

ALL THE SCHEMING AT THE WILLARD ONLY MATTERS BECAUSE OF THE BODIES OCCUPYING THE CAPITOL AND THREATENING PENCE

In a post wondering whether DOJ hasn't opened an investigation into Donald Trump for his role in obstructing the vote count, Ben Wittes provides this description of Judge David Carter's opinion ruling that John Eastman and Trump had likely conspired to obstruct the vote certification.

The opinion's first section—entitled “A. Facts”—begins on page three of Judge Carter's opinion and runs through the middle of page 12. In a footnote attached to the word “Facts” in the subhead leading the section, Judge Carter notes in a fashion characteristic of the section's understatement, “In this discussion, the Court relies solely on facts provided by Dr. Eastman and the Select Committee in their briefing and attached exhibits.”

He is not exaggerating. The section contains no judgments, no legal interpretations, no conclusions. It contains virtually no rhetoric at all. What's more, the section does not contain a whole lot of new facts. The story of Eastman and Trump's efforts to overturn the 2020 election, the relationship between that effort and Trump's concurrent plot to decapitate the Justice Department, and ultimately to the insurrectionary activity of January 6, 2021, has dribbled out bit by bit over the months already. And to the extent the current litigation has

revealed new material, that mostly emerged in the committee's briefing and the accompanying exhibits a few weeks ago.

What makes Judge Carter's account so powerful is that it is linked tightly to record evidence, that it tells the story in an end-to-end fashion crisply and efficiently, and that it thus assembles the evidence into a coherent account of the big picture. I cannot do Judge Carter's account justice; please do read it. For present purposes, let me just say that it leaves the fair-minded reader in no doubt that the events that took place between Joe Biden's defeat of Trump at the polls and congressional certification of Biden's victory on Jan. 6 were an all-out effort by the lame duck president to seize and retain power in unapologetic defiance of the law using extra-constitutional means—up to and including violence directed against a coordinate branch of government.

As Ben tells it, Carter's description of the conspiracy to obstruct the vote certification focuses on attempts to overturn the election, his attempt to "decapitate" DOJ, and only then to the "insurrectionary activity" on January 6 that included using "violence directed against a coordinate branch of government."

Mike Pence's name not only doesn't appear in this passage, it appears nowhere in Ben's piece. Pence is named 24 times in those nine pages of Carter's narrative. I think the difference in emphasis is instructive.

It's not that the things Ben focuses on – lawsuits attempting to discredit the electoral outcome and the attempt to install Jeffrey Clark to pursue more efforts to discredit the electoral outcome – didn't appear in Carter's narrative. It's that they serve a different function than Ben accords them, not as

independent criminal behavior, but as actions in the first of a three-part plot all of which ends up in an attack on the Capitol.

1. Election fraud claims
2. Plan to disrupt electoral count
3. Attack on the Capitol

As noted, in Carter's description of the attack on the Capitol, the pressure on, followed by the verbal attacks on and physical threats to Mike Pence are central.

President Trump returned to the White House after his speech. At 2:02 pm, Mark Meadows, the White House Chief of Staff, was informed about the violence unfolding at the Capitol.⁵⁰ Mr. Meadows immediately went to relay that message to President Trump.⁵¹ Even as the rioters continued to break into the Capitol, President Trump tweeted at 2:24 pm: "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!"⁵²

During the riot, Vice President Pence, Members of Congress, and workers across the Capitol were forced to flee for safety.⁵³ Seeking shelter during the attack, Vice President Pence's counsel Greg Jacob emailed Dr. Eastman that the rioters "believed with all their hearts the theory they were sold about the powers that could legitimately be exercised at the Capitol on this day."⁵⁴ Mr. Jacob continued, "[a]nd thanks to your bullshit, we are now under siege."⁵⁵

I point this out because I think it is the easiest way to point out what I think is problematic with Ben's search for an investigation – a separate investigation just for Trump, with leaks about grand jury subpoenas – like so many others. Even in portraying a document of which Ben claims, "the history of the United States has never seen an account of a president's conduct quite so devastating," Ben appears to misread the subject described, though later in his piece, he fully recognizes the question of Trump's criminal liability discussed here is just about obstructing the vote certification.

Carter's is not a story of an attempt to overturn the election. Judge Carter tells the story of an attempt to obstruct a vote certification. All the lawsuits matter because (on top of proving *mens rea*) the election fraud claims are what Eastman used to pressure Pence to throw out the vote and what Trump used to incite his mob. In fact that's what, in my opinion, Carter laid out far better in his opinion than the Committee did in their brief, which argued that *had Pence taken the steps Eastman wanted, the vote count would have been obstructed, and not that the false claims of fraud themselves led to a "siege" that in fact did obstruct the vote count.*

There are, surely, other crimes that Trump might be investigated for – most notably his attempt to pressure Brad Raffensperger. But the way DOJ has been conceiving of the crime of January 6 from the start was as that successful (but temporary) obstruction of the vote count. All the people who seem to think an investigation into Trump would be somehow separate from that seem to be conceiving all that *other* corruption as separate from the dual effort to pressure Mike Pence with literal death threats and to occupy the Capitol and prevent the vote certification from taking place. This is why the people who claim you'll never get to Trump through Alex Jones and Roger Stone are so mistaken: because it's the actions Jones took

leading the mob to add bodies to the attack and Stone took coordinating with the militias that most directly tie Trump to the actual effect on the official proceeding.

I am certain, and have been since well before August, that DOJ is investigating the ways that Donald Trump played a central role in getting bodies to the Capitol that had the effect of threatening the life of his Vice President (and Nancy Pelosi and even Mitch McConnell) and temporarily obstructing the vote certification. The overt signs of that investigation are not, as Ben has been looking for, subpoenas to witnesses in the Willard (in part because Roger Stone would never be subpoenaed). Rather, it is in getting sworn testimony that after Donald Trump sent out tweets about the riot in December, people took that as an order from Trump, and set themselves to buying plane tickets and buying body armor. It is in getting cooperating witnesses about the ways that militias that gave structure to the mob were working in tandem with Trump's rat-fucker. It is in developing evidence that Trump's false claim that he would join them at the Capitol – repeated by his Pied Piper Alex Jones – convinced people who otherwise would never have gone to the Capitol to do so. It is in getting sworn testimony that after Trump attacked Pence in his speech, people responded by decrying Pence while still at the rally and then continued to threaten Pence once they had moved to the Capitol.

I'm less certain DOJ is investigating Eastman but if they are, it would be for the reasons that Greg Jacob laid out: that Eastman's lies played a part in getting bodies to the Capitol to threaten Pence's life and that Eastman and Trump had the intent of using such threats to convince Pence to throw out the legal votes. It's not his bad faith legal arguments that are illegal, it's the way those bad faith legal arguments served to get bodies to the Capitol on January 6.

As Greg Jacob described it in real time, “whipping large numbers of people into a frenzy over something with no chance of ever attaining legal force through actual process of law, has led us to where we are.” That is the crime under investigation. And because it involves mobilizing a mob, the investigation necessarily focuses on the means by which Trump orchestrated the mob.

Most of that evidence is not in the Willard Hotel, but in actions members of the mob took in direct response to Trump’s actions.

The rest of the commentariat has finally caught up to the point I made in August, that DOJ is investigating the obstruction of the vote certification. But I’m not sure they understand that everything, therefore, works backward from the bodies at the Capitol.