

IN HIS IMPEACHMENT DEFENSE, TRUMP CITES MIKE PENCE ADMITTING TRUMP MADE AN UNCONSTITUTIONAL DEMAND

Eleven pages into his 75-page impeachment defense, Trump makes this claim:

President Trump did not direct anyone to commit lawless actions,

In context, he's speaking about his speech before the riot, claiming that his invocation that his mobsters "fight" didn't mean he wanted them to fight *illegally*. His defense only addresses the meaning of that word, "fight," in his speech, while treating impeachment over and over as akin to the passage of a law restricting First Amendment protected speech and not the political act that impeachment is.

But this brief, like in the 14-page answer brief he submitted last week, barely addresses one of the times he quite clearly did direct people to commit lawless action, first, when he called Brad Raffensperger and asked him to find him votes that didn't exist.

The article also discusses in passing other "statements" of Mr. Trump as well as a telephone call to the secretary of state of Georgia.

[snip]

The allegation that Mr. Trump should be convicted for "incitement of insurrection" based upon the telephone call to the Georgia secretary of state rests on even shakier ground. The allegations of "threats of death and

violence” come not from Mr. Trump at all; they come from other individuals from the internet, not identified (nor identifiable) in the House Trial Memorandum, who took it upon themselves to make inane internet threats, which were not urged or “incited” by Mr. Trump in any way shape or form.¹⁵⁰ Examining the discussion with the Georgia secretary of state under the standard of “incitement,” leads to the same conclusion as the January 6, 2021 statements of Mr. Trump: there is nothing said by Mr. Trump that urges “use of force” or “law violation” directed to producing imminent lawless action.¹⁵¹

More strikingly, given the greater length of this brief, Trump again completely ignores a key part of the article of impeachment against him: his actions targeting Mike Pence, both his demand that Pence commit an unconstitutional act by throwing out the votes of key swing states, and his comments that specifically riled up the crowd against Pence, even after the rioters started looking for him at the Capitol to assassinate him.

Instead of addressing the actions he took that got Pence targeted for assassination, Trump mentions Pence only in the context of discussions about the 25th Amendment.

The very next day, Speaker Nancy Pelosi and Senate Democratic Leader Chuck Schumer called on Vice-President Pence to invoke the 25th Amendment concluding – without any investigation – that Mr. Trump incited the insurrection and continued to pose an imminent danger if he remained in office as President.¹²

[snip]

First, in an attempt to usurp Constitutional power that is not in any

way hers, the Speaker demanded that Vice-President Michael Pence or the White House Cabinet invoke the 25th Amendment, threatening to launch an impeachment proceeding if they refused. Four days later, on January 11, 2021, an Article of Impeachment was introduced, which charged President Trump with “incitement of insurrection” against the United States government and “lawless action at the Capitol.” See H. Res. 24 (117th Congress (2021-2022)). The Speaker made good on her extortionate threat.

[snip]

After the Article was introduced, Speaker Pelosi again gave Vice President Pence an ultimatum: either he invokes the 25th Amendment within twenty-four hours or the impeachment proceedings would proceed. Vice-President Pence responded in a letter to Speaker Pelosi the following day stating that he would not allow her to usurp constitutional authority that is not hers and extort him (and by extension the Nation) to invoke the 25th Amendment because he believed to do so would not “be in the best interest of our Nation or consistent with our Constitution.”²⁹ Vice-President Pence also noted that Speaker Pelosi was being hypocritical, as she had previously stated that in utilizing the 25th Amendment, “we must be ‘[v]ery respectful of not making a judgment on the basis of a comment or behavior that we don’t like, but [rather must base such a decision] on a medical decision.”³⁰

I suspect Trump’s lawyers will try to defer any questions about Trump’s attacks on Pence by suggesting that Pelosi’s decision to impeach because Pence didn’t invoke the 25th Amendment is *just like* Trump’s incitement of violence targeted at Pence. With their use of the words,

“usurp” and “extort,” Trump’s lawyers grossly overstate the force of language Pence himself used to compare the two:

Last week, I did not yield to pressure to exert power beyond my constitutional authority to determine the outcome of the election, and I will not now yield to efforts in the House of Representatives to play political games at a time so serious to the life of our Nation.

But there are several problems with this: Congress was already intent on impeaching Trump for his actions before the request that Pence intervene. More importantly, even in Pence’s treatment comparing these two, he calls one – Trump’s demand – unconstitutional but the other – Pelosi’s request – a “political game.”

So in one place in his impeachment defense, Donald Trump’s lawyers claim, “President Trump did not direct anyone to commit lawless actions.” Elsewhere, however, they cite a letter in which Mike Pence says he did, that he made a demand, “beyond [his] constitutional authority.”

And with this apparent effort to deflect a key accusation against him, Trump entirely ignores the specific, targeted action he used to lead the mob to attempt to assassinate his Vice President.

**THE INSURRECTION
AFFIDAVITS DON'T
SHOW WHERE THE**

INSURRECTION WAS ORGANIZED

The normally very rigorous Thomas Brewster has a piece purporting to fact-check Sheryl Sandberg's claim, made days after the January 6 insurrection, that the insurrection wasn't *organized* on Facebook.

"I think these events were largely organized on platforms that don't have our abilities to stop hate and don't have our standards and don't have our transparency," said Sheryl Sandberg, Facebook chief operating officer, shortly after the Capitol Hill riots on January 6.

The piece has led both bad faith and good faith actors to grasp on the story to claim that Facebook is responsible for the violence.

Brewster purports to measure that by seeing how many *mentions* appear in the charging documents for the 223 people included on GWU's list of arrestees.

But a few paragraphs later, Brewster admits he's *not* measuring on what platform the riot was organized, but instead which was most popular among rioters.

Whilst the data doesn't show definitively what app was the most popular amongst rioters, it does strongly indicate Facebook was rioters' the preferred platform.

Even *that* is not proven (though it may well prove to be true), but obviously which platform is most used among rioters to boast about the riot is a very different question than on which platform (if any) the insurrection was organized.

Here's why:

- At least half the existing affidavits are a measure of which riot attendees were most likely to be outed and how
- Expect parallel construction
- There are a lot of dangerous rioters who've not yet been charged
- The currently accused in no way represent all the known people who might be considered organizers of the riot or the larger operation
- The existing affidavits are no measure of what platforms actual organizers used to organize

At least half the existing affidavits are a measure of which riot attendees were most likely to be outed and how

The police made just a handful of arrests on January 6, with the biggest component being curfew violators who did not even provably enter the Capitol (and so those non-federal cases should not be included in the analysis of rioters, as Brewster did).

In the four and a half weeks since the riot, the cops have engaged in a kind of triage, arresting those whom they could easily identify and then, over time, prioritizing those who – from video evidence of the insurrection – appeared to have

committed more dangerous crimes. That means in the days after the insurrection, arrests largely focused on the people who appeared the most outlandishly stupid in videos, those whose own social networks of family, work acquaintances, and high school friends disapproved of their participation in the riot and so called the FBI with a tip, or those who identified themselves in media interviews (which often led to family, work acquaintances, and high school friends to then alert the FBI).

To understand the affidavits, it's important to realize that any person who entered the Capitol without a legitimate purpose on January 6 (that includes a number of people who videoed the event but had no media credentials) were committing two crimes, both tied to it being the Capitol. So all the FBI would need to charge someone is to prove that they entered the building.

About half the current arrestees were charged with just these trespassing crimes, yet many of these people were among the first arrested. These people are in no way the organizers of the riot, and many of them are just Trump supporters who were caught up in the crowd. Some even credibly described trying to de-escalate the situation (including one such guy who got arrested because he had the misfortune to show up in videos of the guy who stole Pelosi's lectern).

The measure of how these people were arrested is quite often a measure of the fact that they shared their memories of the day or were caught by others who did. And to the extent that this happened on Facebook, it likely happened *because* Facebook is the platform where people have their broadest social networks, making it more likely that a lot of people who don't sympathize with the riot would have witnessed social media content talking about it. Facebook is where ardent Trump supporters still share networks with people who vehemently oppose him.

In other words, in this initial arrest push, the

people who bragged on Facebook were among the most likely to be arrested precisely because the network includes a broader range of viewpoints. It's a measure of reach – and the political diversity of that reach – and not a measure of the centrality of the platform to the planning or violence.

Expect parallel construction

As noted, in the weeks since the insurrection, some agents at the FBI have obviously shifted to a reverse approach: rather than arresting those against whom tips came in from aggrieved ex-wives and people who were owed money, the FBI started to identify which rioters were the most dangerous and prioritize figuring out who they were.

One type of more dangerous rioter would be those with institutional ties that lead the FBI to believe there might be something more going on. But these are just arrest affidavits, which the FBI is acutely aware will be publicly scrutinized. As every single one of them say, they don't reflect the totality that an Agent might know about the person. And in those cases, we should expect the FBI to parallel construct what they know about people and how they came to know it.

Social media is a wonderful way to do that.

And it does seem that the FBI relied on social media to establish probable cause for such people. Take the Lebanese-born woman who started engaging in the 3% community in November, which the FBI cites to Facebook. Or consider how the FBI pretends they did not know who Nick DeCarlo was until he showed up in Nick Ochs' Twitter feed. Both rely on social media (in the latter case, one piece of evidence is something researchers found on Telegram and posted on Twitter, and so should be chalked up in the "uses Telegram" column).

But measuring how the FBI parallel constructed other knowledge is not a measure of what social media platforms people primarily use.

There are a lot of potentially dangerous rioters who've not yet been charged

As noted, one way the FBI shifted focus after the initial arrests of people identified by their disapproving family members was by identifying people involved in assaults – first of officers (designated by AFO), and then the media (designated by AOM) – and trying to identify them, in part through the use of Wanted posters (BOL0).

To date, the FBI has released 223 BOL0s, of which 40 precede the shift of focus to those involved in assault (and so include people who caught attention for another reason, such as the use of a Confederate or Nazi imagery). The FBI has arrested around 35 people identified in BOL0s, thus leaving around 190 people that the FBI has identified to be of particular interest *based off video images*, that they have not yet arrested.

For what it's worth, I suspect that the FBI has identified a goodly number of these people, and may even have sealed complaints against some of them but is holding off on an arrest to gather more evidence. That is, they can arrest them now, but would prefer not to until they shore up their case. In a number of cases where people were identified off of BOL0s, the people turned themselves into the FBI but denied any physical contact was anything but a love tap (here's one example, but there are others), potentially making it harder to prosecute for the violence.

If and when these people are identified, they may well prove to have used Facebook. But thus far, this group of people has shown better

operational security and (unsurprisingly) a greater likelihood to flee or to destroy evidence.

But whatever their Facebook use, when counting the numbers of the 800 people who committed a trespass crime on January 6 by entering the Capitol, of which 200 have been arrested, it's worth noting that almost another 200 – some of the greatest concern – have not been provably identified by bragging Facebook posts yet.

The currently accused in no way represent all the known people who might be considered organizers of the riot or the larger operation

Thus far, the government has filed the bare outlines of conspiracy charges against both the Oath Keepers (who spoke of a plan they had trained for) and the Proud Boys (who moved in obviously coordinated fashion communicating via radio on January 6). But those conspiracy charges currently include just three and two people, respectively (with a sub-conspiracy charged against two more Proud Boys).

According to claims quoted in charging documents, there were anywhere from 30 to 65 Oath Keepers involved in the riot (including a busload from North Carolina). There are at least three other key Proud Boys that have not been arrested for the riot (Enrique Tarrío, of course, was arrested days earlier for a different racist attack), and about half of those that have were charged with just the trespassing crimes.

In general, these people are not currently identified in BOLO posters.

In other words, this is a set of people –

perhaps another 40 on top of the 190 outstanding B0L0 figures – that the FBI likely considers key suspects.

And that’s just the organizers of the riot. That doesn’t include James Sullivan, who appears to have been in communication – via text – with Rudy Giuliani. It doesn’t include people like Ali Alexander and Rudy and possibly Roger Stone who would tie the riot to the larger effort to delay the vote (which is the object of both the Oath Keeper and Proud Boys conspiracy). We know from Stone’s prosecution, at least, that he was de-platformed long ago and learned to use encrypted apps by August 2016.

In any case, before you can make claims about what platforms were used to organize the insurrection, you first need to identify the universe of people believed to have organized it. Right now, perhaps as few as 20 of the 200 people who’ve been arrested should be considered leaders of it, and there are probably at least another 40 who might be considered organizers of the riot itself who have not been arrested yet.

The existing affidavits are no measure of what platforms actual organizers used to organize

To be sure, both of the groups identified in conspiracies (and Three Percenters) made use of Facebook. As Brewster cited, accused Oath Keeper conspirator Thomas Caldwell posted updates to Facebook during the siege, and the co-conspirators did use Facebook to communicate both publicly and privately before the event. Among those referencing the Proud Boys in affidavits, Andrew Ryan Bennett uploaded video to Facebook, Gabriel Garcia uploaded video to Facebook, and Daniel Goodwin used Instagram and Twitter. As noted above, Nick Ochs had a

campaign Twitter account.

But some of the more substantive *public* communications from both groups, including important communications from before the riot, was posted on Parler. And both groups used other means – Zello for the Oath Keepers and radios for the Proud Boys – to communicate operationally during the day.

With the Proud Boys, in particular, Facebook and Twitter have long tried to exclude them from the platform, both because their speech violated platform guidelines but also because after expulsion the group tried to bypass that expulsion.

Importantly, aside from some quotations from Jessica Watkins' Zello account and those Facebook messages, the FBI hasn't shown what it has of operational communications between these groups, and it's unlikely to do so, either, until trial. The FBI is not going to share how much it knows (if anything) about the operational contacts of these groups until it has to. Which makes any conclusions drawn from what it is willing to show of questionable validity.

Don't get me wrong: I'm happy to argue that Sheryl Sandberg is one of a number of Facebook executives who should be ousted. I agree that Facebook has fostered right wing violence, not least with the settings of its algorithms (which is the opposite of what Glenn Greenwald wants the Facebook problem to be). Because it has such wide breadth, it is a platform where people not already radicalized might get swept up in disinformation.

But I know of little valid evidence yet about Facebook's role in organizing the insurrection, nor is there likely to be conclusive evidence for some time yet.

Update: Changed language to describe Tarrío's alleged vandalism of a traditionally black church to make it clear he is not accused of assaulting another person.

ANOTHER VIOLENT FOOT SOLDIER RADICALIZED BY DONALD TRUMP

In this post, I noted that many of the people who engaged in the most violent action on January 6 were not known to be part of one of the organized militia groups, which seem instead to have set off and channeled the violence of others. I described how the only explanation that Emanuel Jackson gave for twice assaulting cops was that after attending Trump's rally, he followed the crowds to the Capitol and beat up several cops, including with a baseball bat, in order to prevent the certification of the vote.

In updates, I noted how the son of the guy whose dad was pictured carried a Confederate flag through the Capitol punched out windows because, after attending the rally, he followed someone yelling directions in a bullhorn (which could be Alex Jones) and then followed the instructions of someone else to clean out the glass in a window. And a former Marine beat up several cops after he, "got caught up in the moment" after marching down from the Ellipse.

The charging documents from the recent arrest of Kyle Fitzsimons provides



another example of someone who got inspired

by Trump and went onto first grab and then charge the cops trying to protect the Capitol.

The affidavit quotes from a local article, in which he described being "asked" by President Trump to go give weak Republicans the kind of boldness they needed to take back the country.

"The speeches from the morning were overtly preaching the election was not over, there was a path to victory through decertification, there was a plan to delay the certification by the House and Senate and then state legislatures would convene and (certify) the right result." FITZSIMONS stated that as the rally at the Ellipse ended, the crowd was asked by President Trump to walk to the Capitol to "give our Republicans, the weak ones ... the kind of pride and boldness that they need to take back our country."

In another interview he described that "Trump is a lion leading an army of lambs through 'lawfare'"

After the rally he went and changed into his work clothes, a butcher's uniform, then walked to the Capitol and fought the cops until he got hit in the head with a police baton.

Two witnesses who know him describe that before January 6, he was known for his right wing beliefs, his gun ownership, and his racism, but not for being a violent person.

Yet on January 6, after hearing Trump's request to go to the Capitol and embolden other Republicans to steal an election, he did so, violently.

Here's my running list of the people who, as of yesterday, had been charged with intimidating or assaulting police.

1. Daniel Page Adams, whose arrest affidavit describes engaging in a “direct struggle with [unnamed] law enforcement officers” (his cousin, Cody Connell, described the exchange as a “civil war”).
2. Zachary Alam, who pushed cops around as he was trying to break into the Speaker’s Lobby.
3. Matthew Caspel, who charged the National Guard.
4. Scott Fairlamb, who was caught in multiple videos shoving and punching officers (one who whom is identified but not named); Cori Bush has said she was threatened by him last summer.
5. Kyle Fitzsimons, who charged officers guarding the doorway of the Capitol.
6. Alex Harkrider, who after being filmed fighting with police at the door of the Capitol, posted a picture with a crowbar labeled, “weapon;” he was charged with abetting Ryan Nichols’ assault.
7. Michael Foy, a former Marine who was caught on multiple videos beating multiple cops with a hockey stick.

8. Robert Giswein, who appears to have ties to the Proud Boys and used a bat to beat cops.
9. Emanuel Jackson, whom videos caught punching one officer, and others show beating multiple officers with a metal baseball bat.
10. Chad Jones, who used a Trump flag to break the glass in the Speaker's Lobby door just before Ashli Babbitt was shot and may have intimidated three officers who were pursuing that group.
11. Edward Jacob Lang, who identified himself in a screen cap of a violent mob attacking cops and who was filmed slamming a riot shield into police and later fighting them with a red baseball bat.
12. Mark Jefferson Leffingwell, whom a Capitol Police officer described in an affidavit punching him.
13. Patrick Edward McCaughey III, who was filmed crushing MPD Officer Daniel Hodges in one of the doors to the Capitol.
14. Ryan Nichols, who was filmed wielding a crowbar and yelling, "This is not a

peaceful protest," then spraying pepper spray against police trying to prevent entry to the Capitol.

15. Dominic Pezzola, a Proud Boy who stole a shield from cops.
16. Ryan Samsel, who set off the riot by giving a cop a concussion; he appears to have coordinated with Joe Biggs.
17. Robert Sanford, who was filmed hitting Capitol Police Officer William Young on the head with a fire extinguisher.
18. Peter Schwartz, a felon who maced several cops.
19. Barton Wade Shively, who pushed and shoved some police trying to get into the Capitol, punched another, then struck one of those same cops later and kicked another.

RASKIN'S GAMBIT

Until today, the conventional wisdom was that Senate Republicans would hide behind their claim that it was not constitutional to try Donald Trump on the single count of impeachment for inciting an insurrection, and Democrats would

lose badly in an effort to convict Donald Trump. That's still likely.

But Donald Trump's inability to follow good legal advice and Jamie Raskin's exploitation of that weakness may change that.

In response to the opening brief Trump's lawyers submitted earlier this week, in which Trump went beyond a claim that the entire trial was unconstitutional and feigned responses to the actual facts alleged, Lead Impeachment Manager Raskin invited Trump to testify.

Two days ago, you filed an Answer in which you denied many factual allegations set forth in the article of impeachment. You have thus attempted to put critical facts at issue notwithstanding the clear and overwhelming evidence of your constitutional offense. In light of your disputing those factual allegations, I write to invite you to provide testimony under oath, either before or during the Senate impeachment trial, concerning your conduct on January 6, 2021. We would propose that you provide your testimony (of course including cross-examination) as early as Monday, February 8, 2021, and not later than Thursday, February 11, 2021. We would be pleased to arrange such testimony at a mutually convenient time and place.

Presidents Gerald Ford and Bill Clinton both provided testimony while in office—and the Supreme Court held just last year that you were not immune from legal process while serving as President—so there is no doubt you can testify in these proceedings.

[snip]

If you decline this invitation, we reserve any and all rights, including the right to establish at trial that your refusal to testify supports a

strong adverse inference regarding your actions (and inaction) on January 6, 2021.

It's not clear which specific claims Raskin has in mind. The letter specifically asks about January 6 and not Trump's claims he fashions as "Answer 4," that he didn't lie about winning the election – though Trump reiterates that claim in Answer 6, claiming that he denies that his January 6 expression of "his opinion that the election results were suspect ... is factually in error." Still, he presents that as an opinion, not a knowingly false claim. Then there's a claim about his January 2 call to Brad Raffensperger, so unrelated to the January 6 questions mentioned in Raskin's letter, but which would nevertheless make great fodder for questioning under oath.

The more factual claims about January 6 that Trump made include:

- It is denied that President Trump intended to interfere with the counting of the Electoral votes. [Answer 6]
- It is denied he threatened the integrity of the democratic system, interfered with the peaceful transfer of power, and imperiled a coequal branch [sic] Government. [Answer 8]
- To the extent there are factual allegations made against the 45th President of the United States contained in Article I that are not specifically addressed above, the allegations are denied and

strict proof at time of hearing is demanded. [Answer 8]

To some degree, for Raskin's gambit to work, which false claims in specific he has in mind don't matter.

But given that Trump's response entirely blew off the allegations about Mike Pence in the article of impeachment, which include factual observations about Trump riling up the mob against Pence in particular, Trump has effectively, with the language in the last bullet above, denied an attack on Pence which goes well beyond any First Amendment speech.

As I said, though, it doesn't matter, because the gambit (even ignoring that Trump is constitutionally incapable of telling the truth, under oath or not) is about forcing Trump to adopt an impossible position. The *safest* response to this letter would be to refuse, and let the House assume Trump's entire claim to offering any factual response is false (as it is). But because Trump is Trump, he's likely to choose between two more dangerous options:

- Invoke the Fifth, thereby admitting that his First Amendment speech might expose him criminally
- Testify, thereby undoubtedly setting up sworn lies

The former will get him in trouble for any civil suits arising out of the January 6 insurrection, the very thing that (per reports) Trump was trying to avoid with his decision not to self-pardon.

The latter will set Trump up for (at best) a perjury prosecution and at worst more substantial criminal prosecution based on his responses. Plus, it might pave the way for Mike Pence testimony, which would be compelling.

And by inviting Trump this way, without a subpoena, Raskin avoids all the drama Lindsey Graham has been trying to set up about contentious votes on witnesses. It is Trump's choice, with no coercion.

Trump got through the Mueller investigation and Impeachment 1.0 by successfully avoiding something like this. It may finally be that the third time's a charm.

Update: Trump has responded, claiming without legal citation that there is no negative inference in this proceeding.

DOJ MOVES TOWARDS PARALLEL CONSPIRACY PROSECUTIONS OF THE OATH KEEPERS AND PROUD BOYS

As noted, on January 27, DOJ indicted three Oath Keepers, Thomas Edward Caldwell, Donovan Ray Crowl, and Jessica Marie Watkins, in a conspiracy to hinder Congress' certification of the Electoral College vote. FBI seems to be working on identifying the other people who were marching in formation with Watkins and Crowl on January 6, as well as building out a larger prosecution team (which includes, among others, one of the women who worked the Russian side of the Mueller cases).

Meanwhile, yesterday, DOJ announced the arrest of yet another Proud Boy – Ethan Nordean – and the indictment of two other Proud Boys, Nicholas DeCarlo and Nicholas Ochs, in a conspiracy to hinder Congress' certification of the Electoral College vote. Of particular note, in DOJ's request for detention with Nordean, they invoked

the list of crimes that can merit a terrorist enhancement. (h/t FM)

The United States moves for pretrial detention of the Defendant, pursuant to 18 U.S.C. § 3142(e) and (f)

1. **Eligibility of Case.** This case is eligible for a detention order because this case involves (check all that apply):

- Crime of violence (18 U.S.C. § 3156).
- Crime of Terrorism (18 U.S.C. § 2332b (g)(5)(B)) with a maximum sentence of ten years or more.

They don't say *which* of the terrorist enhancement crimes they have in mind, but several are possibilities:

- ~~351 (relating to congressional, cabinet, and Supreme Court assassination and kidnaping)~~
- ~~844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death)~~
- ~~930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon)~~
- ~~1114 (relating to killing or attempted killing of officers and employees of the United States)~~
- ~~1203 (relating to hostage taking)~~
- ~~1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnaping)~~
- ~~2332f (relating to bombing of public places and~~

~~facilities)~~

Update, 2/6: The detention memo for Nordean explains they're using his 1361 charge to apply the terrorism enhancement.

That rebuttable presumption applies to Defendant because 18 U.S.C. § 1361 is specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B) and carries a maximum sentence of ten years in prison where, as here, damage or attempted damage to property exceeds \$1,000.

All of which is to say the government is treating Nordean's arrest like he's part of a terrorist group.

As suggested above, the DeCarlo and Ochs conspiracy indictment parallels the one obtained against the Oath Keepers.

The Object of the conspiracy is the same: "to stop, delay, and hinder Congress' certification of the Electoral College vote." And several of the overt means are the same: agreeing to participate in a January 6 operation, taking planning steps together, and forcibly storming past the police barricades to enter the Capitol.

Proud Boys <i>Nicholas DeCarlo</i> <i>Nick Och</i>	Oath Keepers <i>Thomas Caldwell</i> <i>Donovan Crowl</i> <i>Jessica Watkins</i>
Stop, delay, hinder Congress' certification of the Electoral College vote	Stop, delay, hinder Congress' certification of the Electoral College vote
Agreeing to participate in Jan 6 operation (a)	Agreeing to participate in Jan 6 operation (a)
Taking steps to plan (b)	Coordinating in advance (c)
Forcibly storming past barricades and other LE officers (e) <i>William Pepe</i> <i>Dominic Pezzola</i>	Forcibly storming past barricades and other LE officers (g)
Fundraising (c)	Recruiting as large a following as possible (b)
Traveling from other states (d)	Using walkie-talkie-like application (d)
	Bringing paramilitary gear (f)
	Concealing evidence (h)

The conspiracy indictment of Dominic Pezzola and William Pepe effectively charged they conspired to achieve one of the means in the DeCarlo and Ochs indictment, to,

obstruct, influence, impede, and interfere with law enforcement officers engaged in their official duties in protecting the U.S. Capitol and its grounds during the demonstrations planned for January 6, 2021.

The government has not, yet, charged Pepe with 18 USC 1512, obstructing an official proceeding (meaning the vote certification).

Meanwhile, the Nordean complaint cites the charges against Pezzola, Joe Biggs, and Robert Gieswein, tying all their actions together without (yet) claiming an agreement to act together.

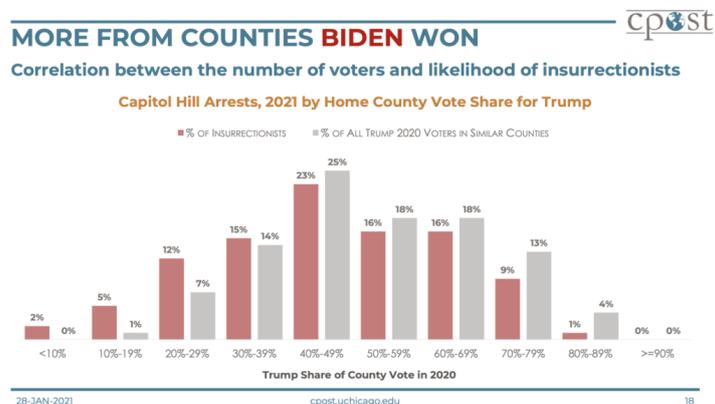
But you can see where this is heading: to two parallel conspiracy prosecutions, each sharing the same object – to halt the vote certification – and each also sharing several of the same

overt acts.

These conspiracy indictments are, for now, based off personal communication between the co-conspirators, for example the Zello communications that Watkins sent. But as I noted in the Oath Keepers post, there is someone with whom both these groups agreed with and pursued some of the same steps as: Donald Trump. These conspiracy indictments may build little by little based off what each group has done among themselves, but the framework for a much broader conspiracy is already in place.

THE JANUARY 6 INVESTIGATION REMAINS IN AN EARLY STAGE

A lot of people are talking about this report comparing the demographics of the January 6 arrestees with those of past right wing extremist arrests. The report has interesting data – most notably showing that those arrested after January 6 were disproportionately from counties that Biden won.



That said, the methodology behind the comparison is flawed because what would get someone arrested at a normal white supremacist event and

what would get them arrested in the wake of January 6 are totally different.

Partly as a way to explain why – and to answer some questions I keep getting – I’d like to talk about what we know of the investigation.

Chain-of-command

First, let’s review who is in the chain-of-command of the investigation.

The investigation is being conducted out of FBI’s Washington Field Office, overseen by Steven M. D’Antuono, and the DC US Attorney’s Office, led by Acting US Attorney Michael Sherwin. Sherwin was Jeffrey Rosen’s hand-selected replacement for Bill Barr flunky Timothy Shea (who in turn replaced Jesse Liu, who did a good job and so was ousted), but unlike Shea (and Barr and Rosen), Sherwin is a career prosecutor with a background on national security cases. And while Sherwin oversaw some politicized shit (notably the later parts of the Mike Flynn gambit), others were involved in the day-to-day, which means, in part, that Sherwin doesn’t necessarily know about the altered documents and whatnot.

In any case, Ken Kohl, a fairly problematic career prosecutor in DC who *was* personally involved in the Flynn corruption, hasn’t been seen in any of the statements or court filings since the first days of the investigation, when he claimed the investigation wouldn’t incorporate those who incited the attack.

There might have been a concern in the first weeks of investigation that Trump’s dead-enders would limit it. But at this point, such a move would be reported on. Moreover, the top political appointee in DOJ until Merrick Garland or Lisa Monaco are confirmed is John Carlin, who served as Obama’s National Security Division head for the last two years of his Administration. He was a long-time prosecutor himself and would be as comfortable overseeing a

terrorism investigation like the DC one as Monaco will be.

It's unclear when Biden will get around to replacing Trump's US Attorneys, including Sherwin. But until that time, every single indictment of a Trump terrorist will be signed by a Trump appointee, which may undercut any claims of politicization. And the pace or focus of the investigation is unlikely to change when Garland is finally confirmed (which might be just days away in any case). The major thing he might approve would be the inclusion of Trump or any other political target, and possibly of a broader seditious conspiracy case – but the latter, at least, already seems likely under Sherwin's supervision.

The prosecution teams are still falling into place right now. Among the prosecutors for the Zip-Tie guy, though, is one of the people who prosecuted Maria Butina. Among the prosecutors for the Oath Keeper conspiracy is one of the women brought into the Mueller team to deal with the Russian defendants.

Triage

I get asked a lot whether the investigation will pick up once Garland is confirmed.

No.

One reason it won't is because the investigation is already moving at a remarkable clip; even without certain bottlenecks due to COVID (such as limited grand jury time and the difficulties created by dial-in court hearings), it would be hard to investigate much more quickly.

I think people may misunderstand that because of the steady clip of arrests since the attack, with around 178 of around 800 people who were in the Capitol during the attack (181 have been charged so far, but that includes a few people who issued threats but didn't make it into the Capitol).

DOJ has said that they've been mostly arresting the people who mugged on social media bragging about the insurrection. What DOJ did in these first weeks, then, is to focus on all the people whose Facebook friends tipped off the FBI or who did interviews or who otherwise came to easy attention. Many of those people (about half of all the people who've been arrested so far) have been charged with just the two trespassing statutes that everyone who stepped foot in the Capitol got charged with, 18 USC 1752 and 40 USC 5104. This is one reason why the study on demographics is not a sound comparison: because literally everyone who stepped in the Capitol committed that trespassing crime, and many of the people who did will never be charged with anything but misdemeanor trespassing charges.

Those people may have loathsome beliefs or be adherents to a cult (whether QAnon or Trump). But it seems that if people just rushed in with the crowds and didn't damage anything and didn't assault cops and weren't privy to or instrumental in a plan to disrupt the vote, it'll end there, with misdemeanor charges.

That said, as I laid out here, DOJ seems to be adding, at a minimum, 18 USC 1512(c)(2) charges for interfering with the certification of the vote to a subset of those initially charged with just the misdemeanors. They seem to be doing so with those who had a bigger role in delaying the vote count. If that's all these people are charged with (a number are also charged with property damage or assault) and they don't have a record, they might be facing 41 to 51 months in prison. I imagine there are some borderline people whom DOJ is suggesting should plead now to those misdemeanor charges to avoid the felony, and I imagine the felony charge(s) will be used to get some people to cooperate and to support keeping others in jail pre-trial.

Already for these defendants, we may not discover what DOJ saw that led them to believe the person merited more than a trespassing charge. In most cases, the FBI will be obtaining

more legal process to understand better why a person showed up at the Capitol, what they did there, and what network got them to go to the riot in the first place, as well as any substantial ties to that network.

In other words, it's likely the 1512 charge is itself a midway point, perhaps a terminal charge for those who were conspiring with others to overturn democracy, perhaps a bookmark as DOJ conducts further investigation.

Sealed investigative steps

Meanwhile, the FBI is conducting further investigation of the right wing networks that planned this attack, steps we're just seeing hints of, such as with this report on a search of the homes of two people who organized the January 5 rally (and I've heard of a few more that haven't been publicly reported).

The FBI recently raided the homes of two men who sponsored an invective-laced rally near the US Capitol a day before the deadly insurrection, the first known search warrants involving people who organized and spoke at rallies preceding the attack.

[snip]

FBI spokeswoman Laura Eimiller confirmed that federal agents executed search warrants last week at two properties in Orange County, California, which public records indicate belong to Russell Taylor and Alan Hostetter. The two men run the American Phoenix Project, which co-sponsored a pro-Donald Trump rally near the Supreme Court on January 5, one day before the attack.

Neither man has been charged with any crimes.

Footage of the rally shows the men spewing militant vitriol: Hostetter told

the crowd to prepare for “war tomorrow” against “vipers” in Congress who refused to nullify President Joe Biden’s win. Taylor said, “We will not return to our peaceful way of life until this election is made right.”

With anyone who didn’t make it inside the Capitol, the government would need to do more to charge them. And for some networks (for example, we know there were around 40 Oath Keepers at the rally, yet only 3 have been charged), the government may want to wait before it starts charging one after another person. It may pick and choose which members of a known network – like the Proud Boys – it charges when.

The thing is, a lot of these people are going to have better operational security than the people who posed for selfies (or managed to destroy evidence). A lot of them are going to be somewhat more difficult to implicate in the insurrection. And a lot of the investigative work will take more time, potentially a lot more time (and require cooperators). You shouldn’t want DOJ to rush it because it’s the kind of thing that good lawyers will mount a First Amendment challenge to.

It will take some time. But that’s not because Billy Barr has come back from whatever corporate boardroom he’s sitting in and sabotaged things. It will take some time because it will take some time.

THE SOFT BIGOTRY OF EXPECTING THE COMMANDER IN CHIEF

TO ONLY TWEET

Based on what source does the lawyer for Donald Trump – a client who never listened to security briefings when he used to be President – state (in an interview with Maggie Haberman, but not in his written defense) that the January 6 insurrectionists planned their attack in advance?

Mr. Schoen pointed to another potential argument that could help Mr. Trump, one not related to free speech: that at least some of the Trump supporters who stormed the Capitol planned their attack in advance, suggesting that Mr. Trump was not the inciting force.

“I have no reason to believe anyone involved with Trump was in the know,” he said of the violence that unfolded at the Capitol.

This defense doesn't help Doug Schoen as much as he thinks. After all, the House brief lays out how, even before the Proud Boys were overtly planning for the insurrection (and meeting with Lindsey Graham and finding a spot on a tour of the White House), Trump had called on the extremist group to

During a debate on September 29, for instance, he told the Proud Boys– a violent extremist group with ties to white nationalism–to “stand back and stand by.”⁴⁸

[snip]

On January 2, for example, Fox News reported on a social media declaration by Proud Boys Leader Enrique Tarrio that the Proud Boys would come to the January 6 rally prepared for violence.⁵⁹ Another Proud Boys organizer said, “We are going to smell like you, move like you, and look like you. The only thing we'll do

that's us is think like us! Jan 6th is gonna be epic."60

As someone who has spent much of the last four weeks tracking what is publicly known about the terrorist attack, anyone following closely enough to know how the Proud Boys, especially, plotted in advance also knows that Trump was coordinating with them going back months and his rat-fucker Roger Stone was coordinating with them even longer, also knows that the mobs breaking into the Capitol timed their move closely with (among other things) Trump's speech, and knows as well that Trump and Rudy were both coordinating with events on the Hill using the mob as a delaying tactic.

But Schoen seems to be considering talking about what someone who refused briefing knew and did not know about an attack while he was still President.

I especially find Schoen's certainty about what an ongoing investigation shows given a fairly remarkable passage in the House trial brief. There's an 11-paragraph section describing, "President Trump's Dereliction of Duty During the Attack." The first describes how Trump watched in delight.

As armed insurrectionists breached the Capitol—and as Vice President Pence, the Congress, and the Capitol Police feared for their lives—President Trump was described by those around him as "borderline enthusiastic because it meant the certification was being derailed."141 Senior administration officials described President Trump as "delighted" and reported that he was "walking around the White House confused about why other people on his team weren't as excited as he was as you had rioters pushing against Capitol Police trying to get into the building."142

But it's another five paragraphs before the House brief mentions that Trump was the Commander in Chief.

During this time, not only did President Trump fail to issue unequivocal statements ordering the insurrectionists to leave the Capitol; he also failed in his duties as Commander in Chief by not immediately taking action to protect Congress and the Capitol. This failure occurred despite multiple members of Congress, from both parties, including on national television, vehemently urging President Trump to take immediate action.

That is, the House brief focuses on what Trump did or didn't tweet, and what victims he never called (while calling Tommy Tuberville to coordinate his delaying tactics).

But it barely mentions that Trump sat in the White House watching an attack on the Nation's Capitol – one his lawyer now suggests he had some knowledge of – and he did literally nothing to intervene. True, there is a thoroughly unreliable Vanity Fair piece quoting Trump's flunkies claiming that Trump made preparations the night before. But that account doesn't match the known events, nor does it accord with the long delay in deploying the Guard troops.

In the middle of the impeachment case against Trump is a tacit admission not just that Trump did nothing as he watched a terrorist attack on the Capitol, but no one expected him to be able to do more than Tweet.

The former President's defense claims, with no proof, that he faithfully executed his duty to protect and defend the Constitution and served to the best of his ability.

To the contrary, at all times, Donald J. Trump fully and faithfully executed his duties as President of the United States, and at all times acted to the

best of his ability to preserve, protect and defend the Constitution of the United States, while never engaging in any high Crimes or Misdemeanors

[snip]

It is denied he betrayed his trust as President, to the manifest injury of the people of the United States. Rather, the 45th President of the United States performed admirably in his role as president, at all times doing what he thought was in the best interests of the American people. The 45th President believes and therefore avers that in the United States, the people choose their President, and that he was properly chosen in 2016 and sworn into office in 2017, serving his term to the best of his ability in comportment with his oath of office.

Perhaps that's right. But if that's true, it's a confession that when the nation's capital came under attack, Trump was helpless to do the least demanded of him as Commander in Chief.

Yes, the case against Trump is deeply rooted in his Tweets inciting terrorists and he should be impeached based just on those and his speech. But along the way, all sides seem to admit that Trump didn't even consider doing anything as Commander in Chief as the country was attacked.

THE MOB PARTY

Responding to the calls for understanding coming from unctuous Republicans, I have once again made an effort to understand the freak show that is the Republican party of today. Tradition dictates a separation between the relatively normal politicians, people like Mitt Romney,

Brad Raffesnperger, and Susan Collins, and the rabble we call the base of the party. This is an artificial distinction. The entire party fears and loves the base, or at least tolerates it, because the base is their sole hope for power.

There are two parts to the base: the action wing and the support wing.

The support wing is composed of two parts: Sympathizers, those who agree with the action wing but haven't yet joined in because of age or fear of consequences; and Normies, who really can't stand any of the rest but need their votes to gain power. Even the vulgar Trump thought his Capitol rioters were low class.

The action wing consists of three main groups, the QQQrazies, the Evangelical Militants, and the Armed Thugs. The QQQrazies are a crowd of gullible people sucked into a reality-denying mash-up of recycled blood libels created by an anonymous Q. [1] The principal lie is a fantasy lurking in the diseased parts of society and translated into less obvious anti-Semitism. The QQQrazies believe certain Democratic politicians and liberal elites drink the blood of children, or use them in some hideous satanic ritual, or keep them for sexual abuse, and that Trump is going to arrest them and either hang them in a public spectacle, or send them to Guantanamo. Or maybe both. The idea that Trump would lift a finger for anyone besides himself is laughably stupid.

The Evangelical Militants are discussed in detail here. The Elmer Gantries from the religio/political segment of Evangelicals decided that The Almighty sent Trump to lead the way to the New Jerusalem. They authorized and directed their flocks to vote for a thrice-married, porn-star screwing, narcissistic reality TV performer, and then doubled down at every step of Trump's increasingly obvious fascism. Then they authorized their flock to support his insurrection.

Most of these Evangelical Militants and

QQQrazies are relatively harmless. They served as fodder in the Capitol Insurrection, and provided cover for the real dangers, the Armed Thugs. This group includes the Proud Boys, the 3 Percenters, the Oath Keepers, the Boogaloo Bois, and the wannabes like a the dolts on TheDonald.win, now Patriots.win. The Armed Thugs also include other militias like the people who attacked the Michigan legislature, and those who allegedly hatched plans to murder the Governor of Michigan. Trump worked to prevent law enforcement from keeping close watch on these people, insisting that right-wing terrorism was nothing compared to Antifa, whatever that is. It's becoming clear that the Armed Thugs were the really dangerous people in the Capitol Insurrection.

The active wing of the Base is not interested in politics. They just want what they want. [2] They have no actual policy goals, and no reason to seek power, except to deny it to others.

So far, I've just described the Base. On its own, it's a formless mob, capable of eruptions of violence and individual acts of terror but not an existential threat to democracy. Like any mob, it needs leadership before it becomes truly dangerous. So I turn to the organizational structure.

Trump is the Capo dei Capo, the undisputed and only leader. The mob is devoted to him, attentive to his every word, his every desire.

His Consigliere are Josh Hawley and Ted Cruz. They are both graduates of elite universities and law schools, and served in SCOTUS clerkships. Cruz earned his bona fides by kissing the ring after Trump insulted his father and his wife in ugly personal terms; he's a weakling. Hawley never crossed Trump. He's a self-motivated lickspittle. They create spurious arguments that serve as crutches for the weaker Republican Senators, who use them as a pretend justification for their own ring-kissing.

The muscle is provided by Lauren Boebert and

Marjorie Taylor-Greene, who carry big guns and talk like gangsters about their rights and the magnificence of their Capo.

Matt Gaetz is Fredo. There are also many sub-Fredos. There's Mo Brooks and Madison Cawthorn, who showed up at Trump's incitement rally to scream at the mob to go forth and defend freedom against the grave danger posed by majority rule. There's Rudy Giuliani, sweating in the role of the horse's behind, the part with no head. There's the Trump spawn, Don Jr and Eric, who hold coats and pretend to be real boys.

There it is folks, the Party of Lincoln has devolved into the Mob Party.

=====

[1] Apparently our vaunted spies can't figure out who Q is.

[2] Astonishingly, 19 of the insurrectionists were elected officials according to the New York Times. Also, there were cops and military among the rioters.

TRUMP'S IMPEACHMENT DEFENSE IS SILENT ABOUT HIS UNCONSTITUTIONAL DEMAND OF MIKE PENCE

There are some weaknesses and gaps in the House impeachment case against the former President (which I'll probably return to).

But there's one giant gap in Trump's defense.

Generally, Trump argues three things: his incitement was speech protected by the First Amendment. The House moved too quickly to impeach but having impeached him while he was

still President the Senate can't now try him, as required by the Constitution. Along the way he makes a soft case that his attempts to undermine the election results can't be proven to be unjustified (in at least two places, those claims are demonstrably false).

But I'm most struck by Trump's silence about his treatment of Mike Pence.

The House brief mentions Pence, by title and sometimes by name, 36 times. Those mentions include a description of how Pence was presiding over the counting of the electoral vote, how he fled when Trump's mobsters flooded into the Capitol, how the attackers targeted him by name, how Secret Service barely kept him safe, how Trump's own actions made Pence's danger worse.

The House brief dedicates a section to how Pence refused to do what Trump explicitly asked him to do, to unilaterally discount certain electoral votes.

C. Vice President Pence Refuses to Overturn the Election Results

By the time the rally began, President Trump had nearly run out of options. He had only one card left to play: his Vice President. But in an act that President Trump saw as an unforgivable betrayal, Vice President Pence refused to violate his oath and constitutional duty—and, just hours later, had to be rushed from the Senate chamber to escape an armed mob seeking vengeance.

In the weeks leading up to the rally, President Trump had furiously lobbied Vice President Pence to refuse to count electoral votes for President Biden from any of the swing states.⁶⁸ These demands ignored the reality that the Vice President has no constitutional or statutory authority to take that step. Over and over again, President Trump publicly declared that if Vice President Pence refused to block the Joint Session

from finalizing President Biden's victory, then the election, the party, and the country would be lost. "I hope Mike Pence comes through for us, I have to tell you," President Trump said in Georgia on January 4.⁶⁹ The next day, he tweeted: "If Vice President @Mike_Pence comes through for us, we will win the Presidency."⁷⁰ President Trump reiterated this demand just hours before the rally: "States want to correct their votes, which they now know were based on irregularities and fraud, plus corrupt process never received legislative approval. All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!"⁷¹ On the morning of January 6, President Trump reportedly told Vice President Pence, "You can either go down in history as a patriot, or you can go down in history as a pussy."⁷²

Later that day, while President Trump was speaking at his rally, Vice President Pence issued a public letter rejecting President Trump's threats. "It is my considered judgment," he wrote, "that my oath to support and defend the Constitution constrains me from claiming unilateral authority to determine which electoral votes should be counted and which should not."⁷³

This letter sounded the death knell to any peaceful methods of overturning the election outcome. It was well known that the House and Senate were going to count the lawfully certified electoral votes they had received. President Trump's efforts to coerce election officials, state legislatures, the DOJ, Members of Congress, and his own Vice President had all failed. But he had long made it clear that he would never accept defeat. He would fight until the bitter end. And

all that remained for President Trump was the seething crowd before him—known to be poised for violence at his instigation—and the Capitol building just a short march away, where Vice President Pence presided over the final, definitive accounting of President Trump’s electoral loss.

The House brief describes how, even as Pence released his letter saying that he could not, constitutionally, do what Trump asked, Trump demanded again that the Vice President do anything besides certify the vote.

He also demanded again that Vice President Pence illegally interfere with the work of the Joint Session—a position that the Vice President rejected even as President Trump spoke.

The House brief then describes how the rioters threatened to, “hang Mike Pence” and left targeted threats for him.

Videos of the events show that dozens of the insurrectionists specifically hunted Vice President Pence and House Speaker Nancy Pelosi—the first and second in the line of Presidential succession, respectively. “Once we found out Pence turned on us and that they had stolen the election, like, officially, the crowd went crazy,” said one rioter. “I mean, it became a mob.”⁹⁸ Rioters chanted, “Hang Mike Pence!”⁹⁹ Another shouted, “Mike Pence, we’re coming for you ... fucking traitor!”¹⁰⁰

[snip]

One of them shouted “Trump won that election!” on the Senate dais where Vice President Pence had presided.¹¹⁵ Another rioter climbed onto the dais, announcing that “I’m gonna take a seat in this chair, because Mike Pence is a

fucking traitor.”¹¹⁶ He left a note on the Vice President’s desk stating, “ITS ONLY A MATTER OF TIME / JUSTICE IS COMING.”¹¹⁷

It describes how, even as the attack was going on, Trump continued to complain that Pence had upheld his own oath to the Constitution.

Just over thirty minutes later, at 2:24 PM, while rioters were still attacking police and after Vice President Pence had been evacuated from the Senate floor, President Trump again tweeted to excoriate the Vice President for refusing to obstruct the Joint Session: “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution.”¹⁴⁴ President Trump thus singled out Vice President Pence for direct criticism at *the very same time* the Vice President and his family were hiding from a violent mob provoked by President Trump. [emphasis original]

In other words, a key part of the House brief describes Trump giving Pence an illegal order, and then, after Pence refused to follow that order and announced he would do his own Constitutional duty, Trump took actions to focus the anger of the mob on his own Vice President.

It’s not just what Trump said *about* Pence, the incitement of an assassination attempt against his Vice President that Trump claims is protected by the First Amendment, but it’s about an illegal order Trump gave to Pence, which Pence duly ignored.

That order was unconstitutional, and as such is not protected by the First Amendment.

Trump’s brief, by contrast, mentions the Vice President (only by title) just three times, two of which are simply citations from the House brief. The sole mention of the man he almost got

hanged involves a concession that the Vice President was, indeed, presiding over the counting of the votes.

It is admitted that on January 6, 2021 a joint session of Congress met with the Vice President, the House and the Senate, to count the votes of the Electoral College.

But in response to the second citation from the House brief mentioning Pence, Trump instead pivots to defending the Republican members of Congress challenging state results. As part of that discussion, Trump denies any intention of interfering with the counting of Electoral votes. That denial focuses exclusively on the actions of Members of Congress, not Pence.

6. He also willfully made statements that, in context, encouraged – and foreseeably resulted in – lawless action at then Capitol, such as: “if you don’t fight like hell you’re not going to have a country anymore.” Thus, incited by President Trump, members of the crowd he had addressed, in an attempt to, among other objectives, interfere with the Joint Session’s solemn constitutional duty to certify the results of the 2020 Presidential election, unlawfully breached and vandalized the Capitol, injured and killed law enforcement personnel, menaced Members of Congress, the Vice President, and Congressional personnel, and engaged in other violent, deadly, destructive, and seditious act.

Answer 6: Admitted in Part, denied in part. It is admitted that persons unlawfully breached and vandalized the Capitol, that people were injured and killed, and that law enforcement is currently investigating and prosecuting those who were responsible. “Seditious acts” is a term of art with a legal meaning and the use of that phrase in

the article of impeachment is thus denied in the context in which it was used. It is denied that President Trump incited the crowd to engage in destructive behavior. It is denied that the phrase "if you don't fight like hell you're not going to have a country anymore" had anything to do with the action at the Capitol as it was clearly about the need to fight for election security in general, as evidenced by the recording of the speech. *It is denied that President Trump intended to interfere with the counting of Electoral votes.* As is customary, Members of Congress challenged electoral vote submissions by state under a process written into Congressional rules allowing for the respective Houses of Congress to debate whether a state's submitted electoral votes should be counted. In 2017, Democratic Members of Congress repeatedly challenged the electoral votes submitted from states where President Trump prevailed. In 2021, Republican Members of Congress challenged the electoral votes submitted from states where President Biden prevailed. The purpose of the Joint Sessions of Congress in 2017 and on January 6, 2021 was for Members of Congress to fulfill their duty to be certain the Electoral College votes were properly submitted, and any challenges thereto properly addressed under Congressional rules. Congress' duty, therefore, was not just to certify the presidential election. Its duty was to first determine whether certification of the presidential election vote was warranted and permissible under its rules. [my italics]

Trump undoubtedly solicited Members of Congress to do just that, challenging individual states, which was itself an abuse of power (indeed, one

weakness of the House brief is they don't mention Rudy Giuliani's second attempt to call Tommy Tuberville asking for a specific delay on vote counting, which shows that Trump was indeed trying to use the mob to delay the certification).

But Trump also made an explicit demand of Pence, one Pence refused. That demand, by itself, was proof that Trump intended to interfere with the Constitutional counting of votes.

And he doesn't address that – speech which is in no way protected – in his defense.

Nor does he address how he almost got Pence killed.

THE SELFIE COPS: OBSTRUCTING AN OFFICIAL PROCEEDING

Yesterday, DOJ unsealed an indictment against the two selfie cops, Thomas Robertson and Jacob Fracker. The two were originally charged on January 12 – among the first to be charged – after they shared pictures of their exploits with colleagues at the Rocky Mount, VA police department, who in turn alerted the FBI.

Both are military veterans and Fracker remained in the VA National Guard when he was arrested.

The two were originally charged with two trespassing charges, 18 USC 1752 and 40 USC 5104. But the indictment adds the more serious obstruction charge DOJ has used against other more dangerous defendants, 1512(c)(2), along with an aiding and abetting charge for the same, 18 USC 2. That's a felony that, if they're convicted, will mean the two men will no longer be able to own guns (and probably won't work in

law enforcement anymore).

I want to look at how DOJ seems to be using that charge, because I expect more people will have it added as their case move to indictment.

The charge is an unusual application of what is normally treated as a witness tampering statute, which most people think of in conjunction with investigations and prosecutions. But the certification of the vote is every bit as much an "official proceeding" as an investigation or trial is. The standard boilerplate being used in insurrectionist charging documents establishes that the vote certification was suspended from 2:20PM, literally minutes after rioters first breached the Capitol, until shortly after 8PM.

Shortly thereafter, at approximately 2:20 p.m. members of the United States House of Representatives and United States Senate, including the President of the Senate, Vice President Mike Pence, were instructed to—and did—evacuate the chambers. Accordingly, the joint session of the United States Congress was effectively suspended until shortly after 8:00 p.m. Vice President Pence remained in the United States Capitol from the time he was evacuated from the Senate Chamber until the sessions resumed.

Up until the indictment against the cops was unsealed, DOJ had used the 1512 charge primarily with people who, in their charging documents, were shown to have done more (there were around 28 before these cops were charged with it). They include:

- The Oath Keeper defendants
- Many of the Proud Boy defendants
- Some, but not all the people, who were accused of assault, damaging property,

- or interfering with cops
- Those – like Gina Bisignano and Riley Williams – who were organizing traffic
 - People – like William Calhoun – whose promise of violence and intent to interfere with vote counting was explicit
 - People – like Leo Kelly – who got to the Senate or Speaker’s lobby (though not all who did were charged with 1512)

Aside from serving as a way to bring felony charges against a defendant, perhaps because the government believes the person to be a greater threat, there’s no clear rhyme or reason to this.

The primary hint of the Selfie Cops doing something like that came, after the fact, in boasts from Robertson claiming to have “attacked the government.”

“CNN and the Left are just mad because we actually attacked the government who is the problem and not some random small business ... The right IN ONE DAY took the f***** U.S. Capitol. Keep poking us.” He also stated that he was “proud” of the photo in an Instagram Post that was shared to Facebook, because he was “willing to put skin in the game”

But it is also the case that the initial complaints seemed to function as a kind of triage, a way to get participants in the insurrection into the legal system to allow more focused investigation of them. Undoubtedly, the FBI continued to investigate after the initial charges.

And such an investigation – especially for people whose initial arrest didn't rely on search warrants and who were arrested before the shape of the attack became more clear – might reveal evidence that these two cops had something more in common with the others charged with 1512, such as explicit plans to shut down the vote count or ties to a militia organization. And unlike the arrest affidavits, which put so much evidence in a few pages, we shouldn't expect to see any of that evidence for a charge in an indictment until a litigation leading up to a trial. Indeed, that may be *why* DOJ feels free to include the charge in order to raise the stakes on the prosecution: because they can do so without having to tip their hand to other coup conspirators.

I expect we'll see more 1512 charges, which will separate the people DOJ is truly concerned about from those who stupidly trespassed in support of their idol Donald Trump.

Update: DOJ did the same thing with Richard "Bigo" Barnett. In his case, he's facing enhancements on some of these charges because he had a stun gun walking stick with him.