Communications of Roger Stone Communications and cooperating witnesses to Stone's role Proof "stand back and stand by" viewed as direction	Communications directly between Trump and militia members Proof that militias were told Trump would take specific action
Mens rea: Corrupt intent	Trump seeking benefit for self Otherwise illegal activity	Proof he knew he lost election Pat Cipolone testimony
Relevant to Motive and Co-Conspirators		
Evidence Trump ensured inadequate policing	Proof Trump didn't have a permit	Proof Trump withheld the National Guard
Proof Trump tried to install Jeffrey Clark	Testimony from former DOJ officials	Cooperation from Clark
Proof Trump planned riot on December 18	Comms implicating Rudy, Mike Flynn, and Sidney Powell	
Proof Trump was acting on vote theft schemes in early January	Comms from early January Pence aide testimony	John Eastman testimony
Proof Trump coordinated with members of Congress	Comms involving Mark Meadows Records of Trump's own calls and those of Rudy	Cooperating witnesses
Proof Trump conspired to coordinate during riot	Rudy's comms	Cooperating witnesses from the Willard
Proof Trump aided-and-abetted assaults	Statements of rioters who assaulted police	Keith Kellogg testimony about Trump's exploitation of mob

In other words, the things in the yellow boxes are the things that would be *necessary* to show that Trump obstructed the vote certification. They basically amount to proof that things that Trump did brought the rioters to DC and to the

Capitol and that he had the corrupt *mens rea* to charge with obstruction. I include there proof that Trump conspired with the militias, which I consider necessary because the Proud Boys, especially, took the bodies that Trump sent them and made those bodies tactically effective.

While prosecutors are still working on tying Roger Stone to both militias and tying Alex Jones and Ali Alexander into the crimes at the Capitol, much of the rest of this evidence has already been collected and rolled out in charging papers. For example, I showed some of the proof that rioters responded to Trump's attacks on Pence by targeting their own attacks on Pence. There are a number of Trump comments that directly led hundreds of rioters to start making plans to come to DC, including arming themselves; NYT recently laid out the most central communication, a Tweet on December 19, 2020, though not only is that focus not new, it's the tweet and response to which Arieh Kovler predicted the attack on the Capitol in real time.

A number of the other things you'd *want* to have before you charged Trump are available to DOJ:

- Details of how the march to the Capitol happened and why it – and Ali Alexander's permitted rallies at the Capitol – made a riot more likely
- Explanations why Ellipse rally organizers balked at including people like Ali Alexander and Roger Stone
- Testimony from Pence's aides about how Trump pressured his Vice President in private

It is true that the testimony of several people

– those involved in selling the Big Lie and Scavino’s coordination of the riot (including a particular focus on The Donald) – would be really useful. But that testimony is as important to proving that *they* were part of the conspiracy along with Trump.

Pat Cipollone’s testimony would be incredibly useful to that case, too. Normally, he could invoke privilege, but Trump already waived some of that privilege by sharing details about his conversations with Cipollone with Sean Hannity. If Cipollone did cooperate with DOJ, I don’t think he would leak that.

Similarly, the Relevant to Motive and Co-Conspirators rows – showing Trump’s coordination with Congress or his prior planning of it – would be really useful to have in prosecuting Trump. But ultimately, as Judge Walton held, what Trump did in private *could not* have influenced most of the rioters, because they never knew those details. As such, some of that information – precisely the kinds of stuff that TV lawyers say would be the first overt signs that Trump was a subject of the investigation – is more useful for including others in the conspiracy.

The most important of this evidence – communications from the December 18 meeting and comms during the day of the riot – are already in DOJ’s possession from Rudy’s seized phones, whether or not they obtained a warrant for that content yet.

Update: I’ve tweaked the horizontal headings on the table to clarify that the top half of the table stems from the elements of offense for 1512(c)(2), whereas the bottom half is clearly related and may help prove *mens rea* or incorporate other co-conspirators, but is not necessary (in my opinion) to meeting the elements of obstruction.