

# TUNNELS AND TRUMP: THE MISSING DETAILS IN THE OATH KEEPER CONSPIRACY

Yesterday, DOJ indicted the three members of the Oath Keepers previously charged with a conspiracy: Thomas Edward Caldwell, Donovan Ray Crowl, and Jessica Marie Watkins. I would be shocked if this indictment didn't serve as a building block for a larger – potentially much larger – conspiracy. Which is why I'm interested in what the indictment includes and excludes in this first release.

The indictment adds details describing the planning and intent of the conspiracy. It shows Watkins planning around the inauguration as early as November 9, the day Trump's enablers were claiming his efforts to undermine the election might serve as an "off-ramp."

On November 9, 2020, WATKINS sent text messages to a number of individuals who had expressed interest in joining the Ohio State Regular Militia. In these messages, WATKINS mentioned, among other things, that the militia had a week-long "Basic Training class coming up in the beginning of January," and WATKINS told one recruit, "I need you fighting fit by innaugeration." [sic] WATKINS told another individual, "It's a military style basic, here in Ohio, with a Marine Drill Sergeant running it. An hour north of Columbus Ohio[.]"

She also spoke in apocalyptic terms about a Biden presidency.

I can't predict. I don't underestimate the resolve of the Deep State. Biden may still yet be our President. If he is, our way of life as we know it is over.

Our Republic would be over. Then it is our duty as Americans to fight, kill and die for our rights.

[snip]

[I]f Biden get the steal, none of us have a chance in my mind. We already have our neck in the noose. They just haven't kicked the chair yet.

The indictment also includes language making it clear that Watkins believed she was responding to Trump's instructions.

On December 29, 2020, CROWL and .WATKINS exchanged the following text messages:

WATKINS: You still going to Illinois? We plan on going to DC on the 6th, weather permitting.

CROWL: No . .... What's going on on the 6th?

WATKINS: DC. Trump wants all able bodied Patriots to come. I'm sure Tom would love to see us as well.

WATKINS: If Trump activates the Insurrection Act, I'd hate to miss it[.]

Because of that and the way the indictment lays out the conspiracy, it makes the details not included in the indictment far more interesting.

The indictment includes a remarkably clear description of the goal and means of the conspiracy. The goal of the conspiracy was to stop Congress' certification of the vote.

## ***Purpose of the Conspiracy***

18. The purpose of the conspiracy was to stop, delay, and hinder Congress's certification of the Electoral College vote.

## ***Manner and Means***

19. CALDWELL, CROWL, and WATKINS, with others known and unknown, carried out the conspiracy through the following manner and means, among others, by:

a. Agreeing to participate in and taking steps to plan an operation to interfere with the official Congressional proceeding on January 6, 2021 (the “January 6 operation”);

b. Using social media, text messaging, and messaging applications to send incendiary messages aimed at recruiting as large a following as possible to go to Washington, D.C., to support the January 6 operation;

c. Coordinating in advance with others, including members of the Oath Keepers from other regions, and joining forces with these individuals and groups to further the January 6 operation;

d. Using a walkie-talkie-like application, and creating a channel on it named “Stop the Steal J6,” to make plans for and to communicate during the January 6 operation;

e. Traveling to and meeting up in Virginia, and continuing together into Washington, D.C., for the January 6 operation;

f. Bringing and contributing paramilitary gear and supplies for the January 6 operation;

g. Forcibly storming past exterior barricades, Capitol Police, and other law enforcement officers, and entering the Capitol complex in furtherance of the January 6 operation; and,

h. After January 6, 2021, concealing evidence of their involvement in the

January 6 operation and attack on the Capitol.

While many of the means included military planning, the first two items were simply planning to interfere with the certification and “recruiting as large a following as possible” to participate.

Remember: under conspiracy law, each member of a conspiracy need only agree on a common goal, agree to participate in it, and take an overt act in furthering the conspiracy – an act that doesn’t even, by itself, have to be illegal.

And Watkins, here, not only cites Trump’s goal of wanting, “all able bodied Patriots to come” to DC, but she also describes the plan pushed by Mike Flynn, the invocation of the insurrection act.

Trump and Flynn conveyed those plans on Twitter. They both,

Us[ed] social media, text messaging, and messaging applications to send incendiary messages aimed at recruiting as large a following as possible to go to Washington, D.C., to support the January 6 operation;

It would be child’s play to include them in this conspiracy (though the manner and means would likely be expanded to include other steps the two of them took). Indeed, laid out like this, *not* eventually including at least those around Trump in this indictment would require some lengthy explanation.

Then there’s this passage that was included in the complaint but not included in the indictment, easily the most chilling language from the complaint.

On January 6, 2021, while at the Capitol, CALDWELL received the following Facebook message: “All members are in the tunnels under capital seal them in .

Turn on gas". When CALDWELL posted a Facebook message that read, "Inside," he received the following messages, among others: "Tom take that bitch over"; "Tom all legislators are down in the Tunnels 3floors down"; "Do like we had to do when I was in the core start tearing oit florris go from top to bottom"; and "Go through back house chamber doors facing N left down hallway down steps."

It's possible DOJ excluded that paragraph from the indictment because they learned it was not actually part of the conspiracy (which would be surprising, given that it was sent while Caldwell was in the Capitol).

It's also possible that this language reflects coordination with people against whom the case still must be developed. Whoever it was not only appears to have had a detailed understanding of the Capitol, but may have had updates about the movement of members of Congress.

Just as one possibility, this person might have been one of the people who allegedly got a Capitol tour the day before the insurrection. This person may have been getting updates from insiders – up to and including Lauren Boebert, who twice tweeted about Nancy Pelosi's movements during the riot.

In other words, this person appears to be a pivot between the terrorists and those giving them inside instruction. DOJ will likely keep what it knows about that part of the operation under wraps until it develops it much further.

Then there are three other people alluded to in the indictment:

- PERSON ONE, who the conspirators expected might, but did not, provide leadership for this operation. He is referred to

as “Stewie” in the complaint, which DOJ took to be a reference to the head of the Oath Keepers, Stewart Rhodes.

- PERSON TWO, who appears to be Caldwell’s spouse. She joined him in breaching the Capitol, and if prosecutors wanted to pressure him to plead, they could threaten to include her.
- PERSON THREE appears to be the lead of a group of North Carolina Oath Keepers who came to DC on a bus. That person and the people he or she brought are likely to be added to this indictment.

Those three people, including to those who directed the Oath Keepers how to navigate the Capitol and the Trump associates who incited them to come might all one day be included in this or a related indictment.

Again, I’m not guaranteeing that DOJ will be brave enough to name Trump in this conspiracy. But if they don’t, there will be real question how they avoided it.

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**WHITHER THE  
DOUGLASS MACKAY**

# INVESTIGATION?

Yesterday, the FBI arrested Douglass Mackey, a far right activist who used the pseudonym Ricky Vaughn, for his efforts in 2016 to suppress Clinton voters. The complaint charges Mackey with a conspiracy against others' Constitutional rights under 18 USC §241. I want to unpack what the complaint says about where this investigation came from and where it might head, if anywhere.

## Mackey and others led almost 5,000 people to miscast their 2016 vote

There's a lot of language in the complaint about Mackey's social media efforts – which has a number of right wingers, including those who were tangentially involved in this effort, whining about their own First Amendment rights. Ultimately, though, the crime boils down to ads that Mackey made and popularized in the weeks leading up to the 2016 election encouraging Hillary voters to text their vote. If people did so, they would have thought their vote was cast, when in effect they would have texted it to a void.

The complaint notes that the text code Mackey used for the campaign got 4,900 responses.

According to iVisionMobile, the company that owned the Text Code listed in the two Deceptive Images distributed by MACKEY, at least 4,900 unique telephone numbers texted “[Candidate's first name]” or some derivative to the Text Code on or about and before Election Day, including many belonging to individuals in the Eastern District of New York. Of the approximately 4,900 numbers that corresponded with the Text Code, approximately 4,850, or 99%, sent their texts after MACKEY first tweeted a

Deceptive Image from MACKEY Account 2.  
[my emphasis]

Effectively, then, the complaint argues that Mackey tricked almost 5,000 people to miscast a Hillary vote, thereby depriving them of their right to cast a valid vote.

## **This investigation was started and finalized under a Trump US Attorney**

Right wingers are also whining that the timing of this complaint shows that the Deep State is moving against Trump supporters immediately after his departure.

That makes no sense.

First, at least two key steps in this investigation, interviews of Paul Nehlen and filmmaker Loren Feldman, happened last fall.

On or about October 5, 2020, FBI agents conducted a voluntary interview with the Congressional Candidate. The Congressional Candidate confirmed that "Ricky Vaughn's" true name was MACKEY, and that MACKEY had offered his services to his/her campaign. The Congressional Candidate added that, although s/he had never met MACKEY in person, s/he frequently communicated with MACKEY by telephone and via MACKEY's personal email accounts.

On or about October 19, 2020, FBI agents conducted a voluntary interview of the Filmmaker who again confirmed that s/he had interviewed MACKEY in 2016 and that s/he knew MACKEY at that time by his Twitter name of "Rickey Vaughn." The Filmmaker further confirmed that s/he had subsequently been shown a photograph of



MACKEY and confirmed that the individual in the photograph was the individual the Filmmaker had met as “Ricky Vaughn.”

In October 2020, as now, the Brooklyn US Attorney was Seth DuCharme. While DuCharme spent his career in EDNY, he was a key aide to Bill Barr, both as Counselor and then PADAG. In July, Barr effectively swapped DuCharme back into EDNY and moved the then US Attorney, Richard Donoghue, to PADAG.

In other words, the guy whose name will be on this indictment is among Barr’s most trusted aides.

DuCharme even issued a strong statement about this prosecution when it was announced.

“There is no place in public discourse for lies and misinformation to defraud citizens of their right to vote,” said Seth D. DuCharme, Acting U.S. Attorney for the Eastern District of New York. “With Mackey’s arrest, we serve notice that those who would subvert the democratic process in this manner cannot rely on the cloak of Internet anonymity to evade responsibility for their crimes. They will be investigated, caught and prosecuted to the full extent of the law.”

I argued in this post that early indictments in the Biden Administration would (because he’s not immediately replacing all US Attorneys) be approved by Trump loyalists, and this is a perfect example of that.

## **Actions completed in 2016 are being charged in 2021**

One of the most interesting questions about this complaint is why actions that were completed in

2016 and didn't appear to take much investigation beyond some warrants to Twitter and two interviews were only charged in 2021.

It's not entirely clear where this investigation came from, but the most likely is that when HuffPo originally exposed Mackey in 2018, someone at the FBI or DOJ took notice. That seems all the more likely given that the complaint relies on some of the research in that original story, including that Mackey had a reach on Twitter well outside his follower count.

There was no mistaking Ricky Vaughn's influence. He had tens of thousands of followers, and his talent for blending far-right propaganda with conservative messages on Twitter made him a key disseminator of extremist views to Republican voters and a central figure in the "alt-right" white supremacist movement that attached itself to Trump's coattails. The MIT Media Lab named him to its list of top 150 influencers on the election, based on news appearances and social media impact. He finished ahead of NBC News, Drudge Report and Stephen Colbert. Mainstream conservatives didn't know they were retweeting an avowed racist and anti-Semite, but they liked what Ricky Vaughn had to say.

So the simplest explanation for the genesis of this investigation is that article.

There are other possibilities, though.

For example, as that original HuffPo story noted, Mackey magnified one of the Internet Research Agency's most effective Twitter accounts, TEN\_GOP, which many right wingers mistakenly believed was the official account of Tennessee's Republican Party.

In the data set of significant accounts we looked at, Ricky Vaughn retweeted

@TEN\_GOP the most, by far. Although Twitter shut down his @Ricky\_Vaughn99 handle in October 2016, another handle he possibly used, @RapinBill, took over and retweeted @TEN\_GOP at least 162 times between early March and late August 2017. (@RapinBill also retweeted @Pamela\_Moore13, another Kremlin-controlled account, at least 37 times during this period.)

Some far-right sources suggest that @RapinBill might be an account run by another anonymous bad actor, an assertion for which there is no proof, but the account has nevertheless capitalized on the Ricky Vaughn brand of far-right intolerance and fake news. We will update this story as we learn more.

Curiously, @RapinBill, which is still active and followed by Donald Trump Jr., does not appear to have received a single reciprocal retweet from @TEN\_GOP during the time period we looked at, perhaps indicating an attempt to conceal the connection. @RapinBill retweeted @TEN\_GOP until the end. When Twitter finally shut down @TEN\_GOP last August, after having ignored numerous complaints about the Russian account, Ricky Vaughn did not take it well. He grouched that @TEN\_GOP had been “banned for supporting our president.” Within hours, he was steering traffic to the Kremlin’s backup account:

Another possibility is that this investigation arose out of Mueller’s investigation of Mike Flynn and Roger Stone’s focus on social media during the 2016 election. As Luke O’Brien (the reporter who first unmasked Mackey) noted in his coverage of the complaint, Mackey had ties to efforts involving Flynn and Stone in 2016.

Mackey and the three co-conspirators that HuffPost was able to identify are

closely associated with a group of high-level pro-Trump political saboteurs known as “MAGA3X” that had ties to the Trump campaign and Trump’s disgraced former national security adviser Michael Flynn.

Presided over by far-right Twitter influencer Mike Cernovich, white nationalist funder Jeff Giese, who is a disciple of billionaire Peter Thiel, and neo-Nazi collaborator Jack Posobiec, who counts Roger Stone as a mentor, MAGA3X spearheaded the Pizzagate disinformation campaign on social media that targeted Hillary Clinton in the weeks before the 2016 election.

Mueller’s team focused closely on both Flynn and Stone’s involvement in social media in 2016. In August 2016, Stone pitched both Paul Manafort and Steve Bannon on how to win ugly using social media. The overt parts of Stone’s effort involved an Erik Prince-funded effort to suppress the black vote. One of the still-sealed warrants pertains to multiple Twitter accounts that don’t appear to be Stone’s. And Mueller interviewed several people who worked with Stone on social media campaigns (and asked Andrew Miller about Alex Jones’ campaigns, as well).

The biggest reason to doubt that this investigation comes out of Mueller’s is the venue. While Mackey has ties to Brooklyn, at the time of his actions, he was living in Manhattan, SDNY rather than EDNY. The complaint seems to claim venue based on victims who reside in EDNY, bolded in the blockquote above, not Mackey’s location at the time of his actions. If Mueller had referred this, he presumably would have referred it to where the actions took place, SDNY.

It’s also possible it comes out of the Intelligence Committees’ investigations into disinformation. As Quinta Jurecic noted last night, Mackey’s ads were among those Twitter

shared with the committees in 2018, though not by name. But again, the logical place to pick that up would have been SDNY or even DC.

There's one other possibility. Last fall, in an effort to feed Trump's conspiracy theories, Barr affirmatively mobilized voter fraud investigations. If someone had been sitting on the evidence unveiled in 2018, Barr's action would have provided the opportunity to wrap it up into an indictment, effectively using GOP claims of voter fraud as the excuse to prosecute GOP voter fraud.

## **DOJ charged just one member of a conspiracy**

Perhaps the most enticing part of this complaint is that it explicitly includes four other people as co-conspirators.

<u>Twitter User ID Number</u>	<u>Defined Term</u>
108465379	Co-Conspirator 1
779739206339928064	Co-Conspirator 2
704041886089084928	Co-Conspirator 3
6091342	Co-Conspirator 4

It describes the actions of Mackey's co-conspirators to include:

- Discussing how best to optimize social media campaigns
- Retweeting Mackey's campaigns
- Running several DM-based strategy groups called the Madman Group, the War Room, Fed Free Hatechat
- Fine-tuning some of the ads used
- Posting some of the actual

ads

- Adding Mackey's new accounts back into the DM collaborations after Twitter shut down his accounts

It's not entirely clear how EDNY chose to treat these four as co-conspirators as distinct from other Twitter users and DM collaboration participants.

O'Brien IDs three of the four co-conspirators:

The complaint lists four co-conspirators referred to only by Twitter "user IDs," a unique string of numbers assigned to each Twitter account. HuffPost can report that one co-conspirator is a prominent alt-right botmaster who goes by "Microchip" and was instrumental in making pro-Trump and anti-Hillary Clinton hashtags and content go viral on Twitter during the 2016 election. A fascist accelerationist who has expressed admiration for Adolf Hitler and Nazism, Microchip claims to have been involved in the early spread of the QAnon conspiracy cult and repeatedly told this reporter that his goal was to destroy the United States.

Another of Mackey's co-conspirators is Anthime "Baked Alaska" Gionet, a pro-Trump white nationalist who was arrested on Jan. 16 for his involvement in storming the Capitol on Jan. 6. Gionet also participated in the deadly white nationalist "Unite the Right" rally in Charlottesville, Virginia, in 2017. (A New York Times story reported Wednesday afternoon that Gionet was a co-conspirator, citing a source close to the investigation, and HuffPost can confirm that reporting based on the Twitter ID cited in the complaint.)

HuffPost was able to link the Twitter

IDs in the complaint to Gionet and Microchip through previously collected Twitter data, interviews and evidence left by both extremists on other websites. In direct messages with this reporter last year, Microchip also confirmed that he was using the Twitter account associated with the user ID listed in the complaint.

The user ID for a third co-conspirator belongs to a pro-Trump far-right activist who goes by “Nia” and has a long history of spreading disinformation on Twitter. HuffPost has not yet been able to identify the fourth co-conspirator.

It’s unclear whether EDNY plans to add them in an indictment or not. It’s possible they just named them as co-conspirators so as to be able to use their DMs and other Tweets to build the case against Mackey (which would make it a matter of prosecutorial efficacy). It’s also possible they’ll get added when this is indicted.

Particularly given the inclusion of Baked Alaska in here, though, it’s possible that this is an effort to crack down on key far right propagandists as part of a larger crackdown in the wake of the January 6 insurrection.

There’s just one detail that suggests this might go further: the inclusion of a PIN prosecutor in the prosecution team.

Assistant U.S. Attorneys Erik Paulsen and Nathan Reilly of the Eastern District of New York, and Trial Attorney James Mann of the Criminal Division’s Public Integrity Section are prosecuting the case.

Among the other cases James Mann is or was prosecuting are the Andy Khawaja case funneling money from the UAE to both 2016 candidates

(though only the Hillary side was charged; George Nader is one of the defendants) and the Elliot Broidy case, whose pardon will close out that case.

While his inclusion by no means makes this a certainty, it raises the chances that this social media activity will either be considered in the scope of campaign donations or might even involve foreign partners.

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## A TALE OF TWO ZIP-TIE GUYS: CRIMINAL PROTESTOR OR ARMED INSURRECTIONIST?

There was a fair amount of disbelief last week when Eric Munchel, better known as Zip-Tie Guy, was given bail by a magistrate judge in Tennessee. But as I noted, the evidence *as presented* to Judge Chip Frensley did not allege preplanning and did not show Munchel engaged in violence. As laid out in the detention memo, Munchel owns an arsenal of guns, but they are all legal. As such, Frensley's decision was probably correct.

As I noted in an update to that post, however, the evidence prosecutors presented to obtain the emergency stay of Munchel's release *did* include an act of violence, targeted at Bloomberg reporter William Turton, who filmed Munchel in the Grand Hyatt after the riot.

On the evening of January 6, 2021, after the insurrection, an individual posted a video of the Grand Hyatt hotel lobby on Twitter. The person then posted a message that read: "After I took this video, several Trump supporters harassed me and tried to follow me to my room."



One accused me of being 'antifa.'<sup>3</sup> Hotel security intervened and moved me to new room. What a weird day." See <https://twitter.com/WilliamTurton/status/1346980284252745729> (Last accessed on January 23, 2021). The person added: "The Trump supporters demanded that I delete the video. One woman flashed her taser at me, and threatened to mace me." See <https://twitter.com/WilliamTurton/status/1347024856416714752> (last viewed January 23, 2021). Two days later, on January 8, based on another video from the Grand Hyatt posted to social media, the person identified the defendant as "one of the people in the hotel lobby who demanded I delete the video, put his hands on me, and screamed at me . . . ." See <https://twitter.com/WilliamTurton/status/1347699125408641024> (last viewed January 23, 2021); <https://twitter.com/WilliamTurton/status/1347699345345417217> (last viewed January 23, 2021). Evidence of this encounter was not presented at the preliminary and detention hearing in the Middle District of Tennessee.

There's a more important difference between the detention motion submitted in Tennessee and the one submitted in DC, beyond the fact that one was presented in a conservative state and the other was presented to a Democratically appointed judge in the city targeted in the insurrection.

The initial detention motion describes Munchel's actions as those of a protestor who committed crimes in the process of protesting, while threatening violence.

The United States of America, by and through its attorney, the United States Attorney for the Middle District of Tennessee, respectfully files this

memorandum in support of pre-trial detention. The defendant, Eric MUNCHEL, traveled to Washington, D.C. to attend the "Stop the Steal" rally on or about January 6, 2021, where he intended to protest the outcome of the 2020 Presidential election. MUNCHEL was prepared for conflict: as he told a reporter, he was ready to "rise up" and "fight if necessary." After the rally concluded, MUNCHEL—who was dressed in tactical gear and carried a taser on his hip, and stashed other "weapons" in a tactical bag outside the Capitol—unlawfully entered the U.S. Capitol along with a mob of rioters who smashed windows and broke through doors. MUNCHEL gleefully acquired several sets of plastic handcuffs as he walked through the Capitol and entered the Senate chamber, where only moments earlier the Vice President of the United States was certifying the results of the 2020 Presidential election. In the Senate gallery, MUNCHEL stood with a crowd whose members shouted "Treason!" and lamented the disappearance of lawmakers from the chamber moments earlier. MUNCHEL's conduct here was dangerous and extremely serious. This Court should adopt the recommendation of the Pretrial Services Office and detain MUNCHEL pending trial. [my emphasis]

The first paragraphs of the emergency motion, by contrast, describe him as one of a concerted pack of insurgents who successfully used terror to halt constitutionally mandated proceedings.

Armed with a taser and clad for battle in fatigues, a tactical vest, combat boots, gloves, and a gaiter that revealed only his eyes, the defendant, Eric Munchel, stormed the United States Capitol on January 6, 2021. Upon penetrating the building through a door

breached by insurgents, the defendant grabbed a handful of Capitol Police flexicuffs and exclaimed: "Zip ties. I need to get me some of them mother--s!" Then, with his co-conspirator, Lisa Eisenhart—who also wore a tactical vest and took flexicuffs—the defendant joined a group of insurgents searching for Members of Congress. Surrounded by insurgents exhorting veiled threats such as "Treason!", "Anybody home?", "They're cowards!", and "Are you afraid?", the defendant infiltrated the Senate chamber—only minutes after the Senate body, including the Vice President of the United States, had been evacuated. The invasion halted the proceedings of a Joint Session of Congress, which had convened to certify the Electoral College vote as required by the Twelfth Amendment. [my emphasis]

A later paragraph discounts the claim that Munchel intended to do nothing more than protest.

First, the nature and circumstances of the offense involve fear, intimidation, and violence—directed at law enforcement, elected public officials, and the entire country. The defendant can make no serious claim that he went to the Capitol on January 6 intending to engage in peaceful protest or civil disobedience. Instead, the evidence supports the conclusion that he intended to contribute to chaos, obstruct the Electoral College certification, and sow fear. This is illustrated by the defendant's preparation before reaching the Capitol and expressly stated intent: the defendant dressed in combat attire from head to toe; armed himself with a taser (and, appearing from his own cell phone video and audio recording, a more dangerous weapon); and told a reporter

that his intent in going to the Capitol was “a kind of flexing of muscles” and that he was ready to “fight if necessary.” Once at the Capitol, the defendant’s conduct was consistent with that expressly stated intent: the defendant helped and encouraged other insurgents to ascend a wall to access the Capitol; exclaimed that he was “F-ing ready to f-k s-t up”; affirmed cries of “Treason” by other insurgents; responded to the chaos by exclaiming, “I guess they thought we were playing!”; stormed into the Capitol through a breached door; grabbed Capitol Police plastic flexicuffs, comprehending that they are instruments of restraint and kidnapping; marched throughout the Capitol searching for Members of Congress who he believed had committed “Treason”; and infiltrated the Senate chamber. The nature and circumstances of the alleged offenses all indicate forethought and specific intent to obstruct a congressional proceeding through fear, intimidation, and, if necessary, violence. These threads—planning, forethought, intent—are all indicative of a capacity and willingness to repeat the offense and pose a clear threat to community safety. As the defendant himself told The Times reporter, “[t]he point of getting inside the building [was] to show them that we can, and we will” (emphasis added).

As with her son, the government told two different stories about the actions of Munchel’s mother, Lisa Eisenhart, who like him was first granted bail then detained on an emergency motion.

The introductory paragraph of her TN detention motion mentions her boast that she was willing to die rather than live under oppression. But

even where it reviews her language in more depth later in the filing, it portrays as it as mere, “disillusionment with the outcome of the 2020 Presidential election,” not a willingness to overthrow the Constitutional order because of it.

The defendant, Lisa EISENHART, traveled to Washington, D.C. to attend the “Stop the Steal” rally on or about January 6, 2021, where she intended to protest the outcome of the 2020 Presidential election. EISENHART was prepared for conflict: as she told a reporter, she would rather “die” and “fight” than “live under oppression.”

[snip]

EISENHART also made statements evincing an intent to engage in violent conduct, and even sacrificing her own life, because of her disillusionment with the outcome of the 2020 Presidential election. [my emphasis]

And as the emergency motion for her son described his own act of violence, Eisenhart’s emergency detention motion describes her approval of the violence around her. (Munchel’s federal defender got prosecutors to admit at his bail hearing that his mom voiced more overt support for violence than he espoused; he even pointedly called out, “Don’t break shit,” ... “No vandalizing shit”.)

Down the road, prosecutors will describe these statements from her as one after another agreement with others to engage in violent insurrection.

The nature and circumstances of the offense involve fear, intimidation, and violence— directed at law enforcement, elected public officials, and the entire country. The defendant can make no serious claim that she went to the Capitol on January 6 intending to engage

in peaceful protest or civil disobedience. Instead, the evidence supports the conclusion that she intended to contribute to chaos, obstruct the Electoral College certification, and sow fear. Specifically, Eisenhart, dressed for combat in a tactical or bulletproof vest, stormed the Capitol building with other insurgents and:

- *carried dangerous “weapons” onto Capitol grounds and stashed them before storming the Capitol building, because “We’re going straight to federal prison if we go in there with weapons”;*
- *encouraged insurgents to climb a Capitol wall and storm inside, exhorting: “Yeah, go up in there. You can go up in there now”;*
- *encouraged Munchel to go inside the Capitol despite knowing that Capitol Police were trying to keep insurgents out—including by using tear gas (“we’re going in”; “the [tear] gas isn’t bad”);*
- *cheered on another insurgent who she understood to have*

*“punched two of them in the face”—likely a reference to Capitol Police;*

- *celebrated as her “best day” an assertion by another insurgent that Members of Congress had been tear gassed (“That is [unintelligible] my best day, to know they got tear gassed.”);*
- *grabbed Capitol Police flexicuffs from inside the Capitol and searched for Members of Congress alongside other insurgents, together shouting threatening chants of: “Anybody home?”; “They went into the tunnels”; “Where’d you go?”; “They’re cowards!”; “Are you afraid?”; and “Treason!”; and*
- *cognizant of the severity of her and Munchel’s crimes, advised before leaving the Capitol: “Don’t carry the zip ties, just get ‘em out of their hand, out of [unintelligible] get ‘em out of our hands.”*

The offense circumstances illustrate a profound disrespect for the rule of law and law enforcement, indicating that the defendant's unwillingness and incapacity to respect court-imposed conditions and demonstrating that no release condition will reasonably assure the community's safety.

Both emergency motions for detention include a paragraph describing the danger mother and son pose as an unprecedented threat to democracy.

Finally, as we asserted in the Munchel appeal, it is difficult to fathom a more serious danger to the community—to the District of Columbia, to the country, or to the fabric of American Democracy—than the one posed by armed insurrectionists, including the defendant and Munchel, who joined in the occupation of the United States Capitol. Every person who was present without authority in the Capitol on January 6 contributed to the chaos of that day and the danger posed to law enforcement, the Vice President, Members of Congress, and the peaceful transfer of power. The defendant's specific conduct aggravated the chaos and danger. It was designed to intimidate Members of Congress and instigate fear across the country. The defendant's active participation in a violent insurgency on the Capitol designed to undermine the democratic process poses a serious and ongoing danger to the community that no release condition can reasonably assuage. As co-conspirator Munchel told The Times reporter: "[t]he point of getting inside the building [was] to show them that we can, and we will" (emphasis added); and as the defendant maintained, she would rather "die" and "fight" than "live under oppression." Only detention mitigates the grave danger the defendant and Munchel pose.



[my emphasis]

I expect readers of this site will agree with the latter emergency motions, and I definitely agree about the threat the insurrection posed to democracy.

But it is critical to understand that legally, both motions are true.

The difference lies in the additional overt act including in Munchel's emergency motion and the import ascribed to Eisenhart's statements in hers. More importantly, the difference lies in the effect of their actions – and the actions of others that, videos show, they encouraged: to halt a constitutionally mandated act using terror.

Defense attorneys will argue, the threats to Turton notwithstanding, that there is no definitive evidence that Munchel or Eisenhart intended to engage in violence at the Capitol (and in Munchel's case, they'll cite his own statements warning against destruction). Outside the context of a concerted plan to prevent the certification of the election, one can make a compelling case that Munchel and Eisenhart are nothing more than protestors who broke the law.

It's possible that prosecutors in Tennessee didn't include that because they view the election outcome differently or simply view these two as individual defendants outside the context of the larger goal. It's possible they're simply not privy to much of the evidence that gives prosecutors in DC confidence they'll be able to prove a more concerted effort, a concerted effort that Munchel and Eisenhart both willingly took a part in. It's likely that DC prosecutors aren't including other prosecutors in plans to build the sedition charge mentioned in the emergency motions.

The evidence amassed so far subjects the defendant to felonies beyond that with which he has been charged so far, including obstructing Congress,

interstate travel in furtherance of rioting activity, sedition, and other offenses.

But the successful prosecution of Zip-Tie Guy and his mom will depend on prosecutors' success at making that larger case and showing that both of them agreed to the larger goal.

I've alluded to, several times, how the case against the Hutaree Militia foundered based on two things: prosecutors' reliance on speech as proof that each member of the conspiracy entered into a goal of attacking the US government, and insufficient proof that the federal government itself was the target.

The lesson is important background for the January 6 insurrection. In her opinion throwing out most of that prosecution, Judge Victoria Roberts emphasized the meticulous scrutiny that a charge of seditious conspiracy must give to speech acts.

Where a conspiracy implicates First Amendment protections such as freedom of association and freedom of speech, the court must make a "specially meticulous inquiry" into the government's evidence so there is not "an unfair imputation of the intent or acts of some participants to all others." *United States v. Dellinger*, 472 F.2d 340, 392 (7th Cir. 1972). It is black-letter law that "[a] defendant cannot be convicted of conspiracy merely on the grounds of guilt by association, and mere association with the members of the conspiracy without the intention and agreement to accomplish an illegal objective is not sufficient to make an individual a conspirator." *Lee*, 991 F.2d at 348. Likewise, mere presence at the scene does not establish participation in a conspiracy. *United States v. Paige*, 470 F.3d 603, 609 (6th Cir. 2006).

The Government has consistently maintained that this case is not about freedom of speech or association, but about the specific acts of violence alleged in the Indictment. The Court relied upon these representations in denying Defendants' pretrial motions for a jury instruction on the Brandenburg case, and the heightened strictissimi juris standard for sufficiency of the evidence (Docs. 610, 618). However, much of the Government's evidence against Defendants at trial was in the form of speeches, primarily by Stone, Sr., who frequently made statements describing law enforcement as the enemy, discussing the killing of police officers, and the need to go to war. Indeed, at oral argument on March 26, 2012, the Government asked the Court to find the existence of a seditious conspiracy based primarily on two conversations involving Stone, Sr., and others – the first on August 13, 2009, and the second on February 20, 2010.

And she cited precedent that requires that seditious conspiracy must target the US government itself (the Hutaree allegedly hoped to spark a larger rebellion by killing some cops – not far different from what the Boogaloo espouse).

In *Anderson v. United States*, the Eighth Circuit applied *Baldwin* and dismissed a seditious conspiracy charge where the force sought to be exerted was “not against those whose duty it should be to execute the laws.” 273 F. 20, 26 (8th Cir. 1921). Defendants were charged with seditious conspiracy for conspiring to prevent, hinder and delay by force, various laws of the United States, including the congressional declaration of war with Germany, and laws relating to conscription. *Id.* at 22-23. In

furtherance of the seditious conspiracy, the Indictment alleged that the defendants circulated books and periodicals calling for strikes and the overthrow of the capitalist system and criticizing the war and individuals who joined the armed services. Id. at 24-24.

Relying on Baldwin, the Court stated that for the Indictment to sufficiently charge seditious conspiracy, the purpose of the conspiracy must be “the exertion of force against those charged with the duty of executing the laws of the United States . . . .” Id. at 26. The court then held that the Indictment was insufficient because the “force was to be exerted, not against those whose duty it should be to execute the laws, and while attempting to do so, but its application was to be made against industrial and commercial activities by lawless acts during strikes for the purpose of accomplishing alleged socialistic ends . . . .” Id.

The law is clear that seditious conspiracy requires an agreement to oppose by force the authority of the United States itself. It must be an offense against the Nation, not local units of government. See *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497, 505 (1956) (“Sedition against the United States is not a local offense. It is a crime against the Nation.” (citation and quotation marks omitted)). Any overt act in furtherance of seditious conspiracy must further a common plan to oppose the United States by force; otherwise, “the seditious conspiracy statute would expand infinitely to embrace the entire agenda of anyone who violated it . . . .” *United States v. Rahman*, 854 F. Supp. 254, 260 (S.D.N.Y. 1994); see also *Haywood v. United States*, 268 F. 795,

800 (7th Cir. 1920) (“[The seditious conspiracy statute] should not be enlarged by construction.”).

In that case, Roberts found that a plan to murder cops did not amount to seditious conspiracy.

The discussions of seditious conspiracy in Baldwin and Anderson are important to this case; while the Government presented evidence of vile and often hateful speech, and may have even shown that certain Defendants conspired to commit some crime – perhaps to murder local law enforcement – offensive speech and a conspiracy to do something other than forcibly resist a positive show of authority by the Federal Government is not enough to sustain a charge of seditious conspiracy. A conspiracy to murder law enforcement is a far cry from a conspiracy to forcibly oppose the authority of the Government of the United States.

The attack on the Capitol is an entirely different matter from that attempt by right wing militia members to spark an uprising in 2010. The targets of the January 6 conspiracy included the first and second in line to the Presidency, Mike Pence and Nancy Pelosi. Among the cops who were targeted – including the one who was murdered – were Capitol Police. The act that rioters were impeding was the execution of a duty laid out in the Constitution, certifying the Presidential election.

There’s little question that this amounts to a conspiracy against the government of the United States.

Nevertheless, as prosecutors tell one after another story about the individuals involved, they are going to have to make it clear, in each case, how each individual’s actions and stated

goals tie to that larger effort to overthrow the constitutional working of the US government.

Update: Corrected where in succession Pence and Pelosi were.

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## **SOME KEY GAPS IN THE JANUARY 6 STORY [UPDATED]**

DOJ continues to roll out arrests of people involved in the January 6 coup attempt.

But there are some obvious gaps in the (public) story so far.

### **Arrests relating to over 100 police assaults**

In a filing submitted over the weekend, the government asserted that 139 cops were assaulted during the insurrection.

In the course of the insurrection, approximately 81 Capitol Police and 58 MPD officers were assaulted,

In its website tracking the people arrested so far, DOJ describes assault charges being filed against 12 people (updated on 2/1 to total 17 people):

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.

While a number of these men – Fairlamb, Jackson, Nichols, Shively, among others – allegedly assaulted multiple cops, that’s still far below the total of 139 alleged assaults.

That says the FBI is still looking for a significant number of people in assaults on police. Over the weekend, the FBI released BOLO posters showing 12 other men believed to have assaulted police – including two targeting individuals specifically.

## **The murder of Brian Sicknick**

Of particular note, while the FBI has released a BOLO poster focused on the men who assaulted MPD

Officer Michael Fanone, no such post has identified suspects as those suspected of killing Brian Sicknick (though note that Robert Sanford did assault a different officer with a fire extinguisher). There are many possible explanations for why his murder might be treated differently (not least that the culprits are more likely to flee).

But we haven't seen anything to suggest who assaulted Sicknick badly enough to lead to his death.

## **The DNC and RNC bomber**

On January 21, the FBI increased their reward for information leading to the guy believed to have planted pipe bombs at the DNC and RNC. But there's no sign they've found the guy yet.

## **Rudy's interlocutors**

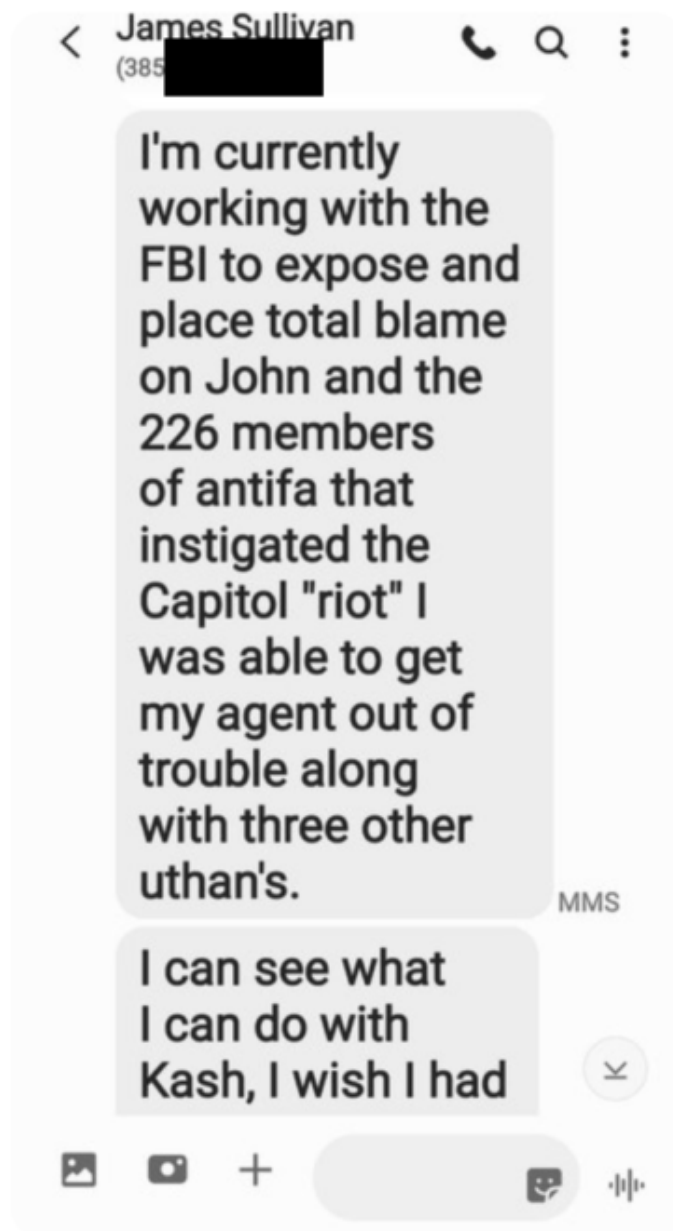
On January 15, Rudy Giuliani posted texts involving "James Sullivan" claiming he was going to blame the riot on "John," that he had gotten "my agent out of trouble along with three other" Utahans, and mentioning "Kash."



**Rudy W. Giuliani** ✓

@RudyGiuliani

Why wasn't this presented to the witch Hunt Impeachment Congress. Because they have no interest in the truth that riots had nothing to do with the Trump speech. They were organized before speech and carried out on their own by groups like ANTIFA trained to riot.



“John” is James’ brother, John Sullivan, someone long ago IDed by leftist activists as a provocateur who had been charged two days earlier. He was arrested on January 14, but bailed the next day.

“Kash,” is Kash Lee Kelly, whose parole officer IDed him at the scene. His bail in the gang-related drug conviction he was awaiting sentencing for in IL was revoked on January 14.

John Sullivan is the only Utahan that GWU identifies as being from Utah, meaning the three Utahans, in addition to James Sullivan, he claims to have gotten out of trouble thus far are (publicly at least) still not in trouble. No one yet arrested is identifiable as his “agent,” either.

That means, key people who might be a pivot between the rioters and Rudy Giuliani, who was coordinating events in Congress with an eye to how much time the rioters would give him, remain (again, publicly at least) at large.

There are around 73 sealed cases in the DC District, many of which probably having nothing to do with the January 6 insurrection and some of which are surely defendants already publicly charged whose cases have not yet been unsealed in the DC docket. The reasons for unsealing could vary – though the most common would be that someone hasn’t been arrested yet). Still, some of these sealed cases may be people who’ve already moved to cooperate.

Update, 2/1: I’ve updated the list of those charged with assault.

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## **BILL BARR’S ENTIRE DOJ**

# CHASED TRUMP CONSPIRACY THEORIES AND PLOTTED INAPPROPRIATELY

When Bill Barr resigned rather than do the President's bidding to challenge elections that were perfectly fair, he could have revealed that fact publicly, okayed the indictment of one of the chief purveyors of election conspiracies, Rudy Giuliani, and admitted that the entire basis for undermining the prosecution of Mike Flynn – who had already called for martial law and an election do-over – was based on conspiracy theories spun by the same woman spinning the worst election hoaxes, Sidney Powell.

He didn't do that.

Instead, he announced his resignation with a page of abject sycophancy that repeated the conspiracy theory that got Barr hired: that the Russian investigation was, "an effort to cripple, if not oust, your Administration with frenzied and baseless accusations of collusion with Russia."

Even before that, though, Barr launched his letter with an ambiguous statement about the election, one that might be read either as endorsing Trump's conspiracy theories or debunking them:

I appreciate the opportunity to update you this afternoon on the Department's review of voter fraud allegations in the 2020 election and how these allegations will continue to be pursued. At a time when the country is so deeply divided, it is incumbent on all levels of government, and all agencies acting within their purview, to do all we can to assure the integrity of elections and promote public confidence in their

outcome.

At a moment where he had maximal power to halt Trump's efforts to overturn an election, then, Barr instead just cowered, resting on the one public statement that there was not sufficient fraud to overturn the election that had gotten him ousted.

Which is to say that to the end, Barr never foreswore the conspiracy theories he adopted in service to Donald Trump.

Now, however, others who also facilitated Donald Trump's conspiracy theories for years until they, in the final days, didn't, are seeding stories to suggest that Jeffrey Bossert Clark was in any way unique for doing so.

The story starts with a tale that suggests the top leaders in a DOJ that had broken all norms in service of Donald Trump weren't, themselves, in the "Trumpist faction" of the Republican Party.

It was New Year's Eve, but the Justice Department's top leaders had little to celebrate as they admonished Jeffrey Clark, the acting head of the civil division, for repeatedly pushing them to help President Donald J. Trump undo his electoral loss.

Huddled in the department's headquarters, they rebuked him for secretly meeting with Mr. Trump, even as the department had rebuffed the president's outlandish requests for court filings and special counsels, according to six people with knowledge of the meeting. No official would host a news conference to say that federal fraud investigations cast the results in doubt, they told him. No one would send a letter making such claims to Georgia lawmakers.

When the meeting ended not long before

midnight, Acting Attorney General Jeffrey A. Rosen thought the matter had been settled, never suspecting that his subordinate would secretly discuss the plan for the letter with Mr. Trump, and very nearly take Mr. Rosen's job, as part of a plot with the president to wield the department's power to try to alter the Georgia election outcome.

It was clear that night, though, that Mr. Clark – with his willingness to entertain conspiracy theories about voting booth hacks and election fraud – was not the establishment lawyer they thought him to be. Some senior department leaders had considered him quiet, hard-working and detail-oriented. Others said they knew nothing about him, so low was his profile. He struck neither his fans in the department nor his detractors as being part of the Trumpist faction of the party, according to interviews.

The department's senior leaders were shocked when Mr. Clark's machinations came to light. They have spent recent weeks debating how he came to betray Mr. Rosen, his biggest champion at the department, and what blend of ambition and conviction led him to reject the results of the election and embrace Mr. Trump's claims, despite all evidence to the contrary, including inside the department itself. [my emphasis]

You'll note that the NYT didn't explain why it granted six surely very powerful people, mostly lawyers, anonymity to spin this tale?

Buried much deeper in the story, however, after retelling all the ways Clark broke normal procedure while running the Environmental Division, the NYT then explains how he came to be Acting head of the Civil Department and in that role took a number of inexcusable steps

that neither Bill Barr nor Jeffrey Rosen objected to (indeed, those may have been the steps that drove Jody Hunt away and won Clark the job).

While Mr. Clark oversaw environmental cases, sometimes working late into the night and personally reviewing briefs, the department's civil division was in turmoil. Its leader, Jody Hunt, sometimes clashed with the White House Counsel's Office and, later on, with Attorney General William P. Barr, over how best to defend the administration.

Mr. Hunt resigned with no warning in July, leaving his deputy to run the division while Mr. Barr and Mr. Rosen searched for an acting leader among the department's thinned-out ranks. Mr. Clark wanted the job, which was a considerable step up in stature, and Mr. Rosen supported the idea even though he was already a division head, according to three people with knowledge of the situation.

After he took the helm of the civil division in September, colleagues began seeing flashes of unusual behavior. Mr. Clark's name appeared on eyebrow-raising briefs, including what would turn out to be an unsuccessful effort to inject the government into a defamation lawsuit against Mr. Trump by a woman who has said he raped her more than two decades ago. He also signed onto an attempt to use the Justice Department to sue a former friend of the first lady at the time, Melania Trump, for writing a tell-all memoir.

Remember: the currently operative story is that Clark *didn't know* Trump until Congressman Scott Perry introduced them, presumably after the election.



It was Mr. Perry, a member of the hard-line Freedom Caucus, who first made Mr. Trump aware that a relatively obscure Justice Department official, Jeffrey Clark, the acting chief of the civil division, was sympathetic to Mr. Trump's view that the election had been stolen, according to former administration officials who spoke with Mr. Clark and Mr. Trump.

Mr. Perry introduced the president to Mr. Clark, whose openness to conspiracy theories about election fraud presented Mr. Trump with a welcome change from the acting attorney general, Jeffrey A. Rosen, who stood by the results of the election and had repeatedly resisted the president's efforts to undo them.

He didn't get the Civil job because Trump picked him or because he promised to turn DOJ into Trump's own personal law firm. Someone else must have picked him. That means Clark's other decisions – one of which he took the day after he was installed and which were "Trumpist" by any definition of the term – had the full approval of the people now suggesting he went rogue later in the year. Indeed, those interventions may have been the entire reason he got picked to run the Civil Division.

Sure, Jeffrey Bossert Clark should be shunned in the respectable legal profession for helping Trump attempt a coup. But so should the men who willfully let DOJ champion Trump's conspiracy theories for the two years before that.

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## PROSECUTING THE

# TRUMP COUP ATTEMPT COMPARED TO THE J20 PROSECUTION

Yesterday, WaPo published a story describing that there's a debate over whether to charge all the people who can be identified as having entered the Capitol during the January 6 coup attempt.

Federal law enforcement officials are privately debating whether they should decline to charge some of the individuals who stormed the U.S. Capitol this month – a politically loaded proposition but one alert to the practical concern that hundreds of such cases could swamp the local courthouse.

The internal discussions are in their early stages, and no decisions have been reached about whether to forgo charging some of those who illegally entered the Capitol on Jan. 6, according to multiple people familiar with the discussions.

Justice Department officials have promised a relentless effort to identify and arrest those who stormed the Capitol that day, but internally there is robust back-and-forth about whether charging them all is the best course of action. That debate comes at a time when officials are keenly sensitive that the credibility of the Justice Department and the FBI are at stake in such decisions, given the apparent security and intelligence failures that preceded the riot, these people said, speaking on the condition of anonymity to discuss legal deliberations.

Federal officials estimate that roughly 800 people surged into the building, though they caution that such numbers are imprecise, and the real figure could be 100 people or more in either

direction.

Among those roughly 800 people, FBI agents and prosecutors have so far seen a broad mix of behavior – from people dressed for military battle, moving in formation, to wanton vandalism, to simply going with the crowd into the building.

Due to the wide variety of behavior, some federal officials have argued internally that those people who are known only to have committed unlawful entry – and were not engaged in violent, threatening or destructive behavior – should not be charged, according to people familiar with the discussions.

The story explains some of the concerns: If all the evidence that they have shows some sympathetic person entering the Capitol non-violently and then leaving, they might lose. These are [largely white] people with no arrest records. Lots of defendants are likely to invoke Trump to justify their actions. Prosecuting everyone will overwhelm the courts.

Nevertheless, these people said, some in federal law enforcement are concerned that charging people solely with unlawful entry, when they are not known to have committed any other bad acts, could lead to losses if they go to trial.

“If an old man says all he did was walk in and no one tried to stop him, and he walked out and no one tried to stop him, and that’s all we know about what he did, that’s a case we may not win,” one official said.

Another official noted most of those arrested so far have no criminal records.

Meanwhile, defense lawyers for some of

those charged are contemplating something akin to a “Trump defense” – that the president or other authority figures gave them permission or invited them to commit an otherwise illegal act.

“If you think of yourself as a soldier doing the bidding of the commander in chief, you don’t try to hide your actions. You assume you will be held up as a hero by the nation,” criminal defense lawyers Teri Kanefield and Mark Reichel wrote last week.

Such a defense might not forestall charges but could be effective at trial or sentencing.

[snip]

There is also a question over whether charging all of the rioters could swamp the federal court system. In 2019, D.C. federal courts recorded only about 430 criminal cases, and fewer than 300 last year, when the legal system slowed significantly due to the pandemic. Many of those cases, however, had multiple defendants.

I’m very sympathetic with the last issue: while I’d love to use Trump’s crimes as an excuse to expand the number of DC District Judges, there will always be a bottleneck to present anything to a grand jury, because of COVID. I’m unworried that a bunch of people will get a misdemeanor record for participating in a coup attempt.

I think the expressed worries about Trump suggest that someone at DOJ or FBI doesn’t yet realize that Trump must be a part of this, even to hold the more dangerous insurrectionists to account. And if I had to choose whether DC’s prosecutors focus on making *that case* – that Trump’s efforts to undermine legitimate election results in multiple states and Rudy’s coordination with members of Congress tie directly to the mob they used to delay the

certification of the vote – or charging 400 of 800 people with misdemeanors, I say focus on Trump and his co-conspirators.

I think DOJ is right that they will lose some of these cases (all the more so if, as the story suggests might be one way for DOJ to deal with the surge, the trials were moved out of DC). It turns out white supremacists sometimes get a more sympathetic take from jurors than black people do.

That said, I want to consider that concern in light of a comparison someone made: the J20 protestors arrested on the day of former President Trump's inauguration. While a handful of them pled guilty early, many of the other cases were ultimately thrown out.

Even ignoring the context of Trump's attempt to use the mob in an effort to steal the election, two things distinguish the two events.

First, as one of the people arrested in 2017 described last week, cops immediately arrested hundreds of people at the Trump protests, both those who had committed vandalism and those who did not.

On Jan. 20, 2017, around the time Trump was sworn in, D.C. police cornered a couple hundred people – largely protesters but also bystanders, journalists and legal observers – onto a street corner far from the White House or the Capitol grounds. The justification for the mass arrests was that a handful of protesters in the crowd had destroyed the windows of several businesses, including a Starbucks and Bank of America branch, and damaged private vehicles parked on the street. I was covering the protest as a freelance reporter and, after catching an eyeful of pepper spray, I got caught up in the mass arrest while trying to leave. We spent the night in jail; police confiscated our phones.

At first, I figured we'd all be charged with contestable misdemeanors. Instead, the U.S. attorney's office conjured up a radical conspiracy theory that rested on defining the protest march as a black bloc riot in which every alleged participant was guilty for all property damage, ultimately charging more than 200 people. Our indictments referenced protest chants captured on video as evidence. Although my actions, as alleged in the indictment against me, consisted of walking and wearing dark clothing, I was charged with more than half a dozen felony riot and destruction charges. It's hard to convey the terror I felt, especially as Trump loyalists cheered on my prosecution because I was a journalist, gleefully using racial slurs.

Almost no one was arrested at the Capitol, meaning everyone is having to be identified after the fact, largely from social media and videos of the event. It appears that DOJ is already conducting a kind of triage process, focusing on those who were obviously violent or ties to a more organized group. So the arrests are already selecting for prosecutable behavior.

Also, by comparison with the Trump protestors who were arrested on a public street, merely entering into the Capitol building in an attempt to stop the vote count amounts to two crimes, with which most current defendants are being charged:

18 U.S.C. § 1752(a), which makes it a crime to (1) knowingly enter or remain in any restricted building or grounds without lawful authority to do; (2) knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engage in disorderly or disruptive conduct in, or within such proximity to, any restricted building or

grounds when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions; (3) knowingly, and with the intent to impede or disrupt the orderly conduct of Government business or official functions, obstruct or impede ingress or egress to or from any restricted building or grounds; or (4) knowingly engage in any act of physical violence against any person or property in any restricted building or grounds; or attempts or conspires to do so. For purposes of Section 1752 of Title 18, a restricted building includes a posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting; or any building or grounds so restricted in conjunction with an event designated as a special event of national significance; and

40 U.S.C. § 5104(e)(2)(D), which makes it a crime for an individual or group of individuals to willfully and knowingly (A) enter or remain on the floor of either House of Congress or in any cloakroom or lobby adjacent to that floor, in the Rayburn Room of the House of Representatives, or in the Marble Room of the Senate, unless authorized to do so pursuant to rules adopted, or an authorization given, by that House; (B) enter or remain in the gallery of either House of Congress in violation of rules governing admission to the gallery adopted by that House or pursuant to an authorization given by that House; (C) with the intent to disrupt the orderly conduct of official business, enter or remain in a room in any of the Capitol Buildings set aside or designated for the use of— (i) either House of Congress or a Member, committee, officer, or employee of Congress, or either House of

Congress; or (ii) the Library of Congress; (D) utter loud, threatening, or abusive language, or engage in disorderly or disruptive conduct, at any place in the Grounds or in any of the Capitol Buildings with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress, or the orderly conduct in that building of a hearing before, or any deliberations of, a committee of Congress or either House of Congress; (E) obstruct, or impede passage through or within, the Grounds or any of the Capitol Buildings; (F) engage in an act of physical violence in the Grounds or any of the Capitol Buildings; or (G) parade, demonstrate, or picket in any of the Capitol Buildings.

The former, unless done with a weapon, is just a misdemeanor, what most of the 400 people who might not otherwise be charged would be charged with. But as noted, DOJ (probably correctly) believes that some people will be able to argue they thought they were permitted in, especially if they claim to have operated on Trump's orders.

There are two other lessons in the J20 case, though, both of which offer important lessons here.

First, in an attempt to claim that the protest was planned to be violent, DOJ relied on a video from Project Veritas which was – unsurprisingly – edited to be misleading. But they withheld the most exculpatory parts.

While the government used some recordings from the right-wing group – which has frequently been found to selectively edit its videos – in Inauguration Day cases that went to trial, a judge later found that prosecutors were wrong not to disclose



an additional cache of videos and audio recordings in their possession. The judge also ruled that prosecutors violated evidence disclosure rules in not revealing video edits that the government made.

[snip]

Defense lawyers also complained that the government originally didn't disclose Project Veritas as the source of the recordings, and that the defense lawyers had to piece together the connection through their own research. Speaking at Friday's hearing, Elizabeth Lagesse, one of the defendants whose case was dropped, questioned whether the secrecy surrounding the videos was the result of an arrangement between the government and Project Veritas.

The judge then asked Goodhand if there was any agreement to keep Project Veritas's identity secret. Goodhand said he didn't know. Morin ordered him to file a supplement to the government's court papers with an answer.

The government will also have to rely on unofficial videos to prosecute the insurrectionists. While there's little reason to believe they're intentionally edited (in many cases they're not edited at all), there will be a provenance issue.

More importantly, DOJ tried, but failed, to get an expansive warrant for the website of the organization that planned the protest, partly an effort to get the IP address of everyone who accessed the site.

DOJ initially demanded that DreamHost turn over nearly 1.3 IP addresses on visitors to the site. Millions of visitors—activists, reporters, or anyone who just wanted to check out the site—would have records of their visits

turned over to the government. The warrant also sought production of all emails associated with the account and unpublished content, like draft blog posts and photos.

The new warrant parameters exclude most visitor logs from the demand, set a temporal limit for records from July 1, 2016 to January 20, 2017, and also withdraw the demand for unpublished content, like draft blog posts and photos. This was a sensible response on DOJ's part—both legally and politically.

But the new warrant is not without its flaws. First, it's not clear from either the warrant itself or the facts of the case whether DOJ is ordering DreamHost to turn over information on one account or multiple accounts. At a minimum, DOJ should be required to specify which accounts are subject to the order. More fundamentally, DOJ is still investigating a website that was dedicated to organizing and planning political dissent and protest. That is activity at the heart of the First Amendment's protection. If, as DOJ claims, it has no interest in encroaching on protected political activity and organizing, then it should allow a third-party—like a judge, a special master, or a taint team—to review the information produced by DreamHost before it is turned over to the government. Anything less threatens to cast a further shadow on the legitimacy of this investigation.

Again, I highly doubt DOJ would go this aggressively after the groups as groups. Indeed, at least from public reports, DOJ has obtained very little legal process yet, and what they've gotten has been targeted at individuals already arrested. (Though there are reports that they're getting location data from the cells in and

around the Capitol.)

Because of the difference I've already laid out – that violent entry into the Capitol is a crime – DOJ won't be forced to try to tie all the rioters together in one intent (though, again, Trump offers them that and they should use it). So long as they can show the violence and illegal entry should have been obvious, they won't need to prove that everyone came in with the intent to cause damage.

Still, this all comes back to the context – a context that report after report seems to suggest DOJ is not vigorously pursuing yet.

To the extent a mob descended on the Capitol to prevent the certification of the vote – and defendant after defendant posted evidence to their social media showing that's what they understood they were doing – then you have a conspiracy.

Ironically, then, Trump ended his presidency providing the legal case his DOJ tried to trump up on its first day.

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## **ZIP-TIE GUY'S RELEASE ON BAIL IS WHY DONALD TRUMP MUST BE PROSECUTED**

Yesterday, a magistrate judge in Nashville, Chip Frenshley, gave Eric Munchel bail. He's the guy who has become known as "Zip-Tie Guy" because of a picture of him taken in the Senate during the January 6 coup attempt, showing him dressed in tactical gear and holding zip ties.

The government will appeal the decision to DC Chief District Judge Judge Beryl Howell over the weekend, and thus far she has granted such

requests from the government, so it's certainly possible he will ultimately be held.

The bail hearing demonstrates one of the problems with the government's investigation and prosecution going forward, one which demonstrates the necessity of prosecuting former President Donald Trump (see also this live tweet of the hearing and Politico's account).

Munchel got charged, along with his mom, Lisa Marie Eisenhart, with the two trespassing charges used for most defendants, conspiracy among themselves, along with obstructing law enforcement during civil disorder.

The filing supporting detention described that Munchel must be found guilty of attempting to impede law enforcement during civil disorder.

To prove a violation of 18 U.S.C. § 231(a)(3), the government must show (1) that a civil disorder existed at the time of any alleged violation; (2) that such civil disorder was resulting in interference with a federally protected function; (3) that one or more law enforcement officers were lawfully engaged in the lawful performance of their official duties incident to and during the commission of such civil disorder; (4) that the defendant attempted to commit an act for the intended purpose of obstructing, impeding, or interfering, either by himself or with someone else, in a violent manner with such law enforcement officer or officers; and (5) that such attempt to act was done willfully and knowingly. *United States v. Casper*, 541 F.2d 1275, 1276 (8th Cir. 1976).

The evidence doesn't show Munchel doing that – though shows his mom yelling at the cops. Indeed, the judge in the hearing described video showing him being deferential to cops inside the Capitol. The fact he grabbed the zip ties and

said he wanted to seize the Senate gavel suggests he targeted Congress, not the cops.

What the evidence does show is Munchel is a gun nut who wanted to terrorize lawmakers. His mom spoke more explicitly of violent revolution.

“It was a kind of flexing of muscles,” said Munchel, who wore a bulletproof vest and complained that police confiscated his Taser during the riot. “The intentions of going in were not to fight the police. The point of getting inside the building is to show them that we can, and we will.”

Preparing for their 10-hour drive home, the 30-year-old clamoured for greater organisation in the next steps to fight against Biden’s America. He worried that many pro-Trump warriors were individualists and lamented that potential leaders in the Make America Great Again (Maga) movement faced difficulty in rallying troops due to banishment from mainstream social media sites. “Our biggest struggle is getting together, knowing where to go, what to do and who to go to,” said Munchel despondently.

His mother agreed: “The left has everything: the media, organisations, the government. We have to organise if we’re going to fight back and be heard.” Eisenhart, a nurse, added that a violent revolution has long been on the cards thanks to last year’s racial justice protests, anti-police riots and “unnecessary” coronavirus lockdowns.

“This country was founded on revolution. If they’re going to take every legitimate means from us, and we can’t even express ourselves on the internet, we won’t even be able to speak freely, what is America for?” said a teary-eyed Eisenhart, biting into a hotdog. “I’d

rather die as a 57-year-old woman than live under oppression. I'd rather die and would rather fight."

The most compelling piece of evidence that Munchel could have coordinated with a more organized plot involves an exchange he had with the Oath Keepers as he headed into the building.

As MUNCHEL and Eisenhart make their way to the Capitol, they encounter several members of the "Oathkeepers," a militia group that is distrustful of government authority. One of the Oathkeepers says, "There's 65 more of us coming." MUNCHEL, when he recognizes them, says in affirmation, "Oathkeepers," and bumps fists with one of the men.

But that doesn't show pre-planning nor does it tie his possession of the zip ties to any plan the Oath Keepers had.

The government clearly either fears that Munchel will engage in violence or it wants to make sure it keeps its showy zip-tie guy on ice to include kidnapping among the parts of the plot they'll eventually lay out. But the judge is right that, thus far, the government hasn't shown evidence that he coordinated with anyone except his mom.

Silent in all this (because, unlike the other kitted-out guy in the Senate that day, Munchel was not shown to have told a reporter that he responded to the call of the then-President to come to DC to engage in that show of force) is the framework of Trump's calls to overturn an election. The evidence even suggests that Eisenhart claims to have believed Trump's Big Lie of a stolen election (and it may well be true that she does believe it). But that's the single factor that makes Zip-Tie Guy's actions, with his mom, dangerous. He wanted to scare lawmakers, and he wanted to do it in the context of a plea to illegally retain power. A plea from Donald Trump.

Until such time as prosecutors are ready to argue that this show of terrorism was intended to support false claims of election theft mobilized in an attempt to overthrow the Constitutional government of the United States, judges are going to find that guys like Munchel owned their arsenals legally and – while violating specific laws protecting the Capitol and the counting of the votes – do not pose a grave threat to our country.

I'm not saying *I* believe that. I'm not even sure Frenshley does.

But absent closer ties to the Oath Keepers (who did clearly pre-plan), the thing that makes the raid on the Capitol especially dangerous, the thing that makes Munchel's grab for the gavel and the zip-ties criminal, is Trump's illegal plan. And so, until prosecutors start naming Trump as a co-conspirator, start naming the Big Lie of a stolen election as the motivating cause of the violence, guys like Munchel are going to continue to get bail.

Update: Mirriam Seddiq did a video talking about how conspiracy works in US law, as applied to Trump's incitement of an insurrection that lays out how this should be presented to judges.

Update: Over the weekend, Beryl Howell granted the government's emergency motion for detention. The motion included an additional allegation against Munchel, that he had assaulted Bloomberg journalist William Turton.

On the evening of January 6, 2021, after the insurrection, an individual posted a video of the Grand Hyatt hotel lobby on Twitter. The person then posted a message that read: "After I took this video, several Trump supporters harassed me and tried to follow me to my room. One accused me of being 'antifa.'<sup>3</sup> Hotel security intervened and moved me to new room. What a weird day." See <https://twitter.com/WilliamTurton/status/1346980284252745729> (Last accessed on

January 23, 2021). The person added:  
“The Trump supporters demanded that I delete the video. One woman flashed her taser at me, and threatened to mace me.”

See

<https://twitter.com/WilliamTurton/status/1347024856416714752> (last viewed

January 23, 2021). Two days later, on January 8, based on another video from the Grand Hyatt posted to social media, the person identified the defendant as “one of the people in the hotel lobby who demanded I delete the video, put his hands on me, and screamed at me . . . .”

See

<https://twitter.com/WilliamTurton/status/1347699125408641024> (last viewed

January 23, 2021);

<https://twitter.com/WilliamTurton/status/1347699345345417217> (last viewed

January 23, 2021). Evidence of this encounter was not presented at the preliminary and detention hearing in the Middle District of Tennessee.

It also more aggressively described what Munchel had done as insurrection.

Finally, it is difficult to fathom a more serious danger to the community—to the District of Columbia, to the country, or to the fabric of American Democracy—than the one posed by armed insurrectionists, including the defendant, who joined in the occupation of the United States Capitol. Every person who was present without authority in the Capitol on January 6 contributed to the chaos of that day and the danger posed to law enforcement, the Vice President, Members of Congress, and the peaceful transfer of power. The defendant’s specific conduct aggravated the chaos and danger. It was designed to intimidate Members of Congress and instigate fear across the country. Make



no mistake: the fear the defendant helped spread on January 6 persists—the imprint on this country’s history of a militia clad insurrectionist standing over an occupied Senate chamber is indelible. Only detention mitigates such grave danger.

It makes it clear Munchel may be facing additional charges.

The evidence amassed so far subjects the defendant to felonies beyond that with which he has been charged so far, including obstructing Congress, interstate travel in furtherance of rioting activity, sedition, and other offenses. These offenses carry substantial penalties, which incentivizes flight and evading law enforcement—a thought that the defendant already appears to have contemplated by virtue of avoiding his residence and workplace, terminating his Facebook account, and leaving his cell phone with an associate.

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## **THE DOD FLUNKIES’ CONVENIENT LAPSE OF EXECUTIVE PRIVILEGE**

The first thing you should take away from this long Vanity Fair profile of the Trump loyalists who led DOD during the Transition period is that Kash Patel has a very selective approach to Executive Privilege. Deep in the story, when caught in a lie about a plot to have him replace CIA Director Gina Haspel, Patel invokes Executive Privilege to refuse to answer.

I asked Patel about an Axios story that broke just before we sat down to talk. It asserted that CIA director Gina Haspel threatened to resign after learning that Trump planned to install Patel as her deputy. "I'm not going to comment on what the president wanted to do or didn't want to do, but there's no conversations of that now or this week or this year," he replied. But he seemed to be playing coy. The CIA gambit took place last year. In fact, when I had spoken with Cohen about the matter, he had told me, "The idea was to put Kash in as the deputy, which doesn't require Senate approval, and then to fire Gina the next day, leaving Kash in charge... Robert O'Brien, [Trump's national security adviser], is the one who deep-sixed it." When I pressed Patel further about these machinations, which had occurred in December, I saw him turn lawyerly: "That stuff is between me and the boss. That's the only thing I don't comment on. Ever. It's executive privilege."

But in the first lines of the profile, both he and former Acting Secretary of Defense Christopher Miller happily offer up a tale of how Trump not only claimed to know what an appropriate deployment of National Guard troops would be in preparation for January 6, but ordered DOD to have them deployed.

On the evening of January 5—the night before a white supremacist mob stormed Capitol Hill in a siege that would leave five dead—the acting secretary of defense, Christopher Miller, was at the White House with his chief of staff, Kash Patel. They were meeting with President Trump on "an Iran issue," Miller told me. But then the conversation switched gears. The president, Miller recalled, asked how

many troops the Pentagon planned to turn out the following day. “We’re like, ‘We’re going to provide any National Guard support that the District requests,’” Miller responded. “And [Trump] goes, ‘You’re going to need 10,000 people.’ No, I’m not talking bullshit. He said that. And we’re like, ‘Maybe. But you know, someone’s going to have to ask for it.’” At that point Miller remembered the president telling him, “‘You do what you need to do. You do what you need to do.’ He said, ‘You’re going to need 10,000.’ That’s what he said. Swear to God.”

I could not recall the last time a contingent that large had been called up to supplement law enforcement at all, much less at a demonstration—the Women’s March and the Million Man March sprang to mind—and so I asked the acting SECDEF why Trump threw out such a big number. “The president’s sometimes hyperbolic, as you’ve noticed. There were gonna be a million people in the street, I think was his expectation.” Miller maintained that initial reports on the anticipated crowd size were all over the map—anywhere from 5,000 to 40,000. “Park Police—everybody’s so hesitant to give numbers. So I think that was what was driving the president.”

There’s a lot of reason to believe this is bullshit. Trump wouldn’t ask for the Guard if he wanted a show of force, he’d ask for a helicopter flyover or something else inappropriate. Trump isn’t a detail guy. Miller and Patel offered up a key (and dubious) excuse used elsewhere – that they hadn’t been told the Park Service had expanded the Trump rally to 30,000 attendees.

Most importantly, Patel demonstrated that he believes his actual conversations with Trump should be protected by Executive Privilege.

Certainly, he would refuse to say anything bad about Trump.

Ezra Cohen[-Watnick], by contrast, isn't prompted to. While he is permitted to claim that Trump threw everyone – the entire country – under the bus, he's not asked about his mentor Mike Flynn's role in the conspiracy.

Ezra Cohen, another of Miller's top confidants, believes that his colleagues' words and deeds may be well and good, but are beside the point: "The president threw us under the bus. And when I say 'us,' I don't mean only us political appointees or only us Republicans. He threw America under the bus. He caused a lot of damage to the fabric of this country. Did he go and storm the Capitol himself? No. But he, I believe, had an opportunity to tamp things down and he chose not to. And that's really the fatal flaw. I mean, he's in charge. And when you're in charge, you're responsible for what goes wrong."

[snip]

His promotion was fodder for trolls of every stripe. "To the left I became this horrible person that enabled the president, attacking [Obama officials] and all this other stuff like that," Cohen contended as we sat in his kitchen and later drove through a Chick-fil-A before tooling around northern Virginia. "And then to the crazy people on the right—that are dangerous people that did the horrible, antidemocratic behavior with the Capitol—these nutjobs are saying that I am QAnon."

The silence about Flynn's call for martial law is all the more telling given Cohen's nod to the way QAnon has worked him into their conspiracies. Flynn played a key role in

mobilizing QAnon to serve as Trump's army.

Also missing from this profile? Any mention of Flynn's brother, Charles, who participated in a call with local DC officials calling for more help but whose role DOD hid until after Biden was inaugurated.

There are other silences as well, perhaps most notably Miller's stubborn effort to burrow in a fourth ally, Mike Ellis, at NSA in the last hours of the Trump Administration.

So even before you get into the details, this profile should be regarded as an effort by three very slick dudes to recast their role as Trump flunkies in the wake of an inexcusable event.

With all that said, it appears to differ in key ways from the timeline DOD released days after the coup attempt. The Vanity Fair narrative makes several claims that are probably true: That Miller came to work expecting he might not get home that night (though didn't stay in DC even as the National Guard did in advance of the inauguration), and that DOD was chastened given the gross abuse in response to June protests.

But it also suggests Muriel Bowser called for help 48 minutes after DOD's timeline shows she did.

On the morning of January 6, as Miller recounted, he was hopeful that the day would prove uneventful. But decades in special operations and intelligence had honed his senses. "It was the first day I brought an overnight bag to work. My wife was like, 'What are you doing there?' I'm like, 'I don't know when I'm going to be home.'" To hear Patel tell it, they were on autopilot for most of the day: "We had talked to [the president] in person the day before, on the phone the day before, and two days before that. We were given clear instructions. We had all our authorizations. We didn't need to talk to the president. I was talking to

[Trump's chief of staff, Mark] Meadows, nonstop that day."

The security posture and response on January 6 did not occur in a vacuum. June 1, 2020, had been a perilous precedent. On that day federal police had expelled peaceful protesters from Lafayette Square to facilitate the president's saunter over to St. John's Church for a publicity stunt. But the brute force displayed to clear out the area proved a national embarrassment and allegedly influenced Washington mayor Muriel Bowser's view, come January, about how the capital should be policed—and by whom. On the day before all hell broke loose on the Hill, she made it clear the D.C. police (MPD) would be running the show on the 6<sup>th</sup>, though 340 unarmed National Guard troops had been requested to help with traffic: "The District of Columbia is not requesting other federal law enforcement personnel and discourages any additional deployment without immediate notification to, and consultation with, MPD."

Miller told me that when Trump made him head of the Pentagon, in November, "the bar was pretty low." He had three goals. "No military coup, no major war, and no troops in the street," before observing dryly, "The 'no troops in the street' thing changed dramatically about 14:30... So that one's off [the list]."

The day began with a lull. "We had meetings upon meetings. We were monitoring it. And we're just like, Please, God, please, God. Then the damn TV pops up and everybody converges on my office: [Joint Chiefs of Staff] chairman [Mark Milley], Secretary of the Army [Ryan] McCarthy, the crew just converges." And as intelligence started

cycling in, things went from watch and see to “a current op.” Miller recalled, “We had already decided we’re going to need to activate the National Guard, and that’s where the fog and friction comes in.”

“The D.C. mayor finally said, ‘Okay, I need more,’” Kash Patel would tell me. “Then the Capitol police—a federal agency and the Secret Service made the request. We can support them under Title 10, Title 32 authorities for [the] National Guard. So [they] collectively started making requests, and we did it. And then we just went to work.”

With his use of the word “finally,” Patel insinuates there was a delay before Bowser called and asked for help. Meanwhile, Miller suggests that DOD’s response took place at 2:30PM.

The timeline, however, shows that Bowser requested help 29 minutes after DOD says they got “open source reports” of demonstrators moving on the Capitol.

1305: A/SD receives open source reports of demonstrator movements to U.S. Capitol.

1326: USCP orders evacuation of Capitol complex.

1334: SECARMY phone call with Mayor Bowser in which Mayor Bowser communicates request for unspecified number of additional forces.

1349: Commanding General, DCNG, Walker phone call with USCP Chief Sund. Chief Sund communicates request for immediate assistance.

1422: SECARMY phone call with D.C. Mayor, Deputy Mayor, Dr. Rodriguez, and MPD leadership to discuss the current situation and to request additional DCNG

support.

1430: A/SD, CJCS, and SECARMY meet to discuss USCP and Mayor Bowser's requests. 1500: A/SD determines all available forces of the DCNG are required to reinforce MPD and USCP positions to support efforts to reestablish security of the Capitol complex.

1500: SECARMY directs DCNG to prepare available Guardsmen to move from the armory to the Capitol complex, while seeking formal approval from A/SD for deployment. DCNG prepares to move 150 personnel to support USCP, pending A/SD's approval.

1504: A/SD, with advice from CJCS, DoD GC, the Chief of the National Guard Bureau (CNGB), SECARMY, and the Chief of Staff of the Army, provides verbal approval of the full activation of DCNG (1100 total) in support of the MPD. Immediately upon A/SD approval, Secretary McCarthy directs DCNG to initiate movement and full mobilization. In response, DCNG redeployed all soldiers from positions at Metro stations and all available non-support and non-C2 personnel to support MPD. DCNG begins full mobilization.

The Vanity Fair profile suggests DOD made the decision based off watching TV – presumably those open source reports – that reinforcements would be needed. But they didn't even begin to "discuss" doing so until 2:30, and didn't move to make that deployment until 3:04 (so 34 minutes after Miller describes).

Plus, Patel makes no mention of the call from Capitol Police at 1:49.

Ezra Cohen would like you to believe that he got thrown under the bus along with all the people supporting rule of law. Patel would like you to



believe the failures of DOD under his watch were not attributable to the Chief of Staff. And Miller would like you to know his family doesn't much like Donald Trump.

But the whole story reads like a fairy tale.

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## **NOW WE KNOW WHY JEFFREY ROSEN HAS BEEN SILENT, HOW ABOUT CHRIS WRAY?**

Since the attempted coup, both Jeffrey Rosen and Chris Wray (and Wray's then-Deputy David Bowdich) were almost silent about the attack. A week after the attack, Rosen a video in the middle of the night, explaining what he had done during the coup.

The day after, Wray released a short statement. More than a week later, he spoke at a closed-press meeting on inauguration security. Neither provided the kind of daily updates one would expect after such an attack.

Last night (as Rayne laid out here), NYT reported on why Rosen was so silent: because he's a witness in what should be a criminal investigation into how the attack relates to the effort to overturn the election.

As the NYT lays out, in the days leading up to the coup attempt, Trump already tried to replace Rosen with someone, Jeffrey Bossert Clark, who would be willing to take steps to overturn the vote.

The effort to force Rosen to use DOJ resources to undermine a democratic election started on December 15, the day after Bill Barr resigned.

■ When Mr. Trump said on Dec. 14 that

Attorney General William P. Barr was leaving the department, some officials thought that he might allow Mr. Rosen a short reprieve before pressing him about voter fraud. After all, Mr. Barr would be around for another week.

Instead, Mr. Trump summoned Mr. Rosen to the Oval Office the next day. He wanted the Justice Department to file legal briefs supporting his allies' lawsuits seeking to overturn his election loss. And he urged Mr. Rosen to appoint special counsels to investigate not only unfounded accusations of widespread voter fraud, but also Dominion, the voting machines firm.

Then, over the weekend in advance of the certification, Assistant Attorney General Jeffrey Bossert Clark told Rosen Trump was going to make him Attorney General so he could chase Rudy Giuliani's conspiracy theories.

On New Year's Eve, the trio met to discuss Mr. Clark's refusal to hew to the department's conclusion that the election results were valid. Mr. Donoghue flatly told Mr. Clark that what he was doing was wrong. The next day, Mr. Clark told Mr. Rosen – who had mentored him while they worked together at the law firm Kirkland & Ellis – that he was going to discuss his strategy to the president early the next week, just before Congress was set to certify Mr. Biden's electoral victory.

Unbeknown to the acting attorney general, Mr. Clark's timeline moved up. He met with Mr. Trump over the weekend, then informed Mr. Rosen midday on Sunday that the president intended to replace him with Mr. Clark, who could then try to stop Congress from certifying the Electoral College results. He said that Mr. Rosen could stay on as his deputy

attorney general, leaving Mr. Rosen speechless.

In a replay of the 2004 Hospital Hero moment, the others involved (including White House Counsel Pat Cipollone) agreed they'd resign en masse if Trump replaced Rosen, which led him to back off the plan.

NYT had four sources for this story, all of whom fear – even after Trump has been relegated to Florida – retaliation.

This account of the department's final days under Mr. Trump's leadership is based on interviews with four former Trump administration officials who asked not to be named because of fear of retaliation.

Clark claimed there were errors in this story, but ultimately he claimed Executive Privilege (his statement to WaPo on the topic, which I've used here, is more expansive).

In a statement that seemed to draw on language in the New York Times account, Clark said, "I categorically deny that I 'devised a plan . . . to oust' Jeff Rosen. . . . Nor did I formulate recommendations for action based on factual inaccuracies gleaned from the Internet."

"My practice is to rely on sworn testimony to assess disputed factual claims," Clark said. "There were no 'maneuver[s].' There was a candid discussion of options and pros and cons with the President. It is unfortunate that those who were part of a privileged legal conversation would comment in public about such internal deliberations, while also distorting any discussions. . . . Observing legal privileges, which I will adhere to even if others will not, prevent me from

divulging specifics regarding the conversation.”

The WaPo version of this story names all who were involved in the confrontation with Trump (though the sources for the story are likely, in part, their aides).

At the meeting were Trump, Clark and Rosen, along with Richard Donoghue, the acting deputy attorney general; Steven A. Engel, the head of the department’s Office of Legal Counsel; and Pat Cipollone, the White House counsel, the people familiar with the matter said. The people said Rosen, Donoghue, Engel and Cipollone pushed against the idea of replacing Rosen, and warned of a mass resignation.

Clark says he will only respond to a sworn statement. By all means, the impeachment managers should demand sworn testimony, from all involved.

Of course, that would mean Pat Cipollone, who led the former President’s defense in his first impeachment trial, would be asked about the second time Trump tried to use government resources to cheat. Steve Engel, who authorized the withholding of a whistleblower complaint describing Trump’s earlier attempt, would also testify. Rosen, who participated in having DOJ chase Sidney Powell’s conspiracy theories about Mike Flynn, would be asked to testify about why the conspiracy theories about Dominion machines were any less credible than the Flynn ones. And Donoghue, who served as a filter for some of the conspiracy theories Rudy Giuliani had been fed by men who have since been named Russian agents, would be asked to testify about why Rudy wasn’t a credible source.

Rosen was silent in his final two weeks, presumably, for fear he might get fired and replaced by someone who would be more pliant to

a coup attempt. But he – and the three others – are also witnesses to a larger plot that ended up in violence and death.

I wonder if Chris Wray has similar evidence he'll be asked to share.

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## **“STAND BACK AND STAND BY:” THE PROUD BOYS NODE OF THE JANUARY 6 ATTACK**

As I and others have reported, a node of three people with ties to the Oath Keepers is, thus far, the first sign of a larger conspiracy charge in the government's investigation of the January 6 insurrection.

It's clear the government believes they can get there with the Proud Boys, either in conjunction with or parallel to the Oath Keepers. But they're not there yet.

I want to lay out what they've shown about the Proud Boys operations thus far.

In addition to Enrique Tarrio (who was arrested before the riot for vandalizing a black church in December), the government has identified six people as Proud Boy adherents in affidavits (plus Robert Gieswein, who coordinated with them):

- Joe Biggs
- Andrew Bennett
- Bryan Bentancur (parole violation)
- William Chrestman
- Louis Enrique Colon
- Nicholas DeCarlo

- Gabriel Garcia (Facebook video—though unclear how IDed)
- Robert Gieswein
- Daniel Goodwyn
- Cory Konold
- Felicia Konold
- Christopher Kuehne
- Ethan Nordean
- Nicholas Ochs
- Dominick Pezzola
- Ryan Samsel

While some of these – notably, Bryan Bentancur, who lied to his parole officer about handing out bibles to excuse a trip to DC that day – were caught incidentally, it's clear that Biggs and Pezzola were priorities, the former for his leadership role in the group and the latter for his appearance in videos breaking in a window with a police shield.

Between these affidavits, the government has provided evidence that the Proud Boys plan their operations in advance, with this quote from a Joe Biggs interview.

When we set out to do an event, we go alright, what is our main objective? And that's the first thing we discuss. We take three months to plan an event. And we go, what's our main objective? And then we plan around that, to achieve that main objective, that goal that we want.

In the case of the January 6 insurrection, that pre-planning involved creating a false flag to blame Antifa. The government showed this in a Tarrío message posted in December.

For example, on December 29, 2020, Tarrío posted a message on the social media site Parler<sup>1</sup> about the

demonstration planned for January 6, 2021. Among other things, Tarrío announced that the Proud Boys would “turn out in record numbers on Jan 6th but this time with a twist... We will not be wearing our traditional Black and Yellow. We will be incognito and we will be spread across downtown DC in smaller teams. And who knows...we might dress in all BLACK for the occasion.” I believe the statement about dressing in “all BLACK” is a reference to dressing like the group known as “Antifa,” who the Proud Boys have identified as an enemy of their movement and are often depicted in the media wearing all black to demonstrations.

And the government showed agreement between Tarrío and Biggs with this similar message from Biggs.

On or around the same day, BIGGS posted a similar message to his followers on Parler in which he stated, among other things, “we will not be attending DC in colors. We will be blending in as one of you. You won’t see us. You’ll even think we are you . . .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.” I understand that BIGGS was directing these statements at “Antifa.”

Daniel Goldwyn, texting that day, addressed the claim of a false flag on texts.



The government provided evidence that members of the Proud Boys had followed the false flag plan, with pictures of the men marching through DC “incognito” before the insurrection.

On January 6, 2021, an individual that I have identified as BIGGS and a group of people that hold themselves out as Proud Boys were depicted on the east side of the U.S. Capitol. Consistent with the directive issued by organizers of the Proud Boys, including Tarrio and BIGGS, none of the men pictured are wearing Proud Boys colors of black and yellow, but are instead dressed “incognito.” Indeed, BIGGS, wearing glasses and a dark knit hat, is dressed in a blue and grey plaid shirt.

In Biggs’ affidavit (the most recent of the six), the government also provided evidence of communications between members during the attack.



Your affiant has reviewed additional footage from the events inside the U.S. Capitol. In one image, shown below, Pezzola appears to have what I believe to be an earpiece or communication device in his right ear. In my experience, such a device could be used to receive communications from others in real time. Your affiant also notes that multiple individuals were photographed or depicted on videos with earpieces, including other individuals believed to be associated with the Proud Boys. For instance, in the picture of the Proud Boys referenced above in Paragraph 13, an individual believed to be part of the group is pictured wearing a similar earpiece.

Your affiant has also identified certain Proud Boys at the U.S. Capitol on January 6, 2021, who appear to have walkie-talkie style communication devices. For instance, in the picture of the Proud Boys referenced above in Paragraph 13, both BIGGS and the individual next to him have such devices on their chests.

Gabriel Garcia is described as captain by another of the men (though it's unclear whether that rank was replicated in the group).

Additionally, on January 8, 2021, the FBI received information from the public regarding a separate subject ("S-1"). S-1 uploaded to Facebook pictures of himself inside of the Capitol building on January 6, 2021. As FBI Agents reviewed the evidence related to that report, they discovered that S-1 posted a status on Facebook tagging GARCIA and calling him "El Capitan." The caption reads, "El Capitan doing his duty. Gabriel Garcia." Systems checks reveal that GARCIA is a former captain in the United States Army. GARCIA also uses the

handle "Captain" as his display name on the social media platform Telegram

Affidavits provide two different descriptions of Pezzola being among the first to break into the Capitol.

One such video depicts an individual, now identified as Proud Boys member Dominic Pezzola, breaking the window of the U.S. Capitol Building with a clear plastic shield at approximately 2:13 p.m.<sup>3</sup> Shortly after the glass in the window is broken, an unidentified individual can be heard yelling words to the effect of, "Go, Go, Go!" Several individuals enter the building through the broken window, including Pezzola. A nearby door was opened and a crowd of people began to enter the U.S. Capitol.

This one comes from the Pezzola affidavit.

On January 8, 2021, FBI received a lead depicting publicly available photographs and videos of an unknown individual breaking the window of the U.S. Capitol Building, which is located in Washington, D.C., with a clear plastic shield, and then entering the Capitol building. According to time and date stamps, this occurred on January 6, 2021, at approximately 2:39 p.m.. Below are screen shots from one such video. In the video, soon after the glass in the window is broken, an unidentified individual can be heard yelling words to the effect of, "Go, Go, Go!" The individual with the shield is depicted in the video as entering the Capitol building, while still holding the shield. The screen shot on the left shows the individual breaking the window, and the screen shot on the right, which is taken seconds after the other screenshot, shows his face.

The government has provided some (albeit thus far, scant) evidence that one plan was to target members of Congress, which Garcia calling Pelosi out personally.

Approximately 35 seconds into the video, GARCIA says loudly, "Nancy come out and play."

There is a witness (who may not be entirely reliable) describing the group to be armed.

W-1 stated that other members of the group talked about things they had done during the day, and they said that anyone they got their hands on they would have killed, including Nancy Pelosi. W-1 further stated that members of this group, which included "Spaz," said that they would have killed [Vice President] Mike Pence if given the chance. According to W-1, the group said it would be returning on the "20th," which your affiant takes to mean the Presidential Inauguration scheduled for January 20, 2021, and that they plan to kill every single "m-fer" they can. W-1 stated the men said they all had firearms or access to firearms.

In Biggs' affidavit, the government describes Biggs disclaiming having any advance plan.

On or about January 18, 2021, BIGGS spoke with agents of the FBI after video emerged online of him inside the U.S. Capitol. BIGGS stated, in substance and in part, that he was present in Washington, D.C. for the demonstration on January 6, 2021. BIGGS admitted to entering the Capitol building on January 6, 2021, without forcing entry. BIGGS informed the interviewing agent that the doors of the Capitol were wide open when he made entry into the building. BIGGS denied having any knowledge of any pre-

planning of storming the Capitol, and had no idea who planned it.

And in two cases, the government has provided evidence that the group was responding to Trump's orders.

On November 16, 2020, OCHS made a post to the social media site Parler, in which he forwarded a Tweet by President Trump declaring, "I WON THE ELECTION!" and OCHS stated, "Show this tweet to leftists and say they won't do shit when he just keeps being president. Don't say it was stolen or rigged. Just say we're doing it and they won't fight back. They are getting scared, and they don't function when they're scared."

In Goodwyn's case, the government shows him adopting Trump's avatar on Twitter and repeating Trump's own line from the debate, "Stand back and stand by."



Again, this is just what's public two weeks after the attack, and just those whom the government identified as members. There are others (notably John Sullivan, whose brother has not been arrested but who has ties to the group), who would be obvious candidates to flip to learn more about the group, and there are some tangential figures not included here.

This route is one of the most likely ones via which the government will tie the violence to those close to Trump trying to undermine the election and – with Trump's "Stand back and stand by" comment – possibly even Trump.

Update: Corrected how Pezzola broke in.

Update: Tarrío was also offering to pay for lawyers for people.

Update, 1/26: I've added Robert Gieswein to this list, based on this WSJ video showing him involved throughout the day with the Proud Boys.

Update, 1/27: I've added Andrew Bennett, who was described as wearing a Proud Boy hat in his affidavit.