

THE BROKEN WINDOWS TERRORISM ENHANCEMENT AND DETENTION OF THE JANUARY 6 INSURRECTIONISTS

In this post, I described how Jessica Watkins' defense attorney, Michelle Peterson, admitted how damning her client's own description of her actions was, but then invented a false timeline to explain away those statements. Peterson also said that evidence about Stewart Rhodes' plans for the Oath Keepers to replicate January 6 can't be held against her client because Watkins was already in jail when Rhodes made those comments, but also says Watkins – who in November, before the Trump rallies that Watkins' own lawyer cited to explain Watkins' actions, said she'd go underground if Biden assumed the Presidency – can be released while those plans are ongoing. (Peterson is also arguing that Watkins should go back to running the bar where she recruited co-conspirator Donovan Crowl.)

I think Peterson's argument fails because the evidence doesn't match her claims. But she makes an argument that I think *will* be compelling for some other Oath Keeper defendants.

The government conspiracy charge against nine Oath Keepers alleges a conspiracy to obstruct an official proceeding (the counting of the electoral vote), obstruction of that proceeding, and forcibly entering the Capitol while the Vice President was present. The evidence for those allegations is all clear cut.

But as I described in the post, the government also charges the nine Oath Keepers with destruction of government property and aiding and abetting such destruction.

The indictment only describes destruction in two places: in the general boilerplate description of the event used against all January 6 defendants, and describing the door through which The Stack entered the Capitol, around 40 minutes after the Capitol was initially breached.

In the course of these events, approximately 81 members of the Capitol Police and 58 members of the Metropolitan Police Department were assaulted. The Capitol suffered millions of dollars in damage-including broken windows and doors, graffiti, and residue from pepper spray, tear gas, and fire extinguishers deployed both by crowd members who stormed the Capitol and by Capitol Police officers trying to restore order. Additionally, many media members were assaulted and had cameras and other news-gathering equipment destroyed.

[snip]

The Capitol building doors through which CROWL, WATKINS, SANDRA PARKER, YOUNG, STEELE, KELLY MEGGS, CONNIE MEGGS, and the others in their group breached suffered significant damage.

The government implicates the Oath Keepers in this destruction via an aiding and abetting charge.

It's on that basis that the government initially moved to detain Watkins.

Watkins made her initial appearance in the Southern District of Ohio on January 19, 2021, and the government moved for detention under 18 U.S.C § 3142(f)(1)(A), on the basis that 18 U.S.C. § 1361 is a crime of violence.

While they don't explain it specifically in that

motion (but the government does elsewhere for other defendants, such as for the Proud Boys' Ethan Nordean), effectively the government is using the damage done to a government building to get presumption of detention under 18 USC 2332b's terrorism enhancement.

Peterson argues that the Watkins' crimes are not crimes of violence.

The offenses charged are not crimes of violence. While violence was committed on January 6, 2021, and those responsible will be held accountable, that is not the issue before the Court in determining whether Ms. Watkins must be held in custody pending the outcome of her case. Rather the question is solely whether or not there are conditions that can reasonably assure the safety of the community and her appearance until this case is resolved in whatever manner it is resolved. Here, the government has not presented any evidence that Ms. Watkins committed any violence. Their evidence is that 40 minutes after the Capitol had been breached, she went to the Capitol and entered the building. By that time, the door had already been opened. The government acknowledges that "the crowd aggressively and repeatedly pulled on and assaulted" the doors of the building to get inside, causing damage. Ms. Watkins is charged with aiding and abetting this offense, but there is no evidence that this was something she had a criminal intent to do. She would have to have shared in the intent to destroy property, when in fact, she attempted to stop people from destroying property.

Peterson argues that the body cameras of some of the cops with whom Watkins interacted will show her trying to prevent damage (though, as noted, Peterson's explanation for Watkins' description of the beauty of breaching the Capitol is

utterly inconsistent with the actual comments Watkins made, which framed that beauty specifically in terms of fighting cops).

Peterson's argument here is important, and it will be very compelling for those Oath Keeper defendants who *didn't* leave tracks of messages describing efforts to train a militia to take out the federal government even before Trump's incitement to violence cited by the defense started. While there might be evidence from *other* Oath Keepers the government is investigating (remember there is a busload of Oath Keepers from NC who were coordinating with the charged co-conspirators, along with the Quick Reaction Force ready to bring additional weapons, as well as a few more known Oath Keepers who directly confronted cops), nothing in the record thus far shows The Stack had a direct role in the damage to the Capitol.

Compare with the Proud Boys to understand the significance of this. In that case, Dominic Pezzola, in fairly obvious coordination with others, was the very first person to break a window allowing the breach of the Capitol. While the other Proud Boys are not yet charged in a conspiracy with Pezzola, there's every likelihood they will be, in which case a claim that they worked together to break that window will be reasonable and detention claims based on that property damage against co-conspirators substantiated.

In the apparent Proud Boys plot to breach the Capitol and delay the vote count, breaking that window was a fundamental part of the conspiracy.

This is the same problem the government has – and will face on appeal – with Zip Tie Guy Eric Munchel and his mother, Lisa Eisenhart. While mother and son clearly had intent to obstruct the counting of the vote and Munchel came armed with a taser, there's no evidence that they were working in concert with those who committed the violence or did the damage to the Capitol.

In both the Munchel case and the Oath Keepers

case, the government might believe or might have believed they could rely on another terrorism enhancement, attempted kidnapping of congressional or cabinet targets (18 USC 351), kidnapping of Presidential staff (18 USC 1751a) or hostage taking (18 USC 1203). The government has argued, for example, that Munchel and his mom are the only ones who saw the Capitol Police zip ties sitting out in public and seized them, after which Munchel headed to where the vote was being counted in the Senate chamber, supporting a supposition he would have detained Senators if he had had the chance.

One of the Oath Keepers on the Zello channel Watkins was using (it's unclear whether the government has IDed this person yet) told her she was executing a citizens arrest based on probable cause for treason and election fraud, implying a plan to detain members of Congress.

An individual directed, "You are executing citizen's arrest. Arrest this assembly, we have probable cause for acts of treason, election fraud." WATKINS responded, "We are in the mezzanine. We are in the main dome right now. We are rocking it. They are throwing grenades, they are fricking shooting people with paint balls. But we are in here." An individual responded to WATKINS, telling her to be safe, and stated, "Get it, Jess. Do your fucking thing. This is what we fucking [unintelligible] up for. Everything we fucking trained for."

That is, in both cases, there's reason to *suspect* the intent was to detain members of Congress – possibly even Mike Pence himself – but that hasn't been charged against either Munchel and his mom or the Oath Keepers.

The government also may have reason to believe the Oath Keepers conspiracy will ultimately merge with the Proud Boys conspiracy, putting the former on the hook for the violence of the

latter.

There's evidence, for example, that Oath Keeper co-conspirator Thomas Caldwell was trying to coordinate between the militias. By December 23, he described to someone what he knew of the Proud Boys' plans.

Okay. I got your msg that maybe a whole bunch of you will be going to the rally which is great. [Person Two] and I are going for sure and as of now a bunch of the Oathkeepers from North Carolina whowe hosted here on the farm for the Million Maga march are coming up on one or two buses so that will be neat. I am expecting a big turn out of the Proud Boys (didn't know until the last march that they had a chapter in Charlestown) and of course the local Vietnamese will probably have at least 2 bus loads like last time. We will keep in touch. I gotta get off my ass and get on parler. I picked up Signal which is a free app that is encrypted talk and text. Thats how I do some secure comms with the Oathkeepers.

On December 30, he reached out to someone in the Three Percenter movement and asked to be included in their plans.

"[A]re you and any of your fellow 3-percenters having any kind of meetings coming up to discuss the 6th of Jan in d.c. or just getting together? I would like to meet some of the guys if you think I 'm cool enough." That individual responded, "You can join our group if you want but you have to be veted before you can attend any training events or zoom meetings. Ill get with ya this evening." In part, Caldwell replied, "Outstanding!"

While there's no sign yet of a conspiracy charge

against the Three Percenters, one of the three people charged together in beating a prone cop, Thomas Lopatic, wore Three Percenter clothes. The father who threatened to kill his kids if they reported his involvement (who mounted the scaffolding used in a flanking move in the breach), Guy Reffitt, is a member. Most intriguingly, Robert Gieswein, who marched with and coordinated with the Proud Boys in the original breach and is also charged with assaulting cops while wielding a baseball bat and some kind of spray, also has ties to the Three Percenters.

There's also reason to believe that the December MAGA March provided a key networking opportunity in advance of January 6 – for example, Pezzola spent time there with Roger Stone bodyguard, Robert Minuta.

Indeed, one of the likely nodes between the two main militia groups charged with conspiracy is Roger Stone, who was hanging out with both of them. Heck, even Rudy Giuliani, a key proponent of a very different theory of law enforcement involving broken windows, could be such a node.

So it's possible that as FBI exploits more communications and starts to flip cooperators, they'll tie the coordinated actions of the various militia together. But they're not there yet. And until they do that, it's not clear that the government has the evidence to detain Oath Keeper foot soldiers or random militia sympathizers pre-trial.

The government makes a very good case that the far right – particularly these three groups – have plans to follow up on January 6, plans for which the existing leadership arrested as part of January 6 could play a key role. This is what I've pointed to repeatedly (most clearly with Munchel). January 6 was an unprecedented insurgent attack on the country. But that unprecedented attack can look like either civil disobedience involving legally owned weapons or a threat to the Republic. Because of that, it's not entirely clear how the government's attempts

to detain key figures pre-trial will work out.