

“STAND BACK AND STAND BY:” JACK SMITH’S HIDDEN CARDS

Two years ago, I wrote a January 6 post describing how the vastness of the attack makes it unknowable, even for someone who had been tracking it full time.

I have spent the better part of the year working full time, with few days off, trying to understand (and help others understand) January 6. I’ve got a clear (though undoubtedly partial) vision of how it all works – how the tactical developments in the assault on the Capitol connect directly back to actions Donald Trump took. Zoe Tillman, one of a handful of other journalists who is attempting to track all these cases (while parenting a toddler and covering other major judicial developments) has a piece attempting to do so with a summary of the numbers. But both those methods are inadequate to the task.

But thus far, that clear vision remains largely unknowable via the normal ways the general public learns. That’s why, I think, people like Lawrence Tribe are so panicked: because even beginning to understand this thing is, quite literally, a full time job, even for those of us with the luxury of living an ocean away. In Tribe’s case, he has manufactured neglect out of what he hasn’t done the work to know. To have something that poses such an obvious risk to American democracy remain so unknowable, so mysterious – to not be able to make sense of the mob that threatens democracy – makes it far more terrifying.

I know a whole lot about what is

knowable about the January 6 investigation. But one thing I keep realizing is that it remains unknowable.

I wrote the post, in part, hoping to allay the fear many people seemed to have because they couldn't understand the investigation and therefore were sure that DOJ was only investigating MAGA tourists, who at that point made up most of the prosecutions. Since that time, hundreds of assault convictions and three seditious conspiracy trials later, we've learned that DOJ was already investigating three of Trump's co-conspirators, it's just that those investigations didn't *look like* what people were looking for.

I'd like to reprise the theme, again to reassure people.

Two years later, 500 and the all important One defendants later, the investigation remains unknowable.

Specifically, while it seems that my assumption from last summer – that Jack Smith chose to charge just Trump first, presumably in a bid to get to trial before the election – was correct, we have no idea what he plans from here forward. A filing in December even revealed that there are others, besides the six identified in the Trump indictment, that the government plans to treat as unindicted co-conspirators at Trump's eventual trial. Given the prosecution's plan to introduce Trump's shout out – "stand back and stay by" – to the Proud Boys, that suggests DOJ might even treat the seditious militia as Trump's co-conspirators.

We don't know what Jack Smith planned to do with all the other co-conspirators last summer. We don't know what he plans to do with them now.

Unlike the Mueller investigation, we don't even know all the prosecutors Jack Smith has working for him. We didn't even hear that Michael Dreeben had returned to government to work for him until his name appeared on an appellate

brief. There are at least four AUSAs who have not shown up, not recently anyway, in public filings. I'm quite certain they haven't been twiddling their thumbs in the last year.

What we do know, however, is that Jack Smith team members JP Cooney and Molly Gaston both survived the aftermath of the Mueller investigation, the former in dealing with the aftermath of the Roger Stone resignations, and the latter in the aftermath of the Paul Manafort prosecution. They know how Trump pardoned his way out of a Russian conspiracy charge in 2020. They likely have some ideas about how to avoid that this time around (which may be why Smith hasn't indicted any of Trump's co-conspirators yet).

Since Judge Chutkan stayed proceedings for Trump's immunity appeal, Jack Smith's team has continued submitting filings – including the 404(b) notice warning prosecutors would raise Trump's support for the Proud Boys at trial. And it's driving Trump nuts; he even asked Judge Chutkan to hold Jack Smith in contempt for continuing to meet deadlines that she has stayed (issuing a filing complaining that they're issuing filings!). One way to create the opportunity to tell more of the story of January 6, as Trump attempts to keep it out of the news through the primaries, is to indict more people, possibly sub-conspiracies tied to each of Trump's identified co-conspirators.

Jack Smith made a choice last summer to only indict Trump at that time. But if the DC Circuit creates further delays in prosecuting Trump, Smith can make a different choice now.

We don't know what his team has been doing while Gaston and Thomas Windom have been the primary faces of the prosecution. But he has cards left to play.