

HOW AND WHY TO CHARGE TRUMP FIRST

In the wake of the news of Trump's target letter in the January 6 investigation, journalists have found no Trump associate willing to admit, on the record, to having received a target letter themselves, leading to questions about whether Jack Smith might charge Trump and only later add co-conspirators.

In this thread, I suggested there might be (unusual) merit to charging Trump – the head of the conspiracy – first, then add in everyone else. A bunch of people asked what I meant – so this post attempts to explain my thinking.

It builds on this post, written before the first January 6 Committee hearings. That post relied on three judge's opinions conceiving Trump's role in the January 6 attack:

- Amit Mehta's opinion sustaining the lawsuits against Trump for January 6
- David Carter's opinion finding crime-fraud exception for some John Eastman's email
- Reggie Walton's opinion that proving Trump's effect on the rioters must stem from the Trump communications the rioters actually knew of, including Trump's December 19 tweet announcing the event and (for those who watched) his Ellipse speech; the Proud Boys are a special case because of Trump's September 29 debate comment

and because almost all Proud Boys skipped Trump's speech

I used those opinions to lay out what the judges – two who were familiar with January 6, one who relied on J6C's representations about it – viewed as evidence supporting that Trump committed a crime. Once you understand that the bodies at the Capitol were a key way Trump obstructed the vote certification (something included in Judge Carter's opinion but often overlooked), then the import of Trump's impact on rioters becomes more clear. It narrows the evidence needed to prove Trump's obstruction beyond what most people understand – and very nearly maps the dozens of successful obstruction prosecutions DOJ already obtained, which I first started mapping out in August 2021.

This table updates my earlier one (and remains mostly a talking document – there's a lot missing). It adopts the two most likely standards for "corrupt purpose" that the DC Circuit might adopt in the Thomas Robertson appeal. And it includes a number of details – largely focused on Mike Pence – on which both J6C and the investigation have focused for over a year.

My argument is that, to prosecute Trump, you need to obtain proof of the stuff highlighted in yellow, largely focused on his effect on Pence and on the mob. To prosecute Trump's lackeys, you need to collect a lot more information and, likely, will need to flip some people. The rest of the table shows what it would take to include the others.

Evidence	Must Have	Nice to Have
Elements of 1512(c)(2)		
Proof Trump claimed vote was fraudulent	Evidence about plan to declare victory anyway Decisions about mail-in voting Fundraising comments Tweets Public statements	
Proof Trump led rioters to believe the vote was fraudulent	Rudy's testimony and lack of back-up evidence Rioters' citation of Trump's false claims	Multiple reports showing campaign knew Trump lost 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 Dan Scahino comms encouraging viral push	Evidence of funding for busses
Proof Trump gave Pence unlawful order	Testimony of Pence, his aides, and Trump's lawyers Eastman disbarment testimony, Rudy "proffer"	
Proof Trump targeted Pence	Evidence of edits to speech Testimony from dining room about Trump's inaction 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 plans to walk to Capitol Trump's false claim he'd walk to Capitol Trump's request that Alex Jones lead rioters to Capitol Discussions of plan for Guard to protect rioters	Evidence showing Trump called for march in defiance of advice Testimony from Dustin Stockton, Jennifer Lawrence, and Katrina Pierson Testimony from NatSec officials Evidence Trump knew rioters were armed
Mens res: Corrupt intent	Trump gives unlawful order to Pence Trump arranges unpermitted march Trump seeks to retain presidency Trump seeks to eliminate votes of 81 million Biden voters (241)	Proof he knew he lost election
Relevant to Motive and Co-Conspirators		
Evidence Trump entered into conspiracy with the Proud Boys	Proof "stand back and stand by" viewed as direction Tania's reference to campaign Friends of Stone extracts Communications and cooperating witnesses to Stone's role	Communications directly between Trump and militia members Proof that militias were told Trump would take specific action
Evidence Trump entered into conspiracy with other conspirators	Prosecutions of Ronnie Sandlin, Danny Rodriguez, Alan Hostetter	Communications involving people like Jeremy Liggett
Proof Trump aided-and-abetted assaults	Danny Rodriguez statement of offense (and backing)	Keith Kellogg testimony about Trump's exploitation of mob
Proof Trump attempted to discount votes of minority cities (241)	Communications with local election officials Actions of people like Mike Roman Comms with Republican local politicians	
Proof Trump knowingly fundraised off false claims (campaign finance, fraud)	Testimony Trump knew he lost Testimony Jared and others approved fundraising scheme Alex Cannon testimony about rejection of ads	
Proof Trump's co-conspirators arranged fake elector scheme	Chesebro memos mapping out plan and knowledge of illegality Comms with fake electors (Mike Roman and Rudy Giuliani) Testimony of select fake electors Fake certificates	
Proof Trump planned riot on December 18	Comms implicating Rudy, Mike Flynn, Sidney Powell, Peter Navarro, Garrett Ziegler, Mark Meadows, Enrique Tarrio	
Proof Trump tried to install Jeffrey Clark to support fraudulent vote claims	Testimony from former DOJ officials Clark's own communications Ken Mukowski	Cooperation from Clark Scott Perry phone
Proof Trump coordinated with members of Congress	Comms involving Mark Meadows Cassidy Hutchinson testimony Records of Trump's own calls and those of Rudy Scott Perry's phone	Cooperating witnesses
Proof Trump conspired to coordinate during riot	Rudy's comms	Cooperating witnesses from the Willard
Proof Trump used money raised for election integrity for other purposes (fraud)	Campaign finance records Testimony from witnesses, including on stolen documents	

Jack Smith obviously thinks he has the evidence to charge Trump (though the circus involving Will Russall yesterday could have created a few hurdles).

With the obstruction charge – assuming the reports of a “witness tampering” charge really refer to 18 USC 1512(c)(2) – Smith has obviously already secured almost all the Pence-related people whose testimony really matters, including Pence himself. Two key exceptions are Rudy Giuliani and John Eastman. But the testimony of the former was locked in in a two-day proffer a few weeks ago and the testimony of the latter was locked in in sworn testimony in Eastman’s disbarment trial in the same time period.

The one other exception I can think of is Ivanka.

With regards to the mob, Smith can rely on the statements of offense of hundreds of convicted defendants, including people who had a key role in the attack, including the Proud Boys and even some others who played a key role in specific breaches.

That’s my understanding of how you could charge Trump (at least with obstruction) before charging a bunch of his lackeys: the evidence

requires less proof of the conspiring on comms that may still be in filter reviews.

Why is another matter.

First, if you're going to charge Trump you need to do so as soon as possible, because of the election. If you charge Trump alone (though it's not clear that's really happening), you might be able to get to trial before August 2024.

Another reason to charge Trump is that it undercuts his ability to buy silence from other witnesses. If people are no longer protecting Trump, they may be less willing to add to their own legal jeopardy by lying.

It's possible, too, that some of the charges would be prophylactic. If Smith were charging Trump *as well* for attempting to tamper with Cassidy Hutchinson's testimony to J6C – something about which we know she gave testimony last September – it might give Trump somewhat more caution before tampering with the testimony of others.

If Smith charged Trump with attempting to discount Black and Latino voters, as opposed to just all Biden voters, it might raise the stakes on Trump's efforts to disenfranchise minority voters in 2024.

In both cases, such charges might give prosecutors cause to include specific prohibitions in release conditions (though Trump will undoubtedly still be released).

It's still not clear what conduct Smith would charge as a conspiracy (18 USC 371). It could be attempting to install Jeffrey Clark to aid his attempts to discredit the election (privilege reviews for which started in May 2022). It could be the fake electors plot (though I'm not convinced that Smith has locked in the testimony of all relevant witnesses yet). But here, too, charging Trump with conspiracy while identifying as-yet uncharged co-conspirators might lead them to hesitate before helping Trump.

I think, in general, anxious commentators underestimate the degree to which Smith is going to want to lock in each and every witness before charging a certain part of this larger conspiracy. J6C's delay in releasing transcripts actually contributed to the difficulty, and probably added several months of delay in January and February. But if Smith were to charge obstruction on a narrowly targeted Pence-and-the-mob charge, then it would limit the necessary evidence to testimony and evidence DOJ already spent years collecting.

Update: Very belatedly fixed Will Russell's last name.